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2 Vancouver, B.C.

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4 (PROCEEDINGS RESUMED AT 10:02 A.M.)

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6 THE REGISTRAR: In the Supreme Court of British
7 Columbia at Vancouver on this the 21st day of
8 February 2001, in the matter of the United Mexican
9 States versus Metalclad Corporation, My Lord.

10 THE COURT: Yes, Mr. Cowper.

11 MR. COWPER: Yes, My Lord. Your Lordship asked us to
12 keep you apprised of timing.

13 Here's where we stand this morning. A late
14 night was put in last evening with respect to our
15 argument.

16 I've indicated to Mr. Foy this morning that
17 by midday we have -- he'll have in his hands about
18 90 percent of our written material that will be
19 had. There's a couple of very brief arguments
20 which are just three or four pages in length which
21 will have to be added.

22 We will have it in his hands, the material
23 Your Lordship will have, by Friday night, with
24 references to the tabs and -- and all ordered.

25 We delivered another installment last
26 evening, and the final installment of the portion
27 I've been speaking about will be ready by midday.

28 My recommendation and suggestion would be
29 that we revisit the issue about written reply on
30 Monday when you see what we have, and when my
31 friend has an opportunity to review it on the
32 weekend. He's indicated a reluctance to have oral
33 reply.

34 From my perspective, I'm in an unusual
35 situation in that I didn't participate below and
36 my friends argued the case below, so we've had
37 to -- to come to grips with the record without
38 having seen it before the wintertime.

39 So my -- my client's instructions and my
40 desire, as we indicated earlier, was to take
41 advantage of this time to finish the work before
42 Your Lordship. I don't think we will know
43 objectively whether that's a reasonable goal or
44 not until my friend has a chance to see the full
45 argument on the weekend.

46 THE COURT: Mr. Foy, do you have anything to add to
47 that?

- 1 MR. FOY: No. I -- I think Mr. Cowper's put it
2 correctly. Until I see what it is I have to deal
3 with, or what we have to deal with, I think it's
4 premature to make any definitive plans. I -- I
5 anticipate that we will definitely want the
6 opportunity to file a written reply.
- 7 THE COURT: Um-hum.
- 8 MR. FOY: We're canvassing a tremendous number of both
9 legal issues and other issues, and I think that
10 would be appropriate in this case. That's why we
11 got our written argument to my friend in -- in
12 January.
- 13 THE COURT: Um-hum. One thing to consider, and I
14 leave it entirely up to you, but as a possibility
15 is -- is doing your reply orally but filing it in
16 written form when it's in a condition that it can
17 be filed. Obviously you couldn't deviate from the
18 written form without your friend having an
19 opportunity to say something about it, but
20 that's -- that's a possibility that we could
21 perhaps pursue if necessary.
- 22 MR. FOY: Well, we'll --
- 23 THE COURT: But again I --
- 24 MR. FOY: I think we'll --
- 25 THE COURT: I'm not going to force that on you. If
26 you would prefer to have a written reply when you
27 make your oral submissions, I'll -- I'll give you
28 that opportunity.
- 29 MR. FOY: Thank you, My Lord.
- 30 My Lord, we were -- at the close of
31 yesterday's hearings we were in Chapter 9, and I
32 was -- and I had indicated that I wanted to come
33 back to the tri -- tribunal's treatment of local
34 remedies. And I'd ask Your Lordship to turn up
35 page 85, paragraph 289.
- 36 THE COURT: Sorry, which tab?
- 37 MR. FOY: It's Chapter 9 --
- 38 THE COURT: Oh, Chapter 9.
- 39 MR. FOY: -- of the -- sorry, of the argument -- of
40 the outline, My Lord.
- 41 THE COURT: Okay.
- 42 MR. FOY: At paragraph 289.
- 43 THE COURT: 289. It's just that your book looks
44 bigger than my book for some reason, maybe not.
- 45 Yes.
- 46 MR. FOY: And I'd like to -- there -- there's the
47 reference. But I'd like to take you as well to

1 the -- the full passage in the award in which the
2 tribunal deals with the -- to the extent it does,
3 the existence of local remedies.

4 And that passage is at paragraph 97 of the
5 award. And there the tribunal notes that:
6 [All quotations herein cited as read]

7
8 "The actions of the municipality following
9 its denial of the municipal construction
10 permit, coupled..." for "...coupled with
11 the procedural and substantive deficiencies
12 of the denial, support the tribunal's
13 finding for the reasons stated above that
14 the municipality's insistence upon and
15 denial of the construction permit in this
16 instance was improper."

17
18 Now, what the -- the tribunal does not refer
19 to the existence of and the exercise of the local
20 remedies by Metalclad following the denial of
21 the -- by the municipality of the permit.

22 Instead, a footnote is -- is -- is set out
23 where the tribunal says:

24
25 "The question of turning to NAFTA before
26 exhausting local remedies was examined by
27 the parties. However, Mexico does not
28 insist that local remedies must be
29 exhausted. Mexico's position is correct in
30 light of NAFTA Article 1121(2)(b) which
31 provides that a disputing investor may
32 submit a claim under NAFTA Article 1117 if
33 both the investor and the enterprise waive
34 their rights to initiate or continue before
35 any administrative tribunal or court under
36 the law of any Party any proceedings with
37 respect to the measure of the disputing
38 Party that is alleged to be a breach
39 referred to in NAFTA Article 1117."

40
41 Now, as I mentioned when passing through the
42 award, this does not state Mexico's position
43 accurately, nor does it state accurately the
44 content of Article 1121.

45 And in order to make that point, I have to
46 step back for a moment to -- to describe the local
47 remedies rule, which is a -- a well-accepted

1 principle at international law.

2 And the general principle called the local
3 remedies rule holds that actions against a State
4 on behalf of a private party are not ripe until
5 that party has sufficiently exhausted avenues of
6 redress available to it in the host State's
7 domestic legal system.

8 Now, Mr. Thomas touched upon this as one of
9 the normal incidents of international disputes
10 normally brought by States where the State, before
11 espousing one of their citizen's claims, will
12 examine whether or not that citizen has exhausted
13 the local remedies available to it.

14 Now, this rule is capable of being eliminated
15 by treaty. And just as an example, this is not in
16 the materials, but in the U.S.-Panama Claims
17 Convention, a provision of that treaty provided
18 that no claim shall be disallowed through the
19 application of the general principle of
20 international law, that the legal remedies must be
21 exhausted as a condition precedent to the validity
22 of any claim. So in that treaty the local
23 remedies rule was waived.

24 But the international law re -- requires
25 clear words before that waiver takes effect. And
26 I'd ask you to turn up tab 20 of the brief of
27 authorities for that proposition.

28 This is ELSI case. We've referred to this
29 decision already. And at paragraph 50 of this
30 decision there's a discussion about the question
31 of modification of the local remedies rule by
32 treaty. This is the decision of the -- of the
33 majority. It's at page 31 at the bottom,
34 paragraph 50. And in the middle of that paragraph
35 the United States had been arguing about the
36 extent to which the rule was modified or not in
37 this case. The International Court of Justice
38 said this:

39
40 "The chamber has no doubt that the parties
41 to a treaty can therein either agree that
42 the local remedies rule shall not apply to
43 claims based on..." alleges "...alleged
44 breaches of that treaty or confirm that it
45 shall apply. Yet the chamber finds itself
46 unable to accept that an important
47 principle of customary international law

1 should be held to have been tacitly
2 dispensed with in the absence of any words
3 making clear an intention to do so."
4

5 And in the circumstances of that case the
6 argument was rejected that the local remedies rule
7 had been eliminated by treaty. And I'll be coming
8 back to the -- to the -- to the ELSI case.

9 Now, I'd now like to take you to Article 1121
10 of the NAFTA, which is the article referred to by
11 the tribunal in its footnote.

12 And there you'll recall the tribunal refers
13 to Article 1121(2) which applies to the situation
14 where an investor submits a claim under Article
15 1117 and requires -- and these are condition
16 precedent to the submission of a claim.

17
18 "A disputing investor may submit a claim
19 under Article 1117..."
20

21 And then down to (b), if they:

22
23 "...waive their right to initiate or
24 continue before any administrative tribunal
25 or court under the law of any party..."
26

27 Not just the party, but any party:

28
29 "...or other dispute settlement..."
30 proceedings "...any proceedings with
31 respect to the measure of the disputing
32 Party that is alleged to be a breach
33 referred to in Article 1117, except for
34 proceedings for injunctive, declaratory or
35 other extraordinary relief, not involving
36 the payment of damages, before an
37 administrative tribunal or court under the
38 law of the disputing Party."
39

40 Now, you'll notice that what the tribunal in
41 this case has missed is that this waiver only
42 applies to the right to initiate or continue
43 claims for damages, that it has no application to
44 claims for injunctive, declaratory or other
45 extraordinary relief.

46 None of the domestic remedies that were open
47 to Metalclad and in fact exercised by Metalclad in

1 this case following the municipal stop-work orders
2 and following the denial of the municipal
3 construction permit involved the payment of
4 damages. Those remedies related to either seeking
5 a -- declarations that the -- of excess of
6 jurisdiction or other extraordinary relief. And
7 Article 1121 had no impact, did not speak to the
8 question of the exercise of those remedies or --
9 or their juridical significance once they were
10 invoked.

11 And in our submission the tribunal was not
12 justified in entirely ignoring the -- both the
13 existence of and the exercise of those local
14 remedies by its misreading of Article 1121. In
15 our submission Article 1121 does not waive
16 entirely the local remedies rule, the general
17 principle accepted in customary international law
18 that claims are not ripe at the international
19 level until one's exhausted the reasonably
20 available remedies.

21 Instead of considering the existence and the
22 exercise of those local remedies in this case,
23 Your Lordship's aware that the tribunal
24 substituted itself for the domestic courts to rule
25 on domestic Mexican legal issues, to rule that in
26 its view the municipality acted improperly, and
27 then, in another leap, to equate that domestic
28 impropriety with a violation of the treaty.

29 ELSI also speaks to this second aspect of
30 what the tribunal did here. And I'd like to
31 return to tab 20 and the ELSI case. I'll just
32 give you some of the background to that case.

33 In that case a -- a U.S. company located in
34 Italy threatened to close a plant in Palermo. The
35 mayor of Palermo, in response to local opposition,
36 requisitioned the plant, which was occupied by its
37 workers. A series of local remedies were engaged
38 in by the company against the mayor's requisition
39 order. It went from the mayor to the prefect.
40 And the prefect, after a significant delay in
41 time, annulled the requisition order on the basis
42 that it -- that the mayor lacked -- or that the
43 order lacked the juridical cause that might
44 justify it.

45 Now, the Court of Appeal dismissed an appeal
46 from that, leaving the prefect's order to have
47 been held to have been made in excess of power.

1 These facts were juridical facts. They were
2 in front of the International Court of Justice.
3 The United States, espousing the claim of the
4 company, relied upon this finding of illegality at
5 domestic law to attempt to establish a violation
6 of the treaty. And I'll go to how the tribunal
7 treated that starting at tab 20, paragraph 124.

8 So recalling that -- it's the number at the
9 top -- you have -- is 74. Recalling that the
10 Italian authorities, legal authorities, have found
11 that the act of the mayor was illegal under
12 Italian law, the question arose, well, did that
13 amount to a violation of the treaty?

14 And at paragraph 124, the chamber of the
15 international court says this:

16
17 "Yet it must be borne in mind that the fact
18 that an act of a public authority may have
19 been unlawful in municipal law does not
20 necessarily mean that that act was unlawful
21 in international law as a breach of treaty
22 or otherwise. A finding of the local
23 courts that an act was unlawful may well be
24 relevant to an argument that it was also
25 arbitrary."

26
27 And this treaty in this case prohibited
28 arbitrary treatment of foreign investors.

