20 February 2001 - Certified
Vancouver, B.C.

(PROCEEDINGS RESUMED AT 10:00 A.M.)

THE REGISTRAR: Calling the matter of the United Mexican States versus Metalclad Corporation, My Lord.

THE COURT: Yes, Mr. Cowper.

MR. COWPER: Yes, My Lord, if I may just interrupt my friend for a moment, with his agreement.

I did wish to come back to a housekeeping matter arising from the hearing at which you granted intervenor status to Quebec and Canada. You gave directions that I was to have an opportunity to review the -- Quebec's intervention, and I have done so. I have no objection to the draft materials they've sent to me, and so those can be filed and we'll reply in due course.

With respect to Canada, the situation's slightly different. On Friday we received a copy of the filed submissions. Mr. de Pencier, I think in good faith, did not understand that I was to see something before he filed it, and it was filed and actually has been posted on the Internet as Canada's submission. There are parts of that submission which in my view trespass on the lease between the parties and make inappropriate submissions for an intervenor.

That being the case, and given that it's already filed, I propose to deal with that and that aspect of the submission in my reply, and I don't seek any directions from Your Lordship with respect to the contents of the document which has been filed.

THE COURT: All right. Thank you, Mr. Cowper.

Yes, Mr. de Pencier.

MR. de PENCIER: If I might just say, sir, Mr. Cowper did raise this with me on the weekend, and I appreciate his warning of that.

My understanding of the -- the order you made on the 31st was that Canada's status as an intervenor was granted subject to any further directions that the Court may issue. There have been no further directions that the Court may issue. I did not understand that Mr. Cowper was

receiving the right to vet my submission before it was put before you, and it was on that basis that I provided it to all counsel and -- and to you last Friday. And I apologize if I've misunderstood either the -- the letter or the import of what you told us on the 31st, and I certainly didn't mean any disrespect to my friend either. So I just want to make that clear, sir.

I presume if there's any issue about what Canada has said, you would have to have the full submission in front of you in any event to understand Mr. Cowper's objections, and I -- I'm sure we'll hear from him at the appropriate time on those.

THE COURT: Yes. I -- I think Mr. Cowper's position though is correct, that I -- when I granted leave to intervene, it was subject to further directions with respect to both oral submissions and the written submissions. We got into it in some detail with respect to Quebec and Mr. Giles, and I -- I think it was expressly stated that Mr. Giles was going to be providing his written draft to Mr. Cowper before it was filed.

MR. de PENCIER: Yes.

THE COURT: And I guess it wasn't expressly stated that the same was to apply with Canada, but I -- my understanding was that it was, although Mr. Cowper was anticipating problems with Mr. Giles, not with you, and it's turned out the reverse has been the case.

MR. de PENCIER: Thank you, My Lord.

THE COURT: But I -- I don't think we can do anything now that it's been filed. As Mr. Cowper says, he'll deal with it in his reply.

MR. de PENCIER: Well, again, my apologies if I -- I did misunderstand you.

MR. FOY: My Lord, I would just note for the record that Canada is in a different position than Quebec. Canada has a right under Article 1128 of the NAFTA to intervene in the arbitration below and did so on the interpretation of the agreement. And in my submission it was proper for the parties, and they did, both consent to Canada's intervention as opposed to the opposition to Quebec's intervention.

And in my submission I -- I've looked at the submission as well, and I don't think it goes

beyond submissions with respect to the interpretation of the agreement. Canada was entitled to do that below and is -- is in my submission entitled to do that here.

THE COURT: I don't think I need to determine the issue one way or the other. The point I was making is -- is that the written submissions on behalf of Canada were to be subject to further direction if there was an issue between counsel.

But given the fact -- I -- I may have to deal with the issue when I hear what Mr. Cowper has to say during his reply.

Yes, Mr. Thomas.

MR. THOMAS: My Lord, yesterday afternoon I was completing by discussing the matter of jurisdiction -- excuse me, My Lord.

MR. FOY: Excuse me, My Lord. Counsel for Quebec wanted to introduce another counsel before we got going.

MR. THOMAS: Oh, right.

MS. COLVIN: My Lord, my name is Colvin, initial B.

With me today is Ms. Sylvie Scherrer, a member of the Quebec bar. Ms. Scherrer will be sitting in on -- on the majority of this -- these hearings, and Ms. -- as explained by Mr. Giles yesterday on watching brief.

THE COURT: Yes.

MR. THOMAS: My Lord, we were discussing the issue of jurisdiction in international proceedings involving States, and I was making the point that objections to jurisdiction were to be examined with "meticulous care," to use the Southern Pacific Properties case term.

Before moving on to the question of the governing law, I did want to draw Your Lordship's attention to the fact that jurisdiction is not only of concern to the NAFTA parties with respect to investor-State arbitration, but it is a concern with respect to any dispute which can arise under the agreement.

Yesterday we spent some time on Chapter 20 in the party-to-party dispute settlement mechanism. And under Chapter 20 a complaining State can allege a breach of any provision of the agreement that is subject to dispute settlement so long as it has properly identified the articles of the NAFTA in its request for consultations with the

other State. This is known in international trade dispute settlement as the terms of reference for the panel.

And I have included in our materials, and I've asked the -- the registrar to -- to provide you this, is to tab 15, it's a Chapter 20 dispute settlement case under the NAFTA, it was by the name of Broom Corn Brooms. This was a case that was brought by Mexico against the United States, and it involved what's known as a safeguards or emergency action. I'll just take one minute just to describe the background.

The United States had imposed restrictions on the importations of broom corn brooms, these brooms you use to sweep, and it was exercising its rights under Chapter 8 of the NAFTA. Mexico was of the view that the action taken by the United States authorities was not permissible under Chapter 8, and it requested consultations with the U.S.

The matter was not resolved between the parties in consultations, so Mexico requested the establishment of a panel under Chapter 20. And the report that you'll be looking at is the decision of the Chapter 20 panel.

Now, I'm only referring -- I'm not going to take you through the merits of the case, I'm only referring to this issue of what the Chapter 20 panel was seized with. And if you turn to paragraph 51 of the report at page 20, you'll see that the panel writes that: [All quotations herein cited as read]

> "It will be recalled that the United States had argued that the only legal claims that Mexico had properly raised before this panel were its legal claims based on NAFTA Articles 802 and 805. According to the United States argument, legal claims under other NAFTA articles, particularly claims relating to the process requirements of Article 803 and Annex 803.3, could not be considered by the panel because Mexico had not given timely notice of them in its request for consultations of the following dates.
>
> "In particular, the United States

argued Mexico's failure to mention Article 803 in its November 25th, 1996 request for a commission meeting meant that legal claims under Article 803 and Annex 803.3 were not within the panel's terms of reference."

And then if you skip down over paragraph 52 and just note the first sentence of paragraph 53:

"The panel agreed generally with the United States contention that timely notice must be given of legal claims to be considered in a dispute settlement proceeding."

Now, ultimately in paragraphs 55 and 56 the panel rejected the American contention. It found that there was sufficient notice provided by Mexico in the request for consultations and another document leading up to establishing the terms of reference that the United States had been sufficiently put on notice as to what Mexico would be arguing in this Chapter 20 proceeding.

And if you turn to par -- to paragraph 56 on page 22, the panel concludes:

"In conclusion, the panel must reject the preliminary objection entered by the United States pertaining to the adequacy of the notice given by Mexico. Accordingly, the panel finds that its terms of reference authorize it to examine Mexico's legal claims under NAFTA Article 803 and Annex 803.3 and that the panel is not otherwise precluded from examining those legal claims."

So, My Lord, I direct you to this case to make the point that even under Chapter 20, if a matter is challenged under one chapter of the NAFTA and during the course of the proceedings other provisions of the NAFTA are invoked, a Chapter 20 panel could find that it was not seized properly with the matters which were now being raised before it.

And I -- I don't have any authorities for

this, but I can tell you that the WTO panels would operate on the same basis, because this is really a trite principle of arbitral law, that the jurisdiction of the arbitral tribunal is established by the agreement of the parties and the -- in this case a terms of reference, in the case of a Chapter 11 tribunal, the notice of claim and by the jurisdictional limitations established in Chapter 11 itself. And a tribunal that strays from those jurisdictional limits will of course act in excess of jurisdiction, and its award will be liable to be set aside.

Now, I'm going to pass on to another important issue. It's an issue that was flagged yesterday by Mr. Foy, and it's one that we will be coming back to in more detail later on, and it's the question of the governing law of a Chapter 11 tribunal.

As you know, one of Mexico's concerns in this case is that there was a Mexican judicial decision which denied Metalclad's attempt to set aside the municipality's denial of the municipal permit. The decision was based on jurisdictional grounds but, in any event, the tribunal decided not to deal with this juridical fact, what had happened in the Mexican courts.

And we say that the tribunal, in making a determination of the impropriety of the municipality's assertion of jurisdiction at Mexican law, was acting as a Mexican court; it inserted itself into the place of a Mexican court. And we make this point at paragraph 104 of the outline.

Now, I'll be directing you to the governing law which is set out in Article 31 -- 1131 of the NAFTA in a -- in a few minutes.

But we make the point in our outline, starting at paragraph 99 and commencing from there, that the -- a NAFTA Chapter 11 tribunal has a very different governing law than an ICSID tribunal. We are of course going to be referring to decisions of ICSID annulment committees. But it's important for you to understand a fundamental difference between Chapter 11 and the ICSID convention.

At paragraph 101 of the outline and carrying over onto the next page we point out that, in the

absence of an agreement to the contrary, an ICSID tribunal must apply the domestic law of the host State as supplemented by applicable rules of international law.

So at the top of page 27 we cite article 42 of the ICSID convention, and I'll just read it, that the tribunal:

> "...shall decide a dispute in accordance with such rules of law as may be agreed between the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."

This is -- this convention language is indicative of what happens in the normal ICSID case, that the tribunal is in fact given the jurisdiction to decide questions of domestic law, unless the parties have agreed otherwise.

The tribunal is also given the jurisdiction to apply such rules of international law as may be applicable. And the reason for that is that ICSID wanted to provide for the situation where, for example, a host State does not have a law of expropriation but there is the international law of expropriation; it would be appropriate in a case involving a claim for expropriation under the ICSID Convention for the tribunal to have regard to applicable rules of international law on expropriation. But normally it will be applying the law of the contracting State.

And if you look at the ICSID cases, you will see that that is the first and foremost concern of an ICSID tribunal. And we provide an example of that. I need not take you through it, but it's at -- it's referred to in the materials, and it's at tab 34. It's the Liberian Eastern Timber or LETCO versus the Government of the Republic of Liberia case where that tribunal was considering a dispute that arose over a concession agreement for lumber -- for the exploitation of timber. And the tribun -- the tribunal found that Liberian law applied to that dispute.

And basically given a jurisdiction which

encompassed Liberian law and international law, the award turned principally upon a finding of breach of contract under Liberian domestic law.

So we refer you to the LETCO case, and I'll be coming back to some other ICSID cases later on, in order to illustrate the point that an ICSID tribunal does have the jurisdiction to apply domestic law. And this may be one of the reasons why this tribunal went awry in this part of the award.

Now, by contrast if you would turn, My Lord, to Article 1131 in the NAFTA, Article 1131, paragraph 1 states:

> "A tribunal established under this section shall decide the issues in dispute in accordance with this agreement and applicable rules of international law."

So you'll see, My Lord, right off the bat that there is no reference in Article 1131, paragraph 1 to the domestic law of the respondent State. In contrast to Article 42 of the ICSID Convention, the NAFTA does not confer the jurisdiction upon a Chapter 11 tribunal to decide the dispute in accordance with the agreement, the domestic law of the host State, and applicable rules of international law. And we say that assuming the role of an interpreter of domestic law was clearly outside the jurisdiction of this tribunal.

Now, My Lord, there is a reference of course in Article 1131 to applicable rules of international law, and I should spend a few minutes discussing those so you have a clear understanding of what that refers to.

If you turn to page 9 -- or paragraph 99 of the outline, we set out an excerpt from Article 38 of the statute of the International Court of Justice. And that is a statute which identifies the sources of international law that are to be applied by the International Court of Justice.

And Article 38 of the statute is considered, widely considered, to be the authoritative statement by the international community of the sources of international law.

So it provides that the international court,

whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply -- and then it lists four paragraphs which are the sources, the first is in paragraph A:

> "International conventions, whether general or particular, establishing rules expressly recognized by the contesting States."

And that is a -- a long way of saying treaties.

International conventions, when we do refer to conventional international law, we're referring to law which is established by negotiation by States and recorded in a treaty which is then ratified and implemented by the parties to the treaty. And the NAFTA is a classic example of conventional international law. This is treaty-based law.

And for the vast, vast majority of the obligations contained in the NAFTA, they would not exist as between Canada and the United States and Mexico as customary international law, which is the next source of law. These are purely conventional obligations. Although you'll see later on that, for example, Article 1105, the minimum standard of treatment is a customary international law standard.

But the point is is that all of the tariff reductions, all of the rules of origin, all of the liberalization of trade and services and et cetera, et cetera that takes place under the NAFTA and under the WTO agreements have been arrived at by lengthy negotiations between States, the conclusion of a treaty, in this case a trilateral treaty, and the necessary legal steps taken by the signatories to implement the international treaties in -- under their respective laws.

So the first source of public international law is international conventions or treaties. The second is:

> "International custom, as..." evidenced
> "...as evidence of a general practice

accepted as law."

And -- may I see the argument, please?

International custom, My Lord, is a -- an area of international law which is determined by the Court examining the practice of States. And at paragraph 238 and 239 of the outline, if you would refer to it, I -- there are a couple of paragraphs that deal with customary international law.

And we state that there is a distinction to be drawn between customary international law and conventional international law. The former is found in the practice of States, who by their conduct and statements show that they consider themselves to be bound by a rule of international law, and the international court and the learned commentators speak of the need to determine the opinio juris. This is a subjective element showing that States consider themselves to be bound by the law.

So it involves analyzing State practice and looking at whether or not they consider themselves to be bound by the rule that is alleged to be customary international law. An example of that is set out in paragraph 239. And it is a -- a practice that developed in the 1960s and '70s where States extended their fishing zones off of their coasts to a 12-mile limit. And in a famous case called the Fisheries Jurisdiction case, the international court found that this was a practice which was generally accepted in 1974, and therefore it was customary international law that a fishing zone would be 12 miles.

Now, we're not going to go into customary international law in great depth, but this is what the second source of international law is from the perspective of the International Court of Justice.

Now, the third and the fourth parts set out in paragraph 99 are, first:

"The general principles of law recognized by civilized nations..."

And when we talk about general principles of law, we're talking about the most fundamental

principles of law. For example, good faith is a principle which is expressed in virtually every legal system, and it's one that is reflected in the international law principle of pacta sunt servanda, which is that a treaty should be -- should be implemented in good faith.

The last one is -- states that:

"Subject to the provisions of Article 59..."

And Article 59 simply says that decisions of the Court of bi -- have no binding force except as between the parties.

There's a reference here to:

"...judicial decisions and the teachings of the most highly qualified publicists of the various nations as a subsidiary means for the determination of rules of law."

Now, here in the statute of the international court we see -- and I don't mean to suggest that this is relegated to the bottom of the heap, but there's no question these are considered to be subsidiary means of -- of identifying what the rules of international law will be.

The -- the teachings of the most highly qualified publicists would be the very, very top international law treatise writers, people who have served as judges of the International Court of Justice, et cetera. And the decis -- judicial decisions of the various nations are referred to there.

Now, the point here, My Lord, is that we do not see in the statute of the International Court of Justice a reference to the statutes and the regulations of the 150-odd States that comprise the international community. There's no incorporation of all of the statutes and laws of the States in these -- in this definition of international law.

And you don't see the inclusion of the court decisions of all of the judges of all of the States that comprise the international community on matters of domestic law. That -- they're looking at -- to the extent that they are

interested in judicial decisions of the various nations, they are as a subsidiary means for the determination of rules of international law, not for the determination of domestic law.

So the international court will on occasion look to what the courts of England or the courts of Canada, or the courts of the United States or elsewhere, have decided on issues relating to public international law as a subsidiary means of determining what the rules of international law will be.

The key point to take from this recount of Article 38 of the statute, My Lord, is that the statute is not an authorization to an inter -- to the international court or to an international tribunal to wade into domestic law. And the reason for that is that international law operates on a different plane from domestic or municipal law. And the international court and, we would submit, a NAFTA Chapter 11 tribunal under Article 1131 is concerned with international law; it is not concerned with domestic law in the sense that it is not given the jurisdiction to become essentially a determiner of domestic legal issues of the States that appear before these tribunals.

