

1  
Case called

1                                   19 February 2001 - Certified  
2                                   Vancouver, B.C.

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4       (PROCEEDINGS COMMENCED AT 10:20 A.M.)

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6 THE REGISTRAR: In the Supreme Court of British  
7 Columbia at Vancouver on this February 19th, 2001,  
8 in the matter of the United Mexican States versus  
9 Metalclad Corporation, My Lord.

10 THE COURT: Yes, counsel, my apologies for having to  
11 start late. I had a matter earlier this morning  
12 that didn't conclude as quickly as I would have  
13 hoped.

14 MR. FOY: Thank you, My Lord.

15 P.G. Foy, F-o-y, appearing on behalf of the  
16 petitioner, United Mexican States, and with me  
17 Mr. J.C. Thomas, Mr. R.J. Deane, D-e-a-n-e.

18 And I would also ask for leave to -- for  
19 Mr. Hugo Perezcano to join us at the counsel  
20 table. Mr. Perezcano is general counsel for trade  
21 negotiations for Mexico, and in -- in what is now  
22 called the Secretariat of the Economy and what was  
23 called the Secretariat of the Trade and Commerce  
24 at the time. Among his responsibilities include  
25 representing Mexico in all NAFTA arbitrations.  
26 And Your Lordship will know from the award that he  
27 represented Mexico in this arbitration.

28 MR. COWPER: Yes, My Lord. Jeffery Cowper, and I  
29 appear for the respondent, Metalclad. And  
30 appearing with me is Mr. Henry Alvarez, Mr. Brook  
31 Greenberg. And although not here today,  
32 Mr. Michael D. Parrish will also be appearing  
33 during the course of the proceedings.

34 And with Your Lordship's leave, Mr. Clyde  
35 Pearce and Jack J. Coe, that's C-o-e, Junior, will  
36 be appearing before the bar. They were counsel  
37 for Metalclad in the proceedings before the  
38 tribunal.

39 MR. de PENCIER: Good morning, My Lord. I'm  
40 de Pencier, initial J., appearing for the Attorney  
41 General of Canada.

42 Joining me later this week or perhaps early  
43 next week will be Ms. Meg Kinnear, also of the  
44 Department of Justice appearing for the Attorney  
45 General.

46 MR. GILES: My Lord, I appear for the Province of  
47 Quebec as an intervenor. And I have with me

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Case called

Discussion re preliminary applications

1 Ms. Victoria Colvin.

2 Also arriving tomorrow is a Ms. Sylvie  
3 Scherrer, who is a member of the Quebec bar but  
4 not a member of the British Columbia bar. And I  
5 would ask leave for her to sit this side of the  
6 bar, if I may, when she arrives.

7 And also, My Lord, if Ms. Colvin and I may  
8 have leave to come and go without asking to be  
9 excused on each occasion, I would be grateful.

10 And should we both be absent, Ms. Scherrer will be  
11 here only to watch and brief.

12 THE COURT: Yes, Mr. Giles.

13 And that applies to all counsel; you're free  
14 to come and go as you wish.

15 MR. GILES: Thank you, My Lord.

16 MS. THAYER: My Lord, it's Thayer, T-H-A-Y-E-R,  
17 initial J. for the province of British Columbia.

18 As you are aware, we're not a party to these  
19 proceedings. I would ask leave of the Court to be  
20 able to sit at counsel table to conduct a watching  
21 brief on behalf of the province.

22 And if I am not present, My Lord, I would ask  
23 that Ms. Rachel Mete of our office who is an  
24 articling student be given leave to sit at the  
25 bar.

26 MR. COWPER: My Lord, we've discussed as counsel two  
27 matters which are really preliminary to the  
28 hearing of the petition which was set to commence  
29 this morning.

30 There are two applications before  
31 Your Lordship which have been set over to this  
32 morning. The first is an application to add  
33 another intervenor to the proceedings, which has  
34 been supported by an affidavit of Mr. Carten.  
35 That is generally opposed.

36 And I would like, with Your Lordship's leave,  
37 to indicate some preliminary objections I have to  
38 the application first this morning.

39 There is a second application, which is an  
40 application brought to have these proceedings  
41 broadcast. I don't know the position of all the  
42 parties. I will be opposing that application.  
43 Mr. Nelson is here to speak to that. And we would  
44 propose to have that application heard second, if  
45 that's satisfactory to Your Lordship.

46 THE COURT: I have no preferences. Do other counsel  
47 have any preferences?

1 MR. COWPER: Now, with respect to Mr. Carten's  
2 application, has Your Lordship had an opportunity  
3 to have the materials find their way to you?

4 THE COURT: Yes, and I've read them.

5 MR. COWPER: Okay.

6 In general, if I may say, there's a  
7 straightforward means of disposing of that  
8 application, My Lord.

9 As Your Lordship will recall, in the  
10 pre-hearing phase of this matter Your Lordship  
11 directed that any parties interested in seeking  
12 intervention do so before the hearing.

13 More fundamentally, Mr. Carten's application  
14 is premised and based upon another claim that is  
15 made, I understand, on behalf of another party  
16 pursuant to Chapter 11 proceedings in NAFTA on a  
17 very preliminary basis; that is not a basis on  
18 which any party ought to be allowed to intervene  
19 in this -- in this proceeding, particularly given  
20 the fact that my client's claim is not connected  
21 to Canada.

22 As Your Lordship knows, this is a claim by an  
23 U.S. investor against the United Mexican States  
24 and it is in British Columbia because this is the  
25 venue of review of the award.

26 I understand that Mr. Carten's application is  
27 premised on a claim that is being brought  
28 separately by another investor involved in Canada.

29 I should say as well, and I know Mr. Giles  
30 wants to be heard on this, that there are portions  
31 of the affidavit which is filed in support by  
32 Mr. Carten which are inappropriate. They speak to  
33 matters which ought not to be spoken to -- spoken  
34 to by Mr. Carten, and in the technical sense  
35 they're scandalous in the face of the Court. They  
36 ought not to be heard here, and I do not think  
37 reference should be made to them. I say that, as  
38 counsel, they are -- they are not appropriate for  
39 the relief sought.

40 And for those grounds, it's my submission  
41 that Mr. Carten's application should be dismissed  
42 summarily.

43 MR. CARTEN: My Lord, my name is John Carten, and I am  
44 the person who is making an application for  
45 intervenor.

46 May I speak to my application briefly,  
47 My Lord?

1 THE COURT: Yes, you may

2 MR. CARTEN: This dispute is a private dispute. And  
3 as legal counsel for Sun Belt Water, which has a  
4 large claim against Canada under NAFTA, I've been  
5 following the developments in the NAFTA -- in the  
6 Metalclad case.

7 So two weeks ago I went to the court registry  
8 and I was surprised to learn that the Government  
9 of Canada and the Government of Quebec had  
10 intervened in what one would normally regard as a  
11 private dispute between two parties.

12 The question then arises what could be the  
13 reasons that the AG of Canada and Quebec have  
14 entered this private dispute when they are not  
15 parties to the dispute?

16 It is trite law but well settled that  
17 domestic court has no jurisdiction to make binding  
18 rulings on the interpretation of an international  
19 treaty when the parties to that treat do not  
20 submit to that court.

21 The record is clear that the Republic of the  
22 United States has not submitted to the  
23 jurisdiction of this court. So why is it that the  
24 AG for Canada and the AG of Quebec have  
25 intervened?

26 Well, the intervention of the AG for Canada  
27 and for Quebec in this proceeding is similar to a  
28 reference case. The Court will be asked for  
29 rulings that -- as they might apply to Canada in  
30 hypothetical situations under NAFTA, and in the  
31 absence of a real dispute in the Canadian  
32 context.

33 Canadian politicians and government employees  
34 will then rely on the words of the Court, or those  
35 of a higher court if the case is appealed, to  
36 justify their conduct as it relates to NAFTA.

37 In Canada the court -- governments have a  
38 long history of referring cases to the courts for  
39 guidance. The government then relies on the court  
40 to justify its later course of action. There are  
41 many notorious examples: the GST reference case,  
42 the Quebec separation reference, the gun  
43 registration reference.

44 For very good reasons the American courts,  
45 the Australian courts and the English courts do  
46 not permit themselves to hear reference cases. I  
47 cannot speak to the Mexican court.

1           A reference case is a politicization of the  
2 judicial process. It tends to lessen the  
3 perceived independence of the judiciary, and it's  
4 fundamentally at odds with the adversarial  
5 traditions that are the foundation of the English  
6 common law.

7           In the absence of a strong and able adversary  
8 arguing from a real factual situation, the court  
9 operates in a vacuum and the judgments tend to be  
10 reiterations of the political positions, although  
11 clothed in judicial language. The onus of a  
12 reference case has become accepted, an accepted  
13 part of the political process in Canada.

14           The intervention of the AGs in Canada in  
15 Quebec in this private dispute are clearly an  
16 attempt to turn it into a reference case.

17           Now, although it is accepted within Canada,  
18 the use of a reference case or similar case  
19 process before a domestic court on the  
20 interpretation of an international treaty is a  
21 highly questionable strategy. And I would  
22 suggest, My Lord, that there's a tendency or a  
23 possibility that this court will be brought into  
24 disrepute.

25           Now, my request is to provide the court with  
26 a factual pattern which will assist the court to  
27 develop a well-reasoned judgment if it accedes to  
28 the perceived request of the AG of Canada and  
29 Quebec.

30           I hope to prevent the Court from making a  
31 ruling or interpretation that will allow a  
32 continuance of the kind of political corruption  
33 and shenanigans that took place in British  
34 Columbia which gave rise to the case of Sun Belt  
35 Water.

36           Certainly the Court cannot decide the  
37 validity of the Sun Belt claim. But the Court can  
38 guard itself against being used in a matter that  
39 will bring it into disrepute or that would  
40 fulfill -- or that will facilitate a perpetuation  
41 of the peculiar kind of Canadian political  
42 corruption which dissuades foreign investment in  
43 our economy and brings discredit to our  
44 community.

45           Now, the leading legal authority, the most  
46 recent legal authority, on access of the courts is  
47 a decision of Mr. Justice Lambert in the Court of

1 Appeal with Hollinrake concurring. At page 188,  
2 he says: [All quotations herein cited as read]

3  
4 "I consider it is the right of  
5 every...everyone in Canada has the right to  
6 come to court and seek the help of the  
7 court in obtaining a resolution of the  
8 legal issues that have given rise to that  
9 person's problem. Everyone in Canada has  
10 the right to seek the protection of the  
11 court from a perceived oppression by the  
12 State."

13  
14 Mr. McEachern concurred in that decision, but  
15 he did not -- with those principles. The case was  
16 appealed but leave to appeal was denied.

17 So it's my respectful view, My Lord, that you  
18 are bound by that decision of the Court of Appeal,  
19 and I respectfully request status as an  
20 intervenor.

21 Those are my submissions.

22 THE COURT: Do other counsel wish to make  
23 submissions?

24 MR. GILES: I -- I have one point that I wish to add  
25 to the submissions made by my learned friend  
26 Mr. Cowper, and that is that I would object to  
27 Mr. Carten being heard on the affidavit he filed  
28 which refers to Quebec.

29 And I make that objection on the grounds that  
30 the material is, on its face, scandalous. It's  
31 material that impugns the integrity of  
32 individuals, including members of the judiciary,  
33 and without a shred of evidence to support these  
34 imputations that is not hearsay or opinion, or  
35 invective.

36 Now, the -- the affidavit, the nature of the  
37 affidavit is apparent from its face. I'd only  
38 refer you particularly to paragraph 7 and 12, and  
39 16 and 25, which in my submission amply support  
40 the chara -- the way I've characterized it.

41 I rely, My Lord, on your authority to protect  
42 the processes of this court which is expressly  
43 stated by Rule 19(24) which applies to  
44 affidavits. And in addition, in my submission,  
45 this type of material is a form of contempt in  
46 that it is calculated, particularly by its  
47 references to members of the judiciary at

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Submissions by Mr. Giles  
Submissions by Mr. de Pencier  
Submissions by Mr. Foy  
Submissions by Mr. Carten

1 virtually all levels in this country. It is  
2 calculated to lower the authority of the court.

3 And I accordingly submit that the affidavit  
4 should be struck out and an order made that was  
5 made not so long ago by the Supreme Court of  
6 Canada in similar circumstances that Mr. Carten be  
7 barred from making further -- any further applications  
8 in these proceedings, except with leave first  
9 obtained on proper material.

10 And the case I referred to was one in which I  
11 was counsel, and the plaintiff was a David Kunce.  
12 The defendant were a number of doctors for which I  
13 acted. Dr. Kunce filed scurrilous material, in  
14 principle the same as before Your Lordship now,  
15 and the Court upon its own motion not only quashed  
16 the application for leave, but on its own motion  
17 made an order barring the applicant from making  
18 any further applications.

19 Those are my submissions, My Lord.

20 MR. de PENCIER: Thank you, My Lord.

21 I would agree with Mr. Cowper's submissions.

22 I would only add two things. The obvious one  
23 is that to the extent that Mr. Carten is concerned  
24 with decisions on interventions, those decisions  
25 have been made; we've passed that matter.

26 Otherwise, he obviously has nothing to add to  
27 these proceedings.

28 Thank you.

29 MR. CARTEN: My Lord, one final matter --

30 THE COURT: Just -- Mr. Foy --

31 MR. CARTEN: Sorry.

32 THE COURT: -- is contemplating speaking.

33 MR. CARTEN: Oh.

34 MR. FOY: Just to confirm, My Lord, that Mexico's  
35 position is that it is not satisfied Sun's Belt --

36 Sun Belt's participation would be of assistance  
37 and opposes the application for intervention.

38 MR. CARTEN: One further -- further matter in reply to  
39 Mr. Giles' comments being I came to this court out  
40 of respect for the process of the court. The fact  
41 that a few members of the judiciary misled the  
42 public and the press with respect to complaints  
43 that I have filed with the judicial counsel does  
44 not bring the court into disrepute; it brings  
45 the -- it may bring those members of the judiciary  
46 into disrepute, but that's their own doing.

47 I have very high regard for the court,

1 My Lord. Thank you.

2 THE COURT: Thank you, Mr. Carten.

3 I dismiss Mr. Carten's application on two  
4 grounds. First of all, I set a deadline for  
5 applications to intervene. That deadline has  
6 passed, and this application is out of time.

7 In addition, I'm not satisfied that the  
8 participation of Mr. Carten in this process would  
9 be of assistance to the Court.

10 Thank you, Mr. Carten.

11 MR. COWPER: I think it was discussed between counsel  
12 that we would hear Mr. -- Your Lordship would  
13 hear Mr. Nelson's application next, if that's  
14 satisfactory, if it would be easier.

15 THE COURT: Just before we proceed to that, and this  
16 is somewhat tied in, I see we've got the tape  
17 machine going, we've got a realtime reporter and  
18 we're now going to be talking about videotaping.  
19 Can we at least get rid of one of them and have  
20 the --

21 MR. COWPER: I believe that's called convergence  
22 actually, My Lord.

23 I -- I think we can dispense with the tape  
24 recorder.

25 THE COURT: Yes.

26 Mr. Registrar, you can turn off the tape  
27 recorder.

28 THE REGISTRAR: Yes, My Lord.

29 MR. NELSON: My name is Scott Nelson, and I'm making  
30 application on behalf of the Vancouver Independent  
31 Media Centre to record this proceeding.

32 I've originally thought that my application  
33 was not opposed by any party, but I found out this  
34 morning that it is opposed by -- by counsel for  
35 Metalclad.

36 I'd like to go through a few of the things in  
37 my chambers record. Has Your Lordship had the  
38 opportunity to -- to look at it?

39 THE COURT: I have read your materials, yes,  
40 Mr. Nelson.

41 MR. NELSON: Okay. So I thought I'd start with tab  
42 number 3, the affidavit. I've filed affidavits in  
43 my own name so that counsel for the parties would  
44 know the basis of my application.

45 Paragraph 2, I'll begin there. The  
46 Independent Media Centre, IMC, is a  
47 volunteer-based, non-profit international Internet



1 news service which was formed in 1999. The IMC  
2 consists of 1 international and 45 regional  
3 Internet news sites. I actually have 44 in here,  
4 but there's since been another one added.

5 Regional IMCs operate in 15 countries  
6 worldwide, including countries in North and South  
7 America, Europe and Africa. A regional, that is  
8 British Columbia, IMC news wire service has  
9 operated from premises located at 301-303 West  
10 Hastings Street, Vancouver, since August of 2000.

11 The IMC broadcast both live and edited  
12 archive video and audio, as well as still images  
13 and text over the Internet. Approximately 50,000  
14 viewers visit the international IMC site every  
15 day. I don't presently know how many viewers  
16 visit each of the regional IMC sites.

17 The mandate of the Independent Media Centre  
18 is to create and sustain local networks of  
19 participatory democracy and democratic  
20 communication by publishing news stories and  
21 commentary which have not been filtered by the  
22 mainstream media.

23 Each of the international and regional IMC  
24 sites consists of a news wire service and a  
25 storyboard. Everyone is permitted to post news  
26 stories and commentary to the news wire service.  
27 An editorial board then determines the relative  
28 significance of each item posted, and those items  
29 determined to be the most significant are moved to  
30 the storyboard.

31 Skipping ahead to number 9, I have been an  
32 Internet communications consultant since 1993 and  
33 a regular contributor of multimedia to the IMC  
34 news wire since its inception. I'm also a member  
35 of the Vancouver, British Columbia IMC editorial  
36 board.

37 I've previously made video and audio  
38 recordings of lectures, conferences and workshops  
39 for broadcast by the IMC. And I'm able to make  
40 broadcast quality video and audio recordings with  
41 an unobtrusive digital video camera mounted on a  
42 tripod with a single fixed pivot using an internal  
43 microphone and standard room lighting.

44 Now, if I could move to tab 1, my outline,  
45 and at page 2, international trade agreements such  
46 as NAFTA and their impact on participatory  
47 democracy is of primary interest to the IMC, its

1 viewers and the public at large.

2 NAFTA proceedings generally and this  
3 proceeding in particular have the potential to  
4 significantly impact the ability of democratically  
5 elected local, provincial and national governments  
6 to formulate and implement public policy.

7 Quasi-judicial proceedings under NAFTA are  
8 usually conducted behind closed doors and are not  
9 open to the public. Accordingly, the public is  
10 deprived of the opportunity to evaluate such  
11 proceedings and hence to evaluate an important  
12 component of agreements such as NAFTA and their  
13 impact on democracy and the public interest.

14 By choosing the British Columbia Supreme  
15 Court as the venue for their appeal, the parties  
16 have elected to conduct the proceedings in a forum  
17 that is open to the public. Granting electronic  
18 access by permitting video and audio recording of  
19 the proceeding for broadcast to the public extends  
20 public access to a much wider segment of the  
21 population.

22 The Canadian federal government has stated  
23 its intention to participate in negotiations aimed  
24 at implementing a NAFTA-style trade agreement  
25 throughout the Americas. A meeting to further  
26 these negotiations is scheduled to occur in Quebec  
27 City in April of 2001. Accordingly, the timing of  
28 the current proceeding makes it of even greater  
29 interest to the public.

30 Page over. There is no statutory prohibition  
31 against the use of electronic recording devices  
32 in -- in courtrooms in British Columbia. I have a  
33 case here, R v. Cho, which I can hand up to you,  
34 if you'd like.