29
30 "But by itself and without more,
31 unlawfulness cannot be said to amount to
32 arbitrariness. It would be absurd if
33 measures later quashed by a higher
34 authority or a superior court could for
35 that reason be said to have been arbitrary
36 in the sense of international law. To
37 identify arbitrariness with mere
38 unlawfulness would be to deprive it of any
39 useful meaning in its own right. Nor does
40 it follow from a finding by a municipal
41 court that an act was unjustified or
42 unreasonable or arbitrary, that that act is
43 necessarily to be classified as arbitrary
44 in international law though the
45 qualification given to the impugned act by
46 a municipal authority may be a valuable
47 indication."

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Now in this case of course we had a finding -- and I'm going to carry on with those passages -- had a finding by the courts of -- of Italy with respect to that.

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In the instant case, the tribunal had instead no such finding, had in fact -- the finding was to the opposite effect. Metalclad's application to review the denial of the municipal permit was dismissed, and then later abandoned in favour of negotiations. The tribunal not -- have not referred to that, substituted itself for the Mexican courts to find a finding of illegality at municipal law. But as ELSI points out, even if that had been the case, that is not -- not enough.

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And they go on at the -- in the ELSI case in paragraph 126 to consider whether this amounts to arbitrary conduct at international law. And at the bottom of paragraph 126, just above para -- the paragraph just above paragraph 127, it's noted that:

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"It was of course understandable that the mayor as a public official should have made his order in some measure as a response to local public pressures. And the chamber does not see in this passage of the prefect's decision any ground on which it might be suggested that the order was therefore arbitrary."

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And Your Lordship will see later on that the municipal denial, permit denial in this case, was made in response to local public pressures; that's not a -- seen to be an arbitrary act.

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Over the page the chamber deals with the allegation that -- the finding by the Italian courts that the prefect acted in excess of his authority therefore made it arbitrary. And in the last five lines of the first paragraph there it's noted:

"The analysis of the prefect's decision as a finding of excess of power with the result that the order was subject to a defect of lawfulness does not in the chamber's view necessarily and..." of it

1 "...and in itself signify any view by the
2 prefect or by the Court of Appeal of
3 Palermo that the mayor's act was
4 unreasonable or arbitrary in the
5 international sense."
6

7 Arbitrariness is not so much something
8 opposed to a rule of law; in other words,
9 incorrect in law, as something opposed to the rule
10 of law. This idea was expressed by the Court in
11 the Asylum case when it spoke of arbitrary action
12 being substituted for the rule of law. It is a
13 willful disregard of due process of law, an act
14 which shocks or at least surprises a sense of
15 juridical propriety.

16 Nothing in the decision of the prefect or in
17 the judgment of the Court of Appeal of Palermo
18 conveys any indication that the requisition order
19 of the mayor was to be regarded in that light.

20 Again, the Court goes on or the chamber goes
21 on to note the circumstances at the time.

22
23 "You must remember the situation in
24 Palermo at the moment of the requisition
25 with a threatened sudden unemployment of
26 some 800 workers at one factory."
27

28 When I get to the facts of this case, I'll be
29 reminding the Court of -- of a fact the tribunal
30 did not refer to, and that is the situation with
31 the prior -- arising by reason of the prior
32 contamination of the site.

33
34 "It cannot be said to have been
35 unreasonable or merely capricious for the
36 mayor to seek to use the powers conferred
37 on him by the law in an attempt to do
38 something about a difficult and distressing
39 situation. Moreover, when one looks at the
40 requisition order itself, one finds an
41 instrument which in its terms recites not
42 only the reasons for it being made, but
43 also the provisions of the law on which it
44 is based. One finds that, although later
45 annulled by the prefect because the
46 intended purpose of the requisition could
47 not in practice be achieved by the order

1 itself, it was nonetheless within the
2 competence of the mayor of Palermo,
3 according to the very provisions of the law
4 cited in it. One finds the Court of Appeal
5 of Palermo, which did not differ from the
6 conclusion that the requisition was intra
7 vires, ruling that it was unlawful, as
8 falling into the recognized category of
9 administrative law acts of excess of
10 power. Furthermore, here was an act
11 belonging to a category of public acts from
12 which appeal on juridical grounds was
13 provided in law, and indeed in the event
14 used not without success. Thus, the
15 mayor's order was consciously made in the
16 context of an operating system of law and
17 of appropriate remedies of appeal and
18 treated as such by the superior
19 administrative authority in the local
20 courts. These are not at all the marks of
21 an arbitrary act."

22
23 My Lord, the municipal permit denial in the
24 instant case was made in the context of an
25 operating system of law in which -- from which
26 there were remedies available in Mexican domestic
27 law, which remedies were exercised and later
28 abandoned, and I will be attempting to demonstrate
29 cannot be said to be -- have been considered
30 arbitrary or unreasonable in the international law
31 sense.

32 At this point in my argument what I am
33 stressing is the tribunal's total failure to
34 consider -- to -- to approach the question by
35 reason of an examination of this context, this
36 larger context of the operating system of Mexican
37 law, and instead to substitute itself to determine
38 its view of the municipality -- the extent of the
39 municipality's jurisdiction, and to do so upon, it
40 appears, a -- a misstatement of the terms of
41 Article 1121 of the NAFTA.

42 And I note that you don't see the
43 International Court of Justice in the ELSI case
44 re-examining Italian law to substitute its view.
45 What you do is -- what you do see on -- on Italian
46 law. What you do see is it examining those
47 juridical facts to see whether or not they amount

1 to a violation of international law.

2 Now, before I leave ELSI, there's another
3 point in ELSI that I'd like to refer to. ELSI
4 also addresses the question of the situation where
5 an international tribunal is faced with a
6 theoretical issue of domestic law. And the
7 particular issue that was considered in ELSI
8 was -- was -- arose in the context of the argument
9 with respect to the local remedies rule.

10 The United States argued that the local
11 remedies rule had not been exhausted because
12 the -- or, sorry, had not been -- the Ital --
13 Italy argued that the -- that locals (sic) remedy
14 rule had not been exhausted because the company
15 did not, itself, in the domestic proceedings
16 assert a violation of the treaty itself. This had
17 not happened. And the question was, well,
18 theoretically what would have been the case if
19 the -- if such an allegation had been made in the
20 lower courts?

21 And at paragraph 62 the international court
22 deals with -- deals with this point. In the
23 middle of that paragraph, 62, after setting out
24 the details of the decisions made, it says:

25
26 "When in 1971 Raytheon consulted two
27 Italian jurists on the question of local
28 remedies for the purposes of a diplomatic
29 claim, it apparently did not occur to
30 either of them to refer even as a
31 possibility to action under Article 2043 in
32 conjunction with the treaty. It thus
33 appears to the chamber to be impossible to
34 deduce from the recent jurisprudence cited
35 what the attitude of the Italian courts
36 would have been had the two companies
37 brought an action some 20 years ago in
38 reliance upon Article 2043 of the civil
39 code in conjunction with the provisions of
40 the FCN Treaty and the supplementary
41 agreement."

42
43 And then they say this:

44
45 "Where the determination of a question of
46 municipal law is essential to the Court's
47 decision in a case..."

1

2

The international court's decision.

3

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"...the Court will have to weigh the jurisprudence of the municipal courts; and if this is uncertain or divided, it will rest with the Court to select the interpretation it considers most in conformity with the law.

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"In the present case, however, it was for Italy to show as a matter of fact the existence of a remedy which was open to the United States stockholders in which they failed to employ. The chamber does not consider that Italy has discharged that burden."

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So in some circumstances, in the absence of juridical facts with respect to the issue, where the determination of a question of municipal law is essential to a finding of an international tribunal, the Court will have to decide that as a matter of -- for itself. That is not the sit -- that is not substituting itself as a reviewing court for the domestic court to reinterpret juridical facts or to ignore juridical facts and substitute its views on what Mexican or domestic law is.

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In respect of all of the other steps that had been taken in the ELSI litigation, and there were numerous, that -- the chamber simply details what happened and notes what happened, and then asks was there a violation of international law having regard to that context; very opposite of the approach taken by this tribunal, which was to not mention at all the court proceedings taken by Metalclad, and then assume that those proceedings had been brought before it and -- and examine the domestic legal issues.

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The only mention of domestic legal proceedings made by this tribunal was -- was with respect to the proceedings, the Amparo proceedings, brought by the municipality against the Convenio. And I'll -- I'll return to those in more detail.

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And the only -- interestingly the only thing the tribunal did there was to -- to criticize the

1 municipality for having taken those proceedings
2 and obtaining an injunction from the courts and
3 inferring that this suggested a lack of confidence
4 on the part of the municipality's position.

5 So those were the only domestic proceedings
6 referred to in the -- in the award. And you --
7 one must be careful in reviewing the award not to
8 confuse the Amparo proceedings brought by the
9 municipality with the Amparo proceedings brought
10 by Metalclad. The latter are not mentioned.

11 Now, yesterday in my submissions I also
12 indicated that I would return to the reference to
13 the Waste Management case, and that's at -- I'd
14 ask Your Lordship to turn that up. That's at tab
15 69. It's in Volume 2 of the book. This again is
16 a decision of a -- a NAFTA Chapter 11 tribunal.
17 It's a decision on jurisdiction. There's a -- a
18 majority judgment and a dissenting judgment.

19 The majority con -- and -- and the dissent
20 consider the requirements of Article 1121 where
21 claims for damages are involved, so it's unlike
22 this case. But it's -- considers a situation
23 where claims for damages were advanced by the
24 claimant both in the domestic courts and in front
25 of the NAFTA und -- under Chapter 11.

26 And the question was whether a conditional
27 waiver which was filed by the claimant in
28 circumstances where the claimant continued damages
29 claims in the domestic courts, whether or not that
30 was effective to amount to the waiver required by
31 Article 1121.

32 And the majority held that the -- the waiver
33 in those circumstances was ineffective and that
34 the jurisdiction of the tribunal had not properly
35 been invoked. The conditions precedent to a
36 Chapter 11 arbitration had not been met.

37 The dissenting arbitrator took a different
38 view of what was claimed by the claimant and
39 thought that the jurisdictional issue really
40 should be put over to a hearing on the merits.
41 And in the -- but in the -- and I'm going to be
42 taking you to some of the things he said.

43 The reason for that is that he deals with
44 some issues that are not dealt with the majority,
45 but the difference between the two was that he
46 thought this issue of jurisdiction should be put
47 over to the merits.

1 Interestingly, the -- this arbitrator was
2 Mr. Highet, who was one of the counsel for Italy
3 in the ELSI case, an experienced international
4 practitioner. And his reasons are at the second
5 set of reasons, his dissenting opinion is about
6 halfway through.

7 And I'll just, while I'm here, make a --
8 point out some things that are -- relate to points
9 earlier made.

10 In his introduction to the dissenting opinion
11 he notes in the -- the reason he's doing this,
12 just before paragraph 1.

13 THE COURT: Um-hum.

14 MR. FOY: He says -- and -- and this again is to
15 distinguish Chapter 11 awards from private
16 international commercial arbitration. You don't
17 normally see dissenting opinions. He says:

18
19 "The precedential significance of this
20 award for future proceedings under the
21 North American Free Trade Agreement cannot
22 be underestimated. In addition, the award
23 will be an important guidance to future
24 potential NAFTA claimants. It is for this
25 purpose that as complete an understanding
26 as possible be expressed of the legal
27 issues involved."

28
29 Very unusual in arbitration to see this, but
30 appropriate in the -- in his view in -- in the
31 circumstances of NAFTA Chapter 11.

32 Turn to paragraph 8. He also there makes the
33 distinction made in the ELSI case between the
34 legal obligations at municipal law and legal
35 obligations at international law. He says:

36
37 "There must be and is a distinction to be
38 drawn in juridical terms between the legal
39 obligations of Mexico under Mexican law and
40 the legal obligations of Mexico under its
41 international treaty obligations imposed by
42 NAFTA. If this were not true, arbitrations
43 could be commenced under NAFTA for remedies
44 under national law, such as actions for
45 payment of money had and received, goods
46 sold and delivered, actions for breach of
47 contract, actions for breach of warranty,

1 lawsuits respecting zoning modifications,
2 litigation concerning unauthorized strikes,
3 lawsuits about collective bargaining, and
4 so forth.