In the absence of any express conferral of jurisdiction to interpret matters of domestic law, the only time that the international court would ever look at domestic legal decisions would be as a subsidiary means of determining international law.

So taking that and applying it to the facts of this -- of this particular case, the applicable rules of international law do not include statutory interpretation of the federal environmental law in Mexico, statutory interpretation of the State law that deals with the issuance of municipal permits, the constitution of Mexico for that matter. It does not extend to determining whether or not the federal Amparo court acted in accordance with its jurisdiction under domestic law in Mexico.

This is the stuff for the domestic courts of the NAFTA party. It is not the stuff for a NAFTA Chapter 11 tribunal to be wading into. And this is of absolutely fundamental importance to the

proper operation of the NAFTA.

Now, in contrast to Article 1131, which is restricted to the agreement and applicable rules of international law, the NAFTA parties did know how to expressly confer the jurisdiction to consider domestic legal issues on a NAFTA panel. They didn't do it in Chapter 11, but they did it in another chapter of the agreement.

And I'll ask you to turn to Chapter 19. And Chapter 19 is entitled "Review and Dispute Settlement in Anti-dumping and Countervailing Duty Matters." The purpose of this chapter, My Lord, is to deal with the particular type of trade dispute that arises between the NAFTA parties.

To give you a local example, you'll be aware that Canada has had long-standing disputes with the United States over softwood lumber. The United States has alleged that Canadian provinces subsidize the production of timber -- or lumber through the way in which they administer the pricing of timber. And there have been a number of disputes over the years where the United States has launched what's known as a countervailing duty case. And the countervailing duty is applied by U.S. authorities to offset an alleged subsidy on Canadian lumber.

Canada has the same laws. These laws are all derived from the GATT, and they are the subject of additional agreements negotiated under the World Trade Organization.

So the United States has a body of law which implements these international rights.

In Chapter 19 there is a special dispute settlement mechanism which has been created by the drafters of the NAFTA to deal with disputes arising over the enforcement of these national laws, and it's called a binational panel process.

And essentially what happens is that if a NAFTA party is of the view that another NAFTA party has misapplied its domestic law, and I emphasize it, misapplied its domestic law, then it can request and can compel the establishment of a Chapter 19 binational panel.

So if we were to take a Canada-U.S. dispute involving lumber, if the U.S. Commerce Department were to impose a countervailing duty on lumber, Canada can request the establishment of a

binational panel. And that panel will be comprised of five trade lawyers or perhaps judges -- Mr. Justice Goldie sat on one of these -- and there will be at least two Americans and two Canadians, and then they flip the coin to determine who will be the fifth panelist. And that panel is seized with the jurisdiction to review the application of the United States law as a Federal Court would make that determination on judicial review in the United States.

So if you turn to Article 1904, you'll see at paragraph 2 an involved party, so the -- in my hypothetical it would be Canada:

> "...may request that a panel review based on the administrative record a final anti-dumping or countervailing duty determination of a competent investigating authority of an importing party..."

In that case it would be the Commerce Department of the United States.

> "...to determine whether such determination was in accordance with the anti-dumping or countervailing duty law of the importing party. For this purpose, the anti-dumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing party would rely upon on such materials in reviewing a final determination of the competent investigating authority."

So that it's absolutely crystal clear here that the panel is to, in an sense, supplant or -- or be inserted in the place of the reviewing court that would otherwise exercise a judicial review function.

And then go on to note this important sentence in the balance of this paragraph:

> "Solely for purposes of..." this artic
> "...of the panel review provided for in

this article, the anti-dumping and countervailing statutes of the parties as those statutes may be amended from time to time, are incorporated into and made part of this agreement."

So there was an express incorporation by the drafters of a particular body of domestic law into the NAFTA itself.

Then note in paragraph 3:

"The panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing party otherwise would apply to a review of the determination of the competent investigating authority."

Now, if you were to tur -- turn, My Lord, to the definition section of this chapter, which is Article 1911, you'll see that general legal principles are defined, including principles such as standing due process, rules of statutory construction, mootness and exhaustion of administrative remedies.

And then in the annex there is a -- a series of further country-specific definitions. And then in the last annex that I want to refer you to, which is Annex 1911, you'll see at the very end standard of review is defined. And you'll see that it -- there is a -- this is at page 19-32. You'll see standard of review means the following standards as may be amended from time to time by the relevant party, and it referenced to Section 18(1) of the Federal Court Act in the U.S., a reference to the Tariff Act and, in Mexico, the reference to the Federal Fiscal Code.

Now, My Lord, this is an absolutely fundamental point, because what it shows is that where the NAFTA parties wanted a panel to review matters of domestic law, they were very clear and concise. And you can see that there is very careful attention paid to what law is incorporated into the NAFTA, the standard of review that is to be exercised by the binational panel, a reference to its ability to look at statutes and to apply general legal principles as are defined by the

NAFTA itself. The function of binational panel review is very carefully set out by the parties.

And I direct you to this because it stands in very sharp contrast to what's been done in Chapter 11. Chapter 11 is purely an international law governing law. And that is in my submission perfectly clear from a comparison of Chapter 19 to Chapter 11.

This is not a situation where this particular tribunal was vested with the jurisdiction to determine whether or not this municipality could -- was acting ultra vires according to Mexican law. It was not authorized to engage in an exercise of statutory interpretation and decide that the federal jurisdiction had exclusive jurisdiction with respect to matters relating to hazardous waste.

Now, Mr. Foy referred you to a case, an ICSID case, and it's at tab 80 -- tab 38. I won't take you to it now, because I'm going to take you through it in greater detail later on in some of my other submissions. But this is a case called MINE, M-I-N-E, v. Guinea. It's an annulment decision by an ICSID tribunal. And the point is made by the annulment committee that:

> "The parties' agreement on applicable law forms part of their arbitration agreement. Thus, a tribunal's disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function."

So in this part of the award, we'll go into this in some further detail, where the tribunal entered into a consideration of the domestic legality of the municipality's act, it was acting in derogation of the parties' agreement on applicable law as stipulated by the NAFTA parties in Article 1131.

My Lord, I just have one final point, it's a very minor point, but it's an important one because it explains, for example, why Canada is here this week.

The NAFTA parties did provide in Chapter 11 that tribunal decisions are final and binding as

between the parties, subject of course to the judicial review function that is exercised by the Court. But the NAFTA parties were also well aware that Chapter 11 tribunal decisions would have an informal precedential effect. It is entirely natural, even for lawyers who are not trained in the common law tradition, to look at previous decisions in the international area.

And so the NAFTA parties recognize that, while there may be a dispute between one party and an investor of another party, the other two parties did have a very legitimate interest in ensuring the proper application of the treaty, because we are dealing with treaty obligations, and we're dealing with the potential exposure of all three NAFTA parties to claims against them based on how these decisions are arrived at by Chapter 11 tribunals.

And so therefore the NAFTA parties expressly provided for certain rights; the first is that when a party has been notified of a claim against it, it's under an obligation to serve the other two parties with the notice of claim. It is also obliged, if it's requested, to provide documents that are filed in that claim to the other two parties and, most importantly, reflecting the long-term interest that the parties have in the proper application of this agreement. Article 1128 of the NAFTA permits the non-disputing NAFTA parties to intervene, to make submissions to tribunals with respect to questions of interpretation of the NAFTA.

And you'll find as we go through this that both Canada and the United States made submissions to this tribunal on certain matters relating to the interpretation of the agreement.

We'll be directing you to this and to other submissions made by the NAFTA parties to indicate to you instances where the parties have been very concerned with arguments made by claimants against another party. And this is a very important point here because it reflects the long-term interest, as I said, of all three parties in the proper application of this agreement.

So that's a general introduction to the Chapter 11 and the role of jurisdiction. I'm going to pass the podium back to Mr. Foy.

MR. FOY: Thank you, My Lord. Mr. Thomas has taken you to the end of Chapter 3, and I'd like to carry on from there.

Chapter 4 deals with some topics that we've already mentioned, and particularly the effect of the law of the place of the arbitration.

You'll recall that we've identified to date two relevant laws to this application, the law governing the arbitration itself, the -- the law of the arbitration or the place of the arbitration. And Mr. Thomas has just talked about the law which the arbitral tribunal has jurisdiction to apply to the substantive issues.

And there's a third law that can become relevant in transnational situations, and that's the law governing enforcement. And that would be the law of the place of enforcement, wherever that might be.

And at page 31 of the materials we point out our position with respect to the effect of setting aside in the law of the place of the arbitration. And it's our position that if an award is set aside at the place of origin, it prevents enforcement of that award in those other places. And in the words of that commentator, it kills the award at the root.

We are, I think, agreed that this Court has jurisdiction as the place of arbitration. What the parties -- the difference between the parties is addressed in the next chapter, and that is: Is this jurisdiction to be exercised under the Commercial Arbitration Act or the International Commercial Arbitration Act? And I'd like to address that section next.

In this section we will argue that the applicable statute is the residual statute, the -- what I call the any other arbitration act, and I'll tell you why later, which is the Commercial Arbitration Act and not the International Commercial Arbitration Act.

But I would like to stress again as I did at the outset that in our submission, even if the international act applies and even if this Court applies the presumption of jurisdiction that has been applied to private commercial arbitrations, in our submission we have demonstrated rebuttal of that presumption and have demonstrated manifest

excess of jurisdiction.

So in terms of the relief that we seek, at the end of the day, both ex -- excess of jurisdiction is available under both statutes. And in our submission we ought to succeed regardless of which statute applies.

Now, I'd stress it -- before I -- I will turn in a moment to the terms of the legislation itself, but I'd like to stress that those terms are -- the express terms are important. They are defined terms and they are not -- and you have to look at them carefully.

In particular I'd like to turn to the Commercial Arbitration Act, which is at -- both in your small book and in tab 74 of the -- of the materials. I'm going to be using tab 74.

Under tab 74 of the 1996 version of the Commercial Arbitration Act, and I'd direct your attention to Section 2, this act applies to the following:

> "(a) an arbitration agreement in a commercial agreement..."

So it applies to commercial arbitration agreements. And then down to:

> "(c) applies to any other arbitration agreement."

That's why I mentioned at the outset that I would call this act the -- and -- and let me take you as well to the definition of arbitration agreement, which is over the page in Section 1, it means:

> "A written or oral term of an agreement between two or more persons to submit present or future disputes between them to arbitration whether or not an arbitrator is named, but does not include an agreement to which the International Commercial Arbitration Act applies."

So if the International Commercial Arbitration Act applies, this statute does not. If the International Commercial Arbitration Act

does not apply, then this act applies whether it's a -- commercial or not; it applies to any other arbitration agreement.

So the -- the question of the scope of -- of the jurisdiction of this Court will depend upon interpreting the International Commercial Arbitration Act to determine whether it applies to this arbitration. It's found at tab 76, and also in the small book.

And I'd just note in respect of both of these statutes that they were enacted at the same time and replaced the former arbitration act and divided between them jurisdiction over arbitrations.

Prior to that time, review primarily occurred on the basis of error of law in the face of the record. The Commercial Arbitration Act replaced that with review for arbitral error, which includes excess of jurisdiction and review on questions of law with leave.

The international commercial act with some changes implemented what's called the Model Law. And the Model Law was developed by, as noted there, the United Nations Commission on International Trade Law.

Model Law on international commercial arbitration, it's noted there at paragraph 122. It was developed to promote the efficient functioning of private international commercial arbitrations. It's been enacted in many Canadian jurisdictions and in a significant number of States, including Mexico and the United States.

In the -- some of the cases referring to it it's been referred to as an effort among nations to facilitate the resolution of international commercial disputes through the arbitral process.

Now, the grounds for setting aside of the award, and I'll be getting to these, under the Model Law are based in part on the New York Convention, a convention that entered into in 1958. And there has been reference in some of the Model Law cases to convention decisions as well, decisions dealing with the recognition and enforcement of foreign arbitral awards.

But I note in paragraph 124 that the international commercial act also -- our British Columbia act expressly provides for reference to

what's called the analytical commentary and the United Nations report for, quote:

> "In construing a provision of..." the "...Act, a court...must give those documents the weight that is appropriate in the circumstances."

And may refer to them. And those documents have been referred to in cases interpreting the Model Law. And I will be referring briefly to portions of the analytical commentary.

One thing I'd pause to note is that private international commercial arbitration is also referred to in the NAFTA. And I'd ask you to -- to look at Article 2022.

2020 -- Article 2022 refer -- is entitled "Alternative Dispute Resolution," and what it does is say that each party shall to the maximum extent possible encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area.

And I direct Your Lordship to an article by Mr. Justice Lysyk on Article 2022 and some of the Model Law cases which have been used between private parties in the settlement of international commercial disputes. And I won't take you to it, but you'll find it at tab 113 of the brief.

Now, at page 34 of the outline we note that the -- under the International Commercial Arbitration Act, and I note this, a combination of -- in paragraph 127, if you'd combine the requirements of the act you'll see that the arbitration falls within the scope of the -- of this act if it's international, if it's commercial, and if the place of arbitration is in British Columbia.

Now, I won't spend much time on the requirement that it be international, although I do note that the definition here is -- is somewhat problematic when its applicable to States. It's -- in -- in Section 1(3) it talks about -- of the International Commercial Arbitration Act, an arbitration is international if the parties to an arbitration agreement have their places of

business in different States.

This act was enacted in my submission at a time when it was contemplating private disputes between commercial parties who had their places of business in different States. And recall that this act was -- like the Commercial Arbitration Act, was enacted in the -- in the -- in the '80s prior to the existence of the NAFTA and prior to the existence of Chapter 11 of the NAFTA.

But I'm not going to spend more time on the question of whether or not this is an international arbitration, because in my submission the question is settled that it is not a commercial arbitration. A Chapter 11 arbitration -- this Chapter 11 arbitration is not a commercial arbitration.

So I need to take you to the meaning of commercial in this -- in this act. And I -- and I'll start with the analytical commentary which, as you recall from Section 6 of the act, is something you may refer to, and take you to that at tab 82. It's the -- it's the small brief with statutes, treaties and international legal materials.

And I'd just like to note some passages in the analytical commentary starting at page 100 of tab 82. And there at the introduction it's noted that this effort grew out of a working group on international contract practices who were tasked with preparing a draft Model Law on international commercial arbitration.

They at page 102 -- and this is a commentary on the draft that was prepared by that working group. Page 102 notes the -- the question of -- the definitional -- the scope of the application. And you'll note in a footnote to the commentary at the bottom of the page, with two stars before the footnote, the reference to the term "commercial," and this was restricted to -- international commercial arbitration is noted, and it -- the commentary says:

> "The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature. Relationships of a commercial nature include, but are not

limited to, the following transactions..."

And you'll see the word "transaction" appear again in the international act.

"...any trade transaction for the supply or exchange of goods; distribution agreement; commercial representation or agency; factoring; leasing; construction of works..." consul "...consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road."

Now, in British Columbia this footnote was, with some modifications to its format, put into the definition in Section 1(6) of the -- of the international act. And I've -- I've quoted that at page 35 of the outline. And you'll see there it says:

"An arbitration is commercial if it arises out of a relationship of a commercial nature including..."

And then there's a list. And the list includes some of the things you've seen in this footnote. I just note a -- a trade transaction in (a); (d), an exploitation agreement or concession; carriage of goods; construction of works; insurance; licensing; factoring; leasing; consulting; engineering; financing; banking; investing. So all of the -- or I think all of those would show up in one way or another in the -- in the act there.

The commentary also indicates that in -- in their view that it wasn't -- the -- the interpretation should be wide, but that the words should not be defined.

And a question arose with the wor -- in the working group, recognizing that for the most part the act is directed at private commercial transactions between private parties, would it apply at all if there was a State that was a party

to the commercial relationship. And the working group said, yes, that could happen.

And I tur -- turn back to the analytical commentary at page 107. And there it was noted that the -- a question arose about sovereign immunity, and that was a sensitive issue. And the question was asked -- and this is in paragraph 21 on page 107. For example, it does not say whether the signing of an arbitration agreement by a State organ or a government agency constitutes a waiver of any such immunity. On the other hand, it seems equally noteworthy that the Model Law covers those relationships to which a State organ or governmental entity is a party, provided of course the relationship is of a commercial nature.

So, for example, going back to that list, it's possible to have a State party to a concession contract with -- contained within an arbitration agreement which could be covered by the Model Law. And I will be pointing out that we have no relationship of a commercial nature between the State of Mexico or the other levels of the government in Mexico with Metalclad in this case.