35 THE COURT: I think I know which decision you're  
36 referring to, but --

37 MR. NELSON: There is no common law basis for  
38 excluding electronic recording devices from  
39 courtrooms in British Columbia, and that's also  
40 R. v. Cho. There is no statutory or common law  
41 right of privacy inside courtrooms in British  
42 Columbia other than that afforded to very  
43 restricted classes of persons, none of whom will  
44 be before the Court in these proceeding, that's R.  
45 v. Cho.

46 The reasons for allowing electronic public  
47 access into the courts include the need, one, to

1 maintain an affective evidentiary process; two, to  
2 ensure a judiciary that behaves fairly and is  
3 sensitive to the values espoused by society;  
4 three, to promote a shared sense that our courts  
5 operate with integrity and dispense justice; and  
6 four, to provide an ongoing opportunity for the  
7 community to learn how the justice system operates  
8 and how the law being applied daily in the courts  
9 affects them. That's from the Edmonton Journal v.  
10 Alberta.

11 An additional reason for allowing electronic  
12 access to the court in this particular instance is  
13 to provide the public with information regarding  
14 the effect of abstruse trade agreements such as  
15 NAFTA on the ability of democratically elected  
16 officials to formulate government policy.

17 Section 2(b) of -- of the Canadian Charter of  
18 Rights and Freedoms guarantees everyone the  
19 freedom of expression, including freedom of the  
20 press and other media of communication. The  
21 constitutional guarantee of freedom of expression  
22 is intended to protect the listeners as well as  
23 speakers.

24 Prohibiting electronic recording devices from  
25 the court is a violation of Section 2(b) of the  
26 Charter; one, the activity for which leave is  
27 sought is expressive and non-violent; two,  
28 prohibiting electronic access to courts clearly  
29 limits and is intended to limit expression; three,  
30 allowing video and audio recording of court  
31 proceedings is compatible with fair judicial  
32 proceedings and the proper administration of  
33 justice; four, the expression sought to be  
34 protected in this instance is political  
35 expression, and accordingly is entitled to the  
36 highest degree of protection compatible with the  
37 proper administration of justice.

38 And we've got a cite there, Daniel J. Henry,  
39 "Electronic Public Access to Court, an Idea Whose  
40 Time has Come." The case is cited within that.

41 The page over. This violation of Section  
42 2(b) cannot be justified under Section 1. One,  
43 there is no rational link between banning the  
44 electronic recording of court proceedings and the  
45 fairness of the trial process; two, a total ban is  
46 an overboard restriction and cannot meet the  
47 minimal impairment test. And that's again from

1 that article.

2 I have a decision of the B.C. Securities  
3 Commission regarding this issue which summarizes  
4 the arguments for and against, and decides in  
5 favour of allowing recording. And I can hand that  
6 up to you, if you like.

7 THE COURT: This is different from Mr. Hyndman's  
8 letter which you attached to your affidavit?

9 MR. NELSON: Yes. This is a British Columbia  
10 Securities Commission in the matter of Top Line  
11 Resources.

12 And then if you could go to tab 4 for my  
13 affidavit, from that, number 2, attached to this  
14 affidavit is Exhibit A, it's a cop -- and is --  
15 summarizing those articles and the arguments in  
16 there.

17 Attached to this affidavit as Exhibit A is a  
18 copy of an article by Dale Elator provided in  
19 February 1986 edition of The National, wherein  
20 Mr. Justice Grange is reported as believing that  
21 television cameras should be allowed in courtrooms  
22 for certain trials.

23 Mr. Justice Grange was also reported saying  
24 that the presence of television cameras did not  
25 cause a problem, and that was at an inquiry  
26 presided over by him.

27 And number 3 there, attached to this  
28 affidavit as Exhibit B is a copy of a letter from  
29 Douglas Hyndman to Daniel Burnett dated May 11th,  
30 1992. I'm advised and verily believe that  
31 Mr. Hyndman wrote this letter following his  
32 experience as a Chair with B.C. Securities  
33 Commission hearing wherein the use of electronic  
34 recording equipment was permitted.

35 In the letter Mr. Hyndman states that the  
36 presence of electronic recording equipment did not  
37 adversely affect the decorum of the hearing, the  
38 presentation of evidence or the right of the  
39 respondents to a fair hearing. Mr. Hyndman  
40 further states that he and other panel members  
41 would have no concern about allowing electronic  
42 recording of future commission hearings on a  
43 similar basis.

44 So electronic recording is permitted in many  
45 American jurisdictions, as I'm sure you know, the  
46 Supreme Court of Canada and many quasi-judicial  
47 hearings; it is not obtrusive, and it doesn't

1 adversely affect the proceedings.

2 Thank you, My Lord.

3 THE COURT: Thank you, Mr. Nelson.

4 MR. FOY: Mexico takes no position on the  
5 application.

6 THE COURT: Yes, Mr. Cowper.

7 MR. COWPER: Yes, My Lord. We oppose the application,  
8 and let me go swiftly from generalities to  
9 particulars.

10 I have no comment on the general issue of  
11 whether proceedings should be broadcast and  
12 matters of public comment that -- occurring within  
13 courtrooms should be broadcast.

14 My client's essential concern with respect to  
15 the proposed broadcast of this hearing has to do  
16 with the manner in which the hearing has been  
17 ordered to be held and the potential risk of a  
18 distorted and unfair perception in the public as  
19 to the issues which the Court has agreed to  
20 entertain from Mexico.

21 The risk of confusion over what this  
22 proceeding involves has -- is -- is an obvious  
23 handmaiden of the public issues which have already  
24 been excited by the publicity surrounding the  
25 case.

26 To give you an example that just occurred a  
27 few moments ago as I walked in the courtroom,  
28 there was a large hand-lettered sign indicating  
29 that the person who prepared it was concerned that  
30 U.S. toxic waste was being dumped in Mexico.

31 As Your Lordship knows from the pre-hearing  
32 matters, Metalclad in this case has constructed a  
33 state-of-the-art facility for the purpose of  
34 processing and safely storing hazardous waste  
35 produced by Mexican industry, and not by U.S.  
36 industry.

37 And indeed, as Your Lordship knows, the award  
38 which is the subject of Mexico's application was  
39 an award by three eminent international lawyers,  
40 including a Mexican lawyer appointed by Mexico,  
41 which found that Metalclad had been unfairly  
42 treated and had had its facility which was already  
43 constructed and is lying idle expropriated by the  
44 measures taken by the Mexican governments.

45 In the pre-hearing I indicated to  
46 Your Lordship that Metalclad objected to Mexico's  
47 reference to the domestic international act -- I'm

1       sorry, the domestic arbitration act. And our  
2       position was that the only proper statutory  
3       framework within which Mexico's complaints could  
4       be heard was the international commercial act  
5       which provides for very narrow grounds of review.

6       The importance of that for the present case  
7       is that I say to you that it's apparent and clear,  
8       and indeed implicit in my friend's application to  
9       have reference to the Commercial Arbitration Act,  
10      that under the international act there is no  
11      review of facts, there is no review of the merits  
12      of the dispute.

13      Now, Your Lordship quite properly indicated  
14      that that objection, although it was perhaps a  
15      proper objection in the normal case, could be  
16      dealt with by combining my friend's submissions  
17      under the international act and under the  
18      commercial act, and they could all be disposed of  
19      in one hearing.

20      And with respect to the -- the outcome of  
21      that direction was that my friend very properly  
22      has served on us a very long and extensive  
23      argument which goes into not only the grounds  
24      which he would be permitted to under the  
25      international act, but if Your Lordship has  
26      reviewed it, dozens and dozens of pages which deal  
27      with the facts that were before the tribunal and  
28      various complaints made about the facts and -- and  
29      legal issues which my friend says arises from  
30      them.

31      My concern is that, as a result of that  
32      direction, a broadcast of these proceedings viewed  
33      by a member of the public would be misunderstood  
34      as a re-hearing of the matters before the  
35      tribunal, would run the risk of a distorted and  
36      unfair perception of what Your Lordship has agreed  
37      to entertain on a review of the panel.

38      Now, that in a nutshell is my concern with  
39      respect to the broadcast of this particular  
40      hearing.

41      I don't address myself to the general issues  
42      of publicity. I don't -- I don't know the  
43      technology which Mr. Nelson has said is  
44      available. I haven't seen it, so I don't know  
45      whether there are any technical concerns or  
46      otherwise.

47      I assume it's some form of Internet

1 broadcasting which is a bit awkward and would make  
2 us all look like stick people, but I -- I've put  
3 that aside, the fact, because I probably look like  
4 a stick person at the best of times anyway.

5 THE COURT: That was going through my mind vis-a-vis  
6 myself.

7 MR. COWPER: But, as I say, with re -- arising out of  
8 the manner in which we've agreed to have this  
9 matter heard, I'm concerned about the carriage of  
10 the case.

11 And I can, just before I -- I sit, close with  
12 this observation: If the matter was to be  
13 broadcast, my main concern with respect to the  
14 fairness of the hearing is that I plan on being  
15 silent throughout my friend's submission and not  
16 objecting to those parts of his submission which  
17 in my view are outside of the purview of either  
18 act. I'd be concerned about whether that silence  
19 in a broadcast environment would be interpreted as  
20 an agreement that Your Lordship had either agreed  
21 to hear those submissions or that they were proper  
22 under either statute.

23 So I -- I -- I fear that the risk of a  
24 broadcast on such a matter of public note would  
25 distort and present an unfair appearance of these  
26 proceedings as it relates to Metalclad's case.

27 THE COURT: Mr. Cowper, let me ask you this: I  
28 received a message through my secretary from the  
29 reporting firm that is dealing with the realtime  
30 reporting on this matter, and what I understand is  
31 being proposed is that the realtime reporting  
32 transcripts, so to speak, in electronic form, be  
33 posted on the Internet on a daily basis.

34 MR. COWPER: Yes. I was going to deal with the  
35 transcript separately. I have a separate concern  
36 as it relates to the transcript, and I can deal  
37 with that right now if Your Lordship --

38 THE COURT: It would seem to me that the concerns that  
39 you've raised would apply equally to a transcript  
40 being posted on the Internet. I don't think it's  
41 any different whether a person views the  
42 proceedings on the Internet or reads them on the  
43 Internet.

44 MR. COWPER: I -- I think the same concerns would  
45 apply. I have a separate concern as it relates to  
46 the transcript, which is that the -- I have no  
47 objection and I -- and my client would have no

1 objection to the transcripts of the hearing as a  
2 whole being made available, because it is a public  
3 proceeding. My client has no objection to  
4 publicity in the general sense.

5 The concern is the fairness and balance.

6 If at the -- at the end, the conclusion of  
7 the hearing, the transcript is available, that's  
8 something that my client would have no objection  
9 to.

10 The -- the -- the daily posting of the  
11 transcript has two problems, one of them being the  
12 partial nature of the publication. And other  
13 courts I know faced with this have banned the  
14 daily dissemination of transcripts for that  
15 reason.

16 The second issue though is this: and that is  
17 I have actually conducted a 200-day trial using  
18 Livenote and -- and the realtime transcripts.  
19 There are many occasions in which corrections to  
20 the transcript appear after counsel have had an  
21 opportunity to read the transcript. That's  
22 particularly the case when the court reporter is  
23 trying to keep up with counsel's submissions as  
24 opposed to evidence which, as Your Lordship knows,  
25 proceeds at a more sedate pace.

26 And when we're talking about posting on the  
27 Internet, it's very important obviously that  
28 counsel be satisfied that their comments have been  
29 faithfully recorded. My experience is that takes  
30 a matter of a few days after the publication of  
31 the draft by the reporter under Livenote, just --  
32 I don't know if Your Lordship has had a Livenote  
33 trial.

34 THE COURT: I have.

35 MR. COWPER: Okay. Well --

36 THE COURT: A couple.

37 MR. COWPER: -- as Your Lordship knows, the live feed  
38 is a very draft document. You then receive a -- a  
39 subsequent draft, and then the final transcript is  
40 approved by the court. That process takes --

41 THE COURT: Not approved by the court. It's certified  
42 by the reporter.

43 MR. COWPER: Certified by the reporter.

44 And in the normal course, counsel who have  
45 concerns about the transcript have an opportunity  
46 to say that is an error and I'd like you to go  
47 back and check your notes. In this case we'd



- 1 certainly want to have an opportunity to do that.  
2 And my preference would be to have any publication  
3 of the transcript deferred until the conclusion of  
4 the hearing.
- 5 THE COURT: Do any other counsel wish to make  
6 submissions?
- 7 Mr. Foy, you're not taking any position, I  
8 take it, on -- what about on the -- the transcript  
9 of the realtime reporting?
- 10 MR. FOY: We have no position on -- we don't object,  
11 sorry, to the -- the posting of the transcripts on  
12 a daily or other basis.
- 13 THE COURT: Mr. Nelson, you have the right of reply.  
14 You get to answer the points that Mr. Cowper has  
15 raised, if you'd please go down before the  
16 microphone again.
- 17 MR. NELSON: I'm not sure that I have a reply. I  
18 mean, you know, other than reiterating that -- the  
19 points that I've made. I just fall upon the mercy  
20 of the Court to bring a camera in.
- 21 THE COURT: In posting the video on the Internet, how  
22 would you -- how would you do that? What  
23 procedure would you follow?
- 24 MR. NELSON: Yeah. I should be clear. I'm not  
25 proposing to broadcast live from the courtroom.
- 26 THE COURT: Um-hum.
- 27 MR. NELSON: What I'm proposing to do is to videotape  
28 and record on -- on -- on a format known as  
29 Mini-DV, which is a broadcast-quality audio and  
30 video signal, and then to do some editing of that,  
31 and post that on the Internet.
- 32 THE COURT: And when you say doing editing, what type  
33 of editing would you propose?
- 34 MR. NELSON: Well, I don't think that -- that there's  
35 that much -- I think there's going to be too much  
36 information for -- for most people to -- to deal  
37 with in terms of this, and because I can't do it  
38 live, I think probably daily summaries are what --  
39 what I had in mind.
- 40 I -- I -- are you looking for further sort of  
41 daily summaries I would be looking at doing?
- 42 THE COURT: That's -- I think you're hitting upon the  
43 concern Mr. Cowper is expressing, and it's a  
44 concern that I have.
- 45 Generally speaking, the -- the court has two  
46 concerns about videotapes or television cameras in  
47 the courtroom; one is the effect on witnesses. We

1 will not have any witnesses here. I guess it has  
2 an effect on lawyers as well, but I think I can  
3 handle the effect it may have on -- on the  
4 lawyers.

5 The second concern is -- is a question of  
6 what is the record. And on an application such as  
7 this where I'm going to be hearing the  
8 submissions, I don't think that the record is  
9 terribly important vis-a-vis the court process.

10 If the matter goes to the Court of Appeal,  
11 then the Court of Appeal will probably not have  
12 any occasion to have regard to the submissions of  
13 lawyers. Generally speaking, there the lawyers  
14 will be making new submissions before the Court of  
15 Appeal.

16 But a -- a third concern, and the concern  
17 that Mr. Cowper's raising, is -- is a concern  
18 that -- that by editing the materials, that it is  
19 leaving in the hands of an outsider the perception  
20 which the public is going to receive as a result  
21 of these proceedings.

22 And my view is that I -- I would be prepared  
23 to allow videotaping if all of the videotape were  
24 placed without editing on the Internet. But if  
25 it's proposed that editing take place, then I'm  
26 not prepared to allow it because I -- I believe  
27 that the -- rather than informing the public on an  
28 unrestricted basis, which is what you express to  
29 be the objective, is that we then have a situation  
30 where -- where an edited version, which is perhaps  
31 going to be taken out of context -- I'm not  
32 suggesting that you would do anything improper.  
33 But there's a risk that it could be taken out of  
34 context, and that does concern me.

35 MR. NELSON: My Lord, the -- there's two problems  
36 there. One is because I want to videotape it,  
37 there is going to be an interval where I'm going  
38 to miss some materials as I change tapes, because  
39 each tape only has one-hour length, so I'm not --  
40 under the setup that I'm proposing I'm not  
41 physically able to record the entire proceedings  
42 end to end. And I don't want to take up the  
43 Court's time with asking people to stop while I  
44 change the tape or anything like that.

45 Secondly, I -- I think may -- perhaps we can  
46 get around this by -- by my undertaking to link in  
47 the -- anything that I do produce to the realtime

- 1 transcript that's being prepared. I mean, that's  
2 very easy to do on the Internet, to put up a  
3 story, to tell something and then to have a link  
4 to more information about it. And that may be one  
5 way that that addresses the Court's concerns.
- 6 THE COURT: I do see some difficulties in that  
7 regard. I'm not sure that's a complete answer,  
8 because some people will just be content to look  
9 at the video without having regard to the entire  
10 transcript.
- 11 MR. NELSON: Um-hum.
- 12 THE COURT: Mr. Cowper, as I've indicated, I would be  
13 prepared to allow the videotaping if -- if a -- an  
14 unabridged version were to be placed on the  
15 Internet.
- 16 You've heard Mr. Nelson express concerns.  
17 I -- I'm not overly worried about random  
18 interruptions while the tape gets changed. What  
19 I'm more concerned about is intentional editing  
20 which could possibly affect the context of the  
21 matter.
- 22 MR. COWPER: Yes. I -- I agree with that, if  
23 Your Lordship's disposed to permit the broadcast  
24 on the basis of the uninterrupted -- I -- I'm not  
25 concerned about anything lost over the interval.
- 26 I am concerned that -- whether consciously or  
27 otherwise, editing by its nature is a selection of  
28 material, and it does raise immediately the risk  
29 that the material's unfairly presented, not  
30 that -- the members of the media of course are  
31 present, and it's their job to present materials  
32 as they wish, and they endeavour in their  
33 professional standards to do that fairly or  
34 otherwise.
- 35 The main concern with a broadcast is that it  
36 appears to be, as Your Lordship indicated in your  
37 comments, a faithful and accurate record of what  
38 happened, and so there's an additional potential  
39 mischief of -- of a selection in that, and so I  
40 would be concerned about that. And I don't think  
41 that could be overcome by -- by any assurance  
42 about how the editing would take place.
- 43 THE COURT: Um-hum.
- 44 MR. COWPER: I -- I'm not concerned about the changing  
45 of tapes, if that's what your only question to me  
46 was.
- 47 THE COURT: Very well.

1 Mr. Nelson, I'm going to allow your  
2 application, but it be on the condition that the  
3 proceedings be broadcast, and the manner in which  
4 you're planning to do that is post them on the  
5 Internet only, if the entire proceedings be  
6 posted. And I have no concerns with you doing it  
7 on a -- on a daily basis.

8 But my restrictions is going to be that if  
9 you are to post part of any day, or broadcast in  
10 any fashion part of a day, that you have to  
11 broadcast the whole of the day.

12 MR. COWPER: I'm sorry. There's one remaining point,  
13 My Lord. And I would ask that the condition be  
14 that the entire proceedings be broadcast. As you  
15 might anticipate, if the broadcast stopped after  
16 Mexico made its submission, my client might be  
17 concerned about the fairness of that process as  
18 well.

19 THE COURT: Yes. I think that follows from -- from  
20 what I'm saying.

21 Are those conditions satisfactory?

22 MR. NELSON: Just to be sure that I understand them, I  
23 can broadcast the whole proceedings but not a  
24 portion of the proceedings.

25 THE COURT: Yes. But -- you can post them on the  
26 Internet or publish them on the Internet on a  
27 daily basis; but having done that for the first  
28 day, you have to realize that you are then  
29 undertaking to do it for the remainder of the  
30 proceedings.