5 "It is inconceivable that any of
6 these complaints had been intended by the
7 NAFTA States party to be resolved in NAFTA
8 arbitrations. Proceedings relating to them
9 could never have been proceedings with
10 respect to the measure of the disputing
11 party that is alleged to be a breach
12 referred to in Article 1116 within the
13 meaning of Article 1121."
14

15 In his view they were beyond the scope of the
16 waiver and would not have been intended to be part
17 of it.

18 He goes on on paragraph 9:

19
20 "This is consistent with the normal rule."
21

22 He says -- in this context he says:

23
24 "Jurisdiction is never to be presumed."
25

26 And I -- we've touched on that point in other
27 submissions.

28 He also touches upon the question of a -- a
29 NAFTA tribunal dealing with Mexican domestic
30 decisions at paragraph 45, where he says:

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32 "When could a NAFTA tribunal be placed
33 in the position of reversing a decision of,
34 for example, the Mexican courts? The NAFTA
35 tribunal would of course have no
36 jurisdiction to do so. What would have to
37 be alleged in respect of those decisions
38 would not be a disguised appeal of these
39 decisions, it would have to be a NAFTA
40 claim, such as for a substantial denial of
41 justice in respect of those proceedings.
42 And that again is a separate matter from
43 conducting appeals under local law, but not
44 asserting the protection of the treaty
45 itself..."
46

47 Again, making the distinction a -- a NAFTA

1 tribunal has no jurisdiction to in effect reverse
2 a decision of the Mexican courts. It asks and
3 ought to ask a different question: Has there been
4 a violation of a standard found in the treaty?

5 He in paragraph 46 endorses the passage of
6 the Azinian case to which we've already referred
7 you to, noting that the quote made in the Azin --
8 by the Azinian tribunal:

9
10 "A governmental authority surely cannot be
11 faulted for acting in a manner validated by
12 its courts, unless the courts themselves
13 are disavowed at the international level."
14

15 Coming back to ELSI:

16
17 "...unless looking at the domestic legal
18 system as a whole one can find a denial of
19 the rule of law, an outrage."
20

21 Now, that -- those comments are made in a
22 case in which there were claims for damages,
23 parallel claims for damages, which Article 1121
24 does speak to.

25 In the instant case, as I mentioned, the
26 remedies -- the domestic legal remedies that were
27 available to and exercised were not claims for
28 damages, and Article 21 (sic) had no application
29 to them at all. And those points are made in the
30 outline at paragraphs 289 through 292, 289 through
31 292.

32 That completes the submissions with respect
33 to that chapter, My Lord.

34 And I'll turn to the next chapter, which
35 is -- introduces a new topic, the excess of
36 jurisdiction in the treatment of Article 1110.

37 Now, in this section the first point we make
38 is one I made during the course of going through
39 the award, and that is that the tribunal's
40 disregard of the applicable law and misdirection
41 with respect to the infusion of transparency
42 requirements into the customary international law
43 standards of 1105 also infected its analysis of
44 Article 1110. I took you through paragraphs 102
45 to 112 of the award where it was repeated in
46 different ways, the -- the transparency, the --
47 the tribunal's view of the failure to comply with

1 the transparency obligations.

2 That was part of this tribunal's analysis of
3 Article 1110. But to the extent we're correct
4 that the tribunal made jurisdictional error in the
5 treatment of Article 1105, the same defect affects
6 the rest of their decision under Article 1110.

7 That point's elaborated upon in paragraph 304
8 where we quote a portion of the award in which the
9 tribunal holds that a measure tantamount to
10 expropriation can be shown by permitting or
11 tolerating the conduct of the municipality, and
12 thus participating:

13
14 "...in the denial to Metalclad of the
15 right to operate the landfill,
16 notwithstanding...the project was fully
17 approved and endorsed by the federal
18 government..."

19
20 And I note there that -- the -- the measure
21 so-called referred to here -- here identified by
22 the tribunal. And you'll recall Mr. Thomas's
23 identification of a requirement for a measure in
24 order to bring a claim under Chapter 11 is not a
25 positive act but a fail -- an alleged failure to
26 act on the presumption that the NAFTA imposes upon
27 the federal authorities a positive obligation to
28 take steps against the local municipality, because
29 on -- because of this tribunal's view of the
30 impropriety of the municipality's act at Mexican
31 domestic law, saying nothing about whether or not
32 that issue ought to have been one resolved in the
33 Mexican domestic courts.

34 There's no question there was a contest
35 between the municipality and the federal level
36 with respect to the extent of their jurisdiction.
37 The question for the tribunal was -- this
38 tribunal, wasn't whether there was a contest or
39 not; the question was whether or not there was a
40 legal means available to resolve that contest.

41 And again, in paragraph 106 and 107 of the
42 award, you see the tribunal mixing the notion of
43 the improper permit denial together with the
44 representations of the Mexican federal government
45 and the absence of their view of a timely, orderly
46 or substantive basis for the denial by the
47 municipality of a permit as amounting to an

1 indirect expropriation.

2 Now, in the -- paragraph 307 we've set out
3 the text of Article 1110. We've done that for a
4 purpose, because immediately thereafter we set out
5 the tribunal's version of Article 1110.

6 And you'll see there, without reference to
7 authority, without reference to commentary,
8 without reference to anything other than quoting
9 the text of Article 1110, this tribunal goes on
10 and says:

11
12 "Thus..."

13
14 And concludes:

15
16 "...expropriation...includes not
17 only...deliberate and acknowledged takings
18 of property, such as outright seizure or
19 formal or obligatory transfer of title in
20 favour of the host State, but also covert
21 and incidental interference with the use of
22 property which has the effect of depriving
23 the owner, in whole or in significant part,
24 of the use or reasonably-to-be-expected
25 economic benefit of property, even if not
26 necessarily to the obvious benefit of the
27 host State."

28
29 Now, this single sentence constitutes the
30 tribunal's -- the entirety of the tribunal's
31 analysis of its jurisdiction over expropriation as
32 conferred by Article 1110.

33 And I'd like to take you to -- this -- this
34 is not included in the outline at this place, but
35 it is elsewhere in the outline -- to
36 characterizations by the -- that have been made by
37 ICSID tribunals of jurisdictional error by reason
38 of this kind of statement of law limited to the
39 postulation of a -- of a statement without any
40 demonstration of the existence of the principles
41 upon which it's based, without any reference to
42 legal texts, judgments or scholarly -- scholarly
43 opinions.

44 That has been held to amount to an excess of
45 jurisdiction as demonstrating the tribunal's
46 failure to apply the applicable law. And I'll
47 take you to a secondary source, which -- which

1 summarizes a portion of one of the ICSID tribunals
2 in order to demonstrate this point at tab 99.

3 You'll recall that ICSID tribunals are
4 empowered to apply domestic law. And in -- this
5 is a reference to the Klockner case. And I'll
6 take you to pages 340 and 341 of this article,
7 which is an analysis of some of the ICSID
8 annulment awards which -- the first ICSID
9 annulment awards were arou -- were the subject of
10 great scholarly debate, because the first -- one
11 of the first ones -- first committees, ICSID
12 tribunals, was in -- in fact annulled by the first
13 annulment committee. And the president of the
14 tribunal who was annulled was -- had been the
15 president of the International Court of Justice, a
16 very well-respected international lawyer.

17 And when his first decision, or his
18 tribunals' first decision, was -- was annulled, it
19 gave rise to a lot of scholarly debate back and
20 forth between international lawyers and -- as to
21 whether or not the annulment committee had it
22 right, whether or not ad hoc review was
23 appropriate, whether the extent of their review
24 was appropriate, et cetera. So you'll see in the
25 materials a number of cases -- or, rather,
26 articles dealing -- dealing with that.

27 The -- the Klockner claim involved French
28 civil law. And at the bottom of 340 there was a
29 note -- note of the text -- at the very bottom,
30 that the committee examined the text of the award
31 on a principle of law. We need not bother with
32 the -- with that because it's over the page
33 where -- with -- with the details of it.

34 But over the page it's noted:

35

36 "In criticizing the adequacy of this
37 statement of legal grounds for the
38 tribunal's award the ad hoc committee..."

39

40 That's the annulment committee.

41

42 "...commented that it may immediately be
43 noticed that here the tribunal does not
44 claim to ascertain the existence of a rule
45 or principle but asserts or postulates the
46 existence of such a principle which, having
47 postulated its existence, the tribunal

1 assumes or takes for granted that it's a
2 basic principle of French civil law.
3 The committee asked whether the basic
4 principle of French civil law referred to
5 by the award comes from positive law and
6 stated that it is impossible to answer this
7 question by reading the award, which
8 contains no reference whatsoever to
9 legislative text, to judgments or to
10 scholarly opinions."

11
12 It's very similar to the "thus" paragraph
13 that I've read from our award. It -- it
14 postulates a principle without any reference to
15 legislative text, to judgments or to scholarly
16 opinions.

17 The author of this article states the result
18 of the annulment committee's analysis of this --
19 of this approach, stating:

20
21 "In conclusion, it must be acknowledged
22 that in its reasoning, limited to
23 postulating and not demonstrating the
24 existence of a principle or exploring the
25 rules by which it can only take concrete
26 form, the tribunal has not applied the law
27 of the contracting state. The award was
28 therefore annulled."

29
30 So that was an additional point I wanted to
31 add under -- underneath paragraph 309 of the
32 outline, that this single sentence in paragraph
33 102 of its award does not allow the parties to
34 identify, to be confident that its tribunal has
35 applied the applicable law. None of that language
36 in their paragraph 102 is found in Article 1110.

37 Now, the next point I make at paragraph 310,
38 a separate jurisdictional point that appears from
39 the language that is used rather than from the --
40 from the lack of reference, what the tribunal
41 appears to be doing here is putting together two
42 concepts. And you'll -- I'll take you later to
43 some treaties which do put these -- these concepts
44 together in the treaty language itself. And those
45 concepts are expropriation on the one hand and
46 interference with economic benefits on the other
47 hand.

1 There are treaties in which the parties have
2 conferred upon claims commissions or tribunals the
3 jurisdiction to determine whether there's been any
4 interference with your property rights. This is
5 not one of those tribunals, but this tribunal
6 appears to have mis -- mistakenly assumed that
7 jurisdiction.

8 And this point's made in paragraph 310.
9 The -- these two notions, expropriation and
10 interference with the property rights, are set out
11 there. The -- in general international law, and
12 you'll know from what I said about both the U.S.
13 and the Canadian interventions in the tribunal
14 below, their position and Mexico's position that
15 Article 1110 states customary international law
16 with respect to the meaning of expropriation, that
17 does not include mere interference with property
18 rights or economic benefits. Yet this tribunal
19 considered itself -- that it had the jurisdiction
20 to consider interference with the
21 reasonably-to-be-expected economic benefit of
22 property, not just the taking or expropriation of
23 property.

24 On the next page of the outline I give an
25 example of a treaty which does vest this
26 jurisdiction, and this is the Iran-U.S. Claims
27 Tribunal. And there the tribunal was granted
28 jurisdiction to consider all claims arising out
29 of, quote:

30
31 "...expropriations or other measures
32 affecting property rights."
33

34 Article 1110 has no equivalent provision.
35 And it's -- it's noted in the commentary on
36 investment treaties, from which Chapter 11 was --
37 was derived, that they vary in their text. And
38 they -- they in some cases do provide this
39 additional jurisdiction, in other cases they
40 don't.

41 And in paragraph 314 we've referred to a -- a
42 general text which summarizes the basic and
43 different types of investment protection
44 treaties. And reference is made to the U.S. model
45 protection treaty, which is -- turns up
46 frequently. And they contrast that with an
47 example they give of the U.S.-Zaire Bilateral

1 Investment Treaty which prohibits:

2

3 "...any other measure or series of
4 measures, direct or indirect, tantamount to
5 expropriation..."