And I note in paragraph 131 of the outline that, as Mr. Thomas has already referred you to the Pfizer case in speaking of, in that case, the WTO, but generally international trade agreements, noting that, and this was already quoted to you:

> "They are matters of public law concerning public rights, rights affecting Canada as a sovereign State. They are not matters of private, economic or commercial rights."

And I turn from there to just -- starting what -- another place that anyone would go, and that's dictionary definitions, and -- and the reference to a Boro -- a case called Borowski, a decision of the Alberta Queen's Bench, and I don't need to take you to it. It was a decision interpreting the Model Law and the question of whether or not the Model Law as enacted in Alberta applied to an arbitration arising out of a contract of employment.

And the Court examined dictionary definitions of commercial. They're -- they're set out there.

I think they're summarized best by -- at the bottom of the quote on page 37:

> "Commercial relates to buying, selling in exchange of commodities for profit."

And the Court concluded that a contract of employment was not a commercial relationship within the meaning of the Model Law, and noted at the bottom of paragraph 37 another section of the act which comes back to the word "transaction" and says -- and the restriction of the -- of the international act to what is normally private commercial transactions in Section 28 of the act, which says:

> "In all cases the arbitral tribunal must decide in accordance with the terms of the contract..."
>
> There's almost always a contract.
>
> "...and must take into account the usages of the trade applicable to the transaction."

That's the normal application.

Now, having noted that, I also note that it is not necessary -- necessary entirely for there to be -- well, it is necessary for there to be a contract, but non-contractual relationships have also fallen into the Model Law, and I'll take you back to the commentary where they are related to a contract. And that's a reference at page 116 of the analytical commentary.

And this comes back to -- and this is another aspect of the -- of the definition that -- in the act it goes on to note that:

> "The Model Law recognizes..."
>
> And this is paragraph 4 on page 116:
>
> "...recognizes an arbitration agreement if the existing or future dispute relates to a defined legal relationship, whether contractual or not. It is submitted that

the expression 'defined legal relationship' should be given a wide interpretation so as to cover all non-contractual commercial cases occurring in practice, for example, third party interfering with contractual relations, infringement of trademark..." and other "...or other unfair competition."

Now, I turn to the top of page 38. And I make the point there, and I emphasize this, that NAFTA itself recognizes that Chapter 11 arbitrations are not, quote, commercial on their own. And it -- at -- how does it do that? It does that in Article 1136. Article 1136(7) and the -- the relevant -- says this:

"A claim that is submitted to arbitration under this section..."

That's Section B of Chapter 11.

"...shall be considered to arise out of a commercial relationship or transaction for the purposes of Article 1 of the New York Convention and Article 1 of the Inter-American Convention."

Now I'm going to explain what the drafters of the NAFTA are doing here. Recognizing -- and I'll show you authority for this. Recognizing that a -- an arbitration of this type would not normally be considered to be commercial, the drafter -- for the purposes of the New York Convention, which is what I -- I mentioned, was the convention dealing with the recognition, enforcement of foreign arbitral awards, parties to the NAFTA deemed it to be arising out of a commercial relationship.

Without this deeming provision, in my submission Chapter 11 and the arbitrations arising out of it would not be enforceable under the New York Convention, and I set out in paragraphs 136 why that's the case.

When parties implement the New York Convention, they are given the option of enacting what's called the commercial reservation, which is to say an arbitration will only be considered to

be commercial under the convention if it's commercial under our law, under domestic law. And that was done certainly in Canada, and I think in all of the three NAFTA parties.

Article 1136 was required because, without it, without deeming these arbitrations to be arbitrations for the purposes -- or commercial for the purposes of the New York Convention, they would not be considered to be so otherwise.

This was in a -- to ensure that they were enforceable under the law of the place of enforcement, which would be in these parties the New York Convention, because each of them is a party to the New York Convention.

Now, the New York Convention is, itself, restricted to commercial matters which do not include regulatory relationships. And I take you to a decision in that regard at the bottom of page 38, and I'd like to turn that up. It's in Volume 1, tab 21; 21, this is a decision involving the interpretation of the -- the -- the New York Convention and whether or not the arbitration that I'll describe was commercial within this context.

The facts were these: A Nassau company -- and they're set out briefly in the award. A Nassau company entered into three reinsurance contracts with a New York company. The contracts contained arbitration clauses. The New York company became insolvent, and the liquidator, the superintendent of insurance, made claims under the reinsurance contracts, made claims in the courts against the -- the Nassau company.

The company requested that the dispute be referred to arbitration as there had been arbitration clauses in the original reinsurance contracts with the New York company, and asked that the matter be sent from the courts to arbitration. And the -- the issue is set out in paragraph 1 on page 664 of that at the bottom of the page. And this is an excerpt from this decision:

> "The ultimate issue presented to us is whether the New York Convention mandates arbitration of the dispute with the defendant Ardra, a Bermuda corporation, by the superintendent of insurance's

liquidator precluding application of the liquidation provisions of the insurance law, giving the supreme court exclusive jurisdiction of claims for and against the insolvent insurer."

The conclusion of the Court is at paragraph 8, page 667, and it's noted there that:

"The relationship between these parties, originally of a commercial nature, was transformed to one of a regulatory nature. In acceding to the convention, the senate restricted its applicability to commercial matters."

As noted. And since the dispute which arose is not between the original parties to the -- to the agreement, but between one of them and the liquidator stepping into the -- the shoes, it's not a commercial matter. The liquidator sues as a fiduciary protecting not only the interests of Nassau but also policyholders and the general public. And by definition relationships of a regulatory nature are not considered to be commercial within the meaning of the New York Convention.

Now, when the NAFTA for the purposes of the New York Convention deemed Chapter 11 arbitrations to be of a -- arising out of a commercial nature, they did so only with respect to the New York Convention, not with respect to the separate law of the place of the arbitration, in this case British Columbia. They did so not in respect of the Model Law as enacted in British Columbia. They did so only for the purposes of the New York Convention.

And I make the point at para -- at page 39, paragraph 140, that:

"The convention is limited to recognition and enforcement of a foreign award. It does not apply in the country in which, or under the law of which, that award was made..."

"...the convention is not applicable in

the action for setting aside the award. This has been unanimously affirmed by the courts."

And then there's -- over the page there's another -- another quote that's saying:

"...the New York...Convention establishes no criteria for proper or improper vacatur at the arbitral situs."

That is dealt with by a separate law. So in my submission, stepping back, and back to the purpose of 1136, it was a narrow purpose, to deem Chapter 11 arbitrations to be commercial for the purposes of the New York Convention. The drafters could have gone on and deemed them commercial for the purposes of the Model Law, and I'll take you to a law that does that in a minute, but they didn't.

And we are left with in my submission, in the case of regulatory relationships, a situation where we're not cov -- we're -- we're not dealing with a -- a, quote, commercial arbitration.

And at para --

THE COURT: Would this be a convenient --

MR. FOY: Yes, My Lord.

THE COURT: -- time to take --

MR. FOY: Yes.

THE COURT: -- the morning --

MR. FOY: It would.

THE COURT: -- break?

THE REGISTRAR: Order in chambers. Chambers is adjourned for the morning break.

(MORNING RECESS)

(PROCEEDINGS ADJOURNED AT 11:14 A.M.)

(PROCEEDINGS RESUMED AT 11:30 A.M.)

THE COURT: Yes. Please continue, Mr. Foy.

MR. FOY: My Lord, I was at page 40 of the outline, and I was making the distinction between the New York Convention applicable to recognition and enforcement of our awards and -- and the Model Law applicable to an application to set aside arbitral awards, and the -- and was noting that for the purposes of the convention NAFTA Article 1136

designated Chapter 11 arbitrations to be commercial, to arise out of a commercial relationship.

And paragraph 142 again highlights the difference between the -- the two regimes. It was only done for that purpose. And there's a U.S. case dealing with the scope of the convention, and notes that:

> "The Convention specifically contemplates that the State in which, or under the law of which, the award is made..."
>
> In this case British Columbia.
>
> "...will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds of relief."
>
> Those are two separate jurisdictions.

Now, another indicator that this would not be considered to be a commercial arbitration absent some legislative designation in that regard is found in the federal Commercial Arbitration Act. Now, just -- I'll take you to that in a minute, but I'll just advise you -- advise you that, although it's called the Commercial Arbitration Act, and it's at tab 75 of the brief, it really should be the arbitration act applicable where the -- one of the parties to the arbitration is Her Majesty in Right of Canada. That's the scope of its application.

And if you go to tab 75, you will see there the federal arbitration act. And what that act does, My Lord, it's attached as a code, for arbitrations to which this act applies as defined, where at least one of the parties is Her Majesty in Right of Canada, whether they are international or domestic.

I could have noted in the course of the analytical commentary, but the -- the working group noted that the Model Law, although it was designed for use in international arbitration, could equally be adopted by any State in respect of any type of arbitration. And what -- that's what Canada has done in respect of arbitrations

where at least one of the parties is Her Majesty.
Now, recognizing that Chapter 11 would give rise to arbitrations in which Canada was a party, this act was amended on the entry into force of the NAFTA. And you'll see the amendment in subsection (4), Section 5, subsection (4), where it says:

"For greater certainty, the expression 'commercial arbitration' in Article 11 of the code..."

Which is again the scope of the -- of the -- of the Model Law:

"...includes a claim under Article 1116 or 1117 of the agreement."

Of the North American Free Trade Agreement.
So again, there Canada considered it appropriate to take legislative action so that arbitrations under Chapter 11 would be considered commercial arbitrations for the purpose of this piece of legislation.
British Columbia did not amend either the International Commercial Arbitration Act or the Commercial Arbitration Act in 1994 when the NAFTA was approved at the federal level.
So this doesn't exist insofar as the -- this arbitration is concerned. This would be applicable if, in the case of a -- a case -- you'll hear more about, like Myers, which is an arbitration brought under Chapter 11 of the -- of the NAFTA against Canada, and has been -- award has been made. And Canada is seeking review of that award under this statute, because this is the statute that would be applicable to that.
Now, I -- I -- I add that this designation by Canada does not indicate a preference for the Model Law for the purposes of -- of Chapter 11 arbitrations because, as I noted, this act applies to all arbitrations, whether international or any other type in which Canada is a party. So at the federal level, rather than there being two statutes, the international act and the commercial act, there's just the one statute.
And as I've noted at the top of -- or at the

bottom of page 40, the top of page 41, British Columbia has not chosen to legislate in the -- in this manner.

And I turn to the question of, well, what was the nature of the relationship between Metalclad and Mexico in the instant case? Was that relationship a commercial relationship? We've looked at the dictionary definitions. We've looked at some designations.

We have to look to the facts in order to identify the nature of the relationship. And Your Lordship will want to reserve your judgment on this issue until you've been taken through all -- some more of the -- of the facts, because it will -- because those bear upon whether or not this was a commercial relationship.

But in summary, it's Mexico's position that it was not, and that it can be looked at from two perspectives.

The first perspective you can look at the relationship is that between the federal, State and municipal authorities and Metalclad, the underlying relationship there. And I -- Mexico will submit that it's clear that those -- that relationship was a regulatory relationship. It's a relationship recorded in permits, in applications for permits, in permit denials, in closure orders, in agreements providing for the lifting of closure orders.

You'll see in the -- reference to Mexican domestic laws involving the rele -- regulation of construction and operation of hazardous waste landfills. You will not see any concession contract entered into between Mexico and Metalclad for the provision of a public service on behalf of Mexico or any agreement like that.

You -- during the course of the arbitration the -- Metalclad referred to the Convenio, and we'll get to the Convenio in the course of things, as a concession-like agreement. And I'll be taking you to that and showing you that in our submission it was a regulatory act and not anything like a -- a concession contract or other commercial agreement.

Now, that's at one level, which is the underlying level giving rise to the relationship.

Another level to look at this relationship is

the -- is the relationship at the arbitration itself, the relationship arising by reason of Chapter 11 of the NAFTA.

Now, as Mr. Thomas has pointed out, what that does, what Section B of Chapter 11 does, is provide a limited access to private parties to enforce treaty rights. The -- in my submission that too is not a commercial relationship and has been recognized not to be a commercial relationship, both by the parties who have made submissions on this issue in front of arbitral tribunals, Chapter 11 tribunals, recognized in the Pfizer case which Mr. Thomas took you to, and in some extracts I'm about to take you to. And the first of those is in paragraph 147.

And I emphasize that this is an extract not from a decision but from an argument made in the course of an arbitration. This is an extract from the procedural hearing in an arbitration under Chapter 11 brought by Methanex v. The United States where the United States made these comments at the -- at the stage of dealing with a question of where the place of the arbitration ought to be. And it was argued that, well, the Ontario Model Law will apply if we choose Ontario. And the United States responded:

> "Section 2(2) of the Ontario International Commercial Arbitration Act applies the Model Law only 'to international commercial arbitration agreements and awards.' Chapter 11...is not a commercial arbitration agreement..."
>
> So this is one of the parties, the United States, saying that that's not its view of -- of Chapter 11.
>
> "...and given the nature of this dispute..." and this was "...a challenge under international law to measures to protect public health and the environment..."
>
> Another regulatory dispute.
>
> "...an award would not easily lend itself

to being characterized as commercial."

And the United States also argued that -- it also referred to Article 1136(7) to which I've referred to, and said:

"It is unclear that this provision can be construed to deem Chapter 11 claims as commercial in contexts other than the two conventions..."

I.e. the New York Convention and the Inter-American Convention.

"...and it's far from clear that the claims here could be considered 'commercial' for other purposes."

Now, the tribunal, the Methanex tribunal, didn't have to -- didn't rule on this -- or, sorry, it ruled on the question of where the place of arbitration was -- was to be, and chose Washington, but went on -- in the course of that ruling did say some things about -- about these submissions, and also recognized that this important issue was going to be the subject of a -- court proceedings. And those references are in paragraph 149 and 150.

And it's noted that -- again, the United States argument is noted:

"The respondent noted that Section 2(2) of the Ontario International Commercial Arbitration Act applies to International Commercial Arbitration Act agreements and awards. And by itself Chapter 11 of NAFTA is not of course a commercial arbitration agreement between the investor claimant and the respondent party/State."

That was the United States position.

The Mexi -- the Methanex tribunal noted that:

"It was unnecessary for present purposes to decide that issue...and it's an important and controversial issue better

decided in a case which requires an actual decision by the appropriate tribunal..."

Which is not the present situation in this arbitration. No -- now -- and then over the page:

"No doubt it may soon be resolved in another NAFTA arbitration."

And this happened after Metalclad -- after Mexico filed these proceedings, and it was likely known to the tribunal that the issue would arise in this jurisdiction.

I also refer to another decision made in the Metha -- by the Methanex tribunal to again reflect the non-commercial nature of Chapter 11 disputes in which an application was made for intervention status by environmental groups, non-governmental organizations. And it was recognized that, given the public interest involved in this type of arbitration, that was appropriate, unusual for a -- and unheard of for a private commercial arbitration, but allowed in the context of a Chapter 11 arbitration because, as noted in paragraph 152:

"There is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not..." just "...because one of the...parties is a State...the public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions."

And I'm going to be suggesting that Your Lordship has ample evidence before you in this case as well that the substantive issues in this arbitration extend far beyond those raised in the normal, private commercial arbitration. We've had a number of applications for intervention status. We have intense public interest in the -- in these proceedings.

They differ substantially from the normal issues arising in a private commercial

arbitration, like the Quintette case, where it's an interpretation of a one-off contract in which only the parties ever have an interest in the result. That's the case primarily that the Model Law was intended to deal with.

One of the terms that I noted in the course of the litany of including commercial relationships was the term "investment." And I'd just like to note that again there was no concession contract in this case. There was a -- undoubtedly an investment made by Metalclad in one of the States of Mexico, but it was not an investment with Mexico. There was no involvement as a joint venture agreement. There was no concession contract, no other commercial relationship. And the relationship between Mexico and Metalclad and this investment was the relationship of -- that of regulator.

Now, I'd just add another point here. You'll recall that parties and the claimants under the NAFTA are entitled to choose one of three sets of arbitral rules: the ICSID, if it were available; the additional facility rules; and the UNCITRAL rules, which are, as well, used in private commercial disputes.

I would just note that the fact that the parties have chosen -- parties to the NAFTA have chosen arbitral rules that can also be used in commercial arbitrations does not make a Chapter 11 arbitration a commercial arbitration where the relationship that -- at bottom is quite different.