31 MR. NELSON: Okay. Thank you, My Lord.

32 THE COURT: In connection with the -- the transcript  
33 of -- of the realtime reporter, Mr. Cowper, you  
34 raised the point of -- of the potential errors,  
35 and I certainly -- I certainly accept that. And I  
36 think the -- the mechanism by which we can guard  
37 against that is to simply provide that they --  
38 they not be posted on the Internet until certified  
39 by the reporter.

40 MR. COWPER: That's satisfactory. And -- and I can  
41 deal with the reporter in terms of some reasonable  
42 interval for us to comment on the -- on the  
43 transcript.

44 THE COURT: And -- and I would quite frankly be  
45 surprised if the reporter would want something  
46 published on the Internet until it had been  
47 certified as correct.

1 MR. COWPER: Thank you, My Lord.

2 THE COURT: It's now 5 past 11. I don't know whether  
3 you wish to get started.

4 Just generally speaking so counsel are -- are  
5 knowledgeable, but -- I usually take a 15-minute  
6 break in the morning and a 10-minute break in the  
7 afternoon.

8 I don't know whether it would be appropriate  
9 to take the break before you get started, Mr. Foy,  
10 for this morning.

11 MR. FOY: What time do you intend to take the break,  
12 My Lord?

13 THE COURT: I'm just saying do you want to take it now  
14 or do you want to get started?

15 MR. FOY: That's fine. I'm in Your Lordship's hands.

16 THE COURT: Given the fact that I started at 8:30 and  
17 haven't had a real break yet, I think I'll take  
18 the morning break at this time.

19 THE REGISTRAR: Order in chambers. Chambers is  
20 adjourned for the morning recess.

21

22 (MORNING RECESS)

23 (PROCEEDINGS ADJOURNED AT 11:08 A.M.)

24 (PROCEEDINGS RESUMED AT 11:34 A.M.)

25

26 THE COURT: Mr. Registrar, here are the materials on  
27 the applications that we've dealt with.

28 THE REGISTRAR: Thank you, My Lord.

29 THE COURT: Yes, Mr. Foy.

30 MR. FOY: My Lord, I have one additional introduction  
31 and request for leave.

32 Ms. Guadeloupe Albert, Consul General for  
33 Mexico, has joined us, and I would ask that she be  
34 given leave to sit on this side of the bar.

35 THE COURT: Yes.

36 MR. FOY: I'd like to start, My Lord, with some  
37 housekeeping matters, there -- and identify first  
38 the materials that have already been filed.

39 To your left, the record, the entire record  
40 of twenty volumes, has been filed together with  
41 briefs of authorities. There are four volumes of  
42 briefs of authorities.

43 And I'll be -- just tell you now that the  
44 first two volumes contain case law. The third  
45 volume contains statutes and rules. The fourth  
46 volume contains some secondary sources and in  
47 addition, at the very end, some additional cases.

1 I've also handed up a -- a binder, a red  
2 binder which contains extracts from the record.  
3 And I will be referring you to portions of that in  
4 the course of my submissions.

5 I'll just tell you that at the -- the start,  
6 the first -- under the first tab of that volume is  
7 an index to the record. The first page of that  
8 index shows you where you will find the written  
9 arguments that were filed by all the parties. And  
10 then the rest of the index shows you where you'll  
11 find everything else.

12 I would like to ask Your Lordship whether you  
13 still have the case management brief which  
14 contained the award.

15 THE COURT: Yes, I do.

16 MR. FOY: Thank you, My Lord.

17 I've also handed up to Your Lordship your own  
18 NAFTA, complete NAFTA.

19 THE COURT: Thank you.

20 MR. FOY: We'll be referring to that.

21 You'll know from reviewing the written  
22 argument that it's also available in electronic  
23 form, and the Web site address is in the  
24 materials.

25 THE COURT: Yes.

26 MR. FOY: I'm also assuming that Your Lordship has the  
27 petitioner's written argument that was filed some  
28 time ago.

29 THE COURT: I do. And I did have an opportunity to  
30 peruse it.

31 MR. FOY: Thank you, My Lord.

32 We will generally be following the outline of  
33 the submissions that have been filed by Mexico.  
34 After some introductory remarks, I want to take  
35 you to the award and identify those portions of  
36 the award that cause concerns.

37 After that introduction, Mr. Thomas will take  
38 you through Chapter 11 and its place in the NAFTA  
39 with particular emphasis on the limited  
40 jurisdiction that is accorded to Chapter 11  
41 arbitral tribunal panels.

42 After that, we will address which statutes  
43 governs this -- these -- these proceedings, and  
44 identify the grounds for review and the extent of  
45 the review under each of the statutes.

46 We will then review what I will call the  
47 jurisdictional errors, alleged errors. That will

1 also involve going through some of the documents  
2 that I've placed before you in the red brief.

3 We'll then deal with allegations with respect  
4 to the failure of the tribunal to deal with  
5 significant issues, some -- and lastly some  
6 interpretation issues with respect to Chapter 11.

7 Now, the outline of argument, I will not read  
8 it to you. I adopt it in its entirety. If I do  
9 neglect to refer to a particular paragraph, then I  
10 would -- I don't want to be taken to have  
11 abandoned that point. I will spend my time in  
12 oral argument emphasizing aspects of that outline.

13 As Your Lordship is aware, this is an  
14 application to set aside a unanimous award made by  
15 three arbitrators in an ad hoc tribunal. The  
16 president of the tribunal was Professor Sir Elihu  
17 Lauterpacht, a professor from Cambridge England,  
18 the -- and he was jointly agreed to by the  
19 parties; Mr. Benjamin Civiletti, who was appointed  
20 by Metalclad, a lawyer from Washington D.C.; and  
21 Professor Jose Luis Siqueiros, appointed by Mexico  
22 and a lawyer from Mexico City.

23 Your Lordship already is aware of why this  
24 court is seized with jurisdiction to review this  
25 award. The claimant invoked in -- in this case,  
26 the ICSID additional facility arbitral rules as  
27 allowed by NAFTA Article 1120. And under those  
28 rules, and they're at tab 85 of the -- the brief  
29 of authorities, and in accordance with Article  
30 1130 of the NAFTA, the tribunal was required to  
31 select a place of arbitration. That was done  
32 after representations by the parties.

33 And the tribunal -- and Your Lordship is  
34 aware that this is a legal selection, not a place  
35 of hearings, but identifies the -- the law of the  
36 arbitration itself. And when the tribunal made  
37 that selection, they noted that the formal  
38 location by reference to which the enforceability  
39 of the award is to be determined should be a  
40 neutral country, and on that basis decided it  
41 should be Canada and chose Vancouver.

42 The fact of this court's jurisdiction is not  
43 contested. The scope of that court's jurisdiction  
44 is contested, and depends upon which statute  
45 applies.

46 The jurisdiction of this court is either that  
47 conferred by the Commercial Arbitration Act or the

1 International Commercial Arbitration Act, only one  
2 of which applies.

3 I would point out that common to both is  
4 review for excess of jurisdiction. And it's my  
5 understanding from some of the draft materials  
6 I've received from the respondent -- I -- I don't  
7 have their argument yet, but I do have some draft  
8 materials -- that Metalclad concedes that under  
9 the Commercial Arbitration Act it permits a  
10 broader scope of review, including appeal on  
11 questions of law arising out of an award with  
12 leave of this court.

13 Now, I'd like to, just while we're on that  
14 topic -- I'm not going to argue in detail at this  
15 point which act applies, but I'd like to note some  
16 misnomers. The Commercial Arbitration Act was  
17 referred to by my friend as the domestic act.  
18 Both acts are acts of British Columbia and in that  
19 sense are domestic law.

20 The Commercial Arbitration Act should more  
21 properly be called the arbitration act that  
22 applies to any other arbitration. It's the -- it  
23 has a section to which I'll take you which makes  
24 it clear it applies to other than commercial  
25 arbitrations. The International Commercial  
26 Arbitration Act on the other hand is restricted to  
27 commercial arbitrations.

28 And while I -- I note that, the -- it is not  
29 incorrect to refer to a domestic international  
30 arbitration. The law of the place of the  
31 arbitration in the case of arbitrations like this,  
32 governed by a national law, are properly referred  
33 to as domestic international, and I'll take you to  
34 references in that regard.

35 Now, the applicant recognizes that there are  
36 limits on the grounds of review and appeal that  
37 are open to it and is prepared to meet the  
38 strictest tests that are applicable, both to the  
39 grounds of review and to the standard of review.

40 The applicant's submissions invoke this  
41 Court's traditional role in protecting -- in the  
42 supervision of arbitrators, and that is to protect  
43 the parties against excess of jurisdiction. The  
44 applicant will also ask this Court to play a role  
45 under the Commercial Arbitration Act in the  
46 interpretation of the NAFTA.

47 The interest that this case has already



1 generated indicates that the issues raised are  
2 fundamentally different and extend far beyond the  
3 issues typically arising in transnational, private  
4 commercial arbitration.

5 And I note that the role of the reviewing  
6 Court, or in the case of ICSID arbitrations, which  
7 are also available under Chapter 11 of the NAFTA,  
8 the role of review in the supervision of NAFTA  
9 Chapter 11 tribunals is expressly contemplated by  
10 Chapter 11. Chapter 11 in Article 1136 provides  
11 an automatic stay of enforcement of an arbitral  
12 award, which stay continues pending further  
13 appeal.

14 Now, the fact that the parties have provided  
15 for a review, recognized review either by a  
16 national court, as in the case of this  
17 arbitration, or by an ICSID annulment committee,  
18 is significant. Your Lordship is aware that it's  
19 open to parties to private arbitration to exclude  
20 judicial review. That was not done under the --  
21 under Chapter 11.

22 The parties, in my submission, recognized the  
23 value of the -- error correcting value of review  
24 in the systematic development of universal rights  
25 such as those set out in the NAFTA.

26 This is of value to investors and States  
27 alike. And I would point out that even in the  
28 case -- or even recognizing that a NAFTA panel's  
29 decision is only binding on the parties, incorrect  
30 decisions will encourage -- if not reviewed,  
31 incorrect decisions will encourage wasted claims,  
32 claims that may be later rejected by tribunals but  
33 may be brought in sup -- by reliance upon  
34 tribunals which have erred or gone beyond the  
35 scope of their jurisdiction.

36 And you -- you were referred to -- in the  
37 intervention application by CUPE, to a claim made  
38 by UPS, which in the submissions that were made  
39 there that was based upon the Metalclad tribunal  
40 decision. And I think that both investors and the  
41 parties have an interest in this court's reviewing  
42 function.

43 The fact is that notwithstanding the  
44 technical provision of the NAFTA that provides  
45 that these tribunal's decisions are only binding  
46 upon the parties, they have a significant  
47 influential effect. And I'll be coming back to

1 that point.

2 Now, before I take you to the award itself,  
3 I'd like to illustrate some of the places and the  
4 things that we will be talking about, and I do  
5 that by starting with the extracts from the  
6 record.

7 And I'd like to start simply geographically  
8 by referring you to tab 4. These are maps that  
9 were filed by Metalclad before the tribunal.

10 Tab 4 shows a -- all of Mexico, and in the  
11 centre the State of San Luis Potosi in which the  
12 municipality of Guadalcazar is situated. It's in  
13 the north of Mexico, north of Mexico City.

14 The next map changes the scale and shows you  
15 the boundaries of the State. The dark black line  
16 shows the boundaries of the State. San Luis is 1  
17 of 26 of the United Mexican States.

18 The pink portion shows the boundaries of the  
19 municipality of Guadalcazar. As you can see, it's  
20 a large boundary, and I'll be talking about the --  
21 the place of municipalities in the constitution  
22 of -- of Mexico.

23 You'll see on that map as well coloured in  
24 yellow down on the left this -- the city of San  
25 Luis, and it is the seat of the State government.

26 If you -- you'll see as well, although it's  
27 harder to see, the town of Guadalcazar in the  
28 southern portion of the municipality. You will  
29 also see in the northern portion of the  
30 municipality a site designated La Pedrera. And  
31 La Pedrera is the site of the -- of the hazardous  
32 waste, the proposed hazardous waste landfill which  
33 is the subject of this proceeding.

34 Map number 3 shows that -- those locations in  
35 a bit larger scale, cutting off a portion of the  
36 boundaries of the municipality. And map 4 shows a  
37 larger scale, again showing at the bottom of map 4  
38 the town, and at the top the site of La Pedrera.  
39 There's about 70 kilometres between the two.

40 Now, municipalities have a constitutional  
41 status in Mexico. The Mexican constitution  
42 requires States to organize themselves into  
43 municipalities. And the constitution, unlike in  
44 Canada, grants specific powers to municipalities.

45 In furtherance of their obligation to  
46 organize themselves into States -- or to organize  
47 themselves into municipalities, States, which are

1 the repository of all powers not expressly granted  
2 to the federation, enact municipal laws. So you  
3 will find municipal requirements in the State  
4 laws, just as you will find in British Columbia  
5 the Municipal Act in provincial legislation.

6 Now, this particular municipality is -- is  
7 poor and sparsely populated. The climate is hot.  
8 And the -- it consists primarily of arid desert.  
9 There is no industry or commercial activity. It  
10 does not produce hazardous waste itself. The  
11 inhabitants for the most part are subsistence  
12 farmers and ranchers.

13 The municipality is governed by something  
14 called a municipal council. The members of the  
15 council are elected for a three-year term, and  
16 they serve in a representative capacity. The  
17 municipal council meets either monthly or in  
18 extraordinary session and maintains written  
19 records. And I will be taking you during the  
20 course of my submissions to some of those written  
21 records.

22 This particular municipality due to its  
23 poverty has a very undeveloped infrastructure.  
24 The mayor shares a telephone with the public  
25 telephone system. The municipality has one  
26 station wagon, one police officer, and forty  
27 employees. It has few resources to enforce any of  
28 its legal sanctions. And given the lack of  
29 commercial activity in the municipality -- there  
30 is no large commercial activity in the  
31 municipality. You will not find in its records  
32 significant permit applications for construction  
33 of facilities as significant as this, other than  
34 in respect of this particular application. And  
35 I'll be taking you to those.

36 Now, in 1990 a Mexican company called  
37 COTERIN, then owned by Mexican nationals, and I  
38 emphasize not owned by Metalclad at this time,  
39 obtained a permit to operate a hazardous waste  
40 transfer station at La Pedrera. And I emphasize  
41 there's a difference between a transfer station  
42 and a landfill and ask you to keep that in mind.

43 COTERIN wanted to develop a hazardous waste  
44 landfill, did not have the necessary permits from  
45 any level of government, but in the meantime was  
46 given a licence to operate a transfer station.

47 COTERIN began to receive hazardous waste.

1 And instead of transferring that waste, it was  
2 dumped. It was dumped on the ground; 20,000  
3 tonnes of it was dumped on the ground, inorganic  
4 and organic waste, 20,000 tonnes being the -- the  
5 same amount dumped at the infamous Love Canal  
6 site.

7 And the photos at tab 5, and again I  
8 emphasis -- emphasize this is before Metalclad is  
9 in -- is on the scene, show the waste dumped at  
10 the site of La Pedrera. There's three photos  
11 there showing the volume, showing the conditions,  
12 open bags, and again showing the -- the volume.

13 And I'd ask you to turn to -- to tab 61 of  
14 this book. This is a later report with respect to  
15 this waste. And these documents, I should add,  
16 My Lord, are in chronological order once we get to  
17 the documents, but it describes the -- on page --  
18 the second page of that document, which has page  
19 360 at the bottom, describes the conditions in  
20 1990. And in the -- in the -- in the second  
21 paragraph under the heading "The Pedrera Transfer  
22 Station," it says:

23  
24 "On October 31st, 1990, while an  
25 application to establish a hazardous waste  
26 disposal site is evaluated, the now-defunct  
27 secretariat of urban development and  
28 ecology authorized the company COTERIN to  
29 operate on the site a site for hazardous  
30 waste transfer. Between November of that  
31 year and May of 1991, the company stored  
32 approximately 55,000 drums, 20,000 tonnes  
33 and an unquantified amount of wastes,  
34 holding them in 3 temporary storage  
35 containers not authorized for that  
36 purpose."

37  
38 The wastes are described. They are wastes  
39 coming from the mechanical, metal, automotive,  
40 chemical, pharmaceutical and agrochemical  
41 industries, among the most frequent are acidic  
42 acid, Poly-all (sic) sludge from smelting works;  
43 brine slag from paint; calcium sulfate sludge;  
44 polymers of something that I'm not familiar with,  
45 sediments from lagoons, magnesium silicate  
46 filtering cloth with rough seams and dirty  
47 solvents, among others.

1 The operation of the transfer station was  
2 inadequate as the wastes stored there were not  
3 even covered to protect them from the elements.  
4 The discontent and distrust of all that caused  
5 among the population of Guadalcazar led to the  
6 closing of the facilities by SEDUE on September  
7 25, 1991.

8 Early in 1992 the wastes were covered with --  
9 with dirt which did not guarantee the safety of  
10 the site. So that subsequently the State  
11 delegation of PROFEPA, a federal agency, ordered  
12 the installation of a plastic cover and clay,  
13 which were put in place on August 9, 1994.

14 Now, I add there Metalclad has come into the  
15 picture by that time. They purchased the site in  
16 1993, and I'll be taking you to the details with  
17 respect to that purchase and their acquisition  
18 of -- of this contaminated site.

19 THE COURT: You mean they purchased COTERIN in 1993?

20 MR. FOY: They purchased COTERIN in 1993. And I'll  
21 take you to the purchase documents during the  
22 course of my submissions.

23 Now, this contamination, not surprisingly,  
24 generated intense public disapproval at the  
25 municipal and local level. The municipality's  
26 consist -- consistent position from -- from 1991  
27 onwards was that they wanted this contamination  
28 remediated. And I'm going to take you to the sum  
29 of the steps that they took in the courts and  
30 otherwise to attempt to force remediation.

31 The municipality wanted remediation before  
32 the introduction of any new hazardous waste.  
33 Non-governmental organizations, including  
34 Greenpeace and local environmental organizations,  
35 supported the municipality and opposed the  
36 introduction of new hazardous waste.

37 Competing science was generated as to the  
38 suitability of the site, the risks posed by the  
39 existing contamination and the risks posed by  
40 proposed operations.

41 And of course the -- there are different  
42 risks associated with those different factors.  
43 Operations depend upon the operator. Even though  
44 the site may be suitable, safe operations in  
45 respect of the disposal of hazardous waste depend  
46 upon the operator.

47 Now, different views, different scientific

1 views, were expressed as to the proper mode of  
2 remediation, but it was common ground that  
3 remediation was needed.

4 Even Metalclad, who purchased COTERIN,  
5 described itself -- and I'll take you to this  
6 later -- described the contamination as giving  
7 rise to serious and grave dangers. As I've noted  
8 at tab 61, the contamination led to a closure  
9 order in 1991. And those federal closure orders  
10 remained in force until February of 1996.

11 At that time federal authorities were  
12 satisfied that the closure order could be lifted.  
13 The municipality was not satisfied, and continued  
14 to insist upon remediation before the introduction  
15 of new hazardous waste. This led to court  
16 proceedings that I will be referring you to.

17 Now, the pre-existing contamination and the  
18 local opposition that it generated were known to  
19 Metalclad before it acquired COTERIN in 1993. One  
20 board member voted against the acquisition on the  
21 basis of the contamination. And I -- as I  
22 mentioned, I will be taking you to the acquisition  
23 documents which again disclose the need for  
24 municipal approval before operations could take  
25 place.