6

7 And then going on:

8

9 "...(including the levying of taxation,
10 the compulsory sale of all or part of an
11 investment, or the impairment or
12 deprivation of its management, control or
13 economic value)..."

14

15 Any impairment of economic value can give
16 rise to a claim under that treaty. And the
17 commentators note that this:

18

19 "...provision represents possibly the
20 broadest scope in investment treaties with
21 respect to indirect expropriation insofar
22 as the inclusion of measures that cause the
23 'impairment...of...economic value...'"

24

25 That:

26

27 "...equates expropriation with a host of
28 measures which might not otherwise be
29 considered as such under general
30 international law, let alone under liberal
31 systems of domestic law."

32

33 In those comparisons the -- the authors are
34 noting a number of things, first of all, that
35 expropriation at customary international law does
36 not include mere impairment of economic benefits,
37 or I would say reasonably-to-be-expected economic
38 benefits.

39 It also demonstrates that there are treaties
40 where that jurisdiction has been conferred upon
41 tribunals. And it demonstrates the kind of
42 language that can be used in order to accomplish
43 that goal.

44 Article 1110 doesn't contain that language.
45 And in its terms is even more restrictive than the
46 U.S. model in that it only speaks of a measure
47 being tantamount to expropriation in the singular,

1 rather than measure or measures which could -- to
2 measures or series of measures in the -- in the
3 other treaties.

4 So notwithstanding that the parties have with
5 knowledge of the types of language out there to
6 confer this kind of jurisdiction, have chosen not
7 to do so, this tribunal appears to have assumed a
8 jurisdiction in -- in the commentator's view
9 beyond even the possibly broadest scope used in
10 the U.S.-Zaire treaty. It includes jurisdiction
11 where there's inte -- incidental interference with
12 reasonably-to-be-expected economic benefits.

13 Now, the -- this appears from this one
14 paragraph of the tribunal's award. It -- no
15 reference to authority is made, as I mentioned at
16 the outset. And it's unclear whether or not
17 they -- this tribunal was misled by the citation
18 of the U.S.-Iran claims tribunal cases which were
19 put before it.

20 It was argued by the parties that those cases
21 are not informative of the jurisdiction of this
22 tribunal because, as I mentioned earlier, the
23 U.S.-Iran claims tribunal was empowered to deal
24 with any measures affecting -- but it's -- I can't
25 make that -- I can't make that point out, because
26 there is no reference to that jurisprudence by
27 this tribunal.

28 I mean, it's really part of the first part of
29 my concern with this aspect of the -- or the -- of
30 the award, that there is no reference to legal
31 texts, judgments or scholarly opinions in support
32 of this postulation of a -- of a jurisdiction
33 which in my submission doesn't appear in the -- in
34 the text of Article 1110.

35 I should say that -- I should clarify what I
36 was saying.

37 The -- it was argued by Metalclad that the
38 jurisprudence of the Iran-U.S. claims tribunal
39 should inform this NAFTA's tribunal's
40 jurisdiction. It was arti -- argued by parties to
41 the NAFTA, Canada the U.S. and -- Canada and
42 Mexico, that it should not, pointing out the more
43 expansive jurisdiction granted under that -- under
44 that treaty, the jurisdiction to consider measures
45 affecting property rights.

46 So I make three points in respect of the
47 tribunal's treatment of expropriation at this

1 stage, the first being the fact that their
2 analysis was infected by their earlier
3 jurisdictional error with respect to Article 1105
4 and their disregard of the applicable law; the
5 second, that they made a statement of law outside
6 the text of the NAFTA without demonstrating the
7 existence of any of the underlying principles,
8 demonstrating a fail -- again, a failure to apply
9 the applicable law as agreed by the parties, both
10 amounting to an excess of jurisdiction; and then,
11 thirdly, by assuming a jurisdiction not conferred
12 by the -- by Article 1110 by assuming that it went
13 to incidental interference with
14 reasonably-to-be-expected economic benefits where
15 that jurisdiction is conferred by other treaties
16 but not by this one.

17 THE COURT: Go ahead.

18 MR. FOY: And that takes me to the -- the end of that
19 chapter. And I'm going to now turn to -- I've to
20 date -- although I've made some reference to
21 matters not referred to by the tribunal, I haven't
22 taken you into the record. I've based my
23 submissions upon the award as it's disclosed.

24 I'm about to take you into the record and to
25 refer to some of the -- the underlying facts.

26 THE COURT: And in doing that, I think we should
27 probably take the morning break now.

28 Are you going to be referring me to the
29 extracts or the record itself?

30 MR. FOY: I'm going to be referring you to the red
31 volume of extracts. Before I get to that, I'm
32 going to refer you to some authority with respect
33 to the propriety of doing that.

34 MR. COWPER: My Lord, I wonder if I might inter --
35 interrupt my friend with one small point, and that
36 relates to the chapter he's just finished, and
37 it's a matter Your Lordship may wish to give us
38 direction on.

39 On my reading of the tribunal, the tribunal
40 was prepared to and did find, in relation to
41 expropriation, that the ecological decree was an
42 expropriation of Metalclad's asset independently
43 of the other measures it relied upon.

44 My friend in his submission to you in
45 relation to the award had said, no, it was obiter
46 dicta, they didn't do that.

47 My concern being this: I'm going to say

1 that. I'm going to rely upon that finding and say
2 that in order for my friend to set aside this
3 award, he must not only attack successfully the
4 findings he has referred to today but the
5 alternative ground with respect to the impact of
6 the ecological decree which they found permanently
7 brought the end to Metalclad's ability to operate
8 this, in addition to the other measures they
9 found.

10 My main concern being in my friend's present
11 state he hasn't endeavoured to approach that
12 because in his view it isn't an obiter. And I
13 just wish to say we're not in agreement on that,
14 and I'm a little bit worried that I'm only going
15 to hear his argument in reply with respect to that
16 issue, and I have identified this as an issue with
17 my friend.

18 I -- I think it would be more satisfactory if
19 he would deal with that in his principal argument,
20 but I leave that to Your Lordship.

21 THE COURT: Mr. Foy?

22 MR. FOY: I can assist my friend. I will be dealing
23 with the ecological decree when I deal with the
24 facts. And I will be -- I'll be repeating the
25 argument that I made with respect to whether or
26 not this tribunal was prepared to rest this award
27 upon the decree, and in my submission they were
28 not and made that clear, but I will also be,
29 before reply, further -- making further
30 submissions with respect to the decree.

31 THE COURT: On that we'll take the morning break.

32 THE REGISTRAR: Order in chamber. Chambers is
33 adjourned for the morning recess.

34

35 (MORNING RECESS)

36 (PROCEEDINGS ADJOURNED AT 11:10 A.M.)

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

38

39 THE COURT: Yes. Proceed, Mr. Foy.

40 MR. FOY: Thank you, My Lord.

41 Just returning to the point we discussed just
42 before the break, Mr. Cowper and I have discussed
43 this. The -- it's not -- he has now advised me of
44 his position with respect to the ecological
45 decree. I had -- hadn't seen his argument nor
46 been advised of that before.

47 Our primary position is that the ecological

1 decree did not form a basis for this award. If --
2 and as I understand Mr. Cowper, he's advised me
3 that the respondent will be taking the position
4 that it was a basis for the award. A reply
5 position to that will be that if that was the
6 case, and we say it's not, then the tribunal had
7 no jurisdiction to consider it and ought not to
8 have considered it, it having been promulgated
9 after the filing of the notice of claim.

10 So I just want to make sure my friend -- and
11 my friend and I have had this discussion, and he
12 understands that that's the position we'll be
13 taking. And I will be, in deference to my friend,
14 attempting to articulate that position at -- at
15 the end prior to his -- to his submissions, but it
16 is not in my outline right now because I haven't
17 seen his response.

18 My Lord, I was turning to Chapter 11, but --
19 and what I'm going to do with Chapter 11 is to
20 actually take you to documents themselves, the
21 materials from this selected extract book. I'm
22 going to be taking you to witness statements. I'm
23 going to be taking you to documents created by
24 Metalclad. And I'm going to be taking you to some
25 public records of the municipality.

26 In the case of the witness statements, I'm
27 going to be commenting on the fact that particular
28 witnesses were not cross-examined.

29 The primary documents upon which I'm going to
30 rely were documents that were Metalclad's own
31 documents.

32 But before I go to that, I just want to
33 revisit the propriety of examining the record in
34 the context of an attempt to demonstrate patently
35 unreasonable error and by reference to a recent
36 Supreme Court of Canada case referred to in our --
37 in our standard of review section which summarizes
38 some of the principles, and it's at tab 66 of
39 Volume 2.

40 This was a review of an arbitration board
41 dealing with a labour arbitration grievance.
42 The -- in the facts of the case, a dis -- a
43 teacher had been discharged by an education board
44 after writing abusive and threatening letters.
45 And the majority of the arbitration board ordered
46 the teacher's conditional reinstatement. That
47 decision was challenged. And the question was

1 whether the arbitration board's decision was
2 patently unreasonable.

3 And Mr. Justice Cory delivers the -- the
4 reasons of the majority, the court -- sorry, for
5 the majority for -- for eight of the nine justices
6 and reviews briefly the duty of deference owed in
7 this case to the administrative tribunal starting
8 at page 503.

9 And I'll just note that this decision got to
10 the Supreme Court of Canada after the Ontario
11 Court of Appeal had overturned the divisional
12 court on the basis that the divisional court had
13 permitted itself to review the merits to a greater
14 extent than is appropriate under the definition of
15 patently unreasonable. So the -- the Court of
16 Appeal said you shouldn't have looked at the
17 record to the extent you did when you found this
18 decision patently unreasonable.

19 The Supreme Court of Canada, as I will
20 demonstrate, found the Court of Appeal to be wrong
21 in that regard and that it is appropriate to
22 review the record in these circumstances.

23 Now, after having emphasized the duty of
24 deference on page 503, the very high degree of
25 deference owed to the labour arbitration boards on
26 page 504, the review of some of the authorities as
27 to what constitutes a patently unreasonable
28 decision on page 507, and the emphasis on page 508
29 at paragraph 46 that -- or paragraph 45, that the
30 Court can only intervene where the evidence viewed
31 reasonably is incapable of supporting a tribunal's
32 finding of fact, findings of fact, noting that all
33 these tests are strict, and yet -- and noting
34 this, and I emphasize this at the bottom of
35 paragraph 46:

36
37 "Yet courts also have a duty to protect
38 parties from a decision which is patently
39 unreasonable."
40

41 And going on in paragraph 47:

42
43 "In order to decide whether a decision of
44 an administrative tribunal is patently
45 unreasonable, the Court may examine the
46 record to determine the basis for the
47 challenged findings of fact or law made by

1 the tribunal..."

2

3 Refers to Mr. Justice Gonthier's judgment in
4 National Corn Growers to which I referred earlier,
5 and then goes on to say, referring to the Lester
6 case:

7

8 "This Court conducted a review of the
9 record to determine whether there was any
10 evidence which could reasonably support a
11 particular factual finding made by a labour
12 relations board."

13

14 It goes into the facts of this particular
15 case and the question of whether or not the board
16 was -- had made a patently reasonable or
17 unreasonable finding in that this teacher ought to
18 be reinstated, that his conduct was temporary
19 rather than -- the -- the improper conduct was
20 temporary rather than something that would
21 continue.

22 And in the course of dealing with that
23 question of fact and that inference, one of the
24 important points that the Supreme Court of Canada
25 makes is that the board, the arbitral board,
26 didn't refer to a piece of evidence. And that --
27 you'll find that at page 519 in paragraph 72.

28 And there was a significant item of evidence
29 with respect to this teacher's conduct in a letter
30 that had been written after the board of inquiry's
31 decision, but before the hearing before the board
32 of arbitration. And that -- and the --
33 Mr. Justice Cory notes:

34

35 "Curiously the majority did not even refer
36 to it."