Here, Metalclad sought to do business in Mexico and sought regulatory approvals from three levels of government in respect of that business. It did so to provide services to its customers on its own behalf. There was never any concession contract where the State was asking Metalclad to pro -- come into the State to provide a service to members of the public on behalf of the State, as if -- as in the case of a concession contract. And one cannot identify the relationship here as commercial simply because Metalclad wanted to engage in commerce.

It's necessary to examine the specific facts, and the specific inter -- interaction between Metalclad and the State authorities in order to fully appreciate the nature of the relationship,

and so we will come back to this issue when those points are -- are covered.

But in summary, it's our submission that, because the relationship is not commercial, that the requirements of the International Commercial Arbitration Act are not met. The result is that the Commercial Arbitration Act, which is -- really should be called the any other arbitration act, is -- is applicable.

And I'd just note that when the B.C. legislature was introducing these two pieces of legislation, it was of course open to them to -- as Canada did, to choose the Model Law for all arbitrations or to make the international act the residuary act, the act to which you fall if you don't fall -- if you don't meet the requirements of an International Commercial Arbitration Act. The legislature did not do that.

The legislature deliberately made the Commercial Arbitration Act the default. If you don't fall within the International Commercial Arbitration Act, then -- and you are any other arbitration, you fall into the commercial act.

Now, that concludes that chapter.

And the next chapter is -- is brief. It simply identifies under the two statutes the grounds of review. And as was indicated procedurally, we have in this document -- although we have argued that we're under the commercial act, we have set out the -- the grounds open for review under both statutes, and we have argued and -- and dealt with both, recognizing that -- that it's appropriate to examine both and -- and that the decision will come at the end as to which -- which particular statute we're under.

Now, Your Lordship is familiar with review under the Commercial Arbitration Act. You've decided cases involving the grant of leave and are familiar with the fact that it provides for review under -- of arbitral error, that is to say ex -- excess of jurisdiction, and also provides for review of questions of law upon leave of this Court.

I also note that it -- it, like the international act, contains a provision restricting review. The -- when these two statutes came in, there are parallel provisions as

set out in paragraphs 155 and 156 that -- provisions of the Commercial Arbitration Act provide that an arbitral award:

> "...must not be questioned, reviewed or restrained by a proceeding under the Judicial Review Procedure Act or otherwise except to the extent provided in this Act."

The international act has the same -- has a similar provision in Section 5. It's quoted at page 167 and says that:

> "In matters governed by this Act, a court must not intervene unless so provided in the Act."

It was intended to provide the -- both were intended to provide the available grounds and means of review of arbitral awards.

And I'd just pause here to note that the -- in the petition and in the materials the applicant also refers to the inherent jurisdiction of the Court. We don't refer to that in reliance upon -- in seeking any relief. You have been exercising your inherent jurisdiction as well in the proceedings in the course of dealing with intervention applications, in the course of dealing with other matters that have come up.

But we are content to rely upon the statutes, either one, to establish the substantive grounds of review and are not seeking as a ground of review to invoke any inherent jurisdiction.

And I would -- I'd like to come back to the bases upon which leave is sought and the grounds of -- of -- of review under the Commercial Arbitration Act when I have identified those in more detail. But I'll just note the primary differences between the two acts is that -- are that the -- and the similarities, is that a common ground for review is excess of jurisdiction. The major difference is that pure questions of law alone, reviewed on a correctness standard is not available under the international commercial act, but is available with leave of this Court under the commercial act.

Because -- My Lord, I'll take you to the next

chapter. I'll -- Your Lordship is familiar with the commercial act. I'll take you to the international act to identify the grounds of review in the next chapter, Chapter 7.

THE COURT: Just before you proceed on to the -- the international act, the -- the normal procedure, as you're aware, under the Commercial Arbitration Act, if it's sought to have the Court review a -- a question of law, is to first seek leave and then to subsequently have the hearing as to whether the error has taken place or not. What I understand that you are doing is you're combining the two proceedings so that you're asking for leave but, before getting the answer, you're then going into the substantive argument.

And I -- I just wish to raise whether there's -- there's any issue about that procedure. And I'm actually really addressing my -- my question to Mr. Cowper, not so much to you.

MR. COWPER: Yes, My Lord. I think I can answer your concern in that respect.

My understanding of -- of the pre-hearing conference we had was that Your Lordship was able to make the time available this week and next week to combine processes which might otherwise be separated, and -- and you'll recall I had a -- a motion to determine which was the relevant statute. And I think in many cases that would be a threshold issue before the hearing of -- of -- of the matter generally.

For the purposes of this record, I can certainly confirm that I'm prepared to meet Mr. Foy on both the issues of leave to appeal, and if leave to appeal is granted, Your Lordship's consideration of any issues on which Your Lordship grants leave to appeal.

One of the concerns I raised in the pre-hearing matter which I do raise for your consideration here is that on my reading of my friend's material, which I've endeavoured to read since receiving it, it's not clear to me how he defines the issue of law, which upon my interpretation of the -- of the Commercial Arbitration Act on which he's seeking leave to appeal.

And I did raise that, I think, at our first

hearing. And I -- I hope --
THE COURT: And you --
MR. COWPER: -- to receive --
THE COURT: -- you raised it also in your outline of your arguments --
MR. COWPER: Yes.
THE COURT: -- and that's why I'm now --
MR. COWPER: Yes.
THE COURT: -- raising it, because I wasn't sure whether -- when that came up in -- in your outline, whether --
MR. COWPER: I'm not satisfied --
THE COURT: -- the consequences --
MR. COWPER: -- that I have a list in clear terms of the issues of law on which my friend is seeking leave to appeal. I -- I do know there are clearly some issues he's raised which are capable of expression as issues of law. I was anticipating that as I heard him this week that that would become clearer, and that if there were any problems about that, he and I could resolve it before I have to answer. I don't think there's going to be any necessity for an adjournment.

I am concerned about the absence of any clear identification of issues of law. And -- and my friend may set me right and say he's done it and I've just misread what he's done so far.

I think we can deal with it. And I certainly confirm that my client's interested in having the -- both issues determined in the course of this hearing.

Is that responsive? I'm sorry, I didn't --
THE COURT: Yes, it is, Mr. Cowper. Thank you.

Mr. Foy, I raised it because of a comment that I'd read in Mr. Cowper's outline of argument with respect to this issue as to which of the two statutes are -- are applicable. And I think he's just articulated or elaborated on -- on his position, so you should discuss with him and -- and either come to a common understanding or raise the issue again with me.
MR. FOY: Thank you, My Lord.

Could I ask you to what you're referring when you say his outline? I have been handed what I thought was a draft of something. I haven't -- I'm not aware that an argument has been filed, but perhaps I'm mistaken.

MR. COWPER: I sent you the file on --
MR. FOY: So I have the file document on -- then I got something else on the international act; that's a draft.
MR. COWPER: That's correct.
MR. FOY: Okay. Well, then I know what you have. I had understood, as Mr. Cowper's suggested, that we, in the interests of taking advantage of Your Lordship's time, were going to address all of the issues and not split this into a two-stage or three-stage proceeding.
THE COURT: That had been my understanding as well. But because Mr. Cowper in the outline that I've reviewed raised a question as to the -- to the questions of law in respect of which you're seeking leave, it broadened my mind to an issue of whether we were all of the same mind. And I -- I just want it clarified.
And I think I now have Mr. Cowper's position, and I think you do as well. And so you should discuss that further with him and -- and either come to a common understanding or -- or raise the issue before me again.
MR. FOY: Thank you, My Lord.
The -- it's the applicant's position that in the voluminous written argument that we have filed, we have set out precisely the issues of law that we seek this Court to review. And I'll just -- for my friend's benefit and the Court's, in my submission all of the grounds of review that are set out are available to the applicant under the Commercial Arbitration Act.
THE COURT: Um-hum.
MR. FOY: That if the international act applies, then all of the grounds of review are available, except for the last two dealing with the interpretation of 1105 and the interpretation of 1110. So that's our position.
In my view, we've -- and I will be making that clear as I go through both the grounds that are available under the international act and my characterization of the grounds that we have raised.
THE COURT: Um-hum. And -- and it may well be that it's adequately set forth in your outline of argument.
I think what I gather Mr. Cowper was perhaps

looking for is that since it is normally a two-step process, he would like perhaps a distillation of those questions of law which you are seeking leave on.

MR. FOY: Which I will point to him in the materials provided to him where I have distilled those.

THE COURT: I apologize for that interruption, but I thought I should raise the issue at this stage.

MR. FOY: Now, I'll just identify under Chapter 7 the grounds for review available under the -- the international act. Again, as I mentioned at the outset, there's a provision similar to that in the commercial act that restricts review to those -- on those bases provided for in the act. And Section 34 sets out the grounds upon which an award may be set aside. And under Section 34(2)(a):

> "An arbitral award may be set aside...only if..."

And this places the burden on the applicant, this section, and that's Mexico.

> "...only if...the party making the application furnishes proof that..."

And I take you down to:

> "(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration..."

That's an excess of jurisdiction ground, and we rely upon that.

And over the page in small Roman numeral 5, in the second part of that, it says:

> "...the arbitral procedure was not in accordance with the agreement of the parties..."

And we rely upon that.

And we will be referring you to the mandatory

provisions of the additional facility rules which in our submission -- which are the subject of the agreement of the parties which were not complied with by this tribunal.

Then, thirdly, we refer to:

(b) the court finds that..."

And this -- this replaces the onus on the applicant with it being a matter at large, if:

"...the court finds that the arbitral award is in conflict with the public policy in British Columbia."

And we rely upon that. And we will -- I will be taking you to the authorities interpreting that phrase public -- the -- in conflict with the public policy in British Columbia, and in particular a case dealing with the Model Law which interprets that in my submission -- and my friend will disagree with this -- interprets that to include review for patently unreasonable error.

Now, in this jurisdiction I'm also required to deal with the fact that there are decisions interpreting the -- the scope of review open under the international act where applicable to private international commercial arbitrations.

Now, you'll -- I -- I want to -- it is difficult when making these submissions to keep recalling the fact that in our submission we're under the other act, that this is not a private commercial arbitration, but if it were -- and I apologize if I -- if I keep repeating that, but I'll try not to. It -- it -- this is a secondary submission, that -- and I'm sure Your Lordship recognizes that.

But in this jurisdiction the Court of Appeal has in the Quintette case examined the Model Law and interpreted it in the context of an application to set aside a private commercial arbitration award. That award involved a long-term coal contract between Japanese buyers and British Columbia suppliers.

The arbitration involved the interpretation of that one-off contract. It was a very long inter -- arbitration before the then-former Chief

Justice of the province. Chief Justice Nemetz was the -- was the president of that tribunal.

And after an award was granted an application was made under the international act to set aside the award. The application -- it was submitted that the award had dealt with the matters beyond the scope of the arbitration agreement. And the Court of Appeal held that the tribunal was correct in its interpretation of the agreement.

But in the course of those reasons the Court, because it was the first case to discuss the Model Law in British Columbia, went on to give guidance as to the sta -- the stance of the Court in respect of review of arbitral awards of this type.

And Mr. Justice Gibbs noted the need to preserve the parties' autonomy to select the forum for their disputes, to minimize judicial intervention in the review of private international commercial awards, and noted that mere error of law or fact would not justified setting aside an award in a private international commercial arbitration.

And there I've referred to Mr. Justice Lysyk's article where he reviews Quintette and other Model Law cases, and I -- and I mentioned that earlier.

Now, in my submission Mr. Justice Gibbs left open the question review on -- beyond the mere error of law in fact, the question of review for patently unreasonable error. And I take that from a passage which I've quoted at 173 where he notes -- and this is in obiter. I -- I -- I can see -- because he's already determined that the arbitrators in this case made no error. But he says:

"Even applying the domestic test..."

And he refers to a Supreme Court of Canada decision in Shalansky. He says the:

"...interpretation..."

That is the arbitrator's interpretation of the agreement:

"...is one which the words of the contract

can reasonably bear."

And he wouldn't intervene on -- for that reason.

The case referred to, a Supreme Court of Canada decision, considered a judicial review of consensual arbitration, a consensual arbitration involving a collective agreement, interpretation of a collective agreement.

And there the Supreme Court of Canada recognized that that kind of decision could be set aside if it involves an interpretation of the agreement that the words could not reasonable bear, a patently unreasonable standard could apply and, if satisfied, could justify setting aside such an award.

Again, obiter comment that they did not interfere in that case but in my submission recognized that prospect. And in my submission Mr. Justice Gibbs left open that question even if we're applying the private international commercial test.

And I've referred over the page to the United States authorities which, in my submission, leave open the same prospect of review for the test of fundamental rationality, is the expression used in the decision I've referred to in paragraph 175.

Earlier in that decision review on that basis is said to be similar to review of a decision of a tribunal where the -- there has been an excess of jurisdiction.

And you will see later reference to authorities where review for patently unreasonable error is seen as an aspect of review for jurisdictional error where a tribunal, having jurisdiction to enter into the inquiry, loses that jurisdiction by committing a patently unreasonable error. So you'll see this notion of review for patently unreasonable error referred to both in the jurisdictional context, and I'll be taking you to a Model Law case which recognizes its prospect in the context of public policy.

Now, I note that under the -- the Model Law there is this presumption of enforcement of private commercial awards, but even that presumption is qualified. And I'm quoting there from a decision of the Ontario General Division in

paragraph 177. It's the purpose -- it's noting the purpose of the Model Law:

> "To establish a climate where international commercial arbitration can be resorted to with confidence by parties from different countries on the basis that if..."

And there's the condition:

> "...if the arbitration is conducted in accordance with the agreement of the parties..."

A fundamental precondition including, as you've heard already, agreement as to the applicable law, an agreement as to the applicable procedure, then:

> "...an award will be enforceable..."

So this -- even in the private context if, in my submission, an applicant can demonstrate that the arbitration was not conducted in accordance with the agreement of the parties, the award will not be enforceable.

In the next section I identify that -- and recognizing that not every arbitration is alike, and that even if this Court's jurisdiction is that informed by the international act, it's open to this Court to apply a different perspective because of the very different issues involved in this kind of arbitration. And I refer to a -- a reference from the text writers, Mustill and Boyd, and in fact in a -- in a passage which Your Lordship recently referred to in a -- well, not that recently -- in a 1993 decision in Powell River where Mustill and Boyd warn against reliance upon generalized authorities to different types of arbitrations. And we've earlier on noted that in this context there are a number of different types of arbitrations you'll be referred to. And Mustill and Boyd's note:

> "...attempts to transfer principles from the one to the other will inevitably lead to error."

Now, as Mr. Thomas has already pointed out, as they applied to the case before them in Quintette, we have no difficulty with the approach taken by the Court of Appeal or the -- the principles there espoused. But attempts to transfer those principles without scrutiny into this type of arbitration would, in our submission, lead to error.

There are common features, the requirement for consent to agreement to the arbitration. But there are differences, differences arising from the different relationship, differences arising from the nature of the obligations, differences arising by reason of the fact that one of the parties is a State. And Mr. Thomas has referred you to the authorities in which presumption of -- the presumption of jurisdiction is not applicable to arbitrations involving a State, differences in the applicable law.

So we caution that, although we take no issue with the correctness of Quintette in its context, we caution about the application holus-bolus of those principles in this context even if the international act does apply.

And I have noted what Mr. Thomas -- at the bottom of page 52 and over the page, what Mr. Thomas has already referred you to, that in the Southern Pacific Properties case involving a State there's no presumption of jurisdiction.

We go on to add, and I probably have made this point earlier, that in our submission any presumption if applicable is rebuttable. And it's this Court's -- one of this Court's functions, to review the arbitral process to determine whether the extent of their authority extends as far as they have exercised.

And I note that the -- the rationale, one of the rationale -- rationalia of judicial restraint in the interference with private international commercial awards is that they have nothing to do with anything other than the parties. Very often private commercial international arbitration is not even made public. The awards are confidential. No body of law develops in the context -- it's -- context of interpretation of one-off agreements between commercial actors.

This rationale is not applicable in the context that we have here under the NAFTA, and you've -- you've -- you've been referred to a number of reasons for that already.

We've noted that -- in paragraph 186 that the Metalclad decision itself was cited to four Chapter 11 tribunals in claims against all of the three parties within months of its release. And we add that the fourth there is the UPS case, which Your Lordship heard about in the intervention application brought by CUPE.

Now, as noted, the international act does offer review for excess of jurisdiction. And I'd like to address the issue of whether in all cases there's this overwhelming presumption of jurisdiction. And I'll demonstrate by reference to a couple of cases that -- that, in my submission, that's -- that's not the case, although I recognize there are also other cases where, as in Quintette, the Court has indicated a strong -- strong presumption.