26 During the course of the negotiations, and  
27 again arising as a result of the pre-existing  
28 contamination, Metalclad was offered other sites  
29 in the State for a -- for a proposed hazardous  
30 waste landfill and was offered assistance to  
31 identify other sites. Metalclad insisted upon  
32 seeking to open this site.

33 There was, as I mentioned, a number of  
34 competing science. At the outset of its  
35 acquisition, Metalclad agreed that the initial  
36 studies of the site were inadequate. Subsequent  
37 studies were done. Technical suitability was  
38 something that experts acts -- acting reasonably  
39 could disagree, and there was disagreement.

40 But at the municipal level, opposition to the  
41 introduction of new waste continued, although --  
42 and I -- I note, and this is important -- the  
43 municipality was prepared to allow operation of  
44 the site with the introduction of non-hazardous  
45 industrial waste. So the municipality wanted  
46 remediation, was prepared to allow Metalclad to  
47 operate as a non-hazardous waste landfill and then

1 consider what might -- what might happen after  
2 that.

3 Now, I -- I will later take you to the  
4 documents describing how construction of the  
5 landfill occurred, and I'll come back to that.  
6 But I'd like to go back to the selected extracts  
7 and to show you photos of what Mr. Cowper  
8 described as the state-of-the-art landfill that  
9 was in fact constructed. You'll find those at tab  
10 6. These were photographs filed by Metalclad.

11 They show an entrance, a -- a view, a change  
12 house, a drum storage area, and truck unloading  
13 dock, a truck scale, another view, and then over  
14 the page, a view north over completed cells 1 to  
15 3.

16 The hazardous waste that I showed you the  
17 photos of before and described how it was in 1994  
18 placed -- capped over, is underneath those cells.

19 And I'm going to be taking you later to -- to  
20 audits of the conditions underneath there.  
21 Those -- that cap, which shows that the mixing of  
22 the organic and inorganic waste, none of which was  
23 remediated before it was placed there, it was  
24 simply mixed all together and capped, the audit  
25 shows that there is a -- a -- gasses venting  
26 from -- from those cells and that there's a  
27 hundred percent chance of -- of explosion if those  
28 gasses are ignited.

29 Then you'll see what the -- the technology  
30 involved in this -- this waste landfill is -- a  
31 membrane is placed in a big hole. And you'll see  
32 that view north from cell 3 of cell 4, it -- it  
33 shows the hole. The membrane's placed in it, the  
34 waste is placed in there, and then it's covered  
35 over.

36 Now, the -- the remaining pictures show a  
37 test pit for geological studies and a rainwater  
38 runoff collection ditch around the site.

39 Now, having located you geographically and  
40 shown you some photos of the landfill, I'd like to  
41 take you to the award.

42 What I'm going to do in this section of my  
43 presentation is to identify those portions of the  
44 award that we will later be arguing are  
45 deficient. I'm not going to make those arguments  
46 in full as I take you through, but I am going to  
47 identify those aspects of the award that we take

1 issue with.

2 And it -- I start simply with the  
3 introduction, paragraph 1, and I'll paraphrase.  
4 Paragraph 1 notes that the -- Metalclad alleged  
5 interference with the development and operation of  
6 a hazardous waste landfill.

7 I will be showing you later in the portions  
8 of the award that in effect this tribunal found  
9 that NAFTA imposes an obligation to ensure  
10 successful implementation of investments. And I'm  
11 going to suggest that that -- that's incorrect.

12 Part 2 of the award describes the parties.  
13 And at this stage I would just emphasize that what  
14 we're dealing with is COTERIN, the owner of record  
15 of the landfill, as well as permits and licences  
16 which are the basis of the dispute.

17 I'm going to ask you to note that there are a  
18 number of other enterprises in Mexico that you  
19 will be hearing about, enterprises of Metalclad in  
20 Mexico that you will be hearing about, but that --  
21 and you'll hear about them because of the manner  
22 in which Metalclad presented its claim for damages  
23 in this case. But we are dealing with COTERIN.

24 Now, Part 3 of the award describes the other  
25 entities, and I have dealt with that in my  
26 introduction.

27 Part 4 describes the procedural history. And  
28 I note a point that Your Lordship is already  
29 familiar with, that in paragraph 11 it's noted  
30 that the tribunal determined that the place of  
31 arbitration would be Vancouver, British Columbia.  
32 The tribunal notes that the parties accepted that  
33 determination.

34 At paragraph 21 the tribunal refers to a  
35 pre-hearing conference that took place in July of  
36 1999.

37 And I would just pause there to familiarize  
38 Your Lordship with the proceedings under the  
39 arbitral rules governing this arbitration.  
40 Those -- we'll be taking you to them later, but  
41 those were the ICSID arbitration additional  
42 facility rules. They provide for the extensive  
43 exchange of written materials in advance of oral  
44 hearings. Those written materials include  
45 argument, the memorial, together with witness  
46 statements, documents, and -- and expert reports  
47 exchanged by the parties in advance of any oral



1 hearing.

2 And Your Lordship has -- as I have noted at  
3 the outset of tab 1 of the index to the record,  
4 the parties exchanged a memorial,  
5 counter-memorial, reply, admissions and denials  
6 rejoinder, post-hearing submissions by both  
7 sides. And both Canada and the United States also  
8 filed written submissions. And I've given you the  
9 location of those, and I'll be showing you  
10 portions of them. But I -- I can -- you --  
11 Your Lordship can see voluminous documentary  
12 record was -- was exchanged in advance of the oral  
13 hearing.

14 And prior to that oral hearing, the tribunal,  
15 having regard to this exchange of documentary  
16 material, gave some directions to the parties with  
17 respect to what should go on at the oral hearing.  
18 And I include at tab 3 of the red brief a letter  
19 written by the secretary for the tribunal to the  
20 parties.

21 And I would just emphasize one point:  
22 After -- the parties were given the opportunity to  
23 call for cross-examination any of the witnesses of  
24 the other party who have -- who had filed witness  
25 statements. And not surprisingly, the tribunal  
26 gave some direction saying that:

27  
28 "The function of cross-examination..."

29  
30 And this is at paragraph 5 on page 2:

31  
32 "...is only to enable one party to raise  
33 doubts about the general veracity of a  
34 witness relied upon by the other party or  
35 to achieve the contradiction of a specific  
36 statement of fact asserted by a witness in  
37 a manner more conclusive if necessary than  
38 the denial of that fact achieved by the  
39 filing of relevant documentary material."

40  
41 Under this mixture of continental and common  
42 law systems, the oral hearing is -- has a limited  
43 role, and that was emphasized by the -- by the  
44 tribunal.

45 But I will be noting, when I refer you to  
46 the -- some of the record, I will be referring  
47 primarily to documents created by Metalclad

1       itself. In rare cases I will be referring to  
2       witness statements, and in those cases filed by  
3       Mexico. In the cases in which I refer to witness  
4       statements filed by Mexico, it will be of  
5       witnesses who were not called for  
6       cross-examination by Metalclad.

7       Paragraph 23 of the award lists some of the  
8       statements that were submitted and exchanged  
9       between the parties.

10       Paragraph 24 notes Canada's intervention.  
11       And I paraphrase that Canada intervened to submit  
12       that Article 1110 of the NAFTA, the expropriation  
13       section, is not a codification of U.S. law on  
14       expropriation. The U.S., the United States, also  
15       intervened, again with respect to Article 1110,  
16       taking the position that Article 1110 reflects  
17       customary international law of expropriation.

18       Now, the next portion of the award is  
19       called -- is Part 5, and it's called "Facts and  
20       Allegations." And I contrast it to Part 7 of --  
21       the title of it to Part 7 of the award which is  
22       called "The Tribunal's Decision." And the reason  
23       I contrast it is that, except as a recitation of  
24       allegations, Metalclad's allegations, this section  
25       is difficult to follow, that is Part 5.

26       For the most part the tribunal refers to,  
27       quote, assertions; quote, Metalclad maintains; or,  
28       quote, Metalclad alleges. And those references  
29       are found in paragraphs 32, 33, 34, 36, 37, 38,  
30       39, 41, 46, 49, 52, 53, 60 and 61.

31       In very few instances it's also noted that  
32       Mexico denies the allegations. And for the most  
33       part, no findings are made or appear to be made at  
34       all in this section. It's -- it's most coherent  
35       if it's described as allegations.

36       Having said that, you will find sentences  
37       from time to time in the -- in the course of this  
38       section, Part 5, and I'll take you to paragraph  
39       46, for example, which says -- it talks about an  
40       event that occurred on March the 10 and notes in  
41       the -- in the third line:

42  
43       "Metalclad asserts that this demonstration  
44       was organized at least in part by Mexican  
45       State and local governments, and that State  
46       troopers assisted in blocking traffic into  
47       and out to of...into and out of the site."

1  
2 No finding is ever made with respect to that,  
3 but -- that assertion, but then the next sentence  
4 says:

5  
6 "Metalclad was thenceforth effectively  
7 prevented from opening the landfill."  
8

9 Well, My Lord, if that was intended to be a  
10 finding, it is, as you will already be aware,  
11 inconsistent with the evidence. This site was  
12 subject to a federal closure order throughout this  
13 time, until February of 1996. And so as a  
14 finding, I would be arguing that that finding,  
15 if -- if it were a finding, would be perverse.

16 There are other examples throughout this  
17 section of Part 5 where, although for the most  
18 part everything is said -- said to be assertions,  
19 where findings were not made, but -- but -- of  
20 a -- of an example of another difficulty with this  
21 section, and that is omissions.

22 And I'll take you to paragraph 54. This says  
23 that Metalclad was -- this refers to a -- a  
24 meeting that took place in December of 1995 when a  
25 municipal permit application was considered and  
26 denied by the municipality.

27 Paragraph 54 notes:

28  
29 "Metalclad was not notified of the town  
30 council meeting where the permit  
31 application was discussed and rejected..."  
32

33 I'll leave that for the moment.

34  
35 "...nor was Metalclad given any  
36 opportunity to participate in that  
37 process."  
38

39 And I'll -- I'll be talking about this  
40 meeting and come back to that.

41  
42 "Metalclad's request for reconsideration  
43 of the denial of the permit was rejected."  
44

45 That part is accurate.

46 What is omitted, what you won't find  
47 immediately after paragraph 54, is that Metalclad

1 then went to the Mexican domestic courts to  
2 challenge the denial of the reconsideration.  
3 Metalclad initiated those domestic court  
4 proceedings, took them to one level. They were  
5 initially unsuccessful because they had failed to  
6 exhaust appropriate remedies, and then -- and they  
7 initiated an appeal from that. They later  
8 abandoned those domestic court proceedings in  
9 favour of negotiations with the municipality.

10 Now, as I mentioned earlier, those  
11 negotiations led to the point where the  
12 municipality was prepared to allow operation of a  
13 non-hazardous waste landfill, and Metalclad  
14 continued to insist upon operation as a hazardous  
15 waste landfill and led to this arbitration as  
16 opposed to continuing with the -- with  
17 negotiations.

18 But it is an important omission that the  
19 tribunal never refers, neither here nor anywhere  
20 else in this award, to those domestic  
21 proceedings. And I'll come back to the -- to the  
22 significance of that.

23 At this stage I would just ask you to treat  
24 Part 5 as a series of allegations and contrast it  
25 to the findings which are found in Part 7.

26 Now, there's one exception to that, and  
27 that's paragraph 64 through 69 of this part deal  
28 with what's called the ecological decree. And I  
29 will be later dealing in more detail with this  
30 ecological decree. But in brief this was a decree  
31 issued by the State after this NAFTA arbitration  
32 was initiated. And in paragraph 64 through 69 the  
33 tribunal deals with whether or not it's  
34 appropriate for it to consider at all those facts  
35 that occurred after the claim was initiated, after  
36 Metalclad had already alleged that its investment  
37 had been expropriated and unlawfully interfered  
38 with.

39 And at paragraph 69 the tribunal concludes on  
40 the jurisdictional basis that it can -- it -- that  
41 the decree is within its jurisdiction, the last  
42 line, but as will be seen, does not attach to it  
43 controlling importance. So there is, I guess, an  
44 obiter finding that the decree is within its  
45 jurisdiction, but I'll come back later to the  
46 treatment of it in terms of its controlling  
47 importance.

1       The next part of the award is Part 6, page  
2 23. This is a very important part of the award  
3 for this application and generally. In this  
4 section the tribunal sets out the applicable law.

5       Now, this is a crucial part of any  
6 arbitration award. It is appropriate for an  
7 arbitral tribunal to identify the applicable law,  
8 and that is to say the law governing the  
9 substantive dispute between the parties. The law  
10 separate from the law governing the arbitration,  
11 I'll be taking you to the arbitral authorities  
12 with respect to that. But here they're setting  
13 out the law governing the substantive dispute  
14 between parties.

15       Why is it crucial to set it out? The reason  
16 is is that arbitrators only have jurisdiction to  
17 decide disputes according to the rules laid down  
18 in the legal system which the -- of the parties'  
19 choice. They may not go outside those rules. If  
20 they do go outside those rules, they act in excess  
21 of their jurisdiction. And a tribunal which  
22 applies the wrong applicable law exceeds its  
23 jurisdiction.

24       Now, the authorities, and we'll be taking you  
25 to these, the authorities distinguish this from  
26 misapplication of the correct governing law. So  
27 it's appropriate for the tribunal to set out -- an  
28 arbitral tribunal to set out the applicable law.  
29 And this tribunal does so in two paragraphs,  
30 paragraphs 70 and 71.

31       They start out in the first sentence of  
32 paragraph 70 to refer to the -- that -- to re --  
33 to state that a tribunal established pursuant to  
34 NAFTA Chapter 11, Section B must decide the issues  
35 in dispute in accordance with NAFTA and applicable  
36 rules of international law.

37       They cite Article 1131, and that's a correct  
38 cite. They also refer to Article 102, providing  
39 that the agreement must be interpreted and applied  
40 in light of its stated objectives and in  
41 accordance with applicable rules of international  
42 law. And we take no position on this application  
43 with respect to those two statements.

44       In the third sentence the tribunal refers to  
45 the objectives set out at the outset of NAFTA,  
46 noting that they specifically inclu -- include  
47 transparency and the substantial increase in

1 investment opportunities in the territories of the  
2 parties. We'll come back to that.

3 They then note -- make a reference to the  
4 Vienna Convention on the law of treaties  
5 and note about -- and note the general rules set  
6 out there. And again no issue arises on this  
7 application with respect to the statements made in  
8 the remainder of that paragraph.

9 Paragraph 71, they then refer to one of the  
10 sentences in the preamble to the NAFTA, and we'll  
11 be taking you to these. They refer to that  
12 portion of the preamble that indicates the parties  
13 agreed to ensure a predictable commercial  
14 framework for business planning and investment.

15 They then referred to this, they say NAFTA  
16 further requires, and they quote:

17  
18 "Each party shall ensure that its laws,  
19 regulations, procedures and administrative  
20 rulings of general application respecting  
21 any matter covered by this agreement are  
22 promptly published or otherwise made  
23 available in such a manner as to enable  
24 interested persons and parties to become  
25 acquainted with them."  
26

27 A reference to Chapter 18 and Article 1802 of  
28 the NAFTA.

29 They explicitly referred to an obligation not  
30 found in Chapter 11, but found elsewhere. This  
31 point will be elaborated upon in more detail, but  
32 I want to emphasize it at this stage.

33 At this stage, whether you consider any of  
34 the other facts to which my friend objects you  
35 looking at in respect of this arbitration, at this  
36 stage it is evident this tribunal has exceeded its  
37 jurisdiction. And I'm going to show you how this  
38 excess of jurisdiction infects the rest of its  
39 findings. But the tribunal has in this paragraph  
40 misdirected itself as to the applicable law.

41 Investors under Chapter 11 are not entitled  
42 to bring investor-State disputes with respect to  
43 any obligations other than those contained in  
44 Section A of Chapter 11. Only the parties under  
45 Chapter 20 of the NAFTA can in part -- in  
46 State-to-State arbitration allege violations of  
47 Chapter 18.

1           You will see, as I take you through the rest  
2 of the reasons, that the tribunal's notion of  
3 transparency becomes the crux of its reasoning.  
4 And you will see that it bases its finding of a  
5 violation of Chapter 11 on its notion of what it  
6 thinks transparency is.

7           And I'll just -- just before we break for  
8 the -- for the -- for the luncheon break, I'll  
9 take you to paragraph 100 of the outline of  
10 argument, if I may, just to -- which is set out at  
11 page 26. This is a reference to a decision of  
12 the -- of an ICSID ad hoc annulment committee.

13           And we'll in the course of the submissions be  
14 explaining that process and these -- these  
15 tribunals. But in paragraph 100 it is noted that  
16 in dealing with a review of a -- of an arbitration  
17 under the ICSID rules:

18  
19           "...the parties' agreement on applicable  
20 law forms part of their arbitration  
21 agreement. Thus, a tribunal's disregard  
22 for the agreed rules of law would  
23 constitute a derogation for the terms of  
24 reference within which the tribunal has  
25 been authorized to function. Examples of  
26 such a derogation include the application  
27 of rules of law other than the ones agreed  
28 by the parties, or a decision not based on  
29 any law unless the parties had agreed on a  
30 decision a quo de bono. If the derogation  
31 is manifest, it entails a manifest excess  
32 of power."

33  
34           They note there the distinction I mentioned  
35 earlier:

36  
37           "Disregard of the applicable rules of law  
38 must be distinguished from erroneous  
39 application of those rules which, even if  
40 manifestly unwarranted, furnishes no ground  
41 for annulment..."

42  
43           In our submission this tribunal in paragraph  
44 71 has demonstrated its disregard of the agreed  
45 rules of law by seeking to apply rules, those set  
46 out in Chapter 18, other than those agreed to by  
47 the parties, those set out in Section A of Chapter

1 11, and that this disregard is manifest on the  
2 face of it and of the award entails a manifest  
3 excess of power, which is a ground for review  
4 under both statutes and furnishes grounds for  
5 setting aside the award without more.

6 Now, I see it's the -- 12:30. It would be a  
7 convenient time in my submission to break.

8 THE COURT: Yes. We'll take the luncheon recess and  
9 reconvene at 2 o'clock.

10 THE REGISTRAR: Order in chambers. Chambers is  
11 adjourned until 2 p.m.

12

13 (NOON RECESS)

14 (PROCEEDINGS ADJOURNED AT 12:28 P.M.)

15 (PROCEEDINGS RESUMED AT 2:00 P.M.)

16

17 THE COURT: Continue, Mr. Foy.

18 MR. FOY: Thank you, My Lord.

19 I ended this morning in pointing out the  
20 jurisdictional error made by the tribunal in going  
21 outside Chapter 11 to the transparency obligations  
22 of Chapter 18. And in doing so, Mexico does not  
23 want to be taken to be conceding that there was a  
24 breach of NAFTA Chapter 18 and that the tribunal  
25 just got the wrong section; to the contrary,  
26 Mexico will show that Metalclad was advised of the  
27 need for the municipal permit, was aware of the  
28 extent of the jurisdiction asserted by the  
29 municipality, and most importantly was aware of  
30 the domestic remedies available to resolve any  
31 issue in that regard. And in fact, as I mentioned  
32 before the break, exercised those remedies, later  
33 abandoning them in favour of negotiations with the  
34 municipality.