37

38 And then went on to say it was serious error,
39 in paragraph 74, notwithstanding that this
40 evidence in fact came up after the original
41 decision, that it was -- in -- in paragraph 74 in
42 the last sentence:

43

44 "In this case it would not only have been
45 reasonable for the arbitrators to consider
46 this letter, it was serious error for them
47 not to do so."

1
2 And the Supreme Court of Canada goes on in
3 the circumstances of that case to conclude that
4 the divisional court had been correct in quashing
5 the decision and on the basis of this -- this
6 patently unreasonable finding.

7 So there's -- this is not an international
8 arbitration, but it is review of an administrative
9 tribunal entitled to the highest of deference in
10 our system, and the Court affirming that in
11 certain circumstances it -- it is appropriate in
12 the application of this very strict test to
13 consider portions of the record, and that -- that
14 it may in some circumstances be serious error to
15 fail -- to fail to have regard to cogent
16 evidence.

17 In our courts, leaving aside review of
18 administrative tribunals, there's authority that,
19 although there is no obligation on any trier of
20 fact to -- they're not bound to accept any
21 evidence in the face -- in the face of cogent
22 evidence on a point, it may be serious error for a
23 tribunal -- a trier of fact not to give a reason
24 for refusing to deal with that -- with that
25 particular evidence or for rejecting it if one
26 feels bound to do so. In the very least, in a
27 review of this type it is appropriate.

28 And so I'd like to turn to the -- to the red
29 book and refer to some evidence. By way of
30 reminder, the first tab of this book simply
31 contains an index to the record which is there for
32 convenience.

33 The second tab I didn't refer to. This is a
34 chronology. This was prepared by Mexico. This is
35 not a Metalclad document. And it's there -- and
36 it's not all of the facts. It would not be
37 accepted by Metalclad. Mexico attempted to set
38 out facts in bold and in brackets where they were
39 in contention. I -- I only put it there in case I
40 lost track of where things happened in the
41 chronology, and for that reason only.

42 Where this started, Your Lordship will
43 recall, was with tab 5. Tab 5 are the pictures of
44 the contamination of the site that occurred in
45 1990/'91 when operated by the Mexican company
46 COTERIN prior to its being owned by Metalclad.
47 This contamination led to local opposition.

1 And I'd like you to turn to tab 8. This is a
2 letter -- or, sorry, this is the record of a
3 letter to the State governor of February 9, 1991.
4 And it's signed by 13 of the municipal presidents
5 of the surrounding municipalities -- sorry, signed
6 by 12, supporting the municipal president of
7 Guadalcazar with respect to this point:

8
9 "The undersigned municipal presidents of
10 the Highland region hereby respectfully
11 appear before you to express our full moral
12 support to our colleague, the municipal
13 president of Guadalcazar, who, echoing the
14 residents of this municipality,
15 definitively opposes the establishment of
16 an industrial waste landfill in the site
17 called La Pedrera located a few kilometres
18 from the intersection of...this being a
19 high-risk project to the physical health of
20 the residents of the neighbouring
21 communities and that of future
22 generations."

23
24 The -- the -- the document is signed by each
25 of the municipal presidents, indicating the
26 initial -- and what Your Lordship will see is the
27 long-standing opposition to the siting of an
28 industrial waste landfill at La Pedrera.

29 Now, the next tab -- and these tabs from here
30 on, My Lord, are arranged chronologically for the
31 most part. I'll tell you when there are
32 exceptions to that.

33 The next tab is a reference to a -- a -- an
34 inspection report again generated by the
35 contamination that was occurring by the deposit at
36 the -- at the transfer station. This is a federal
37 inspection report. And you'll see at the top it's
38 in the municipality, La Pedrera site, on March 12,
39 1991, the undersigned inspectors of the SEDUE
40 delegation. And I'll just pause there.

41 SEDUE is the federal secretariat of urban
42 development and ecology, was at that time. That
43 secretariat is now called SEMARNAP and was for a
44 time SEDESOL. And you'll see references to these
45 other names later.

46 SEMARNAP, I would call it the -- the Ministry
47 of the Environment. It has different arms, and

1 one is called INE, I-N-E, and another, PROFEPA.
2 INE is the permitting arm of the Ministry of the
3 Environment and PROFEPA is the enforcement arm,
4 the Attorney General's arm. And I'll -- when I
5 get to certain documents I'll indicate from where
6 they emanate. But this is the federal Ministry of
7 the Environment investigating the contamination.

8 And you'll notice that the local
9 representative of SEDUE in the State of SLP, it's
10 noted here is Rodarte Ramon, in compliance with
11 the State delegate's inspection order contained in
12 this letter, visited COTERIN at La Pedrera, the
13 municipality. And the manager of the company,
14 Aldrett Leon, was being informed of the content of
15 the record of this inspection.

16 And I'll just take you down to the -- the --
17 you'll notice there's reference to drums of waste
18 that are there, and then just this note in the
19 next paragraph:

20
21 "It is calculated that..."

22
23 This is by March 1991:

24
25 "...approximately 9,000 tonnes of wastes
26 are stored. This waste is not confined.
27 It lays only on the ground and in the
28 open."

29
30 So there was the inspection report again
31 arising out of the contamination that we saw the
32 pictures of.

33 The -- in addition to the municipal
34 authorities in this -- in this area, there are
35 local Ejidos, which are communal land holdings
36 which also have a representative structure. And
37 they -- you'll find them throughout -- throughout
38 the municipality. They too demonstrated their
39 opposition in the next document, tab 10, to this
40 contamination and to the proposal to turn this
41 site into an industrial landfill. And this
42 document is signed by a number of the Ejidos or
43 representatives of the Ejidos and states this:

44
45 "Further to these problems, others are
46 added, such as the intention to turn the
47 municipality of Guadalcasar into an

1 industrial landfill with..." well-know
2 "...with the well-known environmental
3 harm, all of which has been originated by
4 the federal SEDUE representative in
5 physics, Rodarte Ramon, who, with a very
6 arrogant attitude, tried to mislead the
7 community in order to reduce the importance
8 of the petition to close the landfill in
9 disregard of the municipal authorities."

10
11 You'll see some conflict between Rodarte
12 Ramon and the local community from the outset of
13 these -- of these facts.

14
15 "The community of Guadalcazar desires to
16 express the following: that the
17 sovereignty of each municipality be
18 respected, and that any actions in each of
19 them be taken pursuant to our Magna Carta,
20 our constitution."

21
22 They're saying here that they don't -- they
23 don't want this landfill in their -- in their
24 area.

25 Now, the next document is at tab 11. And
26 this is the -- COTERIN, although it had been
27 authorized on a temporary basis to conduct this
28 trans -- transfer station activity, its plan was
29 to open a landfill. And in the course of
30 attempting to realize that plan, it sought
31 approvals. It sought approvals at the federal
32 level, State level and at the municipal level.

33 And this document dated August 15, 1991 is
34 the application by COTERIN when owned by Mexican
35 investors before Metalclad's involvement for a
36 municipal construction permit. And it -- I've
37 only -- its only portion -- a portion of it has
38 been translated.

39 And I'd ask you actually to look over at the
40 Spanish version just to see that in the second
41 paragraph this application for a municipal
42 construction permit is based upon certain articles
43 of the ecologic and urban code of the State of
44 SLP. And those are -- they're numbered there.
45 And I'll just ask you to note 63 and 64. These
46 are laws contained in the State legislation with
47 respect to municipal requirements that were

1 discoverable by COTERIN in 1991 and were
2 transparent to COTERIN in 1991, and were the --
3 made the subject of their application for a
4 municipal permit.

5 The next document is a translation of the
6 municipality's response to this first permit
7 application, and it's a letter. And you'll recall
8 that the principal of COTERIN is Aldrett, Salvador
9 Aldrett. And this is a letter from the
10 then-municipal president to Salvador Aldrett dated
11 October 1, 1991. It's on the letterhead of the
12 municipality. And it's re the denial of the
13 construction permit. It's addressed to Salvador
14 Aldrett, and says:

15
16 "By these means..."

17
18 This is the -- the municipal president.

19
20 "...I inform you of the decision to deny
21 the construction permit to the industrial
22 waste landfill. This decision was taken at
23 the extraordinary Cabildo session September
24 30, 1991."

25
26 The municipal council, when it sits in
27 session, is called the Cabildo. The municipal
28 council sits in session both in ordinary sessions,
29 which are regularly scheduled, and in
30 extraordinary sessions called for special
31 purposes.

32 The representatives of the municipal council
33 are named, including the municipal president, and
34 those others. And they note:

35
36 "After finding that the applicant company
37 does not have, 1, an environmental impact
38 study as required by SEDUE, the federal
39 authority; number 2, does not have a
40 land..."

41
42 That should be "land-use."

43
44 "...authorization as required by the State
45 government; and, number 3, does not have
46 control of the high risk posed by this
47 project..."

1

2 It is noted that, in addition, the number of
3 studies conducted by Mr. Ottoman that show the
4 area is not suitable to establish the cemetery,
5 and that's the landfill, thus the applic -- the
6 application submitted to the Ayuntamiento, and
7 that's the municipal council, is completely
8 denied.

9 So in 1991, after the contamination caused by
10 the approval -- temporary approval of the transfer
11 station, and upon application for a construction
12 permit for a haz -- for industrial waste landfill,
13 hazardous waste landfill, the municipality -- and
14 an application made on the basis of stated laws,
15 the municipality denied that application to
16 COTERIN when owned by Mexican investors.

17 Now, the next tab is out of -- is taken from
18 the -- Metalclad's reply in which, and I'll get to
19 this later, but in which it is admitted by
20 Metalclad that it is a matter of corporate record
21 that COTERIN, while owned by Mr. Salvador Aldrett,
22 sought a municipal construction permit from the
23 Municipality of Guadalcazar. That permit was
24 denied on September 21, 1991.

25 Metalclad was aware, after it did its due
26 diligence, prior to exercising the option to
27 purchase COTERIN, that as matter of corporate
28 record COTERIN had applied unsuccessfully for a
29 municipal construction permit as early as 1991.
30 The -- and Metalclad admitted that.

31 The next document is dated January 20, 1992.

32 These are the minutes of a public meeting of
33 the municipal council sitting in session as -- as
34 the Cabildo. And what had happened here, My Lord,
35 is there had been a change of administration.

36 The -- the application for the municipal
37 construction permit made in September and denied
38 in December of the previous year was revisited by
39 the incoming municipal council who had just been
40 elected and had taken office in January of '92.
41 And this records the minutes of this -- this
42 meeting. Cabildo meetings are public, and the
43 minutes of them are a matter of -- of record.

44 This document insi -- indicates a
45 confirmation by the new municipal administration
46 of the opposition to any siting of a hazardous
47 waste landfill at La Pedrera. And it notes in the

1 City of Guadalcazar, State of SLP, on January 19,
2 1992, they -- they're assembled in, again, the
3 Cabildo room, the following: the municipal
4 president and the other municipal councillors,
5 noting that, in the next paragraph, the only order
6 of business is the denial that was issued by the
7 municipality during the period of 1989-1991,
8 previous administration in regard to the
9 construction of the industrial cemetery located in
10 the site named La Pedrera.

11 The background shown in the record of this
12 Cabildo about this difficult reality in our
13 municipality are the following: First, its
14 construction took place almost in secret, using
15 the excuse that the drilling of wells was to
16 improve the agriculture in the area.

17 Second, the former State governor denies the
18 existence of the use of land permit issued by the
19 State government. In the meantime, thousands of
20 tonnes of waste are being accumulated in the
21 mentioned area.

22 One of the candidates to the government of
23 SLP, after visiting the site, states in another
24 city in that State that this area has an
25 industrial dump and is not a control landfill, and
26 after being elected governor directs a closure.
27 That's a fact that had happened elsewhere.