And the first case is referred to under paragraph 188. This is a -- and I'll take you to this case, a private commercial arbitration case, at tab 65. This is a decision of the Hong Kong Court of Appeal and -- on an application to enforce a New York Convention award.

And you'll recall that I mentioned that the grounds in the Model Law for setting aside an award are modelled on the grounds for refusing to enforce contained in the New York Convention, including the ground for excess of jurisdiction, the ground that we're dealing with here.

And this case involved a -- contracts for the supply of latex. They contained arbitration provisions. And the clause is set out at page 517 of the decision, just over the page, noting that:

> "All disputes as to quality or condition of rubber or other dispute arising under these contract regulations shall be settled by arbitration."

The -- a -- an award was made. And in the course of the award the -- one of the parties was found responsible by reason of a failure to open letters of credit. And it's noted at page 518, 17

arbitration awards were rendered. And thereupon the applicant sought enforcement of all of the awards in Hong Kong. First, initially at the high court level enforcement was granted. The Court of Appeal reversed, holding that, and this is noted at 518 at the top:

> "The arbitration clause in the five agreements were not broad enough to cover the matters in dispute, i.e. the buyers' failure to establish a letter of credit."

And if you look at the reasoning of the Court of Appeal, which starts at page 522, what the Court of Appeal does is point out the issue in paragraph 14, issue as to whether or not this arbitration clause was wide enough to embrace the matters in dispute being the effect of the defendant to -- to -- failure to establish letters of credit. Look at the -- and they look. And I would suggest they look on a correctness standard to the arbitration agreement itself and ask whether or not such a dispute falls within the language in the middle of the page there or other disputes arising under these contract regulations.

And the court -- the Hong Kong Court of Appeal says this:

> "In my opinion, the court is not entitled to ignore any of these words, no more is it entitled to write a fresh arbitration clause for the parties on the footing that so to do would render it more efficacious from a business point of view and enable all disputes arising under one or more of the agreements to be dealt with by the same tribunal. Any presumption that the parties so intended is rebutted by the express language which they have adopted. Parties are entitled to provide for restrictive reference confined, for example, to disputes as to condition or quality."

Reference to English authority supporting that proposition is made.

I'd just take that language and apply it to

one of the arguments made by the applicant in this case.

In our submission artic -- Section B of Chapter 11 restricts the matters that -- the disputes that can be submitted to a Chapter 11 tribunal. It restricts those disputes to the matters raised in Section A of Chapter 11.

The tribunal is not entitled to ignore that restriction. It might have been, as was done in Chapter 20, more efficacious from an investor's point of view to enable all disputes under NAFTA to be raised with a Chapter 11 tribunal, but the parties didn't do that. They did that only at the State level.

And I -- I refer to this not just because it informs that point which is applicable to the facts of our case, but it informs the approach of the Court to the question of whether or not the tribunals acted in excess of jurisdiction.

It appears to me on this analysis that what the Court of Appeal is doing is applying a correctness standard to the interpretation of the arbitration clause in question between the parties to determine what -- what was done was within the scope of the arbitrator's jurisdiction. And I -- I'm stressing this case as an example of doing that, because this is a New York Convention case. And the same grounds exist under the International Commercial Arbitration Act.

My Lord, another case which takes the same correctness standard is a decision of the Saskatchewan Court of Appeal found in Volume 1 at tab 2.

You'll -- and before I leave the Hong Kong case, you'll -- you'll notice that there's no mention of a presumption of jurisdiction in the context of that case. Now, it may be simply because the Court there was able to on its own rebut that resumption, but I simply note for the record that they didn't feel themselves constrained in -- in that way.

This is a decision of the Saskatchewan Court of Appeal again seeking to register -- dealing with the convention, seeking to register an arbitration award made in the United States under the International Commercial Arbitration Act of Saskatchewan, which is the Saskatchewan's

implementation of the Model Law.

The same basis for review was sought, that the arbitrators had acted -- had -- had dealt with the dispute not contemplated by or not falling within the terms of the submission of arbitration. And you'll see the language quoted on page 2 of the reasons, the language quoted of the -- of the particular article.

In the course of dealing with that allegation, again what the Court of Appeal did was interpret the agreement to arbitrate. And you'll note at the penultimate paragraph:

> "The..." peal "...the appeal turns solely upon the interpretation of the franchise agreement..."
>
> Which contained the arbitration clause.
>
> "...and the principles of common law relating to interpreting such a contract."

Now, the trial judge in this case said -- on a correctness standard, interpreted the clauses not applying in the circumstances of the case. The Court of Appeal confirmed he was correct and the refusal to enforce was upheld.

Now, that would be a convenient point to break, My Lord, if that's appropriate.

THE COURT: Yes, if it's convenient to you, we'll take the luncheon recess and reconvene at 2 o'clock.

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

(NOON RECESS)

(PROCEEDINGS ADJOURNED AT 12:25 P.M.)

(PROCEEDINGS RESUMED AT 2:03 P.M.)

THE COURT: I apologize, counsel. I just had a meeting that ran over a bit.

Please continue, Mr. Foy.

MR. FOY: Thank you, My Lord.

We were in Chapter 7 at page 54 of the outline. And I'd just referred you to two decisions dealing with the application of the convention, review of -- for excess of jurisdiction. And I was -- I had gone from

identifying that as a ground for review, and had gone further to the -- to explain the application of the standard of review applied to that ground by the two cases to which I took you.

And I argued that both the Hong Kong Court of Appeal and the Saskatchewan Court of Appeal applied in reviewing that ground a standard of correctness to determine whether or not the matter fell within the scope of the arbitration clause and the jurisdiction of the arbitrators. In that -- in doing that, I was really foreshadowing the next Chapter, and I'll -- and I'll get to that in a minute.

I acknowledge that in the Parsons case, which is referred to in my materials, and in the Quintette case, there is in the private international commercial context -- there are, rather, in the private international commercial context decisions which refer to a presumption of jurisdiction in favour of the arbitrators and the need for the applicant to overcome that presumption of jurisdiction.

Those authorities are not mentioned in -- by the Hong Kong Court of Appeal or the Saskatchewan Court of Appeal. And -- but -- but I go on to add this: The -- one thing that has to be recalled when identifying the appropriate standard of review applicable to these specific grounds is that the Supreme Court of Canada's analysis in this country with respect to identifying that standard, the pragmatic and functional analysis, was an analysis developed after the Quintette case was decided, after these other cases were decided, and may today have to be applied by this Court to each and every one of these grounds of review that are open to -- with the Supreme Court of Canada's guidance, to identify what is the appropriate standard of review in each case. And I'll be getting to that in Chapter 8.

But I simply note at this stage that that analysis -- the Court of Appeal in Quintette may have been engaging in that analysis without -- without knowing it when they identified this presumption and the factors in favour of the restraints in judicial intervention, but it has to be revisited in light of those subsequent Supreme Court of Canada authorities.

Over the page on page 55 we identify an additional ground available to us under the international act, and that's the -- Section 34(2)(a)(v), that the arbitral procedure was not in accordance with the agreement of the parties.

We will be submitting that the tribunal failed to comply with Article 53 of the additional facility rules. And in subsequent -- Mr. Thomas will deal in detail both with the requirements of that article, 53, and the arbitral jurisprudence that interprets that requirement in a -- in subsequent portions of the argument.

Article 53 is quoted there and requires the arbitral tribunal to deal with every question submitted to that. There is jurisprudence from the ICSID annulment committees as to what the question means in that context and what the extent of that requirement entails. And we'll be taking you to those later.

The final ground available under this act, the international act, is the statement -- or the -- that the Court may set aside the award where it's in conflict with the public policy in British Columbia.

Now, you'll recall Section 6 of the act allows reference to the analytical commentary and the report of the United Nations in interpretation of the act. The report of the United Nations was -- deals with what was meant by public policy.

And again, you'll recall that this report was delivered after the decision in the Quintette case, and after earlier Model Law decisions on what the Model Law meant, and is perhaps more authoritative because the -- on what the convention jurisprudence meant, because this is what the group working on the Model Law intended to mean by public policy in including that.

And it's noted there in -- and I've quoted from the report, it -- you need not go to it in the -- in the materials, the following:

> "In discussing the term 'public policy' it was understood that it was not equivalent to the political stance or international policies of the State but comprised the fundamental notions and principles of

justice..."

"It was understood that the term 'public policy' which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording 'the award is in conflict with the public policy of the State' was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at."

The report of the United Nations therefore makes it clear that fundamental principles of law and justice were intended to be covered by this notion of public policy. There are of course -- the cases dealing with public policy in this context are of course private commercial inter -- arbitrations. And there's no decision dealing with the type of public policy concerns that are raised by a NAFTA Chapter 11 tribunal award.

And it may be that the notion of public policy or rather that the fundamental principles of law and justice involved differ in this context than they do in the private commercial context.

But even in the private commercial context we do have some guidance. And over the page on page 56 there's reference made to one of the Ontario decisions where there's a quote with respect to the Model Law. And the phrase that is most often repeated in the authorities is that one is justified in setting aside on this basis only where enforcement would violate the "most basic notions of morality and justice." You'll see that phrase referred to in U.S. authorities, referred to in other authorities, Canadian authorities, and it's quoted at paragraph 195.

You'll also see reference in the Ontario authorities that this ground does not permit the Court to reopen the merits of legal issues. And the -- the reason for that is the enforcement procedure would be brought into disrepute.

It's -- the public policy reason for that is -- is noted there:

> "...if this Court were to endorse the view that it should reopen the merits...on legal issues decided in accordance with the law of a foreign jurisdiction and where there has been no misconduct, under the guise of ensuring conformity with the public policy of this province, the enforcement procedure of the Model Law could be brought into disrepute."

And I just pause there to note that of course there again the context in which they're dealing with is the parties have chosen to apply a law other than the law of the -- other than a law applicable in the -- in the jurisdiction, the law of a foreign jurisdiction.

In the context of this case, we're dealing with the -- the NAFTA, which is not enforced as a domestic law in this jurisdiction but is a -- of a different character than purely foreign law. Investors in Canada, the United States and Mexico are entitled to the benefits of the NAFTA. And it may be that this particular reason is not a reason that would narrow review in the context of the instant case.

I -- I merely point that out, and I don't -- don't rest on it as -- as a basis for -- as necess -- a necessary basis for our application.

I turn though to some -- a case which I will rely upon, which is a decision of Mr. Justice Gonthier when he was sitting as a justice of the Quebec Superior Court, and that's referred to in paragraph 198. This was the first decision to consider the Model Law in Canada and -- and considered the meaning of public policy. The -- both the analytical commentary and the report to which I've referred were referred to by Justice Gonthier as permitted in that jurisdiction as well.

And an argument was made that primarily -- there were two arguments made to resist enforcement of this particular award, one dealing with the inadequacy of the reasons and an argument that -- this is at tab 44, I need not take you to

it, but at tab 44:

> "The absence of coherent and comprehensible reasons and the clear absence of applicable Quebec and Canadian law or, in other words, a patent and unreasonable error of law, each of which defects amounted to a breach of public policy."

Now, on the facts of that case neither ground was made out. And the passages to which I refer are recording the argument that was made, recognizing that it was open to the parties, but it wasn't made out.

But in the course of it, Mr. Justice Gonthier said this, at page -- paragraph 199, and I -- I'd emphasize this:

> "Counsel for the applicant recognizes that a simple error of law cannot justify setting the award because that would mean examining the merits of the dispute."

And that's really repeating the point that was made by the Ontario court in -- in the earlier case, in the case later in time but earlier referred to above.

> "Rather, he relies on a patent absence of applicable law, claiming that the effect of the award is to disregard the law and the parties' agreement. He seems to be invoking the notion of a patently unreasonable error, which Mr. Justice Beetz..." in the Blanchard case "...described as an abuse of authority amounting to fraud and of such a nature as to constitute a flagrant injustice. The Court of Appeal, quoted by Mr. Justice Beetz...had described as follows the error which it saw in that case: '[the arbitrator] committed an excess of jurisdiction by giving the facts an unreasonable interpretation: his award was totally lacking in reality and contrary to public order...'"

Now, in that passage Mr. Justice Beetz is -- and I -- and in referring to this passage in the context of the public policy ground for resisting enforcement, Mr. Justice Gonthier is in my submission treating as either an excess of jurisdiction or as amounting to contrary to public order an arbitrator who gives the facts an unreasonable interpretation in circumstances in which it's a flagrant denial of -- of justice. A patently unreasonable error, in other words, in my submission gives rise to both a loss of jurisdiction and results in the award being contrary to public policy.

And he carries on quoting -- continuing to quote from -- or finishing the quote from Mr. Justice Beetz.

> "'...[it] constituted a flagrant denial of justice...'. One may refer to the formulation of the Supreme Court in the Canadian Union of Public Employees..." case: "'Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?'"

Now, you'll recall I noted above my submission that Mr. Justice Gibbs in the Quintette case left open the issue of patently unreasonable error and the Shalansky test. In my submission Mr. Justice Gonthier has too left open in the context of the public policy issue patent -- patently unreasonable error. I -- I -- I, as I noted at the outset, add Mr. Justice Gonthier did not base a decision upon this; he did not refuse to enforce -- enforce in the circumstances of this case. But in my submission he left open the question of review for patently unreasonable error either as amounting to an excess of jurisdiction or as amounting to an award which is in conflict with public policy.

And in my submission he is identifying that one of the basic notions of Canadian justice, and therefore something that falls within the notion

of public policy in this context, one of the basic notions of -- of Canadian justice is review for patently unreasonable error.

He's referring to it in the context not just of jurisdictional error by administrative tribunals, but by consensual arbitrators and statutory bodies protected by privative clauses. And in our jurisdiction any of those bodies, subject to the pragmatic and functional approach that we'll get to, can be reviewed for patently unreasonable error, and I would include a Chapter 11 arbitral tribunal.

So that -- on that basis, I will be submitting that my arguments with respect to patently unreasonable error can either amount to excess -- a loss of jurisdiction or an award contrary to public policy.

Now, the next section deals with that pragmatic and functional analysis.

Your Lordship is familiar with the jurisprudence in this area. You have recently succinctly summarized it in the -- in the Beazer case, and I'm not going to spend a lot of time going through authorities that you're familiar with. But I will make some -- highlight some of the points in -- that we have summarized here.

Your Lordship is aware that this is a -- a flexible approach which is influenced very much by the context. It examines whether the specific exercise of power by the specific tribunal in the specific circumstances is something that can be justified or ought to be subject to review in order to -- so that the Court can balance its role in -- in maintaining the rule of law with the role of tribunals in deciding issues that are en -- entrusted to them. And you know the factors that are referred to in determining the scope of the review.

I'd just like to pause on one case on page 60. At the bottom of the page, in dealing with the correctness standard, I refer to the Rascal Trucking case. And I'd just for the moment refer to it briefly. It deals with review of a decision by a municipal council, the City of Nanaimo, and addresses the decision from two aspects, first of all asking the question: Did the municipality act within its jurisdiction? And then asking the

question: If it is within its jurisdiction, if it's in -- if this is open to it, did it in the exercise of that jurisdiction err?

And the decision involved was this: The -- Rascal was licensed to carry on a topsoil processing operation within the zoning of the -- the city. They got a licence to do that. They immediately moved a large quantity of topsoil to the site.

The municipal council, after receiving complaints from people who lived nearby, including senior citizens who lived in a -- in condominiums nearby complaining of dust and other annoyances arising from the operation, the city resolved that the operator was required to remove the topsoil and, if they didn't remove it, to -- the city would and -- and the operator would be required to pay the cost. They did so under a section of the Municipal Act allowing them to declare things to be a nuisance, certain things to be a nuisance.

Now, the -- the Supreme Court of Canada in the result held that the decision as to whether or not it fell within their jurisdiction should be reviewed on a standard of correctness. The decision of having found that it was within their jurisdiction to actually do it in response to the complaints of the citizenry was a matter that they would defer to and would only be interfered with a patently unreasonable error, but it took until the Supreme Court of Canada to find that out.

The -- at the trial level the Court upheld the decision in the municipality. Our Court of Appeal overturned it, saying it acted in excess of jurisdiction, went to the Supreme Court of Canada to find out that, no, they had -- they had done it correctly all along.