35 THE COURT: Let me just stop you there, Mr. Foy.

36 Although you say that you don't just stop at  
37 saying that they got the wrong section and -- and  
38 you went on with the other things that you said,  
39 if I were to agree with your -- your submission  
40 that the arbitration panel had exceeded its  
41 jurisdiction by going into the transparency  
42 issues, what -- what do you say I -- I am then to  
43 do? Because it would seem to me that, if that  
44 were the case, I'd simply say the arbitration  
45 panel exceeded its jurisdiction and it goes back  
46 to the arbitrators, and it would not be for me to  
47 then decide whether -- for instance, whether there



1 was compliance with the transparency provisions.

2 MR. FOY: My Lord, I agree that the appropriate order  
3 for this Court to make, if you agree with our  
4 jurisdictional point, would be to set aside the  
5 award. I agree with that.

6 THE COURT: Um-hum.

7 MR. FOY: Whether or not Your Lordship -- it would be  
8 unnecessary if you accept that first point to go  
9 on to opine as to whether or not Mexico is in  
10 violation of any of the transparency provisions of  
11 Chapter 18, just as it was inappropriate for the  
12 tribunal to consider that.

13 But I want to point out that we make that  
14 legal submission, but we're not simply saying that  
15 there was any lack of trans -- we're not conceding  
16 that there was any lack of transparency. I want  
17 to emphasize that. And I will be taking you  
18 through the -- Metalclad's own documents to  
19 demonstrate the awareness of the need for the  
20 permit, the assertion of -- the extent of the  
21 assertion of the authority and the domestic legal  
22 means to resolve that.

23 THE COURT: Um-hum. Are you going to be submitting  
24 that -- that -- if I find that you are in error on  
25 your first submission, in other words, that  
26 transpare -- transparency is something that the  
27 arbitration panel properly looked at, are you then  
28 saying that -- that, based on the facts, that  
29 the -- the tribunal made an error of law which I  
30 could review if it's under the Commercial  
31 Arbitration Act, but -- but it would not be  
32 something I could review under the International  
33 Commercial Arbitration Act?

34 MR. FOY: No, My Lord.

35 I will be going on to submit in the  
36 alternative that if the tribunal was entitled to  
37 look at Chapter 18, that it exceeded its  
38 jurisdiction in legislating transparency  
39 requirements that are not found in the NAFTA.

40 And so I will be arguing that that second  
41 alternative error also results in a loss of  
42 jurisdiction which would justify this Court  
43 setting aside the award under either statute.

44 THE COURT: Okay. I understand.

45 MR. FOY: I was taking you through the award, and I  
46 had concluded with paragraph 71. And I'd like to  
47 continue with that exercise, again emphasizing

1 that what I'm doing is highlighting points that  
2 you will hear more about in due course.

3 In paragraph -- starting -- and this is  
4 the -- part of the decision entitled "The  
5 Tribunal's Decision, Part 7." In paragraph 72,  
6 it's noted that Metalclad contends that Mexico  
7 through its local governments interfered with and  
8 precluded its operation of the landfill and  
9 alleges violation of Articles 1105 and 1110.

10 In paragraph 73 the tribunal examines  
11 responsibility of the -- of Mexico for the conduct  
12 of State and local governments. And although the  
13 tribunal does not record Mexico's position fully  
14 in that paragraph -- and Mexico's more complete  
15 position is set out in its closing submissions --  
16 Mexico is not bringing this application on -- or  
17 basing this application on their treatment of that  
18 issue.

19 They then turn to Article 1105, the  
20 requirement for treatment in accordance with  
21 international law, including fair and equitable  
22 treatment. And in paragraph 74 they announced  
23 their conclusion, that Metalclad's investment was  
24 not accorded fair and equitable treatment.

25 In paragraph 75 they referred to Article 102,  
26 and they state -- of the NAFTA, stating that an  
27 underlying objective of NAFTA is to promote and  
28 increase cross-border investment opportunities,  
29 and then uses this language:

30  
31 "...and ensure the successful  
32 implementation of investment initiatives."  
33

34 You'll recall earlier this morning I  
35 emphasized that point and noted that that language  
36 appears nowhere in Article 102.

37 If you would turn to Article 102 in your  
38 NAFTA for a moment, you will see in Part 1, the  
39 general part, Article 102 lists a number of  
40 objectives. And one of the objectives that the  
41 tribunal may have been thinking of but misdirected  
42 themselves on is -- is 102(1)(c). The objectives  
43 include to increase substantially investment  
44 opportunities in the territories of the parties.

45 The tribunal has taken the obligation to  
46 increase opportunities and turned it into an  
47 obligation to ensure the successful implementation

1 of investment initiatives, again stepping outside  
2 the NAFTA text, the significance of which I'll  
3 elaborate on further.

4 In paragraph 75 the tribunal returns to the  
5 notion of transparency, again demonstrating  
6 that -- in jurisdictional terms, that they're  
7 considering whether or not there has been a  
8 failure in terms of the transparency obligations  
9 of the NAFTA.

10 And then -- then the tribunal sets out its  
11 understanding in paragraph 76. And it says:

12  
13 "The tribunal understands this to include  
14 the idea that all relevant legal  
15 requirements for the purpose of initiating,  
16 completing and successfully operating  
17 investments made or intended to be made  
18 under the agreement should be capable of  
19 being readily known to all effective  
20 investors of another party. There should  
21 be no room for doubt or uncertainty on such  
22 matters. Once the authorities of the  
23 central government of any party whose  
24 international responsibility in such  
25 matters has been identified in the  
26 preceding section become aware of any scope  
27 for misunderstanding or confusion in this  
28 connection, it is their duty to ensure that  
29 the correct position is promptly determined  
30 and clearly stated so that investors can  
31 proceed with all appropriate expedition in  
32 the confident belief that they are acting  
33 in accordance with all relevant laws."  
34

35 The tribunal cites no authority for this  
36 understanding of transparency. The tribunal cites  
37 no -- none of the text of Chapter 18 or the other  
38 portions of the NAFTA that speak to transparency,  
39 which we will be taking you through, to support  
40 this notion of this understanding or this duty.

41 And the tribunal essentially holds that  
42 federal governments have a duty under  
43 international law to actively resolve any  
44 ambiguities in federal, provincial or municipal  
45 law or ambiguities in the constitutional breach of  
46 those laws for the benefit of foreign investors.

47 Now, nothing is said about what occurs in a

1 federation when a municipality or other level of  
2 government takes a different view of what is the,  
3 quote, correct position, to use their language.  
4 Nothing is said about resort to the courts to  
5 resolve differences between levels of government  
6 as to what is the correct position. Nothing is  
7 said about the introduction of new laws, it's --  
8 particularly in the environmental area in which it  
9 is not uncommon for there to be constitutional  
10 litigation with respect to the reach of those  
11 laws.

12 Your Lor -- Your Lordship is intimately  
13 familiar with constitutional litigation respecting  
14 the reach of provincial environmental laws in  
15 other matters before this Court. And nothing is  
16 said there about the existence in Mexico of means  
17 to resolve constitutional uncertainties or other  
18 questions as to the scope of -- or reach of  
19 different levels of government's  
20 laws.

21 That understanding, it will be submitted, set  
22 out in paragraph 76 is, as I mentioned just a -- a  
23 minute ago, also an act of excess of jurisdiction  
24 in legislating a -- even if the tribunal was  
25 correct to be examining transparency, even if that  
26 was within their jurisdiction, that this amounts  
27 to the -- the legislation of a duty that has not  
28 otherwise been agreed to by the parties to the  
29 NAFTA.

30 Now, in paragraph 77, the next paragraph, the  
31 tribunal notes that Metalclad acquired COTERIN for  
32 the sole purpose of developing and operating a  
33 hazardous waste landfill.

34 And I mentioned -- I -- I emphasized that in  
35 the result the tribunal has transformed a business  
36 purpose, an intention, into a property right.  
37 Nothing is said there by the tribunal about the  
38 municipality's preparedness to allow operation of  
39 this site as a non-hazardous waste landfill.  
40 It's -- it's -- it will be seen from the review of  
41 the remainder of the award that somehow this  
42 purpose of Metalclad's becomes a right.

43 Paragraph 78 refers to what the tribunal  
44 calls federal construction and operating permits  
45 and a State operating permit. I will be taking  
46 you to those documents. And I will be  
47 demonstrating that they have been misdescribed

1 there, and demonstrate on the documents themselves  
2 and what was said about the documents that they do  
3 not authorize construction.

4 In paragraph 79 the tribunal states what it  
5 says to be a central point. A central point in  
6 this case has been whether, in addition to the  
7 above-mentioned permits, a municipal permit for  
8 the construction of hazardous waste was required.  
9 And I note that that is a -- an issue of Mexican  
10 domestic law. And I want to -- and -- and you  
11 will see in the remainder of the award  
12 extensive -- or some discussion by the tribunal of  
13 issues of Mexican domestic law.

14 And I want to take you to tab 7 of the red  
15 brief, because this touches upon another  
16 jurisdictional error made by the tribunal. And I  
17 want to take you to some passages from the  
18 transcript and from submissions. And the first  
19 one at tab 7 is from Volume 1 of the transcript at  
20 page 30, and this is counsel for Metalclad in  
21 opening. So this is counsel for the claimant.  
22 And the counsel for the claimant concedes:

23  
24 "This tribunal is not called upon to pass  
25 upon the legality of Mexican law."

26  
27 It goes on to say:

28  
29 "It's appropriate to examine its contents  
30 to see what the claimant reasonably relied  
31 upon."

32  
33 That's at lines 4 through 7.

34 The next page is an extract from the  
35 transcript, and this is counsel for Metalclad  
36 again in closing. And at the bottom of that page,  
37 this is Volume 5 -- at the bottom of that page  
38 counsel for Metalclad is saying:

39  
40 "By way of recharacterizing claimant's  
41 case, respondent has devoted several  
42 paragraphs to the proposition that the  
43 tribunal does not stand as an appellate  
44 court in relation to Mexican law and the  
45 judgments of Mexican courts."

46  
47 And at line 4:

1

2 "And as to this proposition claimant can  
3 only concur of course that the tribunal is  
4 not a Mexican appellate court."

5

6 And then further down in that -- on that

7 page, that line 12:

8

9 "Nowhere has the claimant proposed a rule  
10 of international law that an incorrect  
11 application of domestic law by a domestic  
12 court ipso facto establishes a denial of  
13 justice."

14

15 That is a denial of fair and equitable  
16 treatment.

17 So, My Lord, there you have the claimant's  
18 counsel, both in opening and in closing, agreeing  
19 that the tribunal is not a Mexican appellate court  
20 charged with the responsibility of the  
21 interpretation of Mexican domestic law, and  
22 agreeing that violation of Mexican domestic law  
23 does not itself establish a violation of  
24 international law.

25 Now, the claimant and -- and the respondent  
26 below agreed on this point. And counsel for  
27 Mexico, Mr. Perezcano's note is -- is made on the  
28 next page, Volume 5, page 19, at line 2. This  
29 is -- this is counsel for Mexico talking here, and  
30 he -- he -- he says:

31

32 "It is not up to this tribunal to decide on  
33 issues of Mexican law."

34

35 And then after that page I have included  
36 portions of the written submissions filed at --  
37 filed by Mexico in its closing submissions under  
38 the heading:

39

40 "This tribunal need not and should not  
41 consider questions of Mexican domestic law  
42 where those points are simply elaborated on  
43 in more detail."

44

45 And I point this out to make the submission  
46 that it -- on my reading of -- of that, that both  
47 the claimant and the respondent below, both

1 Metalclad and Mexico were of the view that it was  
2 not the function of this tribunal to act as a  
3 Mexican appellate court deciding upon issues of  
4 Mexican domestic law.

5 Then I take you back to paragraph 79 where  
6 the tribunal has stated the issue -- an issue of  
7 Mexican domestic law, whether a municipal permit  
8 was required for this -- for this landfill.

9 In paragraph 80 the tribunal notes that  
10 federal officials had assured that -- Metalclad  
11 that it didn't need a municipal permit. Now, I'm  
12 just going to pause on that and say that there is  
13 evidence that one federal official may have said  
14 that, there is -- not in writing. There is  
15 contrary evidence in writing, contemporaneous  
16 evidence of the ter -- and the terms of the  
17 permits themselves, there is legal advice as  
18 well. And there's evidence in the very document  
19 purchasing this investment by Metalclad that  
20 demonstrates that Metalclad was aware of the  
21 municipal permit issue and the means to resolve  
22 it.

23 Now, in paragraph 81 --

24 THE COURT: Although just in paragraph 80, the --  
25 the -- this to me appears to be a finding of fact  
26 as opposed to the earlier statements of the  
27 tribunal when they were saying Metalclad asserts,  
28 Metalclad alleges. There's no such qualification  
29 in paragraph 80.

30 MR. FOY: That's correct, My Lord.

31 And what I'm going to be taking you to is the  
32 contemporaneous documents which demonstrate that  
33 there was a significant body of evidence that that  
34 was not the case.

35 THE COURT: Well, are you able to demonstrate that  
36 there was no evidence that that was the case?

37 MR. FOY: I'm -- the only -- I'm going to attempt to  
38 con -- to convince you that that amounts to  
39 patently unreasonable error. And I -- as I said  
40 at the outset, there is evidence in which it -- it  
41 is noted that one federal official may have said  
42 this. And you're going to hear a lot about that  
43 particular federal official and his association  
44 with Metalclad. And you are going to hear  
45 submissions as to the unreasonableness of any  
46 reliance upon such an assertion in the face of the  
47 other contemporaneous documentary evidence. And

1 it will be submitted that this, if it was a  
2 finding of fact, was patently unreasonable.

3 THE COURT: All right.

4 MR. FOY: Now, in paragraph 81 the tribunal starts to  
5 address Mexican domestic law, noting that experts  
6 evidence was filed on Mexican law, noting that the  
7 experts took a different view. No reference to  
8 the qualifications of the -- of the experts.

9 THE COURT: If it was agreed that the tribunal was not  
10 to decide questions of Mexican domestic law, why  
11 were the expert reports filed, the expert opinions  
12 filed?

13 MR. FOY: There's a difference between examining  
14 juridical facts as to the existence of laws in  
15 which for an international tribunal it may be  
16 appropriate to look to evidence to determine those  
17 facts, and interpreting the -- the issues of -- of  
18 domestic law.

19 And you're right in this sense: that it would  
20 have been open to -- and in fact the -- I go back  
21 to the -- to the brief. Mexico objected to the  
22 relevance of this evidence and said the tribunal  
23 had no jurisdiction to -- to deal with it, but  
24 reserved the position that if you're going to look  
25 at it, here is the evidence that you should look  
26 at.

27 And you'll find those in paragraph 538 of  
28 that submission. Mexico -- it's at tab 7 again.  
29 Mexico took the position in paragraph 538 that:

30  
31 "The claimant is seeking to have this  
32 tribunal sit as a court of review of  
33 Mexican municipal law to resolve issues  
34 that do not involve international law.  
35 The NAFTA does not grant the tribunal the  
36 jurisdiction to make such review."  
37

38 Without prejudice to this point, Mexico  
39 explains its corrections on the claimant's  
40 misstatements of Mexican domestic law. Further  
41 below, Mexico registered its jurisdictional  
42 objection and then went on to say:

43  
44 "We think you have the Mexican domestic  
45 law wrong."  
46

47 Now, I'm back at paragraphs 82 of the award



1 where the tribunal starts to set out some of the  
2 Mexican laws in issue. It sets out the -- the  
3 federal general ecology law.

4 I note that this was a new law in 199 --  
5 1988, and I note a point I've made earlier that  
6 it's not uncommon for there to be litigation with  
7 respect to the reach of -- of new laws. And then  
8 in reference -- in paragraph 83 there's reference  
9 to one article of that law. In 84, reference to  
10 another portion of that law.

11 In 85, a -- a note that Metalclad was led to  
12 believe and did believe that the federal and State  
13 permits allowed for the construction and operation  
14 of the landfill. Again, I'm going to be  
15 submitting that that, if it's a finding, is -- is  
16 patently unreasonable. But I'm going to also be  
17 going on to note that, more importantly, Metalclad  
18 was aware of the issue as to whether a permit was  
19 required and was aware of the means to resolve  
20 that issue; that is, by recourse to the Mexican  
21 domestic courts and had contracted for that in  
22 its -- in the document by which it acquired this  
23 investment.

24 Now, in paragraph 86 the tribunal interprets  
25 Mexican domestic law and interprets it to conclude  
26 that the municipal permit denial in this case was  
27 improper by having been done in excess of the  
28 municipality's jurisdiction in the tribunal's  
29 view. And I just note that that is a ruling on  
30 Mexican domestic law; it is not a ruling on  
31 international law.

32 In that paragraph it is unclear whether the  
33 tribunal -- given what they've said earlier about  
34 there being no jurisdiction in the municipality,  
35 it's unclear whether the tribunal is accepting  
36 that the municipality had some but a limited  
37 jurisdiction. And the tribunal never goes on to  
38 consider whether in the exercise of that limited  
39 jurisdiction it was justified in denying this  
40 municipal permit application on the bases set --  
41 other bases set out in the permit denial. And  
42 I'll just note that I will be taking you to the  
43 permit denial and -- and demonst -- and showing  
44 you a number of reasons the municipality gave for  
45 refusing the permit, one of which was the  
46 construction in advance of applying for the  
47 permit.

1 Now, in paragraph 87 this is touched upon.  
2 It's -- the tribunal says:

3  
4 "Relying on representations of the federal  
5 government, Metalclad started constructing  
6 the landfill and did this openly and  
7 continuously with the full knowledge of  
8 federal, State and municipal governments  
9 until the municipality's stop work order of  
10 October 26th, 1994."

11  
12 I will be taking you to the evidence of  
13 Metalclad's that shows that the -- Metalclad was  
14 representing that that -- at that -- the  
15 construction at that time was for remedial  
16 purposes or for the purposes of the audit of the  
17 site. And I will be taking you to the evidence  
18 that they were specifically advised to obtain a  
19 municipal permit in advance of that construction.

20 Here in fact the municip -- the tribunal is  
21 making a virtue out of the construction in advance  
22 of obtaining the permit. And I will be submitting  
23 that it demonstrates illegality and a justifiable  
24 reason for the municipality, even aside from its  
25 environmental jurisdiction, to decline the permit  
26 application.

27 In paragraph 88 the tribunal returns to its  
28 transparency theme, and in the second sentence  
29 says:

30  
31 "The absence of a clear rule as to the  
32 requirement or not of a municipal  
33 construction permit..."

34  
35 So simply the -- the question as to whether  
36 it was required or not:

37  
38 "...as well as the absence of any  
39 established practice or procedure as to the  
40 manner of handling applications for a  
41 municipal permit construction, amounts to a  
42 failure on the part of Mexico to ensure the  
43 transparency required by NAFTA."

44  
45 And I'm going to be, as I did earlier,  
46 suggesting that that is the legislation of a  
47 transparency obligation not found in the NAFTA,

1 completely unworkable in a federation. And on the  
2 facts of this case in which the permit application  
3 itself sets out the laws upon which it is based,  
4 on which the applicant after denial went to the  
5 courts of Mexico to challenge the denial, to --  
6 the failure of the tribunal to consider that  
7 method of resolution of this question of the  
8 clarity of the rule again amounts to a fatal  
9 omission.

10 In paragraphs 89 through 93 the tribunal  
11 again in a number of different aspects repeats its  
12 finding that -- or repeats its view that it was  
13 improper of the municipality to deny the permit,  
14 improper at Mexican domestic law.