28 At the same time, the representatives of the
29 Ejidos of all the municipality opposed to -- the
30 operation of this dump in Ejido land of the
31 municipality.

32 And then it's noted that the -- there was a
33 closure by the central office of SEDUE in
34 September of 1991, closure of the site.

35

36 "And today in light of a possible
37 reopening, this honourable Cabildo after
38 hearing the voice of the residents of
39 Guadalcazar, and through its
40 representatives, determines the denial of
41 any permit that favours the continuity of
42 this company in Guadalcazar."

43

44 There you'll see the municipality acting in
45 its -- the municipal council acting in its
46 representative capacity. These are elected
47 representatives, as I indicated at the outset of

1 my description of the municipality. And they're
2 reacting to their view of the voice of the
3 residents of the area, and as representatives of
4 the -- the voice of the area determining basically
5 their opposition to any permit that would favour
6 the continuity of this company. This is a company
7 that in their view has illegally dumped 20,000
8 tonnes of hazardous waste.

9 Now, in -- by the time -- by this time in
10 1992, the next document, Metalclad has entered
11 into business in Mexico in a number of
12 investments. And my friend Mr. Thomas will detail
13 those in -- in more detail.

14 But this document is here simply to indicate
15 that one of those other investments in which
16 Metalclad was a shareholder in 1992 who was
17 seeking to -- in a different municipality in the
18 same State, was seeking approval to install an
19 industrial hazardous waste recovering and disposal
20 facility, went and applied for a municipal
21 construction permit.

22 And this is a letter from the municipal
23 council of that municipality in 1992 directed to
24 the company Eco Administracion. And Mr. Thomas
25 will locate that company in the scheme of -- of
26 Metalclad's investments in due course. This is a
27 letter granting a municipal construction permit to
28 that company. It notes:

29
30 "In response to your application, allow me
31 to express to you that in the Cabildo that
32 took place on September 18, 1992 your
33 application to install an industrial
34 hazardous waste recovery and disposal
35 facility in the municipality was assessed
36 taking into account certain
37 considerations. And on this basis by
38 resolution of the Cabildo you are
39 authorized to carry out the construction
40 and installation of your project."

41
42 And they ask for other things to be sent to
43 them.

44 The -- the only reason this document is here
45 is to demonstrate, as I'll demonstrate again and
46 again, that Metalclad was well aware of the need
47 to apply for and obtain a municipal construction

1 permit in advance of attempting to construct this
2 kind of facility.

3 The next document is -- now relates back to
4 COTERIN, that -- that other document related to
5 another proposed facility in another municipality
6 of the same State. But this document relates to
7 COTERIN. And this is the federal permit dated
8 January 27, 1993 that was referred to by the
9 tribunal as the federal construction permit.

10 That's how the tribunal refers to this.

11 There are in the -- in the -- the document
12 that I've put at the -- at the outset here has the
13 translation of this document that was filed by
14 Metalclad. And I'm going to take you to the next
15 tab, which is a witness statement filed by Mexico
16 to explain why I've just made the -- the comment
17 that I've made.

18 This is a translation of the witness
19 statement of Rene Altamirano. He was a SEDUE
20 representative at the time of these events. He
21 participated in the authorization of the transfer
22 station when it was owned by Mexican investors at
23 the La Pedrera site. So he -- he participated in
24 the authorization of that temporary use. And he
25 goes on from there to describe the steps taken
26 from his department's perspective with respect to
27 the proposed approval of a hazardous waste
28 landfill. And he starts over on paragraph 6, and
29 he notes that:

30
31 "The approval process for a hazardous
32 waste landfill site must proceed in
33 stages. It is a delicate process that
34 requires a series of highly specialized
35 studies and tests be carried out which must
36 be analyzed by the competent authority in
37 order to approve the construction and
38 operation plans."

39
40 This is only one of a num -- of permits, the
41 federal he's talking about. There's only one of a
42 number of permits that must be obtained from the
43 competent authorities.

44 He talks about how he thought he was
45 authorized to allow the temporary storage of the
46 wastes. And then he notes in paragraph 10:

47

1 "Unfortunately, some time after receiving
2 the authorize (sic) to build the transfer
3 station, and while the environmental impact
4 statement for the establishment of the
5 controlled landfill was being prepared
6 along with detailed technical studies,
7 COTERIN began to receive hazardous waste
8 without constructing the authorized
9 transfer station, which basically consisted
10 of an environmentally safe storehouse. The
11 wastes received were simply placed on or in
12 the land without any neutralization or
13 treatment. COTERIN did not have any
14 authorization to receive the wastes under
15 these conditions."
16

17 He describes the reports that were done, the
18 investigations. And in paragraph 16 notes his
19 order of a closure, complete and temporary closure
20 as a security measure. And he notes in paragraph
21 18:

22
23 "From that time on..."

24
25 September '91:

26
27 "...the federal department had to deal
28 with a very difficult situation.
29 Around 55,000 containers of dangerous
30 waste, approximately 20,500 tonnes, had
31 been deposited on the site, be it simply
32 placed on top or partially buried in the
33 land without the appropriate treatment or
34 any safety measures at all."
35

36 The situation was complex. On the one hand,
37 one of the department's objectives, federal
38 department's objectives, was the installation of a
39 certain number of controlled hazardous waste
40 landfills in different sites throughout the
41 Mexican republic in order to meet the needs of the
42 country in this area.

43 Further, the results of the studies requested
44 from COTERIN showed that the La Pedrera site was
45 suitable for this purpose.

46 On the other hand, COTERIN had created an
47 environmental hazard by receiving unauthorized

1 dangerous waste, significantly damaging its
2 credibility as the operator. This resulted in the
3 distrust of COTERIN in the local community and,
4 moreover, had damaged the credibility of the
5 federal environmental authorities.

6 The -- notwithstanding those difficulties,
7 the federal authorities decided to proceed with
8 investigation of the appropriateness of the site
9 from the federal perspective as a hazardous waste
10 landfill, and he describes that. And he -- and he
11 describes the law under which they're operating at
12 that time. And he notes in paragraph 22:

13
14 "I want to emphasize that this was the
15 first hazardous waste landfill permitted
16 under the new law. The first commercial
17 facility was another facility, but that was
18 long before 1988 law, the federal law and
19 the regulations."

20
21 So they -- he talks about the respective
22 authorizations that -- from the federal
23 perspective, and the capacity that they were
24 prepared to authorize.

25 And he goes on to talk about meeting the
26 Metalclad representatives at the beginning of
27 1993. He talks about the Santa Maria del Rio
28 project that Metalclad was involved in, and that
29 was the one to which I showed you where they --
30 they did obtain a municipal permit. He talks
31 about meeting with Mr. Kesler and Mr. Neveau.

32 He talks about -- in paragraph 27 he talks
33 about directing the -- directing the tribunal's
34 attention to the particular language of the permit
35 that was granted by the federal authorities in
36 January of 1993, the permit that I've just -- was
37 under the previous tab. He says:

38
39 "I direct the tribunal's..."

40
41 In paragraph 27:

42
43 "I direct the tribunal's attention to the
44 matters concerning the language in which we
45 communicated, because I'm absolutely
46 certain that I discussed the issues
47 regarding federal jurisdiction with the..."

1 fed "...with the Metalclad
2 representatives. I remember that I
3 specifically said that the authorization
4 granted only referred to the approval of
5 the conditions of the site and of the
6 technology plan to be used there. This
7 authorization did not mean that the federal
8 government could..." approve "...could
9 approve land usage because that was an
10 issue concerning the State and the
11 municipality. I have no doubt that I made
12 this very clear in my discussion with
13 Metalclad's representatives.

14 "I also remember that Mr. Rodarte
15 Ramon gave the impression that he believed
16 they would prevail over the State and
17 municipal concerns."

18
19 That's the -- "they," the federal authorities
20 would prevail over the State and municipal
21 concerns.

22 When I, in discussion yesterday, mentioned
23 was there any evidence of federal privacy, the --
24 and -- and the -- it was to this evidence that I
25 was referring. Mr. Altamirano is saying he
26 remembers a federal official, Rodarte Ramon, the
27 one that was described earlier as causing
28 difficulties in the area, gave the impression that
29 he believed -- he's an engineer, by the way, not a
30 lawyer or constitutional lawyer -- that he
31 believed that they would prevail over the State
32 and municipal concerns. He thought the influence
33 of the federal government could tilt the decision
34 in favour of the project.

35
36 "However, I was always careful in my
37 position as general director to ensure that
38 the powers conferred on the federal
39 authority to grant permits were fully
40 exercised, but never invading the local
41 government's sphere of jurisdiction.

42 "The tribunal should know that in
43 Mexico the environmental laws with broad
44 scope are relatively new, and that many of
45 the matters relating to the division of
46 jurisdiction have not yet been resolved.
47 For example, in 1983 the constitution was

1 amended to give more powers to the
2 municipal governments. These powers have
3 not been fully exercised but are recognized
4 by the constitution. Therefore, as a
5 federal public servant, it is clear I had
6 wide powers, though not absolute nor
7 exhaustive. As shown in Exhibit 9 to my
8 statement, when the... department "...when
9 the departmental technical group approved
10 the application..."

11
12 COTERIN's application.

13
14 "...I authorized COTERIN's environmental
15 impact statement and the risk study on
16 January 27, 1993..."

17
18 That's the document I've just referred to.

19
20 "...and granted the federal permit for
21 environmental impact. I specifically
22 stated the following: This authorization
23 is issued without prejudice to the holder's
24 need to apply for and obtain other
25 authorizations, concessions, licence
26 permits or such that are necessary to
27 conduct the works that shall be applied by
28 the Secretariat and/or by other federal,
29 State or municipal authorities."

30
31 So the very permit, the first federal permit,
32 issued by SEDUE contained on its face proposition
33 that it was up -- without prejudice to the need of
34 the holder to apply for other permits.

35
36 "This meant that the authorization could
37 not be considered as an authorization
38 satisfying all legal requirements..." by
39 the company -- sorry "...all legal
40 requirements the company had to meet in
41 order to establish a hazardous waste
42 landfill."

43
44 In other words, it meant that this
45 authorization did not supersede other federal,
46 State or municipal authorizations the applicant in
47 addition needed to obtain and construct and

1 operate the hazardous waste landfill.

2

3 "Permitting processes similar to those in
4 the United States where if...where if the
5 county does not grant a land use permit for
6 a hazardous waste landfill, the site cannot
7 be authorized."

8

9 He refers to some cases in the United States
10 of which he's aware.

11

12 "Metalclad had held themselves out to be
13 professionals in the area of hazardous
14 waste management. They ought to have been
15 aware of this risk, especially given that
16 they were planning to invest heavily in
17 Mexico."

18

19 Now, in the next paragraph he refers to the
20 Metalclad's translation of the document. And
21 that's what I've put at -- in the previous tab.
22 And he says:

23

24 "Metalclad's translation of this
25 paragraph..."

26

27 The tenth paragraph in his view is not
28 accurate. He says:

29

30 "Metalclad's translation states this
31 authorization is granted without detriment
32 if the holder applies for and obtains other
33 authorizations."

34

35 Well, he says:

36

37 "The permit actually states this
38 authorization is issued without prejudice
39 to the holder's need to apply for and
40 obtain other authorizations, concessions,
41 licence or permits that are necessary to
42 conduct, including federal, State or other
43 municipal authorities."

44

45 That -- I'm going to come back to that, it --
46 in Metalclad's own documents with respect to the
47 question of whether or not there was any confusion

1 in that regard.

2 Then he notes in paragraph 32:

3

4 "I want to refer to the scope of the
5 authorizations granted to COTERIN by..."
6 the "...by INE in 1993..."

7

8 That's the permit we're talking about.

9

10 "...and to draw the tribunal's attention to
11 the text of such authorizations and to the
12 legal basis for it being granted.