Now, compare that to this case and -- and the facts of this case. If Rascal was a Mexican investor, he should have, rather than challenge the decision of the municipality on domestic grounds as -- as falling within the jurisdiction or not of the municipality, he should have immediately gone to the NAFTA and complained that it's not clear to me whether the jur -- whether the municipality has jurisdiction in this case. That's a failure of transparency. The central authorities haven't cleared that up for me. I

have a violation of Article 1105. And on the Metalclad reasoning, it would appear that that argument would be available, if there -- if -- if Rascal had been a Mexican or U.S. investor.

Now, I point to that because that to me is -- is -- is not reasonable, and that the choice taken to review that -- to review this issue in the domestic courts under domestic law was the appropriate one. This is not a denial of fair and equitable treatment for there to be uncertainty as to the extent of a municipality's jurisdiction. It -- it happens all the time.

Now, so I -- I -- I refer to Rascal, not only for its guidance with respect to the correctness standard on jurisdictional matters, but also just for its -- what it might tell us about this kind of situation happening in -- in -- in Canada as well as in -- in Mexico. And I'll come back to that when I go through the facts in more detail to -- to draw the analogy.

Now, in pages 61 and 62 I've referred to the -- some of the cases with which you're familiar, including the CUPE case, which was referred to by Mr. Justice Gonthier in the navigation case, in the Model Law case.

And then in the next section I deal with the reasonableness simpliciter standard and the -- the Southam case. And then I get to the patently unreasonable standard set out in a number of cases. And I'd just like to emphasize a number of these passages at page 63.

In my submission the Supreme Court of Canada has affirmed that the enforcement of patently unreasonable decisions would violate basic notions of Canadian justice, and they've defined this standard in various ways.

Mr. Justice Bastarache in a recent decision, which I note he was dissenting the result but not on this point, said this:

> "...a decision is patently unreasonable if it gives to the section of an Act a meaning which the words of a statute cannot reasonable bear..."

And I recall to Your Lordship the Salansky -- Shalansky case, which used the same formulation in

the review of a consensual arbitrator, whether he gives to an agreement a meaning which the words cannot reasonably bear. And that was referred to and, I submit, left open as a ground for review by the Quintette case.

Then I've again referred to the CUPE case referred to by Mr. Justice Gonthier:

> "Did the board...so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it?"

You'll see in that formulation the interrelationship between jurisdictional error and this notion of ending up -- and having jurisdiction and losing it by reaching a patently unreasonable result.

In paragraph 218 I note that when determining -- or when reviewing for patently unreasonable error, it's often necessary to closely examine the factual and legislative record. And Mr. Justice Gonthier held that in the National Corn Growers case, saying:

> "In some cases, the unreasonableness of a decision may be apparent without detailed examination of the record. In others, it may be no less unreasonable, but this can only be understood upon an in-depth analysis."

Now, that's of the record. I -- I -- I understand that the -- at the end of the day one has to test the result against the standard of patent unreasonableness, but -- and not just the reasoning of the tribunal. But it's important that it is open to an applicant when embarking upon this analysis, and incumbent upon the Court, to in certain cases examine the record in some detail.

THE COURT: Isn't the phraseology in the later cases a somewhat probing examination?

MR. FOY: The next -- you've anticipated the next paragraph, My Lord, and where your judgment in Beazer is referred to -- and:

"The difference between 'unreasonableness' and 'patent unreasonableness'..." and in the "...reasonableness simpliciter..." standard "...which involves a 'somewhat probing examination,' Mr. Justice Donald stated that the review test for patent unreasonableness is whether the result is patently unreasonable, irrespective of whether there may be defects in the tribunal's reasoning..."

Now, I -- as I understand the authorities, they're -- the probing examination of the record may be required in both cases. But at the end of the day, for the patently unreasonable test to be satisfied it's the result that must be unreasonable, not simply the reasons for the result.

Now, I've also included beyond patent unreasonableness and -- references by Madam Justice L'Heureux-Dube speaking for herself in a case dealing with statutory interpretation and the concept of absurdity. And that goes beyond patent unreasonableness, and she explains why.

And I do that because in one of the international cases that we're going to get to, the tribunal -- or the -- I think it's the international court, uses the phrase "absurd" in context of something. And it may be that some of the findings in this case reach that level.

But it's -- on this spectrum of -- of standards, I think it is one that is also open to the Court to review from correctness to -- to absurdity. And she points out that it warrants judicial intervention pursuant to any standard of review, if -- if that -- that's the result.

Now, I summarize here on paragraphs -- page 66 some of the points I've already made.

A patently unreasonable decision may be one where there's an interpretation the words cannot reasonably bear. It may be one where the tribunal has failed to have regard to relevant evidence. It may be one where there's a finding of fact for which there is no supporting evidence, or a finding that is so contrary to the evidence that a reasonable person would not have made it, or it

may be one where important rules of procedure have been breached.

Now, a patent unreasonableness has also been considered in the context of remedies. The Supreme Court of Canada has held that a remedial order which is -- in which there is no rational connection between the order and the breach and the consequences of that breach may also amount to a -- to a patently unreasonable remedy.

Now, in the next section we deal with, very briefly, the factors that may be relevant in determining the standard of review in this case. I won't -- you've heard a lot of them already. This is not solely of interest to Metalclad and to Mexico, this -- this -- this proceeding. The nature of the question is not solely of a private interest; it's of interest to investors and to all the parties to the NAFTA.

The NAFTA espre -- expressly contemplates review, either by a national court or by an ICSID annulment committee. So there's no, quote, full privative clause in the -- in the NAFTA.

Of course tribunals are only entitled to deference when they act within the scope of their jurisdiction, and that's a factor here.

In terms of the relative expertise of this Court and the tribunal, in terms of the interpretation of the -- in terms of identifying the jurisdiction conferred by Chapter 11 of the NAFTA, that's a matter of the interpretation of that text. And I would suggest that this tribunal had no more relative expertise on that issue. There may be different issues depending upon the nature of the problem and specific grounds of complaint.

But at this stage, with respect to that one, certainly the -- the Hong Kong cases, the Saskatchewan Court of Appeal case, and in my submission the -- the correctness standard cases demonstrate that the -- the relative expertise is -- on respective questions of jurisdiction is -- there's no deference owed to an ad hoc tribunal of this type.

Now, I've taken you through those things. I will come back to the application of each of the standards -- I think it would make most sense -- and they're summarized at 69 and 70, but it would

make most sense in the context of each of the particular arguments made with res -- to the particular grounds of review under each of them. So I'll -- I'll come -- as I go through each of them, each of the substantive arguments, I'll be identifying what in our submission is the appropriate standard of review.

And that takes me to Chapter 9, the excess of jurisdiction in the treatment of Article 1105. And in my submission this is a jurisdictional error, alleged jurisdictional error, and ought to be approached on the basis of the standard of -- of correctness in terms of identifying and interpreting what Chapter 11 of the NAFTA has -- what jurisdiction has Chapter 11 conferred upon arbitral tribunals.

Mr. Thomas has already taken you through the difference between customary international law and conventional international law, and he's really covered paragraphs 238 and 239. I think he's act -- he's covered up until 242. Sorry, up to 240.

At 241 we note that, having identified the difference between -- the functional difference and substantive difference between customary international law and conventional law, we note that NAFTA does incorporate into the text of 1105 concepts that find their origin in customary international law, and the minimum standard of treatment obligation is the leading example.

And here we refer to Canada's statement on implementation. And you were referred earlier to both the U.S. and the -- Canada's statement on implementation, the U.S. statement of administrative action, the documents which were introduced at the time that the NAFTA came into -- into force. And Canada noted:

> "Article 1105, which provides for treatment in accordance with international law, is intended to insure a minimum standard of treatment of investment of NAFTA investors. This article provides for a minimum absolute standard of treatment based on long-standing principles of customary international law."

So in Canada's view the text of 1105 was intended to incorporate into this treaty the long-standing principles of customary international law, not the conventional treaty concepts of transparency, I would add and -- and make that point as we go along.

Now, Your Lordship in -- where -- is already aware, as I took you through the award, that the tribunal based its finding under Article 1105 on a failure:

> "...to ensure a transparent and predictable framework for Metalclad's business planning and investment..."

The tribunal referred to the provisions of Chapter 18, the NAFTA chapter that Mr. Thomas took you to and explained, sets out the conventional treaty obligations in the area of transparency.

In my submission in paragraph 21 the tribunal made it clear that its Article 1105 finding -- and in fact that the applicable law that it was applying to this arbitration was based in part on Article 1802, a matter outside its jurisdiction.

We argue here that in doing so there were two excesses of jurisdiction: one was to incorporate into 1105 a conventional obligation that is not otherwise there, and then to legislate in terms of that conventional obligation, going beyond the text of what the parties had agreed. And I'm -- I'll come back to that, because it's -- I'll make clear that it's an alternative submission.

We note in the footnote that Mexico is not -- on the -- on page 72, that we're not alone in reading the award this way. The -- the Deputy Secretary-General of the ICSID wrote of this award in a recent colloquium that was held in Washington. In commenting on the award, he said:

> "The award in the Metalclad case was the first to have applied the standard of 'fair and equitable treatment.' It linked that standard to the so-called 'transparency' requirements of the NAFTA. The standard was also linked by the award to principles of due process."

So there's an -- a commentator noticing the obvious, that -- when they say Mexico failed to ensure a transparent and predictable framework and they see a reference to Chapter 18, the linkage that this tribunal made when finding a violation of Article 1105.

Now, I note in paragraph 243 that one of the drafters of one of the precursors to investor-State treaties, this principal drafter of the model U.S. investment treaty upon which part of Chapter 11's modelled, stated that:

> "This standard of..." international law "...is a residuary in the sense that it governs only where no other treaty provisions are specifically on point."

That would make sense as part of customary international law. It's a minimum, absolute minimum standard not intended to apply where the -- where a treaty speaks to the -- to the issue in a -- in a different way.

It's -- I've said and Mr. -- Mr. Thomas has noted, it's pre -- it's the precursors of transparency in Article 10 of the GATT, and I won't repeat that here.

Mr. Thomas took you through the Free Trade Agreement and its treatment of -- of the transparency. And then in -- and he also referred you to paragraphs 246 and 247 where throughout the NAFTA you will find chapter-specific transparency obligations, but not in Chapter 11.

What you will find in Chapter 11 is simply the one reference out to Chapter 18 that Mr. Thomas referred you to in Article 1113(2), the notification requirements in the event of denial of benefits.

In our submission this tribunal within the scope of its limited jurisdiction could not and was not in -- was -- the parties did not consent to it passing on the transparency obligations of the NAFTA contained in other parts of the NAFTA, subject to Chapter 20, not Chapter 11, arbitration. We make the point that the parties didn't consent to giving these tribunals this jurisdiction.

Now, I want to take you to some other NAFTA

tribunal awards where the point that we're making has been recognized, and the first is at paragraph 251. And this is the first NAFTA award to be rendered under Chapter 11. It was started slightly after this one, but was completed before in Azinian v. The United Mexican States.

The tribunal -- and again, this is an unusual thing in the con -- context -- unusual, I think it's unheard of in the context of private commercial arbitration, but was considered appropriate in this context as -- it was noted by the tribunal that it was the first dispute to consider the merits of -- of these types of claim, and that it was important to go and elucidate first principles for the benefit of not just these parties but for other investors. Not -- not something you'd see an arbitral tribunal doing in the context of a private commercial arbitration.

The first principle upon which we rely is set out at paragraph 251 there, arbitral jurisdiction. Under Section B, and that's Section B of Chapter 11, is limited, not only to the persons who may invoke it, they must be nationals of a State signatory to NAFTA, but also as to subject matter. Claims may not be submitted to investor-State arbitration under Chapter 11 unless they are founded upon the violation of an obligation established in Section A.

If an investor filed a notice of claim in the form of this award and said we seek a finding of a violation of Chapter 18 as incorporated into Chapter 11, they would be going beyond the first principle. Claims may not be submitted unless they are founded upon the violation of an obligation established in Section A.

The tribunal went on to talk about a number of complaints that investors may have, but indicated that the NAFTA wasn't intended to deal with all the potential complaints that -- that investors may have, and -- and continued in the quote there:

> "NAFTA was not intended to provide foreign investors with blanket protections from disappointment in investments, and nothing in its terms so provides."

And at paragraph 84 in the last -- or in the -- the whole paragraph:

> "It therefore would not be sufficient for the Claimants to convince the present Arbitral Tribunal that the actions or motivations of the...[municipal council]..." in this case "...are to be disapproved, or that the reasons given by the Mexican courts in their three judgments are unpersuasive. Such considerations are unavailing unless the Claimants can point to a violation of an obligation established in Section A of Chapter Eleven attributable to the Government of Mexico."

Now, in that case there was concession contract between the municipal council and Azinian. And the primary complaints by the investor were breaches of the concession contract. Those matters had been taken to -- to the courts, and the investor had -- domestic courts, and the investor had been unsuccessful.

They then brought the claim -- brought a claim in the -- under the NAFTA. And on a jurisdictional grounds the -- the claim was refused, noting in paragraph 87:

> "The problem is that the Claimants' fundamental complaint is that they are victims of a breach of the Concession Contract. NAFTA does not, however, allow investors to seek international arbitration for mere contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes. The Claimants simply could not prevail merely by persuading the Tribunal that...[The Municipal Council]...breached the Concession Contract."

The complaint -- one of the fundamental complaints, at least as disclosed by the tribunal's award in the instant case, is they're

victims of an ultra vires act by the municipal council, an issue of domestic law.

This points out there's nothing in Section A of Chapter 11 which entitles the tribunal to consider simply whether an ultra vires act by a municipal council violates Chapter 11 of the NAFTA. It's a separate domestic issue.

And Azinian is pointing out that there's a different -- that the domestic level plane is a different plane than the international law plane, as Mr. Thomas was arguing. The two are -- are different. And so I'll come back to that when I get to their treatment of domestic law.

But I rely upon the approach taken by the Azinian trial to re -- restrict the jurisdiction of the tribunals to violation of obligations established in Section A of the -- of Chapter 11.

Now, this would be an appropriate time to take a break if Your Lordship -- or I'm prepared to carry on.

THE COURT: It's a little early, maybe another 15 minutes.

MR. FOY: Carry on.

The same point was made in the Ethyl case, the same jurisdictional point, and I note that at 255. There, there was a separate award on jurisdiction by that tribunal. And the point here, the consent point was emphasized where the tribunal said:

> "The fundamental jurisdictional issue here, therefore, is whether Canada has consented to this arbitration. It has two aspects, as the jurisdictional proceedings have underscored. One aspect is that of scope: is Ethyl's claim within the types of claims that Canada has consented in Chapter 11 to arbitrate?"

Now, the tribunal in that case went on to examine the claims as presented, and the notice of claim, the -- to determine whether it satisfied the requirements, and said, yes, it satisfied prima facie the requirements, and went on to take jurisdiction. But it emphasized in doing so that the claim must be within the types of claims that Canada has consented in Chapter 11 to arbitrate,

which claims those set out in Section A of Chapter 11 or based upon violations of Section A.

In another tribunal's decision, the decision in Feldman, the tribunal also addressed this point. And the quote over the page at 77 is important. Here the tribunal is noting the limits on its jurisdiction. It says:

> "The tribunal has taken due knowledge of the parties' respective allegations..." and observed "...and observes that its jurisdiction under NAFTA Article 1117..."
>
> Which Mr. Thomas took you to:
>
> "...which is relied upon in this arbitration, is only limited to claims arising out of an alleged breach of an obligation under Section A of Chapter Eleven of the NAFTA. Thus, the Tribunal does not have, in principle, jurisdiction to decide upon claims arising because of alleged violation of general international law or domestic Mexican law."
>
> And I would add, or other chapters of the NAFTA. It's limited under Section A, so:
>
> "...the Tribunal does not have, in principle, jurisdiction to decide upon claims arising because of an alleged violation of..."
>
> Other chapters of the NAFTA.
>
> "Both the aforementioned legal systems (general international law and domestic Mexican law) might become relevant insofar as a pertinent provision to be found in Section A of Chapter Eleven explicitly refers to them..."
>
> And you'll recall that in Section A of Chapter 11 there is reference out to Chapter 15, to two articles in Chapter 15, explicit reference out. And in Article 1113 there's explicit reference out to Chapter 18, but not in 1105 and

not in 1110. So that might become relevant, where there's explicit reference to it -- to them:

> "...or in complying with the requirement of Article 1131...that 'A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.'"

Now, of course Mr. Thomas has taken you through that language already. And "in accordance with this agreement" means, in my submission, in accordance with the agreement set out in Section B of Chapter 11, the agreement that which is consented to arbitration are those violations of Section A and only those violations of Section A. It would be a violation of this agreement for a Chapter 11 tribunal to turn itself into a Chapter 20 tribunal.