15 In the course of that, again one of these  
16 very significant omissions in paragraph 91, it's  
17 noted that:

18  
19 "The permit was denied at a meeting of the  
20 municipal town council of which  
21 Metal...Metalclad received no notice, to  
22 which it received no invitation, at which  
23 it was given no opportunity to appear."  
24

25 Without any reference to the availability of  
26 judicial review from that municipal permit denial,  
27 which judicial review was initiated in the courts  
28 and which was later abandoned by Metalclad in  
29 favour of negotiations with the municipality.

30 In paragraph 94 the tribunal notes that the  
31 municipality challenged what is -- what is called  
32 the Convenio. The Convenio was an agreement  
33 reached between the federal authorities and  
34 Metalclad in November of 1995, and I'll be taking  
35 you to it.

36 The tribunal infers from the municipality's  
37 attack upon this agreement that the municipality  
38 lacked confidence in its right to deny position --  
39 permission for the landfill solely on the basis of  
40 the absence of a municipal construction permit.

41 In my submission, the tribunal there again  
42 has failed to understand that the municipality was  
43 seeking to enforce what it considered was a -- a  
44 federal prohibition on the introduction of any new  
45 hazardous wastes prior to remediation, and that  
46 the municipality went to court to test its view of  
47 whether or not there was a requirement at federal

1 law to remediate prior to the introduction of any  
2 new hazardous waste. And that was a separate  
3 issue, the need for remediation, a completely  
4 separate issue from the question of the  
5 introduction of new hazardous waste -- hazardous  
6 waste after remediation was occurring.

7 And I'm going to be suggesting that to find a  
8 municipality, and Mexico, liable for recourse to  
9 the courts is -- under the rubric of some denial  
10 of fair and equitable treatment, again is a  
11 patently unreasonable finding. And I'll show you  
12 later when -- where the tribunal faults the  
13 municipality for seeking this relief and obtaining  
14 an injunction in the meantime.

15 Paragraph 95 refers to that injunction. And  
16 the landfill -- and it's noted the --

17 THE COURT: In the --

18 MR. FOY: -- landfill --

19 THE COURT: -- materials that I've read I haven't seen  
20 why that injunction was dissolved in 1999.

21 MR. FOY: My understanding, and I'll be going into  
22 this in more detail -- my understanding was that  
23 the municipality's action was dismissed and  
24 therefore the injunction dissolved for procedural  
25 reasons on the basis that the municipality had  
26 brought the inappropriate -- sought -- sought a  
27 remedy under an inappropriate proceeding. The  
28 municipality had filed an Amparo action, which was  
29 referred to.

30 THE COURT: Um-hum.

31 MR. FOY: And my understanding of Mexican law is that  
32 an Amparo action is only available to a member of  
33 the public against a governmental authority.

34 And as between governmental authorities the  
35 challenge that should have been brought was what's  
36 called a constitutional -- a controversy or  
37 constitutional challenge. My understanding is  
38 that that -- the municipality's action was  
39 dismissed on procedural grounds, and that the  
40 Amparo action having been dismissed, the  
41 injunction was -- was -- was lifted. And I -- and  
42 I note that there's no reference by the tribunal  
43 to the fact that it was lifted; all they refer to  
44 is the issuance of the injunction and not the  
45 lifting of the injunction.

46 And I would suggest that if it's a violation  
47 of the NAFTA for a municipality to go to courts to

1 seek to assert its view of its position and in the  
2 course of that seek an injunction, that that is a  
3 patently unreasonable result.

4 In paragraph 96 the tribunal refers again to  
5 the ecological decree, and I'll come back to  
6 that.

7 Paragraph 97, the tribunal repeats its  
8 finding that it's -- in its view of Mexican  
9 domestic law the municipality's insistence upon  
10 and denial of the construction permit in this  
11 instance was improper. And there you find for the  
12 first time any reference to local remedies.

13 There's a footnote there, and it's noted that:

14  
15 "The question of turning to NAFTA before  
16 exhausting local remedies was examined by  
17 the parties."

18  
19 Mexico does not assi -- insist that local  
20 remedies might -- must be exhausted. Mexico's  
21 position is correct in light of Article 1121. I  
22 will be taking you to this in more detail. That  
23 is not Mexico's -- was not Mexico's position, and  
24 that is not an accurate recitation of Article  
25 1121.

26 In paragraph 98 the tribunal refers to  
27 Article 1114 of the NAFTA which permits a party to  
28 ensure that investment activity is undertaken in a  
29 manner sensitive to environmental concerns, and  
30 notes that the conclusion of the Convenio and the  
31 issuance of the federal permits show clearly that  
32 Mexico is satisfied that this project was  
33 consistent with and sensitive to its environmental  
34 concerns.

35 And again, I note the omission of any  
36 reference to, anyone other than the federal  
37 authorities, environmental concerns. The  
38 municipality was not satisfied that the project  
39 was sensitive and consistent with its concerns.

40 Paragraph 99, there's a reference again to  
41 the failure to ensure a transparent and  
42 predictable framework. Again, all of this section  
43 really is -- running through it is the finding of  
44 Mexican domestic law as to impropr -- impropriety  
45 and the failure of transparency.

46 In paragraph 99 the tribunal concludes that  
47 the totality of these circumstances demonstrates a

1 lack of orderly process and timely disposition in  
2 relation to an investor acting in the expectation  
3 it would be treated fairly and justly in  
4 accordance with the NAFTA. And there appears to  
5 be there, the -- by reference to Chapter 18, in  
6 accordance with all of the NAFTA. It appears to  
7 be again an extension of the finding outside the  
8 scope of Chapter 11.

9 And in 101 the tribunal holds that Metalclad  
10 was not treated fairly or equitably under the  
11 NAFTA and succeeds on its claim under Article  
12 1105.

13 The tribunal then turns to Article 1110 and  
14 the issue of expropriation. The tribunal in  
15 paragraph 102 quotes a portion of Article 1110, a  
16 portion only.

17 Paragraph 103 I'd ask to -- to emphasize.  
18 Having quoted a portion of Article 1110, the  
19 tribunal says, without reference to any authority,  
20 without reference to any legal principle, without  
21 reference to any of the text, says -- says:

22  
23 "Thus, an expropriation under NAFTA  
24 includes not only open, deliberate and  
25 acknowledged takings of property, such as  
26 outright seizure or formal or obligatory  
27 transfer of title in favour of the host  
28 State, but also covert or incidental  
29 interference with the use of property which  
30 has the effect of depriving the owner in  
31 whole or in significant part of the use or  
32 reasonably to be expected economic benefit  
33 of property, even if not necessarily to the  
34 obvious benefit of the host State."

35  
36 It goes -- and I pause to note that there --  
37 this definition of expropriation, unsupported by  
38 authority, appears -- and -- or by the text of the  
39 NAFTA, appears to the applicant to go beyond any  
40 definition of expropriation at customary  
41 international law, which is the -- which was -- as  
42 I mentioned earlier this morning, was the point  
43 that both the United States and Canada made in  
44 their submission that Article 1110 enshrines what  
45 is meant by expropriation at customary  
46 international law.

47 And in particular the interference with the

1 reasonably to be expected economic benefit in the  
2 facts of this case when, as you'll recall, the  
3 municipality's prepared to allow operation of the  
4 landfill as a non-hazardous industrial waste  
5 landfill, this tribunal has found that that's not  
6 good enough. This is an entire taking, because  
7 Metalclad had a reasonable expectation of some  
8 higher economic benefit.

9 And I'm going to be submitting in due course  
10 that the -- both the law with respect to the  
11 distinction between regulation and taking and the  
12 law with respect to customary international law  
13 and expropriation do not support the tribunal's  
14 "thus" and this conclusion.

15 This although is just an abstract statement  
16 by the tribunal, and in order to understand what  
17 they're doing, one has to go on.

18 And in paragraph 104 the tribunal notes  
19 that:

20  
21 "Mexico is liable by permitting or  
22 tolerating the conduct of Guadalcazar in  
23 relation to..." the Metalclad "...to  
24 Metalclad which the tribunal has already  
25 held amounts to unfair, inequitable  
26 treatment, breaching Article 1105, and thus  
27 participating or acquiescing in the denial  
28 to Metalclad of the right to operate the  
29 landfill..."

30  
31 There you see where their business purpose  
32 has been elevated to a property right.

33  
34 "...notwithstanding that the project was  
35 fully approved and endorsed by the federal  
36 government. Metalclad must be held to have  
37 taken a measure tantamount to  
38 expropriation."

39  
40 Now, it -- I pause to ask what step was the  
41 federation to take with respect to the conduct of  
42 the municipality?

43 Here it appears that an expropriation has  
44 occurred by a failure to take a step, not by a  
45 positive step, but by a failure to restrain  
46 another level of government in some way that is  
47 unclear.

1           Again, the tribunal in paragraph 105 re --  
2 returns to its view of Mexican domestic law,  
3 finding that the exclusive authority for siting  
4 and permitting hazardous waste lies with the  
5 Mexican federal government, noting this finding  
6 consistent with the testimony of the secretary of  
7 SEMARNAP, and I'll come back to that, and  
8 consistent with the express language, again an  
9 issue of pure Mexican domestic law.

10           And in 106 the tribunal repeats the finding  
11 that it had made in -- in its treatment of Article  
12 1105 that in considering environmental issues, the  
13 municipality acted outside its authority.

14           And then this is stated to -- to elevate  
15 the -- an ultra vires act at Mexican domestic law  
16 in this tribunal's view to an expropriation by  
17 paragraph 107:

18  
19           "These measures taken together with the  
20 representations of the Mexican federal  
21 government on which Metalclad relied in the  
22 absence of a timely, orderly or substantive  
23 basis for the denial of the permit amount  
24 to an indirect expropriation."

25  
26           And I will -- the -- the next paragraph, the  
27 tribunal refers to the Balloon case. We will be  
28 dealing -- dealing -- which it says this case  
29 resembles. We will be dealing with the Balloon  
30 case in detail in the course of submissions.

31           Now, at paragraph 109 through 111 the  
32 tribunal deals -- comes back to the ecological  
33 decree, but it -- I'm not sure we need to spend  
34 much time on it. We -- we will deal with it. But  
35 at paragraph 11 -- or 111 the tribunal concludes:

36  
37           "A finding of expropriation on the basis of  
38 the ecological decree is not essential to  
39 the tribunal's finding of a violation of  
40 NAFTA Article 1110. However, the tribunal  
41 considers the implementation of the decree  
42 would in and of itself constitute an act  
43 tantamount to expropriation."

44  
45           You'll recall that this reference -- this  
46 decree was issued after this arbitration had been  
47 con -- commenced after Metalclad had alleged that



1 this -- their landfill had been -- already been  
2 expropriated, and of course -- so there's no  
3 evi -- and -- and after Metalclad had abandoned  
4 the landfill. And so there is no evidence of the  
5 implementation of the decree with respect to this  
6 issue. And I'll -- having said that, I'll take  
7 you to what was said about the decree and how it  
8 permitted operation of landfills, but it does not  
9 appear to have been essential to the tribunal's  
10 finding at all.

11 Now, in the next portion of the award, the  
12 tribunal deals with damages. And we're going to  
13 come back to damages in -- in more detail.

14 And at this stage I would like to turn to --  
15 away from the award, having identified those  
16 points upon which we take issue, and return to the  
17 outline of argument. And very briefly I'd like  
18 you to -- I just want to make a couple of points  
19 with respect to -- starting at page 14. I've  
20 really covered up to page 14 in my introductory  
21 remarks.

22 And in page 14 we -- we emphasize a number of  
23 things that I think are apparent to Your Lordship  
24 already, and that is that this case involves a  
25 number of new issues. It's the first review of a  
26 Chapter 11 -- a NAFTA award. It's the first to  
27 consider whether the Commercial Arbitration Act or  
28 the International Commercial Arbitration Act  
29 applies to that review. It's the first to  
30 consider an arbitration conducted under the ICSID  
31 additional facility rules. And there are rules  
32 there that will be -- we will be referring to.

33 So a number of the issues that are raised  
34 are -- are new, but a number are basic.

35 And the most basic issue that in my  
36 submission runs through both acts and through all  
37 consensual arbitration tribunals is the  
38 requirement for the tribunal to remain within the  
39 scope of its jurisdiction. Jurisdiction of NAFTA  
40 arbitration tribunals like other arbitration  
41 tribunals is limited by the parties' agreement.  
42 Excess of jurisdiction is a basis for setting  
43 aside an award under both statutes and under other  
44 forms of review. That is a consistent. That --  
45 that's a consistent point.

46 Now, approaching that in any individual case,  
47 there are significant differences. And I'd just

1 like to emphasize some of them, because you will  
2 be cited cases from a number of different arenas  
3 and should be alive to the differences before  
4 determining whether or not those cases are  
5 analogous, whether they're different, whether  
6 there are significant differences.

7 In the materials we have cited and I expect  
8 my friend to cite, you will be seeing decisions  
9 from tribunals and review of decisions from  
10 tribunals from at least the following types of  
11 arbitrations: State-to-State arbitrations of  
12 international trade law obligations under either  
13 the GATT or the WTO or the NAFTA.

14 There is provision in the NAFTA for  
15 State-to-State arbitration under Chapter 20 of the  
16 transparency obligations of the NAFTA, for  
17 example. And we'll be -- that's one kind of  
18 arbitration. It has its own specific rules, and  
19 those tribunals have their own jurisdiction.

20 At the other end of the spectrum you'll be  
21 referred to cases arising out of private,  
22 transnational commercial transactions, usually  
23 one-off contracts.

24 And the best example in British Columbia is  
25 the Quintette arbitration, and the review by  
26 British Columbia courts of that arbitration, and  
27 the rules that have developed in respect of both  
28 deference and the stance of the courts to  
29 private international commercial arbitrations.

30 Another separate type of arbitration you'll  
31 see referred to are claims commissions tribunals.  
32 An example is the Iran/U.S. claims tribunal.  
33 There, sometimes at a State-to-State level and  
34 other times at an investor-to-State level, access  
35 is provided to arbitrations in respect of  
36 specific claims. They -- each of them are  
37 specific and each of the commissions setting them  
38 up have to be examined to determine the limits and  
39 scope of their jurisdiction.

40 At another level you'll see ICSID  
41 investor-State arbitrations. The ICSID is a -- is  
42 an international convention which can be adopted  
43 by States to provide access to investors to  
44 arbitration. It usually involves the application  
45 of domestic law. It usually -- and it -- by  
46 definition in the convention is a self-contained  
47 process; it's what's called anational. It --

1 review under that process takes place -- review  
2 by -- of a decision of one arbitral tribunal takes  
3 place by decision of another ad hoc arbitral  
4 tribunal called an annulment tribunal. And you'll  
5 see reference to the grounds upon which those  
6 tribunals act and the principles that they have  
7 developed in a -- in the field of investor-State  
8 arbitration.

9 You will also be referred to the specifics of  
10 investor-State arbitration under Chapter 11 of the  
11 NAFTA which is in some respects different than  
12 each of these that I've just mentioned, and in --  
13 in its jurisdictional respect quite the same.

14 They share the characteristic of the  
15 requirement of the parties' consent to the rules,  
16 but the terms of that consent, the jurisdiction of  
17 the tribunal, the applicable law to the  
18 substantive issues, the review mechanism, and the  
19 applicable law to the review mechanism are all  
20 potentially different. And before any authorities  
21 cited by either side is considered appropriate or  
22 analogous, it's important to have regard to those  
23 issues.

24 Now, in order to understand the specifics of  
25 Chapter 11, we have to understand it in detail and  
26 its place in the NAFTA. And Mr. Thomas is going  
27 to take you through that next. It's probably an  
28 appropriate time to take the break, for your  
29 10-minute break, if that's convenient.

30 THE COURT: Yes. We'll take the afternoon break at  
31 this time.

32 THE REGISTRAR: Order in chambers. Chambers is  
33 adjourned for afternoon recess.

34

35 (AFTERNOON RECESS)

36 (PROCEEDINGS ADJOURNED AT 2:55 P.M.)

37 (PROCEEDINGS RESUMED AT 3:06 P.M.)

38

39 THE COURT: Yes, Mr. Thomas.

40 MR. THOMAS: My Lord, I will be addressing points that  
41 are generally made in Chapter 3 of the outline.  
42 I'm not going to be follow -- following it  
43 slavishly, but I will be referring to it from time  
44 to time.

45 And what I propose to do in -- in this part  
46 of our presentation is to deal with five issues;  
47 the first is I'm going to try to provide the Court

1 with some background on the investor-State  
2 mechanism.

3 Secondly, I'm going to place Chapter 11 of  
4 the NAFTA within the broader context of the  
5 agreement as a whole.

6 Third, I'm going to direct Your Lordship to  
7 comments that have been made in investor-State  
8 cases about the importance of jurisdiction. And I  
9 will be making the point that jurisdiction is a  
10 particularly important issue where a proceeding  
11 involves a sovereign State.

12 Fourth, I'll be directing the Court to the  
13 jurisdictional limitations which are contained in  
14 Chapter 11 itself.

15 And finally, I'll conclude with a very brief  
16 discussion of the governing law because, as  
17 Mr. Foy has already pointed out, the governing law  
18 has jurisdictional consequences for these types of  
19 disputes.

20 Now, this is, I emphasize, a general  
21 introduction. We'll be taking many of the points  
22 that I will be making this afternoon and  
23 elaborating upon them as we go into specific  
24 issues over the course of the next few days.

25 I would ask Your Lordship to start by looking  
26 at Chapter 20 of the NAFTA, and specifically at  
27 Article 2004. If you look at the bottom of the  
28 page, My Lord, you'll see that it has Chapter --  
29 it says 20-3.

30 THE COURT: It's only when you get into the annexes --  
31 annexes that it gets a little confusing.

32 MR. THOMAS: Yes. It gets very confusing in the  
33 annexes.

34 But you'll see that in Article 2004, it's  
35 entitled "Recourse to Dispute Settlement  
36 Procedures," and it states that:

37  
38 "Except for the matters covered in Chapter  
39 19..."

40  
41 Which I can discuss further anon.

42  
43 "...and as otherwise provided in this  
44 agreement, the dispute settlement  
45 provisions of this agreement shall apply  
46 with respect to the avoidance or settlement  
47 of all disputes between the parties

1 regarding the interpretation or application  
2 of this agreement..."

3

4 I don't need to complete that sentence.

5 The point that I want to begin by making,  
6 My Lord, is that Chapter 20 contemplates  
7 party-to-party dispute settlement for virtually  
8 every matter which is covered by the NAFTA. There  
9 are a few areas of the NAFTA which are carved out  
10 from general dispute settlement, but they are very  
11 few. And the general principle is that the -- any  
12 part of the agreement can be taken to dispute  
13 settlement under Chapter 20.

14 And in such dispute settlement, it is a  
15 party-to-party or State-to-State dispute  
16 settlement proceeding. There is no role  
17 contemplated for a private party to be able to  
18 assert a breach of obligations in any part of the  
19 agreement other than those obligations set out in  
20 Section A of Chapter 11.

21 So we start off with the point that Chapter  
22 20 is the general dispute settlement mechanism of  
23 the NAFTA. And we observe at paragraph 72 of the  
24 outline that generally speaking at international  
25 law only States have personality. They are the  
26 subjects of international law. And generally  
27 speaking only States have the right to enforce  
28 international treaty obligations that exist  
29 between them.

30 States can, by treaty or otherwise, provide  
31 access to private individuals or legal persons to  
32 step into the shoes of a State, as it were, and  
33 assert their rights at international law. And  
34 that's what's happened in Section B of Chapter 11  
35 of the NAFTA.