13 "Metalclad refers to those
14 authorizations as final construction and
15 operation permits. However, those permits
16 are not legally construction nor operation
17 permits, and are instead authorizations
18 prior to the construction and operation of
19 a controlled hazardous waste landfill."

20

21 You'll see in this -- this -- this will
22 become clear throughout, that there's a number of
23 documents from the federal authorities indicating
24 that although the federal authorization is a
25 necessary requirement, it is not a sufficient
26 requirement for the construction of a hazardous
27 waste landfill. That's what he's saying here.

28 What the federal authorities do is grant the
29 authorization with respect to their view of the
30 environmental -- their view of the environmental
31 impact study that is required by their department
32 and whether it's properly prepared and
33 demonstrated that the environmental impact could
34 be prevented or mitigated as -- as set out in the
35 study submitted, and that's in paragraph 33.

36 And he notes in -- he makes the same point in
37 paragraph 36. The paragraphs from the law, the
38 regulations and the authorizations, along with
39 this clause 10 that he's translated, shows that a
40 construction permit was never granted. It's a
41 misnomer to call this a federal construction
42 permit. But instead what was granted was an
43 authorization in relation to the requirement
44 regarding environmental impact, as shown by the
45 Mexican legislation.

46 He goes on in paragraph 39 to make the
47 necessary but not sufficient point that I have

1 noted, and says:

2

3 "This is a principle..."

4

5 In the last sentence of paragraph 39:

6

7 "This is a principle that Metalclad's
8 lawyers should have been completely aware
9 of."

10

11 And I'll be taking you later to legal advice
12 given to Metalclad on the record which shows that
13 they were completely aware of that and advised
14 Metalclad in that respect.

15 He also notes in paragraph 48 his assumption
16 that an investor like Metalclad would have
17 retained Mexican legal counsel that would know
18 this -- this basic principle of each level of
19 government requiring to be satisfied before all
20 authorizations were -- were obtained, and noting
21 that:

22

23 "In establishing a business, especially a
24 highly regulated facility such as a
25 hazardous waste landfill facility, requires
26 multiple authorizations from different
27 authorities."

28

29 Then he notes in paragraph 51 and 52 there
30 was, in his view, a series of factors at play
31 here; one was the prior conduct of COTERIN,
32 which -- which the -- made the task of obtaining
33 support for the introduction of any new hazardous
34 wastes to this area very, very problematic.

35 This generated -- he says there was local
36 opposition to the project. And it was -- seemed
37 to him that the governor was not sure of how to
38 respond to it. But it was there. It was a fact.

39 And Your Lordship will hear later on that it
40 was a fact, not just by reason of the municipal
41 council and its view of the residents, but also
42 other -- other actors in the -- the scheme of
43 these things. Non-governmental organizations were
44 also opposed and supplied their opposition as
45 well. And opposition had started from the
46 beginning, from 1991, and this particular site was
47 never able to shake it.

1 Now, before leaving that witness statement, I
2 would just note that Mr. Altamirano was not called
3 to be cross-examined. You'll recall when I
4 described the procedure followed by this tribunal
5 under the additional facility rules involved the
6 exchange of witness statements, and involved the
7 opportunity of the opposing parties to call for
8 cross-examination any witness who had filed a
9 witness statement. Mr. Altamirano was not called
10 by Metalclad to be cross-examined at the hearing.

11 I now come at tab 18 to the -- the first
12 document, legal document, introducing Metalclad to
13 this investment. This is the original April 1993
14 option agreement between the Aldretts and
15 Metalclad for the purchase of COTERIN.

16 It's later amended, and then it's further
17 amended. And it's not really the ultimate version
18 of the document that is -- is significant from the
19 perspective of the submissions that I'm making,
20 but what Metalclad's own document discloses about
21 what they knew about the municipal permit issue
22 and what they knew about the means to resolve any
23 uncertainty with respect to the municipal permit
24 issue.

25 So we start with the -- the original option
26 agreement. And Mr. Aldrett states that he's the
27 owner of -- of the land on -- that upon -- of the
28 site of La Pedrera and that he's the owner of the
29 shares of stock of COTERIN. A number of other
30 representations are -- are made.

31 And at page 4 of the document, it's -- in
32 paragraph 4 it's noted that the -- there is
33 reference made to the January 27, 1993 permit that
34 we've just been talking about, addressed to
35 COTERIN by the National Institute of Ecology,
36 granting authorization to it for the establishment
37 of a confinement of industrial hazardous waste at
38 La Pedrera, noting that based on various official
39 authorizations it had already made confinements of
40 industrial hazardous waste.

41 And then it notes in paragraph 6, this is
42 the -- the -- the vendor noting these things:

43 "At present it..."

44 COTERIN,

47

1 "...has applied before the local
2 authorities and all other corresponding
3 authorities of the State of SLP for the
4 necessary permits and authorizations
5 pursuant to the corresponding applicable
6 law to install at La Pedrera a confinement
7 of hazardous industrial waste."
8

9 Now, the vendor doesn't disclose that their
10 application to the municipality had been denied
11 and that -- but that becomes a matter of corporate
12 record. And I'll show you what happens, what
13 Metalclad does to amend this agreement on account
14 of that. What they're just simply saying here is
15 that they've applied.

16 And they set out in this document in the
17 third clause on page 5 the -- the form of the
18 payment of the price. There's a promise to -- to
19 sell. And then there's a price set out, and it's
20 in various installments. The first installment is
21 \$450,000 U.S. on a date of the transfer of the
22 shares. Then further installments of 500, 500 and
23 500, and another hundred -- or \$1,500,000 are to
24 be made within 30 days after the first payment and
25 30 days thereafter. That's the original
26 arrangement.

27 Over the page -- I mentioned this is -- this
28 is in effect an option agreement. Over the page,
29 the terms that the option is open is set out in
30 the -- on page 6 in the term called "Fifth Term."
31 It says:

32 "The term of effectiveness of this..."
33 provi "...promise of sale agreement begins
34 as of this date and ends after 20 working
35 days counted as of the date COTERIN has
36 obtained all the local permits and all
37 other permits required pursuant to
38 applicable law which allow it to operate
39 forthwith, and without any further
40 proceeding or authorization, hereinafter
41 referred to collectively with the federal
42 permits as the permits."
43

44 So this -- this document -- this option
45 remains open for -- from the start of this date
46 until 20 days after COTERIN has all the permits.
47

1 And I'll come back to that.

2 The document, like a document of this type,
3 allows for inspection of COTERIN for due diligence
4 to be done by Metalclad, including, at the bottom
5 of page 7, due diligence in respect of the permits
6 which COTERIN has:

7

8 "...whether..."

9

10 And I'm at the bottom of page 7, over the top
11 of page 8:

12

13 "...whether federal or local and all
14 others required pursuant to applicable law
15 to operate the confinement of hazardous
16 industrial wastes at La Pedrera."

17

18 Well, that's one of the things that they're
19 entitled to do, inspection, access to the
20 facilities of COTERIN, as well as to its corporate
21 documents, to disclose that.

22 They deal with liability for the
23 contamination already made in the eleventh term on
24 page 8.

25 Now, I'll come back to the timing of this
26 sequence, but I'd like to jump ahead to the
27 amendment to that agreement at tab 23. I'll come
28 back in sequence. But if you'd jump ahead to tab
29 23, this is an amendment, September 9, 1993, to
30 the promise agreement that we've just been
31 examining. Again, it's a -- an agreement between
32 Metalclad and Salvador Aldrett.

33 This document notes the price had been agreed
34 upon to be paid, \$450,000 on the exercise of the
35 option, and then 1.5 million in a series of
36 installments within 30, 60, 90 days thereafter.
37 It notes that. And that -- that has changed.
38 That becomes changed by this document.

39 This document exercises the -- the option and
40 says at page 3, clause D, that:

41

42 "On this date and by means of this
43 agreement within the term of effectiveness
44 of the promise agreement..."

45

46 And I'll come back to -- to that. That has
47 to be, as you'll recall, before COTERIN has

1 received all the necessary permits.

2

3 "...within the terms of effectiveness of
4 the promise agreement the beneficiary..."
5 notices "...notifies the promisors in
6 COTERIN that it exercises the right to
7 purchase the shares of the capital stock of
8 COTERIN."
9

10 And they wish to amend the purchase agreement
11 pursuant to these provisions. And they make a
12 number of changes. But the ones I'll take -- draw
13 your attention to are on page 6 and 7.

14 And here, instead of paying the 450,000 and
15 then the 1.5 million in the sequence suggested,
16 they agree to pay the 450,000 in paragraph A. And
17 then I'd like to read paragraph B. And I'd like
18 to emphasize paragraph B on page 7:

19

20 "The payment of..."

21

22 The next installment, the \$500,000:

23

24 "...shall be made within 20 days following
25 the day in which the government of the
26 State of SLP through its current governor
27 has authorized to proceed with the
28 construction needed for the operation of a
29 controlled confinement of hazardous waste
30 located in the lot of land geographically
31 known as La Pedrera with the surface of 814
32 hectares pursuant to what it was authorized
33 to COTERIN by another federal permit dated
34 August 10, 1993."
35

36 That we'll come back to. And so this is
37 payment will be made on condition of two things
38 happening, 20 days of the governor authorizing
39 construction to proceed and:

40

41 "...that the municipal permit for the
42 building of the aforementioned confinement
43 has been obtained by COTERIN or, as the
44 case may be, definitive judgment in a writ
45 of Amparo that allows to legally proceed
46 with the building of such confinement."
47

1 What Metalclad is doing here is conditioning
2 payment of \$1.5 million of a \$1.9 million purchase
3 price upon obtaining approval from the governor,
4 from the State, and either the municipal permit
5 being issued for construction or a definitive
6 judgment in a writ of Amparo, or a legal remedy
7 that allows COTERIN to legally proceed without
8 such permit.

9 And in this document Metalclad is
10 demonstrating both its knowledge of the municipal
11 permit issue and the legal means, the writ of
12 Amparo, to resolve that legal issue if there's any
13 uncertainty.

14 This is the document by which Metalclad
15 acquires this very investment.

16 Now, I think I'm close to the break by my
17 watch, maybe a bit fast.

18 THE COURT: This would be a convenient place.

19 MR. FOY: This would be a convenient time to break.

20 THE COURT: We'll take the luncheon break and
21 reconvene at 2 o'clock.

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

24

25 (NOON RECESS)

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

27 (PROCEEDINGS RESUMED AT 1:58 P.M.)

28

29 THE COURT: Yes, Mr. Foy.

30 MR. FOY: My Lord, I was at tab 23, the amended option
31 agreement whereby this investment was acquired.

32 And I was pointing to that clause whereby the
33 purchaser conditioned payment of three-quarters of
34 the purchase price upon obtaining State approval
35 and municipal approval or, as the case may be,
36 definitive judgment in a writ of Amparo allowing
37 COTERIN to legally proceed.

38 And I'd ask you to recall the tribunal's
39 characterization of the failure of Mexico in
40 paragraph 99 of the award, where the tribunal
41 said:

42

43 "Mexico failed to ensure a transparent and
44 predictable framework for Metalclad's
45 business planning and investment."

46

47 Now, I would submit that this document, the

1 document whereby Metalclad acquired this very
2 investment, discloses Metalclad was able to
3 fashion a business plan around the acquisition of
4 this investment by providing for transparent and
5 predictable framework; namely, the writ of Amparo,
6 to resolve any question with respect to the need
7 for municipal permit.

8 These documents taken together, the original
9 option agreement and the amendment, show
10 Metalclad's awareness of the municipal permit
11 issue, the local permit issue, and show that not
12 having obtained the municipal permit as of the
13 time of the exercise of the option in September of
14 '93, that planning had to be done around that,
15 and was done.

16 Now, I -- the very next tab discloses
17 Mr. Kesler's evidence for Metalclad with respect
18 to this amendment so that you have that. And he
19 says -- and this is Mr. Kesler for Metalclad
20 testifying before the tribunal:

21
22 "The amendment explains really the reason
23 for the amendment to the Aldrett contract
24 was to the extent there was any risk at
25 all, we wanted him..."