It goes on:

> "Other than that, the Tribunal is not authorized to investigate alleged violations of either general international law or domestic Mexican law."

Now, I'll come back to the Mexican domestic law point when I get to that aspect of the award. The -- and I'll come back to the Waste Management case, so I'll leave that reference at the moment.

Feldman went on to find that insofar as Chapter 11 was concerned there was a temporal limitation as well. And in dealing with that temporal limitation it -- it makes a general statement, and it says this:

> "The reliance of the Tribunal on alleged violations of..." chapter "...of NAFTA Chapter Eleven Section A also implies that the Tribunal's jurisdiction ratione materiae becomes jurisdiction ratione temporis as well. Since NAFTA..." and a partic "...and a particular part of NAFTA at that, delivers the only normative framework within which the Tribunal may exercise its jurisdictional authority, the

scope...the scope of application of NAFTA in terms of time defines also the jurisdiction of the Tribunal..."

Now, I emphasize:

"Since NAFTA, and a particular part of NAFTA at that..."

That is Section A of the -- of Chapter 11 of the NAFTA:

"...delivers the only normative framework within which the Tribunal may exercise its..." jurisdiction.

Now, at the top of page 78, I've referred you to the Hong Kong case, which I've already quoted to you in -- which, in my submission, is analogous. The tri -- tribunal in our case was not entitled to ignore these restrictions on its jurisdiction.

The -- these words, the -- the restriction in Section B to only claims arising under Section A, are words of restriction; they limit the jurisdiction of Chapter 11 tribunals. And the tribunal -- neither the tribunal nor the Court's entitled to ignore those words.

THE COURT: Your submission, as I understand it, is that the tribunal, in essence, found a breach of Chapter 18 and it didn't have the jurisdiction to do that, and therefore there's an excess of jurisdiction and this Court can then interfere.

But isn't there another way of looking at the tribunal's award, is that they -- they interpreted Section 1105 and, in particular, the fair and equitable treatment requirement, and they didn't find that there was a breach of -- of Chapter 18 but instead interpreted the phrase "fair and equitable treatment" in a manner which they thought was consistent with NAFTA overall, which included some transparency aspects? So that they weren't necessarily deciding that there had been a breach of Chapter 18, but instead they found that there was a breach of Chapter 11 as they interpreted?

MR. FOY: My Lord, I would say no for -- for two

significant reasons: one is to note that in identifying the applicable law that they applied to that question they identified portions of Chapter 18. So that's what they did, first of all.

Secondly, they failed to distinguish between the substantive difference in the nature of those obligations. We've started out this argument by pointing out that the fair and equitable treatment standard contained in Chapter 11 is a standard based on customary international law, not conventional law. And to go to a conventional treaty obligation to inform the content of customary international law, again to go outside Chapter 11, to inform the content of -- of that is -- is in our submission jurisdictional error.

It's -- and it's not simply a matter of nomenclature. You can't just call it a breach of Chapter 11 on the reasons that this tribunal has given, and therefore cloak it with the jurisdiction that you otherwise don't have.

It's clear from their reasons that the gravamen of the complaint that they said was -- had been made out was a lack of clarity, a lack of transparency. They didn't refer to any customary international law with respect to that obligation; they referred to Chapter 18.

And it -- in my submission it's -- they can't make it into a violation of Chapter 11 simply by, at the end, making a conclusion that this amounts to a violation of -- of Chapter 11. It -- it has to -- when they -- when that conclusion is based upon the introduction of the requirements of another chapter.

And we went through in detail the -- the provisions of the decision in which -- the number of times in which the tribunal notes that Mexico failed to ensure a transparent and predictable framework. Well, they find that in Chapter 18; they don't find that in Chapter 11.

And it's -- although you might say technically they didn't find a violation of Chapter 18, but that's a mere matter of nomenclature. The substance of the -- and -- of their finding was a violation of Chapter 18, not Chapter 11.

And I don't think they can just call it that

at the end of their reasons in their one paragraph, this amounts to violation of Chapter 11, and give themselves the jurisdiction to step outside Chapter 11.

THE COURT: Go ahead.

I'm just wondering, were -- were you about to start Section B on page 78?

MR. FOY: Yes.

THE COURT: Maybe that would be an appropriate time to take the break then.

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

(AFTERNOON RECESS)
(PROCEEDINGS ADJOURNED AT 3:00 P.M.)
(PROCEEDINGS RESUMED AT 3:12 P.M.)

THE COURT: Yes. Please continue, Mr. Foy.

MR. FOY: Thank you, My Lord.

My Lord, I -- I'm going to come back to your question after we've spent some more time in the context of identifying the rules of customary international law which are incorporated into Chapter 11. Article 110 -- and -- and I think my answer to your question will become fuller when Your Lordship is -- has been advised of the -- of the content of those -- of those obligations.

The treatment in accordance with customary international law, fair and equitable treatment, is in a -- is a -- incorporates -- or has a content, a set of rules, that have crystallized over many years of international law, and of customary international law.

National treatment, which is referred to in the preamble to the NAFTA; most-favoured-nation treatment, which is referred to in the preamble to the NAFTA; transparency, none of those are rules of customary international law. You don't -- you can't pour content into the notion of customary international law by a reference to treaty concepts which have no existence other than in the context of the individual treaties.

So just as -- and if -- if the Metalclad tribunal is correct, it would be open to them to go to treaty concepts of most-favoured-nation treatment to inform fair and equitable treatment, and that would be inappropriate. And in --

particularly it's inappropriate to inform rules of customary international law by reference to treaty obligations.

Just -- my friend Mr. Thomas referred to the Broom Corn Brooms case. If this -- if this tribunal's approach was taken, they would be asking, well, was it fair and equitable for the United States to restrict the importation of -- of brooms inconsistently with its obligations under Chapter 8 of the NAFTA, and conclude, well, we think it's unfair and inequitable for the -- for them to do that, therefore there's a violation of Chapter 11. That would amount to an excess of jurisdiction.

And it's no different in -- by importing the -- a -- a res -- a pure trade treaty obligation like a restriction on imports, specific restriction, and the importation of a transparency obligation into this customary international standard of -- of fair and equitable treatment.

If it were the case, then any other chapter of the NAFTA could be poured into the content of the language of 1105, and a tribunal conclude, well, we've concluded that that's not fair and equitable treatment under Chapter 11. And as we will elaborate, that is not the jurisdiction that's been conferred by -- upon Chapter 11 tribunals.

And there are arguments in other Chapter 11 cases which are focusing on not just the question of whether or not you -- one can go outside Chapter 11, but whether or not one can even go outside the provisions of 1105 to 1102, or go outside the -- the specifics of one section of Chapter 11 to another to inform your jurisdiction. And -- and I'll be getting to those in due course.

And I was tur -- turning to point B on paragraph -- or page 78. And I wanted to note, as we discussed yesterday, that this aspect of the argument is alternative. The primary submission is that the tribunal should not be going to the transparency obligations. And if we're correct in that, then we shouldn't be going to them now.

But we -- we do this -- so we do this in the alternative to this first submission, and to argue that if they were entitled to go to Chapter 18 and

the transparency obligations, they were not entitled and were granted no jurisdiction to legislate transparency obligations that the parties had not agreed to. And that's the primary point that's noted starting at paragraph 78.

And in my review of the -- or page 78.

In my review of the award, I have noted some of these points already. One is the transformation of the language of Article 102, which says increase substantially investment opportunities into an obligation to ensure the successful implementation of investment initiatives.

That's one of the mistakes that the tribunal made in starting to discuss its views of the notion of transparency. Nothing in the text speaks of ensuring successful implementation of all investment initiatives. Opportunities are to be increased, but the NAFTA doesn't guarantee implementation.

Now, in paragraph 266 I've noted the paragraph 76 of the tribunal's award, which I've already taken you through. And the text of the -- the duty that this tribunal has imposed upon central authorities, or central government in their view, to ensure a correct position is promptly determined in respect of all -- any aspects of the law that an investor -- foreign investor may face for the purpose of initiating, completing and successfully operating an investment.

Now, I think the tribunal combined this obligation of ensuring results, or this misstatement of Article 102, with this -- this notion of transparency to get to the duty that they -- that they imposed. But I argue that it finds no place in the -- in the text of -- of the transparency provisions of the NAFTA.

Mr. Thomas has taken you through Article 1802 and 1805. There's the publication requirement. There's the requirement to make judicial, quasi-judicial and administrative tribunals available. None of that, none of what's been agreed to by the parties includes this duty to go beyond and remove all doubt or uncertainty in any of the levels of -- of laws of the -- of the three levels, including constitutional uncertainties

that may arise in conflicts between different levels of government.

The -- in paragraph 271 I note that the -- the -- the requirement to make available judicial remedies is -- is important because there were judicial remedies available in this case in respect of the -- the permit denial and the constitutional issue that -- that Metalclad faced.

The tribunal in its award makes no reference to the fact that those remedies were initiated and then later abandoned in favour of negotiations with the municipality. And this is an important oversight when considering whether or not the transparency obligation of the NAFTA had been satisfied.

The provision to make available remedies requires an examination of the remedies. What remedies are available?

This tribunal made no mention, not only of the existence of the remedies, but of the fact of the exercise of those remedies, other than that one footnote to which I referred, which I'll -- I'll be coming back to.

In paragraph 272 I just refer to trite authority that in the -- in the international context about tribunals having no authority to legislate new obligations. And I think it follows from all of the -- would follow in the private commercial context in -- in -- in any of the contexts of which we're talking about in arbitral tribunal. And so we argue that the tribunal had no jurisdiction to add to NAFTA's transparencies obligations.

And in Part C of this section we elaborate upon the tribunal's failure to have regard to the domestic remedies and the juridical facts that existed as a result of the -- of the exercise of those remedies. And I detail in paragraph 274 just exactly what happened. And I'll be taking you to -- when I get to the review of the -- brief review of the facts, I'll be taking you to the documents that demonstrate this. But the facts is that the -- that the -- the -- the crucial fact, that the proceedings were initiated then later abandoned, was admitted.

So although not mentioned in the award, when

the municipal permit denial was confirmed, there -- you'll recall there was the original denial in December of 1995. There was an application for reconsideration. The municipality refused that application for reconsideration. At that stage Metalclad commenced domestic legal proceedings, what's called an Amparo challenge, in the Federal Court.

Now, under Mexican domestic law, it was required to exhaust remedies before the State administrative tribunal. And properly, the Amparo court determined that Metalclad had -- was in the wrong court. It was as if the -- in British Columbia one had gone to challenge a decision of a -- a federal tribunal subject to the exclusive jurisdiction of the Federal Court, and it sought to bring that challenge in -- in a provincial superior court of another province, or something like that. And -- and the -- the -- the complaint was rejected.

Now, in declining to hear the complaint as falling outside of the jurisdiction, the Federal Court didn't get into the merits of the complaint. It was -- it was dealt with on -- on jurisdictional grounds.

Metalclad filed an appeal from that to the Supreme Court, but later abandoned the appeal in favour of negotiations with the municipality. And I'll take you to the admission that demonstrates that.

Now -- so the merits of the complaint were not considered by the domex -- Mexican domestic courts, but as a juridical fact. The permit denial was -- insofar as Mexican domestic law was concerned, was upheld. That was a juridical fact.

And on the facts therefore -- and I'm over at page 82. On the facts therefore that were in front of this tribunal, the permit denial was a matter -- as a matter of domestic law was lawful.

Now, the first time it appears as a -- and I won't call it as a juridical fact, but it appears that this was improper in Mexican domestic law, was the tribunal's own finding of impropriety in the tribunal's view of Mexican domestic law. That was not a juridical fact. The juridical facts were ignored. And instead, this tribunal,

considering itself to be a Mexican domestic court, weighed into the issue of Mexican domestic law and considered that in its view this was -- this permit denial was improper as being ultra vires the municipality's jurisdiction.

The -- I want to make clear, the legality at domestic law or the illegality at domestic law is not determinative of whether there's been a violation of international law. Those two are separate inquiries. Something may be legal in domestic law and illegal at -- at -- at the -- on the international plane. And it may be -- the opposite may be the case as well; it may be illegal at domestic law and not amount to a violation.

But the fact remains that in examining whether or not international law has been violated, tribunals of this type explore the issue not as domestic appellate courts substituting their views for juridical facts, but rather they -- they accept the juridical facts and then ask: Does that amount to a violation of international law?

This tribunal didn't do that. Rather than -- and in fact they ignored the -- the juridical facts. That in itself is a usurpation of the jurisdiction of those domestic courts and is an inappropriate -- and is an excess of jurisdiction by this tribunal.

And I recall Your Lordship -- I took you to tab 7 of the red brief where I took you to both the opening and closing statements of claimant's counsel and the statements by Mexico's counsel where it appeared to be agreed that the tribunal was not sitting as an appellate Mexican domestic court. But in my submission, reviewing the reasons of the tribunal, it's clear -- and I -- and I did that in some detail in the introductory comments, it's clear that the tribunal considered itself -- considered it open to it to consider questions of Mexican domestic law and then, having found a view of Mexican domestic law, without further inquiry, elevated that to a violation of international law.

Now, in a transparency context, if the obligation that we were concerned with was transparency, in my submission what the tribunal

should have done was this, was to say there's lack of clarity in that -- in the -- alleged with respect to the extent of jurisdiction of the municipality. Does that amount to a violation of transparency?

That question can only be answered by reference to whether or not there exists remedies available to remove a lack of clarity. Are there domestic remedies available to foreign investors whereby that issue can be resolved? If the answer is yes, then the transparency requirements of this agreement have been satisfied.

Now, if you're examining customary international law and the obligation of fair and equitable treatment in this context, you'd be asking yourself the question not whether it was transparent, because that's another chapter; you'd be asking yourself the question was there a denial of justice to this foreign investor? And again, the inquiry would focus on: Was there a remedy available too, or was that remedy denied access to this investor to deal with the refusal by the municipality of the permit?

Now, the juridical facts are clear. The remedy was available, the remedy was exercised, and the remedy was abandoned in favour of negotiations with the municipality.

The tribunal didn't refer to any of that, it asked instead had the municipality acted lawfully in its view, the tribunal's view, of Mexican domestic law?

And I want to take you to some tribunal decisions which demonstrate that this is in -- approaching an excess of jurisdiction and inappropriate. And the first I'd refer you to is back -- is in paragraph 284, back to the Azinian tribunal, and I mentioned it previously.

It examined the basic approach taken in international law to the review of domestic issues when those issues are the subject of decisions by domestic courts. The -- you'll recall there was an alleged breach of a concession contract. The investor had sued in the Mexican courts with respect to the alleged breaches of that and had been unsuccessful.

We therefore had decisions of the Mexican judiciary bearing on the subject. It wasn't just

the municipal -- it wasn't just the municipal -- alleged municipal breach of the concession contract, but review of those things by the judiciary. Just as in this case, we didn't just have as a fact the denial by the municipality of the permit but review, at least on jurisdictional grounds, of that decision, and that review dismissed. So that a juridical fact was that this decision stood in Mexican domestic law.

International law poses a strict test for finding that the acts of judiciary attract international responsibility. The Azinian tribunal said the fact that there may be some responsibility:

> "...does not...entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seized has plenary appellate jurisdiction."
>
> It noted:
>
> "This is not true generally, and it's not true for the NAFTA. What must be shown is that the court decision itself constitutes a violation of the treaty."

Now, there was no inquiry in this case as to whether or not the denial -- dismissal by the Amparo court of this application was itself a violation of the treaty or that there had been any other denial of justice to Metalclad. Metalclad's own act was to abandon that -- that proceeding voluntarily.

> "Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the...of the Concession Contract..."

So there's a -- even if, as a matter of Mexican domestic law, the tribunal were satisfied of that:

> "...this would not per se be conclusive as

to a violation of the NAFTA. More is required; the Claimants must show either a denial of justice, or a pretense of form to achieve an internationally wrongful end."

Now, this is in the context of a -- of an Article 1105 claim for denial of justice for that minimum standard afforded to foreign investors at customary international law.

Judicial decision has been made. It's not enough for you to show that it's wrong, and it's the same with the decision by a municipality. It's not enough to show that a -- an incorrect decision has been made, you must show a denial of justice.

The same principle was addressed in the decision of the International Court of Justice in the Barcelona Traction case, and that's referred to at paragraph 285.