36 A qualifying investor of a party may in  
37 specified circumstances commence an arbitral claim  
38 against another party, but not its own, for  
39 damages for an alleged breach of the obligations  
40 that are listed in Section A of Chapter 11. This  
41 of course is an exception to the general rule of  
42 State-to-State dispute settlement.

43 And in investment disputes ordinarily, in the  
44 absence of this kind of investor-State mechanism,  
45 it would be the investor-State that would espouse  
46 the claim at international law. In other words,  
47 if we take Metalclad as an example, in the absence

1 of investor-State arbitration under Chapter 11, it  
2 would be the United States that would examine the  
3 claim of its investor and espouse it as a breach  
4 of international law for duties which are owed to  
5 it as a State.

6 And this is an important point, this notion  
7 of espousal, because I'll be coming back to this  
8 later on in the week. What we have done in the  
9 NAFTA in Chapter 11 is to remove espousal and to  
10 allow the investor direct access to this  
11 particular form of arbitration.

12 I should note parenthetically, My Lord, that  
13 a State still remains able to enforce any of the  
14 obligations in Chapter 11. Those are just the  
15 same as any other set of obligations under the  
16 NAFTA as a whole. They can form the basis for a  
17 State-to-State dispute settlement proceeding under  
18 Chapter 20.

19 Now, this inclusion of investor-State  
20 arbitration is novel in the Free Trade Agreement  
21 context. We point out in our materials that the  
22 Canada/U.S. Free Trade Agreement which was the  
23 regional predecessor of the NAFTA did not include  
24 investor-State arbitration. All disputes that --  
25 that arose under the investment chapter of that  
26 agreement would proceed in the normal course of  
27 events to dispute settlement under the general  
28 dispute settlement provisions. So the NAFTA  
29 represents a significant change in the treaty  
30 relationship which previously governed between the  
31 United States and Canada.

32 We point out, My Lord, that investor-State  
33 arbitration is not new. It wasn't invented with  
34 the NAFTA.

35 And Mr. Foy has mentioned the ICSID. The  
36 ICSID was created by a convention called the  
37 Washington convention which entered into force in  
38 1965. ICSID stands for the International Centre  
39 for Settlement of Investment Disputes. It is  
40 headquartered in the World Bank's headquarters in  
41 Washington, D.C.

42 And the objective of ICSID -- of the ICSID  
43 convention was to provide for consensual arbitral  
44 proceedings against a State that was a signatory  
45 to the convention by a private party of another  
46 State that was also a signatory to the  
47 convention. So in order to invoke the ICSID

1 convention, the respondent State and the State of  
2 the private party both had to be signatories to  
3 the ICSID convention.

4 And the jurisdiction of the ICSID is derived  
5 by -- from Article 25 of the ICSID convention.  
6 The convention is included in our materials at tab  
7 86. I don't need to take you to it now.

8 But what the convention provides is that  
9 disputes, any legal dispute arising out of an  
10 investment between a contracting State, or any  
11 constituent subdivision or agency of a contracting  
12 State designated to the centre by that State, and  
13 a national of another contracting State, which the  
14 parties to the dispute consent in writing to  
15 submit to the centre may be considered by an  
16 arbitral tribunal established by the centre.

17 Now, we'll be referring to ICSID during the  
18 course of our submissions for a couple of  
19 reasons. The first is that there are three  
20 arbitral mechanisms that exist -- that exist, at  
21 least theoretically, under Chapter 11 of the  
22 NAFTA. A claimant can choose the ICSID  
23 convention, the ICSID additional facility which I  
24 will discuss in a moment, or UNCITRAL arbitration  
25 rules.

26 At present there's really only a choice of  
27 the additional facility or the UNCITRAL rules  
28 because neither Canada nor Mexico is a signatory  
29 to the ICSID convention. That provision was  
30 inserted in the NAFTA contemplating that at some  
31 future date one of those States, or both, would  
32 become signatories to the ICSID convention, but  
33 neither has acceded to it. So the choice at  
34 present is between the ICSID additional facility  
35 rules or the UNCITRAL arbitration rules.

36 But ICSID convention practice is helpful to  
37 this Court, we would submit, because there is a  
38 developed body of jurisprudence that deals with  
39 some of the issues that will be arising in the  
40 course of our application before Your Lordship.  
41 It's not a large body of jurisprudence, but in  
42 some areas it's quite detailed and it's quite  
43 illuminating and of assistance in examining some  
44 of the issues that arise -- that will arise over  
45 the course of this application.

46 Now, as I mentioned to you, ICSID is only  
47 available if you have both States involved being

1 signatories. The additional facility was created  
2 by the ICSID in 1978, and it's available to settle  
3 investment disputes where the respondent State is  
4 not a signatory to the ICSID convention, but it  
5 could choose to submit to the jurisdiction of an  
6 additional facility arbitration tribunal. And so  
7 because Mexico had not acceded to the convention,  
8 Metalclad had a choice, and it chose to use the  
9 ICSID additional facility.

10 Now, this was the first additional facility  
11 arbitration to be commenced ever. They created it  
12 in 1978, but it was never used until Metalclad  
13 decided to pick this particular forum of  
14 arbitration under Chapter 11. But during the time  
15 that the Metalclad case was underway, Mexico faced  
16 two other ICSID additional facility claims, one in  
17 a case called Azinian v. United Mexican States,  
18 and we'll be referring to that in -- in due  
19 course, and the other, Waste Management, which I  
20 will be referring to shortly.

21 In both instances the claims were dismissed,  
22 but they are two claims which are -- yield another  
23 source of -- of jurisprudence which will be of  
24 importance to this application, because we will be  
25 referring not only to these two cases but to other  
26 cases which have now been decided by Chapter 11  
27 tribunals as we make our points with respect to  
28 this particular arbitral award.

29 My Lord, I -- I want to turn to the next  
30 point, which is to place Chapter 11 within the  
31 broader context of the NAFTA. And we make the  
32 point in our outline that NAFTA comprises 22  
33 chapters. It is a very broad agreement, and  
34 Chapter 11 is really a slice of this much broader  
35 agreement.

36 The other chapters of NAFTA deal with such  
37 matters as trade and goods. There are a number of  
38 chapters that deal with disciplines relating to  
39 governmental action affecting trade and goods.  
40 There is a chapter that deals with trade and  
41 services generally. That's Chapter 12. There is  
42 a chapter that deals with telecommunications  
43 services, Chapter 13. Chapter 14 deals with  
44 financial services. There is a chapter dealing  
45 with temporary business travel for professionals  
46 and other business persons who move from one  
47 jurisdiction into another. So NAFTA deals with a



1 very, very wide array of issues relating to  
2 international trade. And the investment chapter  
3 deals with a particular set of disciplines placed  
4 within this broader context of 22 other chapters.

5 Much of the NAFTA is derived from rules and  
6 principles that date back to the general agreement  
7 on tariffs and trade, or GATT.

8 GATT was negotiated in 1947 and entered into  
9 force in 1948, and for many years was the main  
10 agreement which governed international trade  
11 relations between States. It has since been  
12 incorporated into and in a sense superseded by the  
13 World Trade Organization.

14 But you will look, as you -- as one goes  
15 through the NAFTA, there will be many principles  
16 which are derived directly from the GATT. And one  
17 of the principles that you have heard already, and  
18 you will hear more about during the course of this  
19 week and next week, is transparency. Chapter 18  
20 of the NAFTA, it's lineage can be traced back  
21 to Article X, Roman numeral 10, of the GATT.

22 And I'm going to explain what transparency  
23 means in international trade law. First of all,  
24 it's a treaty obligation. It's set out in  
25 treaty. It's not an obligation which exists at  
26 customary international law. Rather, it's an  
27 obligation that has been negotiated by States and  
28 is included in a treaty. And the obligation is,  
29 first of all, that a treaty, a State is under an  
30 obligation to publish its laws on the theory that  
31 people who want to do business or trade into a  
32 country ought to be able to discover what the law  
33 is.

34 The second aspect of transparency is that a  
35 State should notify other members of the agreement  
36 of proposed measures that may affect the operation  
37 of the agreement.

38 And the third aspect of transparency is that  
39 a State should ensure that there are  
40 administrative or quasi-judicial or judicial  
41 measures available to challenge action taken by  
42 governments under the agreement.

43 So transparency deals with publication of  
44 law, notification, and establishing mechanisms to  
45 challenge governmental action for matters which  
46 are governed by the agreement.

47 Now, you have heard Mr. Foy mention the

1 Mexican remedy, constitutional remedy, of Amparo.  
2 It is a remedy which is available in Mexico to  
3 private parties to challenge governmental action.  
4 And this is one of the judicial review mechanisms  
5 that Chapter 18 of the NAFTA contemplates. And  
6 I'll take you through this as we continue.  
7 As I mentioned to you, the lineage of -- of  
8 Chapter 18 can be traced back to Article 10. And  
9 if you would be so kind as to look at the third  
10 volume of the materials, the statutes -- statutes  
11 and treaties, I'd like to turn to tab 80.  
12 THE COURT: It looks like they've been reorganized.  
13 MR. THOMAS: Statute and treaty materials.  
14 THE COURT: It should be the one on the top. The one  
15 in blue?  
16 MR. THOMAS: There -- yes, they have a blue binding.  
17 THE COURT: Thank you.  
18 I should perhaps -- if you could bring up all  
19 four of the volumes.  
20 Yes, tab?  
21 MR. THOMAS: Tab 80, My Lord.  
22 THE COURT: Thank you.  
23 MR. THOMAS: Now, the document contained here at tab  
24 80 is an excerpt from a lengthy document published  
25 by the United States executive. It's called a --  
26 a statement of administrative action. And this is  
27 published by the President of the United States  
28 when he transmits an international trade agreement  
29 to the Congress for the Congress to enact  
30 implementing legislation. And the purpose of this  
31 statement is to describe the international  
32 agreement to the legislature.  
33 You will see referen -- we'll be making  
34 reference to the American -- the United States  
35 statement of administrative action and the  
36 Canadian statement on implementation. There is no  
37 Mexican document that is equivalent to what Canada  
38 and United States prepared. But these are  
39 authoritative statements by the executive branch  
40 of the United States on one hand and Canada on the  
41 other as to what was done in the NAFTA.  
42 If you turn through that, there is a page  
43 enti -- page 642, it says:  
44  
45 "Chapter 18, publication notification,  
46 administration of laws."  
47

1 THE COURT: Yes.

2 MR. THOMAS: And this is -- again, this is the  
3 United States executive's description. It says at  
4 the first paragraph:

5  
6 "Chapter 18 sets out a number of  
7 requirements designed to foster openness,  
8 transparency and fairness in the adoption  
9 and application of the administrative  
10 measures covered by the agreement. It  
11 should be noted that various other chapters  
12 of the NAFTA, such as Chapters 7 through  
13 10, 12, 13 and 19 provide specific detailed  
14 rules in this area."

15  
16 You'll notice that in the listing of the  
17 chapters they omit Chapter 11.

18 He then -- the -- the statement then goes on  
19 to describe what these various obligations are.  
20 Article 1801 requires each NAFTA country to designate a  
21 contact point to facilitate communications between  
22 the three governments. Article 1802 closely  
23 tracks Article 2102 of the CFTA. That's a  
24 reference to the Canada/U.S. Free Trade  
25 Agreement. It provides that each government must  
26 promptly publish all laws, regulations, procedures  
27 and administrative rulings concerning subjects  
28 covered by the NAFTA.

29 He then -- they then go on to note that  
30 Article 1803 deals with this notification of  
31 measures that might affect the operation of the  
32 agreement.

33 Article 1804 requires each government to  
34 accord basic procedural guarantees to firms and  
35 individuals from other NAFTA countries in specific  
36 types of administrative proceedings that affect  
37 matters covered by the agreement. Those -- these  
38 guarantees include reasonable notice of  
39 proceedings and the opportunity to present  
40 argument.

41 And then you'll see finally that you have to  
42 provide for review and appeal of final  
43 administrative actions, Article 1805, similar to  
44 GATT article -- GATT Article Roman numeral  
45 10(3)(b) requires each government to establish or  
46 maintain independent administrative or judicial  
47 review procedures.

1           So this is a -- a -- a fairly short and  
2 succinct description of Chapter 18 from the  
3 perspective of the United States government. A  
4 key point to note, that it's talking about  
5 transparency obligations within the context of  
6 Chapter 18. It identifies that there may be some  
7 other elaborations upon transparency in other  
8 parts of the agreement, but when it lists them, it  
9 does not list Chapter 11 as being one of the  
10 chapters in which transparency obligations are  
11 contained. There is no chapter-specific  
12 transparency obligation in Chapter 11.

13           Now, My Lord, if you would refer to tab 72 in  
14 the same binder, this is the Canadian government's  
15 description of -- of the NAFTA, various chapters  
16 of the NAFTA. We've not included the whole of  
17 it. But you'll see that it was published in the  
18 Canada Gazette on January the 1st, 1994, the date  
19 of NAFTA's entry into force, so this is at tab  
20 72.

21           I don't know if -- my pages may have been out  
22 of -- mine were out of order, so you might --  
23 yours might be as well, but I'm looking for page  
24 196 at the top left-hand corner. It's page 196,  
25 and you'll see halfway down the left-hand column  
26 Chapter 18. Again, it states:

27  
28           "While NAFTA's rules provide the rights and  
29 obligations that ensure that the three  
30 countries will pursue their trade and  
31 economic policies on the basis of the  
32 objectives of non-discrimination and  
33 transparency set out in Chapter 1, the  
34 provisions of Chapters 18, 19 and 20 set  
35 out the procedures that will ensure that  
36 these rules are implemented."  
37

38           Now, I -- I stop to note, My Lord, that in  
39 this instance again Canada's focusing on Chapter  
40 18 as being the source of the transparency  
41 obligations, and it is referring to special  
42 dispute settlement mechanisms that follow, the --  
43 a specialized one in Chapter 19 that deals with  
44 trade remedy actions, I'm going to discuss a  
45 little bit of that later on, and Chapter 20, which  
46 I've already discussed, the general dispute  
47 settlement mechanism. So Canada is orienting this

1 of -- the sets of obligations in Chapter 18  
2 towards these other forms of dispute settlement,  
3 not Chapter 11.

4 It then goes on to note in the next  
5 paragraph, and I won't -- won't bother to read it  
6 all, but it again points back to the -- to article  
7 10 of the GATT as being the -- the original  
8 provision dealing with transparency.

9 If you turn up to the top of page 197, in the  
10 upper left-hand corner there's a discussion again  
11 of the obligation upon the parties to have  
12 judicial, quasi-judicial or administrative  
13 tribunals in place to review final administrative  
14 actions regarding matters that are covered by the  
15 agreement.

16 I should note just parenthetically that  
17 Canada observes under point 2, you'll see a -- a  
18 heading "Canadian Legislation," that Canadian  
19 laws, regulations and policies already fully  
20 conform to the obligations of Chapter 11 and no  
21 new legislative action was required to bring it  
22 into effect. The United States makes the same  
23 observation in its statement of administrative  
24 action. It states that there is no need for  
25 legislative action to be taken.

26 Now, My Lord, if you would turn to Article  
27 102 of the agreement, this is the objectives  
28 provision which was relied upon by the tribunal,  
29 and Mr. Foy has already mentioned it to you  
30 before, because the tribunal, as we indicated  
31 earlier, misstated Article 102.1, paragraph C.

32 I want to focus your attention on the opening  
33 sentence of Article 102, which states that:

34  
35 "The objectives of this agreement as  
36 elaborated more specifically through its  
37 principles and rules, including national  
38 treatment, most-favoured-nation treatment  
39 and transparency, are to..."

40  
41 And then it sets out a series of objectives.

42 The point we want to make here is that these  
43 principles and rules, national treatment,  
44 most-favoured-nation treatment and transparency  
45 have separate and distinct meanings. In other  
46 words, they're not -- it's not a bundle of -- of  
47 concepts that underlie every single provision of

1 the NAFTA. On the contrary, they are specific  
2 concepts and specific rules. And if you take a  
3 look at the table of contents of NAFTA which just  
4 precedes that, I'll -- I'll just give you a sense  
5 of how these are expressed in the NAFTA as you go  
6 through it.

7 If you turn to the table of contents at the  
8 beginning of the agreement, if you look at, for  
9 example, Chapter 3, you'll see Section A, Article  
10 301, national treatment. Well, that is the  
11 national treatment rule for trade and goods.

12 If we were to go to Chapter 10, you -- that  
13 deals with government procurement, the procurement  
14 of goods and services by governments. You'll see  
15 Article 1003, national treatment and  
16 non-discrimination.

17 In investment, the chapter on investment,  
18 Article 1102, national treatment, and so on. In  
19 other words, national treatment is a concept which  
20 is expressed in different treaty texts at  
21 different parts sprinkled throughout the  
22 agreement.

23 The same applies with respect to  
24 most-favoured-nation treatment.  
25 Most-favoured-nation treatment is simply a  
26 non-discrimination principle whereby the parties  
27 agree that they will not accord each other less  
28 favourable treatment than they accord to other --  
29 other non- -- non-parties to the NAFTA, so it's a  
30 form of protection against non- -- against  
31 discrimination.

32 And if you look at MFN, you'll see in Chapter  
33 11, Article 1103, most-favoured-nation treatment  
34 is set out as a provision.

35 If you look at Chapter 12, again Article  
36 1203, there's a most-favoured-nation treatment  
37 article there.

38 The same thing happens with respect to  
39 transparency. We have already looked at Chapter  
40 18. Chapter 18 is the main transparency chapter.  
41 And then there are some elaborations upon  
42 transparency in different provisions, different  
43 treaty texts sprinkled throughout the agreement.

44 For example, if I were to refer you to  
45 Chapter 13, if you could turn to Chapter 13, on  
46 telecommunications, you'll see at Article 1306  
47 tran -- is entitled "Transparency." And what this

1 is is a specific -- and I might say a  
2 sector-specific transparency obligation. It's  
3 contained in the chapter on telecommunications,  
4 and it is a further elaboration of what has been  
5 set out in Chapter 18. And you can see that in  
6 the text:

7  
8 "Further to Article 1802 each party shall  
9 make publicly available its measures..."

10

11 Et cetera.

12 So Article 1306 -- there's a number of other  
13 articles in the NAFTA like that -- is a  
14 chapter-specific elaboration upon the basic  
15 transparency obligations in Chapter 18. And at  
16 paragraph 246 of our outline, we set out at places  
17 in the NAFTA where you can find these  
18 chapter-specific elaborations.

19 The only reference to transparency, there's  
20 one reference to transparency in Chapter 11 and  
21 that's in -- under Article 1113. And it's a very  
22 good example of a reference out to Chapter 11.

23 If you were to turn to Article 1113, this is  
24 an article which entitles a NAFTA party to deny  
25 the benefits of Chapter 11 to an investor of  
26 another party. And the classic example would be  
27 let's assume that Canada does not maintain  
28 diplomatic relations with another State and that  
29 State has diplomatic relations with the  
30 United States, Canada might choose under Article  
31 1113 to deny the benefits of Chapter 11 to a  
32 company which is domiciled in the United States  
33 but controlled by persons situated in the other  
34 State.

35 Article 1113 would permit Canada to deny  
36 benefits, but you'll see this reference out in  
37 para -- in subparagraph 2 subject to prior  
38 notification and consultation in accordance with  
39 Articles 1803. So there you see a reference by  
40 the drafters out to the other chapter. But that's  
41 the only reference in the whole of Chapter 11 to a  
42 transparency obligation which is situated outside  
43 of the chapter.