And here, in dealing with a number of complaints made by the claimant in that case, complaints concerned primarily with matters of domestic law and interpretation of domestic law, and provisions of Spanish private international law on the jurisdiction of the Spanish courts, the -- the International Court of Justice says this:

"Questions relating to these matters are of an extremely complicated and technical nature..."

And I'd -- I'd recall the Rascal case, that it was required to go all the way to the Supreme Court of Canada to determine whether or not, as a matter of Canadian law, the municip -- the municipality in that case had jurisdiction to declare this dirt pile to be a nuisance, involving a number of technical issues.

"...they are highly controversial and it is not easy to decide which solution is right and which wrong."

Again, in the Rascal case, there was the decision of the Court of Appeal which was right for a while, and then the decision of the Supreme

Court of Canada.

> "Even if one correct solution could be reached, and if other contrary solutions could be decided to be wrong, we cannot assert that incorrect decisions constitute in themselves a denial of justice and involve international responsibility.
>
> "In short, since these issues are of a technical nature, the possible error committed by judges in their decisions cannot involve the responsibility of a State."

And in my submission it's no different with respect to the possible error committed by the municipality, I'll defend their jurisdiction, but even if their decision was incorrect.

> "That the above-mentioned doctrine precludes such an error from being a constituent element in a denial of justice as an internationally wrongful act is not difficult to understand from other viewpoints also. The reason for this..." that these "...is that these issues are of a municipal law nature and therefore their interpretation does not belong to the realm of international law. If an international tribunal were to take up these issues and examine the regularity of the decisions of the municipal courts, the international tribunal would turn out to be a 'cour de cassation,' the highest court in the municipal law system. An international law tribunal, on the contrary, belongs to a quite different order; it is called upon to deal with international affairs, not municipal affairs. Now, as we have seen...the actions and omissions complained of the Belgian Government, so far as they are concerned with incorrectness of interpretation and application of municipal law, cannot constitute a denial of justice. This means that in itself the incorrectness of a judgment of a municipal court does not have an international

character."

And you'll recall the reasons of the tribunal in this case. When they dealt with their view of the -- what they called the propriety of the municipal permit denial, their analysis was restricted entirely to questions of municipal law. They looked at the federal law involved. They didn't look at all of the laws. They didn't look at the constitution and they didn't look at the municipal laws. But they looked at issues of a municipal law nature and concluded that the municipality had, by taking into account environmental considerations, acted in excess of the jurisdiction which they'd consider was restricted to matters of a construction nature.

Now, they did not go beyond that to provide any analysis as to how that amounted to a denial of justice to Metalclad. They did not examine how, in the face of the availability of domestic legal remedies to redress matters of excess of jurisdiction, how the initial decision of the municipality, subject to review, could amount to a denial of justice. They simply found that -- their view of a violation of domestic law and equated it with a violation of international law. And in my submission they again exceeded their jurisdiction in doing so.

And I -- I've already quoted the Feldman award, and I quote it again here. The tribunal does not have in principle jurisdiction to decide upon claims arising because of an alleged violation of domestic Mexican law.

The -- and it's related -- it may be related to the question Your Lordship asked me before the break, but you can't simply call it a violation of Chapter 11 or 1105 with -- when what you have identified solely is a violation of Mexican domestic law or an incorrect application of Mexican domestic law without this further inquiry.

And on the face of their reasons it is manifest that the further inquiry was not made. And the -- one of the reasons for that is because it's manifest that they did not consider the existence of -- or the effect of the exercise and later abandonment of domestic remedies with

respect to the very issue.

I'm going to be taking you to decisions that consider the circumstance in which, even where the domestic court has found the action complained of to be illegal at domestic law, that does not without more analysis amount to a violation of international law. And I'll be -- I'll be coming back to that point.

But in this case the juridical facts were that the -- insofar as Mexican domestic law was concerned the permit denial stood as lawful.

And I note that -- in paragraph 288, that if the tribunal had been asking itself the correct question, what it would have asked was whether or not there was a denial of justice to Metalclad by virtue of the -- an alleged act of in excess of jurisdiction by a municipality, or whether or not there were remedies open to the investor to -- to deal with that issue.

Now, on -- it's important that, as I've mentioned, that the -- at the international law level no international tribunal is bound by the findings of the domestic courts as to matters of international law. But they are bound to have regard to the juridical facts that are in front of them. And they are not entitled to insert themselves as a -- an appellate domestic court to change those juridical facts.

The tribunal did not examine whether just the law itself violated NAFTA, whether or not the imposition of a requirement for a domestic permit for someone who seeks to build a landfill violates the NAFTA. That might have been a relevant question to ask. Instead, they asked whether this -- this municipality in the exercise of this particular decision had somehow exceeded their jurisdiction at Mexican domestic law.

And in that, they also didn't ask whether or not, if that occurs, if there's an incorrect decision at the very first level of decision-maker, whether that amounts to a denial of justice.

Now, the ELSI case is a case referred to at page 86 which does address that aspect of -- of the -- that aspect of the question that faces this tribunal. And I note that -- and Mexico referred to -- this case to the -- to the tribunal, and it

wasn't referred to in the award. But you'll see -- and I've noted at pa -- paragraph 293, but the quote is at paragraph 298. At paragraph 298, I just take you to it, My Lord.

In that case there were a number of juridical acts. There were a number of acts alleged to have been illegal in events leading to what eventually caused the bankruptcy of a company, acts involving requisition of the site, other decrees by the mayor, a number of which were reviewed in the courts, some of which were found to be illegal in domestic law.

But the ELSI tribunal said, in dealing with whether or not international law was violated as a result, this:

> "...it must be borne in mind that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. ... It would be absurd if measures later quashed by higher authority or a superior court could, for that reason, be said to have been arbitrary in the sense of international law."

And I'll go back to paragraph 294 to note the prevalence of jurisdictional disputes in environmental matters, particularly where new laws are involved. Uncertainty on these matters and judicial proceedings in respect to these matters are -- are commonplace.

I'd like to take you to a -- a decision that is presently before the Supreme Court of Canada which has some bearing on -- or some similarities to the situation in the instant case, and this is a decision at tab 1 of the authorities. And this case arises out of Quebec in which a municipality introduced a pesticide ban in 1991. It's a Montreal suburb of Hudson, Quebec, passed a bylaw banning chemical pesticide use for cosmetic purposes, lawn care purposes.

Now, two companies were prosecuted under the bylaw, Spray-Tech and Chemlawn, for violating the ban on spraying residential properties. The companies claimed the bylaw exceeded the

tribunal's jurisdiction, the -- the town's jurisdiction, the municipality's jurisdiction. And the municipality argued that it was authorized under the general welfare provision of the Quebec Cities and Towns Act. And both the Quebec Superior Court and the Quebec Court of Appeal ruled in the -- in the municipality's favour. And the case that has gone on to the Supreme Court of Canada was heard in December and judgment is under reserve.

The first judgment is found at tab 1 and -- the judgment of Mr. Justice Kennedy of the brief of authorities. And he refer -- he -- he refers to the facts that I've just noted, and says this at page 5 -- and I should add that the -- one of the premise of the complaints was that the pesticides were regulated both at the federal and provincial level, already regulated, and therefore that this was -- couldn't be regulated by the municipality. And he says at paragraph 34:

> "The town council was faced with a situation involving health and the environment. They chose to deal with this by enacting bylaws. The council acted in the public interest in virtue of inherent powers given them by the act, primarily in provision of Section 4(10). The town council in enacting these bylaws was addressing a need of their community. They made a political decision. They saw a situation concerning the health, general welfare and improvement of the municipality."

And I'm going to ask you to recall those words when I take you to the jurisdiction of the Municipality of Guadalcazar:

> "In so doing, the town council did not act beyond the powers given to it under the Cities and Towns Act. The town council is recognizing a current apprehension in the citizens in respect of health and the environment. Twenty years ago there was very little concern over the effect of chemicals, such as pesticides, on the

population. Today we are more conscious of what type of environment we wish to live in and what quality of life which to expose our children."

Now, the -- imagine the situation in -- when this -- if Spray-Tech and Chemlawn were Mexican or U.S. investors, and the bylaw was passed and they were prosecuted under it, or their investment in the sale of those pesticides was somehow affected, the economic benefit was affected. Would they have a claim immediately under the NAFTA by reason that -- of their allegation that the municipality had exceeded its jurisdiction? And would the tribunal hearing that be entitled to ignore the views of the domestic courts on that issue, entitled to ignore the juridical facts of having the -- the availability of domestic remedies and whatever domestic remedies there might exist? Would that in itself be a denial of justice, a denial of fair and equitable treatment under Article 1105?

In terms of transparency, as this tribunal has injected that requirement into Article 1105, the fact that this is in front of the Supreme Court of Canada and unresolved suggests a degree of uncertainty. We don't know whether the municipality will succeed in defending that aspect of its jurisdiction. Other municipalities in Canada have -- because of the risk, they've asked provinces to amend municip -- provincial law to provide expressly for the jurisdiction to regulate pesticides in this context.

And I -- and I refer you to an article at tab 103 of the secondary sources, 103 of the secondary sources in which -- this is just a short article which notes both the Hudson case, which I've been referring to, and a situation in Halifax. And it's noted on the right-hand column, halfway down the -- the page, in the third paragraph from the bottom, starting at press time, in the second sentence:

"A key issue is whether a municipality can impose a bylaw on a substance already regulated by both federal and provincial law."

Well, that sounds quite familiar to the situation facing Metalclad.

"It's noted the federal government is responsible for approval and registration of pesticides under the Pest Control Products Act. The provinces and territories regulate the sale, use and distribution of pesticides within their boundaries. Halifax has taken steps to pre-empt legal challenges like that facing Hudson. We are of the opinion that, rather than rely on general Municipal Act provisions for bylaws concerning health and safety issues, we would be in a better position legally..."

And that's domestically legally.

"...if we approached the province for specific aid in legislation."

But I just -- is -- is the town of Hudson in violation of the NAFTA and the town of Halifax not because one has sought to rely upon the general language enabling that municipality to have regard for the protection of the environment and the health and welfare of -- of the citizens, as referred to by Mr. Justice Kennedy?

In -- in my submission all of these issues are issues of municipal domestic law, and none of them rise to the level of violation of the NAFTA or violation of international standards.

In my submission the domestic courts, the Supreme Court of Canada in the case of the Hudson case, the Halifax courts in the -- in the other case are the appropriate courts to be dealing with those domestic law issues.

And again, dealing with the -- the question of transparency and -- and the duty that was imposed by this tribunal in the area of environmental legislation, I note the cases at page 87 -- or the case at page 87 in which the Supreme Court of Canada in the Ontario and Canadian Pacific case considered a charter challenge to the vagueness of environmental

legislation. But the legislation in that case prohibited pollution of, quote, the natural environment for any use that can be made of it.

And a charter challenge was brought. That was in the Environmental Protection Act of Ontario. I -- I -- I would ask you as well to recall that language when I take you to the language of the municipal legislation and the permit application in Guadalcazar.

But the Supreme Court of Canada noted that in this particular area, environmental legislation, legislators have preferred to take a broad and general approach. For a number of good policy reasons, environmental protection legislation has been framed in a very broad manner, and interestingly -- and -- and they quote the -- the reasons for that.

And interestingly, they -- they refer to, in the course of that, in the paragraph in the middle of the page:

> "Recent environmental disasters, such as Love Canal..."

I recall for Your Lordship that the amount of toxic waste contaminating Love Canal was the same amount, 20,000 tonnes, as contaminating the site at La Pedrera. That contamination led to understandable resistance from the local community with respect to the introduction of any new hazardous waste prior to the remediation of that environmental disaster as far as they were concerned.

Environmental protection is a legitimate concern. And in our -- in -- in Canada, the -- some uncertainty as to the scope of environmental legislation, the restraints that you're under, language like "the natural environment for any use that can be made up" has been justified.

My point is -- is not that -- which law is -- domestic law is correct, but to merely point out that in this area, and particularly in the area of new laws in this area, it is commonplace for investors, foreign and domestic, to expect some uncertainty in the application of law, and to expect that there may be the need for litigation to resolve some of that uncertainty. And the

question is not whether there's some duty on the central government to eliminate all doubt or uncertainty as was imposed here, but whether or not there's a mechanism available to resolve that uncertainty, which is open to the domestic investor, or are they denied access to those mechanisms? That's the relevant question.

This tribunal stopped at its view of Mexican domestic law and its view of this obligation to remove doubt and uncertainty to exceed its jurisdiction.

And I've taken you to the -- to the quote at the bottom of page 88, the ELSI quote. ELSI is like this case in one respect, in that there were domestic court findings in that case. The findings were of illegality. Those were not -- at some levels, and legality at other levels. Those findings were not revisited by the tribunal, not reinterpreted or appealed. What they were -- do is they were recorded and accepted as juridical facts. They were not ignored as the -- as was in the case -- in this case.

The ELSI tribunal also went on to consider as a separate question of fact another issue which had not been considered by the -- by the local courts, the Italian courts, and that was whether or not ELSI ought to have -- before it came to the international court, ought to have made a treaty argument in the domestic courts.

And the tribunal looked at that and said it's a question of fact. Well, wouldn't -- domestic proceedings, that wasn't available to it. So it looked at a question of domestic law as a matter of fact. But in the course of doing that, it didn't ignore all the juridical facts and the juridical steps that had been taken, and it didn't institute itself or insert itself as a -- as an Italian appellate court to -- to review domestic issues.

And I point out in paragraphs 300 and 301 the -- that in international law the normal course is for there to be a requirement to exhaust local remedies before even coming to your State, to ask your State to espouse your claim.

The direct acc -- access that's allowed under Chapter 11 does not entirely eliminate this requirement. And I'll be saying more about

Article 1121 of the NAFTA and what it permits investors to do. But I simply end at this section by pointing out that international responsibilities lies on a different plane than domestic responsibility, and that for this tribunal to find simply a violation of Mexican domestic law and -- and assume that that in itself constituted a violation of the treaty was itself a -- an act in excess of jurisdiction.

And this would probably be an appropriate time to -- to take a break.

Just one last thing, and I -- I haven't had the opportunity to speak to my friend Mr. Cowper about this, but you asked about timing.

THE COURT: Yes.

MR. FOY: And I'm in a bit better position to make two comments with respect to timing.

The -- we are behind schedule because of the delays that occurred at the outset.

We're behind schedule in another way, in that I haven't received any argument from -- written argument from my friend with the exception of the portion that has been -- has been handed up.

The result of that is simply that I haven't been able to consider the preparation of any reply. It -- it was -- it was hoped -- we had provided our argument January 22nd. It was hoped after three weeks we could have gotten something back, but I understand we haven't got that. And -- and that will mean delaying the preparation of any written reply. And I -- I won't be able to do it during the course of the hearing without seeing what -- what my friend has -- has said.

And so it's likely that, given the delay in the starting and given where we are in the proceedings, that it may be that finishing at the end of next week and then allowing us an opportunity to prepare a written reply and come back would be the most convenient way of proceeding.

Now, I know Your Lordship said that there might be days the next week. I -- it may be that it would be preferable for counsel to come back tomorrow with their calendars and -- and Your Lordship's calendar to see whether or not that is the case, or some other date. But that -- that's the comment I have. And I -- as I say, I

haven't had a chance to discuss this with my friend Mr. Cowper.

MR. COWPER: Well, I haven't had a chance to discuss it with my friend, and I'm content to do that. I suggest rather than me responding on my feet that we do that overnight and address Your Lordship tomorrow morning on it.

THE COURT: All right.

MR. COWPER: I should say my -- my understanding of what Your Lordship asked us to do was to get all of this done in the next two weeks, and we've been endeavouring to do that. I'll talk to my friend about the state of -- of our written argument. And we -- we -- my instructions are to conclude as quickly as possible the entire hearing.

I don't care whether I get a written reply or not. I'm endeavouring to reply to the arguments, which are certainly different in character than I originally thought they were, but we're doing that, and we'll do that certainly as soon as possible.

I've given my friend, as -- when we were before you last, he asked for installments, and I've given installments when they've been available. And I think tomorrow morning we'll have a -- a much more certain handle on that.

THE COURT: Well, I'll -- I'll leave it to you to discuss it with Mr. Foy overnight, and we can raise the topic again tomorrow and discuss it further.

We'll adjourn for the day and reconvene tomorrow morning at 10 o'clock.

THE REGISTRAR: Order in court. Court is adjourned until the 21st of February at 10 a.m.

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

Transcript certified by:

Kevin S. Lee, RPR, CRR, for:

Charest Reporting Inc.
Certified Realtime Court Reporters
Vancouver, British Columbia