44 Now, I want to turn, My Lord, to the  
45 substantive obligations that the NAFTA parties  
46 agreed could be subjected to investor-State  
47 arbitration. This of course is absolutely

1 fundamental to this particular petition.  
2 If you turn to Article 1101, following a  
3 drafting convention of the NAFTA, it sets out the  
4 scope and coverage of the agreement, and it states  
5 that:

6  
7 "This chapter applies to measures adopted  
8 or maintained by a party relating to  
9 investors of another party, investments of  
10 investors of another party..."

11  
12 I'll stay with those for the time being.  
13 So the first question that arises, in order  
14 to trigger the application of Chapter 11, it  
15 applies to measures that are adopted or maintained  
16 by a party. And the question you might ask is:  
17 What is a measure?

18 Well, a measure is defined in Chapter 2.  
19 Chapter 2 of the -- of the NAFTA is the general  
20 definitions chapter. And measure according to  
21 Chapter 2 includes any law, regulation, procedure,  
22 requirement or practice. We'll be returning to  
23 this later on when we discuss this -- the issue of  
24 expropriation because, as Mr. Foy has already  
25 identified, the -- the -- one of the expropriation  
26 findings made by the tribunal was acquiescence of  
27 the municipality's refusal to issue the permit and  
28 its subsequent legal actions taken in the Mexican  
29 courts. And so that raises a very important issue  
30 relating to the meaning of the word "measure."

31 Now, if a -- an investor chooses to commence  
32 an investor-State claim under Chapter 11, it  
33 resorts to Section B. And Section B sets out the  
34 whole of the procedure that was drafted by the  
35 NAFTA parties and is available to the investor for  
36 breaches of Section A.

37 And you'll see the two important points here  
38 in Article 11 -- 1116 and 1117. There is a  
39 distinction between a claim by an investor on its  
40 own behalf and a claim by an investor on behalf of  
41 its enterprise. We need not worry about that.

42 What's important is to look at, for example,  
43 paragraph 1 of Article 1116. And you'll see that  
44 the NAFTA parties were very explicit about what  
45 provisions of the NAFTA could form the basis for a  
46 claim. Paragraph A says:

47



1 "Section A or Article 1503(2) State  
2 enterprises...or Article 1502(3)(A) where  
3 the monopoly has acted in a manner  
4 inconsistent with the party's obligations  
5 under Section A."  
6

7 Now, we will submit that the drafters of the  
8 NAFTA understood very well how to refer out to  
9 another provision of the NAFTA in order to  
10 incorporate it into the jurisdiction of a Chapter  
11 11 tribunal. You see nothing in here with respect  
12 to a reference to Chapter 18. You see only a  
13 reference to two subparagraphs from Chapter 15.

14 Now, you may recall, My Lord, that  
15 Mr. Schreiberman, when he appeared on behalf of CUPE  
16 in its intervention, he pointed out to you that in  
17 the UPS case that is currently underway, UPS is  
18 citing a provision of Chapter 15 which is not one  
19 of the two provisions which are included here.  
20 And that it's therefore attempting to shoehorn  
21 provisions of Chapter 15 which were not agreed by  
22 the NAFTA parties to be the subject of a Chapter  
23 11 dispute.

24 And were the UPS tribunal to accede to that  
25 attempt to bring in another provision from Chapter  
26 15, Mr. Schreiberman's point would be correct that  
27 the tribunal would be acting in excess of  
28 jurisdiction, because this is what defines the  
29 subject matter jurisdiction of a Chapter 11  
30 proceeding.

31 And the NAFTA parties were very clear; they  
32 did not intend for Chapters 1 through 9 and 10 and  
33 11 -- sorry, 1 through 10, and 12 through to 22,  
34 with the exception of two subparagraphs of Chapter  
35 15, they did not intend for provisions falling in  
36 those parts of the NAFTA to be incorporated into a  
37 Chapter 11 tribunal's inquiry. The NAFTA parties  
38 did not intend for Chapter 11 tribunals to pass  
39 upon their compliance with any other part of the  
40 NAFTA.

41 And our point is, to go back to the first --  
42 when I discussed the party-to-party dispute  
43 settlement, only a party to the NAFTA has the  
44 standing to assert a breach of the rest of the  
45 NAFTA, and only a Chapter 20 panel has the  
46 jurisdiction to review such a complaint. It's --  
47 it is -- has been committed to an entirely

1 different dispute settlement mechanism. And this  
2 is a fundamental point for the operation of the  
3 NAFTA.

4 There's some reflection of this, My Lord, in  
5 the Canadian federal legislation that implemented  
6 the NAFTA. And we referred you at paragraph 94 of  
7 the outline -- it's not necessary that you go to  
8 the statutes. But at paragraph 94 we quoted  
9 Section 6 of the North American Free Trade  
10 Implementation Act. And that provides that no  
11 person has any cause of action and no proceedings  
12 of any kind shall be taken without the consent of  
13 the Attorney General of Canada to enforce or  
14 determine any right or obligation that is claimed  
15 or arises solely under or by virtue of Part 1, and  
16 that deals with the implementation of the  
17 agreement generally, or any order or regulation  
18 made under Part 1.

19 And then you'll see the express carve-out.  
20 Subject to Section B of Chapter 11 of the  
21 agreement, no person has any cause of action and  
22 no proceedings of any kind shall be taken without  
23 the consent of the Attorney General of Canada to  
24 enforce or determine any right or obligation that  
25 is claimed or arises solely under or by virtue of  
26 the agreement.

27 Now, the effect of this type of language,  
28 that no person shall have any cause of action, was  
29 considered by the Federal Court in a case called  
30 Pfizer v. Canada. It's a decision of a trial  
31 court which -- and an appeal was taken, but the  
32 appeal was dismissed on October the 14th, 1999.  
33 We have it in our materials. It's not necessary  
34 to go to the case because we -- the quote that I  
35 want to refer to is in -- included in your  
36 outline.

37 But this case was an attempt by Pfizer to  
38 argue that Canada had failed to properly implement  
39 it's WTO obligations under an agreement in the  
40 World Trade Organization called the agreement on  
41 trade-related intellectual property. There is a  
42 provision that deals with the length of time that  
43 a -- patents for pharmaceuticals may be granted.  
44 And as you know, in Canada there's a -- there's  
45 always tension between the owners of the patent  
46 rights and the generic manufacturers.

47 The argument by Pfizer was that Canada had

1 failed to properly and effectively implement its  
2 WTO obligations. And the Attorney General  
3 responded that this disclosed no cause of action  
4 under Canadian law. It didn't matter what  
5 happened at the international level; it was a  
6 matter of the Canadian law as implemented by  
7 Parliament. And so the Attorney General brought a  
8 motion to strike the claim as disclosing no cause  
9 of action.

10 Now, following a review of the implementation  
11 acts for the FTA and the NAFTA, Lemieux J. states,  
12 and this is at paragraph 95 of our materials:

13  
14 "What Parliament is saying is that these  
15 international trade agreements are matters  
16 of public law concerning public rights,  
17 rights affecting Canada as a sovereign  
18 State. They are not matters of private  
19 economic or commercial rights giving rise  
20 to causes of action and legal proceedings.  
21 These sections do not eliminate any private  
22 rights. They do not extinguish rights.  
23 Parliament is simply saying no such rights  
24 arise."

25  
26 And the learned judge goes on to say that:

27  
28 "Parliament's concern relates to the very  
29 nature of international trade agreements  
30 between sovereign States and the mechanisms  
31 for dispute settlement and the enforcement  
32 of panel or arbitration rulings. The WTO  
33 agreement provides for such mechanisms.  
34 Parliament did not want private parties,  
35 except where it may be appropriate, to  
36 initiate private actions which would  
37 disrupt or adversely affect the agreed-to  
38 equilibrium for dispute settling."

39  
40 And the same comment applies to the NAFTA.  
41 The parties agreed to investor-State arbitration  
42 for a narrow slice of the NAFTA, namely the  
43 Section A obligations. And Section 6.2 of the  
44 Canadian act reflects that agreement by the NAFTA  
45 parties. So the exception to the  
46 no-cause-of-action language in Section 6.1 is  
47 provided for there. But that exception does not

1 change the nature of the international legal  
2 obligations.

3 A special right of access has been granted to  
4 investors. But these international obligations  
5 are still public rights, to use the Court's term,  
6 they're rights affecting Canada as a sovereign  
7 State, or in this case Mexico as a sovereign  
8 State. And the investor is given a special right  
9 to enforce obligations that in the absence of that  
10 special right could be enforced only by the State  
11 that is a party to that agreement.

12 And we submit, and we will be submitting as  
13 we proceed and make specific points during the  
14 course of our argument, that a Chapter 11 tribunal  
15 that takes upon itself the jurisdiction to apply  
16 provisions that fall outside of Section A would,  
17 in the Federal Court's words:

18  
19 "...disrupt or adversely affect the  
20 agreed-to equilibrium for dispute  
21 settlement as between the NAFTA parties."  
22

23 The United States has the right if it views  
24 Mexico's actions in this case to be a breach of  
25 the transparency obligations, to commence a  
26 State-to-State panel. It hasn't done so. There's  
27 been no indication that it would. And as Mr. Foy  
28 indicated, we feel that we have fully complied  
29 with Chapter 18 as it is written.

30 The tribunal has created a set of chap -- of  
31 transparency obligations that are not found in  
32 Chapter 18, but Mexico has no concern about the  
33 United States commencing a Chapter 20 panel  
34 proceeding in respect of transparency issues  
35 relating to this case. But it's not for this  
36 claimant and it's not for this tribunal to make  
37 this determination.

38 Now, we have noted in our materials how  
39 fundamental the -- the question of consent is for  
40 the jurisdiction of arbitral tribunals. And  
41 consent can comprehend not only the fact of the  
42 arbitration but also the specific issues to be  
43 resolved by arbitration, and of course the consent  
44 may stipulate the governing law which the tribunal  
45 is bound to apply.

46 We make the point in our outline that an  
47 arbitration tribunal only has jurisdiction over

1 those specific issues that the parties have agreed  
2 to submit, and any award that goes beyond those  
3 issues is susceptible to challenge. This,  
4 My Lord, is a trite principle of arbitration law.  
5 At paragraph 78 we cite Redfern and Hunter --  
6 Hunter in their Law and Practice of International  
7 Commercial Arbitration. I don't need to read you  
8 the quote.

9 It's a -- a principle which is reflected at  
10 this -- at the international level, and it's a  
11 matter of great concern to States. In fact, we  
12 point out that the consent to arbitration in the  
13 ICSID convention was described by the World Bank  
14 as, quote, the cornerstone of the jurisdiction of  
15 the centre. And an ICSID additional facility  
16 arbitration is no different from an ICSID  
17 convention arbitration in that respect.

18 At paragraph 80 of our outline we quote a  
19 passage from a NAFTA Chapter 11 tribunal called  
20 Waste Management. And this is a case which was  
21 brought against Mexico. And the claimant had  
22 exercised inconsistent legal remedies.

23 Under the NAFTA there's a -- a -- somewhat of  
24 a choice of forum with respect to damages claims.  
25 The claimant can choose to go to the domestic  
26 courts for a damages claim, or it can go to the  
27 NAFTA for a damages claim, but it can't do both.

28 And what happened in the Waste Management  
29 case was that the claimant did do both. It not  
30 only went to the domestic courts, it also invoked  
31 a arbi -- a domestic arbitration under the  
32 concession agreement that it had which it  
33 considered was allegedly expropriated by Mexico.

34 So the invocation of these inconsistent legal  
35 remedies was met by a response by Mexico that this  
36 was not permissible under the NAFTA. And when it  
37 insisted on persisting with this particular  
38 approach, Mexico filed a jurisdictional objection  
39 with the Waste Management Chapter 11 tribunal.  
40 And that tribunal by a 2-to-1 majority held, and  
41 we quote the paragraph at paragraph 80 of the  
42 outline:

43  
44 "The essential constituent elements which  
45 constitute the institution of arbitration  
46 are the existence of a conflict of interest  
47 and an agreement expressing the will of the

1 parties or a legal mandate on which the  
2 constitution of an arbitral tribunal is  
3 founded. This assertion serves to confirm  
4 the importancy of the autonomy of the will  
5 of the parties which is evinced by their  
6 consent to submit any given dispute to  
7 arbitration proceedings, hence it is upon  
8 that very consent to arbitration given by  
9 the parties that the entire effectiveness  
10 of this institution depends."  
11

12 And the tribunal found that since the --  
13 essentially the consent had been invalidated by  
14 the fact that this claimant had chosen to pursue  
15 inconsistent legal remedies, and Mexico had not  
16 consented to them. And for that reason, the  
17 majority of the tribunal dismissed the claim  
18 against Waste Management.

19 Now, My Lord, I have one other case I'd like  
20 to refer you to, and I will -- if you want to stop  
21 at 4, it's probably an appropriate place to stop  
22 after this case, and it is a case called Southern  
23 Pacific Properties. It's at tab 62 of your  
24 materials, and I would ask that you refer to it.

25 This case is an ICSID case, tab 62. And  
26 I'll -- I'll note that this is a case that the --  
27 where the tribunal ultimately did decide to take  
28 jurisdiction over the dispute. It found that  
29 Egypt had enacted a law, which many ICSID  
30 signatories have done, whereby it's a general law  
31 in their investment code which -- which agreed to  
32 the submission to the jurisdiction of ICSID  
33 tribunals. But there was a question raised at the  
34 outset of this case as to whether or not Egypt had  
35 indeed agreed to submit to the jurisdiction of an  
36 ICSID tribunal.

37 This tribunal, by the way, was chaired by  
38 a -- the president of the tribunal was a former --  
39 actually, I guess at the time he was probably  
40 president of the International Court of Justice.  
41 His name is Dr. Jimenez de Arechaga. The Arechaga  
42 name will come back, because we refer to him in  
43 the course of a number of our arguments.

44 And so this judge from the international  
45 court looked at -- he was not sitting as  
46 international judge, he was sitting as a member of  
47 the ICSID tribunal, but he and his colleagues

1 looked at the question of jurisdiction.

2 And I want to spend just a little bit of time  
3 on the -- on the tribunal's observations, because  
4 this is where you'll begin to see the fundamental  
5 difference between investor-State arbitration and  
6 the question of jurisdiction and the much laxer  
7 (sic) approach to jurisdiction taken with respect  
8 to private international commercial arbitration  
9 where there is a presumption of jurisdiction.

10 In this case, at paragraph 62, you'll see the  
11 tribunal state the following:

12  
13 "A second preliminary matter involves the  
14 question of whether jurisdictional  
15 instruments must be interpreted  
16 restrictively. It has been repeatedly  
17 emphasized on behalf of Egypt in these  
18 proceedings that an international tribunal  
19 cannot exercise jurisdiction over a  
20 sovereign State without its consent. This  
21 of course is an uncontroverted principle of  
22 general international law. Such consent is  
23 expressly required by Article 25 of the  
24 Washington Convention..."

25  
26 That's the ICSID convention.

27  
28 "...and is described as the 'cornerstone  
29 of the jurisdiction of the centre,' in the  
30 report of the executive directors..."

31  
32 Those are the directors of the bank.

33  
34 "...that accompanied the convention when  
35 it was submitted to the governments of  
36 member States of the World Bank."

37  
38 And then if you skip down a couple of lines,  
39 at the bottom of that paragraph it says:

40  
41 "Thus, the consent of the parties to the  
42 jurisdiction of the centre is an  
43 indispensable prerequisite to the  
44 competence of any ICSID tribunal."

45  
46 Then they go on to make this point:

47

1 "Clearly then there is no presumption of  
2 jurisdiction, particularly where a  
3 sovereign State is involved. And the  
4 tribunal must examine Egypt's objections to  
5 the jurisdiction of the centre with  
6 meticulous care, bearing in mind the  
7 jurisdiction in the present case exists  
8 only insofar as consent thereto has been  
9 given by the parties."

10

11 Now, he goes on to say:

12

13 "This is not to say, however, that there's  
14 a presumption against the confirmative  
15 jurisdiction with respect to a sovereign  
16 State or that instruments purporting to  
17 confer jurisdiction should be..."  
18 instrike "...interpreted restrictively.  
19 Judicial and arbitral bodies have  
20 repeatedly pronounced in favour of their  
21 own competence where the force of the  
22 arguments militating in favour of  
23 jurisdiction is preponderant."

24

25 Note the word "preponderant."

26

27 And then he mentions some decisions of the  
28 International Court of Justice or its predecessor,  
29 the permanent court of international justice.

30

31 And the last passage in this decision I would  
32 direct Your Lordship to is on the following page  
33 where the tribunal says:

32

33

34

35

36

37

38

39

40

41

42 Now, we refer to this case, My Lord, because  
43 it is a very succinct and helpful summary of the  
44 importance of jurisdiction in investor-State  
45 arbitration.

45

46 We're well aware from Mexico's perspective  
47 that with respect to private international  
48 commercial arbitration the Court of Appeal of

47



1 British Columbia has said in Quintette that  
2 there's a powerful presumption of jurisdiction.  
3 We take no issue with that statement as it applies  
4 to private international commercial arbitrations.

5 But our point is that this is a case of first  
6 impression. And, Your Lordship, you've -- you are  
7 the first judge anywhere to judicially review a  
8 NAFTA Chapter 11 investor-State tribunal decision,  
9 and you are the first to judicially review an  
10 additional facility arbitral award. And for that  
11 reason in our submission it's of great assistance  
12 to this Court to have a succinct summary of the  
13 importance of jurisdiction in investor-State  
14 arbitrations. They are categorically different  
15 from private international commercial  
16 arbitration. We'll make that point repeatedly,  
17 and you will see it reflected in the governing  
18 rules of this particular arbitration, which  
19 differ. And you'll see it in the sensitivity that  
20 international arbitral tribunals and ICSID  
21 annulment committees have demonstrated when there  
22 have been breaches of the governing rules. We'll  
23 be getting back to that.

24 But I think that this is an appropriate time  
25 to end this part of my submission, My Lord, unless  
26 you have any questions about what I've said so  
27 far.

28 THE COURT: No, that's fine. Thank you.

29 Just before we conclude the hearing for today  
30 then, I'll just wish to raise with counsel the --  
31 the timing of this hearing.

32 We got off to a bit of a slow start this  
33 morning, which is not unexpected in these sorts of  
34 matters. I think I had given counsel some dates  
35 as to the -- my availability if we're not able to  
36 finish within the 10 days allotted, and I think I  
37 gave March 6th and 7th as -- as potential dates.  
38 I -- I endeavoured to convey that to Trial  
39 Division, and I believe that I had, but without  
40 too much success. I know I'm double-booked on  
41 other matters on March 7th. And March 6th, for  
42 reasons that I won't go into now, is still  
43 potentially available, but only as -- as a last  
44 resort.

45 What that leads me up to is that I think  
46 we're -- we're back down to the 10 days initially  
47 allotted. If counsel feel that the 10 days is

1 going to be insufficient, would you advise me and  
2 we can then discuss sitting extra hours in an  
3 attempt to -- to complete it within the 10 days?

4 We'll now adjourn for the day and reconvene  
5 at 10 tomorrow morning.

6 THE REGISTRAR: Order in chambers. Chambers is  
7 adjourned until the 20th of February at 10 a.m.

8

9 (PROCEEDINGS ADJOURNED AT 4:04 P.M.)

10

11 Transcript certified by:

12

13 Kevin S. Lee, RPR, CRR, for:

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