26
27 The -- Aldrett, the vendor, to share that
28 risk:

29
30 "He was representing it they don't issue
31 permits."

32
33 So he's saying Aldrett was representing that
34 the municipality don't issue permits.

35
36 "And if they did, they would have to for
37 the payment of a few pesos. So we said,
38 fine, take that risk with us."

39
40 Now, I pause to note that for what is
41 represented to be a risk of the payment of a few
42 pesos Metalclad conditioned payment of \$1.5
43 million.

44 And I -- I add that, as I mentioned at the
45 outset, this agreement was further amended. And I
46 don't rely upon it to show the final mode of
47 agreement between these parties, but to show

1 awareness on the part of Metalclad, both of the
2 municipal permit issue and the means to resolve
3 it.

4 Now, I'd like to go back in the sequence. I
5 had started with the option agreement at tab 18
6 and then skipped ahead. And I'd like to go back
7 in the sequence to tab 19. And tab 19 is a
8 translation of the State land use permit dated May
9 11, 1993. And I just direct you to the bottom of
10 page 383, that this State land use permit says at
11 the very last paragraph on that page:

12
13 "This licence does not prejudice on the
14 rights of ownership of the solicitant with
15 respect to the site for which this is
16 issued and does not authorize works,
17 constructions or the functioning of
18 business or activities."

19
20 So it would be incorrect to conclude that
21 with the federal environmental impact study permit
22 and the State land use permit there had been
23 authorization of the construction. Both on their
24 face demonstrate in my submission that that's not
25 the case.

26 Now, the next document in sequence is a
27 letter of June 1993. There was a meeting between
28 representatives of Metalclad and the governor of
29 the State, the new governor of the State, who came
30 into the administration after the issuance of
31 this -- the permit I've just showed you, in which
32 a meeting occurred. And the governor writes this
33 to Metalclad in June of 1993. There are -- there
34 is a heated debate during the course of the
35 hearing as to what was entirely the subject of
36 this meeting, and I don't -- I don't need to go
37 into that. What the governor says here is in the
38 last paragraph:

39
40 "I wish to emphasize that as long as
41 they..."

42
43 Metalclad:

44
45 "...comply with the environmental
46 standards of the different levels of
47 government and respect the genuine

1 interests of the community, then the
2 projects presented for my consideration
3 have the necessary support to carry them
4 out successfully."
5

6 The next document -- again, notice of the
7 need for requirements, complying with the
8 environmental standards of the different levels of
9 government, and the need to respect the genuine
10 interests of the community.

11 The next document is a federal permit as well
12 dated August 10, 1993, again from the National
13 Institute of Ecology. And I would just direct you
14 to paragraph 36 of that document, which is on the
15 second-last page of it.

16 That -- this authorization is contained -- it
17 refers to the law, the federal law:

18
19 "...for which the company, COTERIN, must
20 subject itself to all of the established
21 dispositions in these legal instruments as
22 well to the applicable norms to those
23 activities which are the motive of this
24 authorization."
25

26 And there's -- the evidence was that that was
27 referenced to the other levels of government, the
28 other applicable norms to these activities.

29 The next document was -- is one of
30 Metalclad's securities and exchange commission
31 filings filed on August 17, 1993. And I just note
32 the page 9 of -- it's just over the page there.
33 There's an extract from this filing in which
34 Metalclad is telling the public through its
35 filings that:

36
37 "In April 1993 the company entered into an
38 agreement in principle to acquire 94
39 percent of COTERIN..."
40

41 That's the -- the option to purchase.

42
43 "...which owns a permitted hazardous waste
44 landfill near Guadalcazar, SLP. COTERIN
45 has received the construction permit from
46 SEDESOL and anticipates the State and
47 municipal land use authorizations by

1 September of 1993."

2

3

4 Now, that statement we know from the option
5 agreement, which is the next document in the
6 sequence dated September 9, 1993 under tab 23,
7 that COTERIN had not obtained the municipal
8 permit, because otherwise that amendment to deal
9 with the delay of the purchase price would not
10 have been necessary.

11 And that's reflected in tab 25 as well. This
12 is a letter from Metalclad to the federal
13 institute, the National Institute of Ecology. And
14 in the third paragraph of this letter dated
15 September 16, 1993 the -- Metalclad is requesting
16 assistance from the federal authorities, and it
17 says this:

18 "We now have the construction and operating
19 manifest from the..."

20

21 From INE:

22

23 "...and the land use manifest from the
24 State of SLP. We have the support from
25 many individuals who are State and federal
26 staff, individuals within the academic
27 community, people from the communities near
28 the site, union leaders and..." industrial
29 leaders "...industry leaders.

30 Unfortunately, we have not been able to
31 secure the support from the municipal
32 president of Guadalcazar. We intend to
33 meet with him to discuss his concern and
34 have developed a community awareness and
35 social development program."

36

37 And this program, they say, is aimed at
38 educating the people about the safety of the -- of
39 their proposed facility. And he says in the next
40 paragraph:

41

42 "We are prepared to begin construction
43 immediately upon receiving the
44 authorization from Governor Sanchez
45 Unzeuta, but we are not sure if a manifest
46 is necessary from the Guadalcazar
47 municipality. Our law firm in SLP believes

1 that a municipal manifest may be needed for
2 construction."

3

4 So they've received legal advice that a
5 municipal permit may be necessary. He's asking
6 the federal authority:

7

8 "If you believe it is appropriate, we
9 would appreciate your discussing the
10 municipal permit with the governor."

11

12 And they attach a -- a letter in that regard
13 again indicating that, as with any other investor,
14 seeking to site a new facility, they have
15 prudently sought legal advice, and their legal
16 advisor has said you might need a manifest from
17 the municipality. They've already contracted with
18 the vendor to -- to deal with that issue and for
19 the means to resolve it.

20 The next document is another municipal record
21 from the municipality recording a meeting in
22 the -- of the municipal council again on October
23 25, 1993. And again, the prospect of the opening
24 of this landfill is before the municipal council,
25 or the prospect -- the proposals with respect to
26 that. And the meeting is con -- is convened under
27 a -- an agenda which includes .5 in the agenda, a
28 submission before the municipal council of the
29 citizen urgency to reject the reopening of the
30 hazardous waste landfill. So there's been a
31 continued indication of the opposition to any
32 opening of the -- of a hazardous waste landfill.

33 And over the page, the municipal council has
34 received a copy of a letter from Mr. Carlos
35 Salinas to Mr. -- a copy of the letter for
36 Mr. Carlos Salinas requesting the fulfillment of
37 an April 29, 1992 precedential resolution for
38 closing definitively the hazardous waste
39 landfill. And as a response to the citizenship
40 claims this municipal council urges to the
41 municipal ecological Regidor -- this is one of
42 their officials appointed to deal with ecological
43 issues -- that:

44

45 "...as soon as he can to comply with all
46 the needed proceedings to give security to
47 the Guadalcazar inhabitants that the

1 landfill will never reopen and that, on the
2 contrary, that works will be initiated in
3 order to remove the waste storage at the
4 cemetery..."

5
6 What the municipality wanted was remediation
7 of the contamination that had been there since
8 1991.

9
10 "...with the goal to protect this..."
11 municipal "...municipality, environment and
12 its surroundings so as the underground
13 already damaged by the high hazardous
14 waste..."

15
16 So they're requesting assistance at the
17 federal level for definitely the closing and
18 remediating the contamination that is there
19 already. This again is a public record of the
20 municipality.

21 The next tab refers to a series of exchanges
22 that took place in the media between Metalclad and
23 the governor with respect to the continued
24 municipal opposition and -- and the attempts made
25 by Metalclad to convince the community that the --
26 their proposal was in their interests.

27 I have it here for the purpose of showing --
28 and I -- I just turn over the page to paragraph
29 number 2, to showing that Metalclad itself was
30 aware of the serious danger arising and the risks
31 arising by reason of the contamination. And
32 par -- in paragraph 2 Metalclad points out that
33 they were not responsible for the introduction of
34 the -- or management of the transfer station and
35 the introduction of the hazardous wastes in 1991.

36 That's correct. They -- they didn't deposit
37 it there. Whether they, having acquired COTERIN,
38 became legally responsible is a different issue,
39 an issue for Mexican domestic law that I -- I
40 don't need to go into.

41 But I note that Metalclad is stating in about
42 the sixth line down:

43
44 "We recognize that a serious danger exists,
45 in the event that the facility approved by
46 the federal government cannot be operated,
47 given the number of containers existing on

1 the site may reach up to 120,000 in number,
2 representing close to 30,000 tonnes of
3 dangerous and toxic waste deposited only in
4 ditches which do not meet the construction
5 standards and are only covered with dirt
6 without complying with the minimum safety
7 conditions and standards and which may pose
8 a great danger to the health of the
9 inhabitants of the communities.

10 "Given this grave danger, Metalclad
11 is ready to treat and confine these wastes,
12 investing the amount of \$5 million to meet
13 these ends, thereby avoiding further damage
14 that at this moment is already posed to the
15 detriment of the environment."
16

17 Well, you can imagine the -- the inhabitants
18 of the municipality having been concerned about
19 dama -- the risks to health and the environment
20 posed by the presence of this contamination,
21 having that confirmed by Metalclad itself in a
22 public advertisement, describing the matter as one
23 of serious and grave danger to the health of the
24 inhabitants of the communities.

25 Now, of course, what Metalclad wanted to
26 convey was that, well, if we're -- if we operate,
27 we will in the course of that operation remediate
28 this -- this hazardous waste. The municipality
29 saw remediation as a separate issue that did not
30 involve the introduction of any new hazardous
31 waste. Remediation of course of contamination
32 like this can be done in situ by incineration, by
33 taking away the waste to another location.

34 There is no scientific or other requirement
35 for a remediation to occur by reason of the
36 introduction of new hazardous waste. The two
37 were -- are very separate. And in -- and -- and
38 it's more expensive to incinerate. It's more
39 expensive to take it away. But certainly it's
40 not -- it's not required that there be the
41 introduction of new hazardous wastes in order to
42 remediate this existing problem.

43 And what the municipality wanted was, having
44 this problem confirmed, they wanted remediation.

45 And of course Your Lordship again is aware
46 fully of the -- the costs that can be involved in
47 remediation, the complex legal issues that can

1 arise as between owners, prior owners and -- and
2 the like, the governments and others, with respect
3 to remediation of hazardous sites.

4 It -- it -- you're well aware, more -- more
5 fully informed than perhaps anyone in this room --

6 THE COURT: I am aware.

7 MR. FOY: -- save Ms. Thayer, who may be here.

8 THE COURT: Who has disappeared.

9 MR. FOY: Who has disappeared.

10 So Metalclad confirms, in my view, the -- the
11 worst fears of the community. And likely this has
12 the effect -- and you'll see that this has the
13 effect not of calming opposition but of the
14 opposite.

15 The next document is another document along
16 this -- again from Metalclad, the document at tab
17 28, noting by Metalclad to the government -- to
18 the State governor that they have not started to
19 construct or operate the facility because they
20 have not the consent of the State government.

21
22 "The real and only risk that may exist at
23 La Pedrera are some 120,000 containers with
24 close to 30,000 tonnes of hazardous wastes
25 which cannot be neutralized while we are
26 not permitted to carry out the necessary
27 works."

28
29 Well, as I've said, that could be neutralized
30 by incineration, by other means. It doesn't
31 require the operation of a hazardous waste
32 landfill and the introduction of new waste.

33 And they note that in their view there's been
34 some misinformation of the public as to -- to
35 their plans and proposals. The next doc -- and
36 that again is common in these con -- the siting
37 of controversial sites like hazardous waste.

38 The next document is the response of the
39 State government to these public statements in
40 which the State notes again the -- the deposit of
41 the waste, and in the third paragraph in the last
42 two sentences:

43
44 "The public positions of both the federal
45 and State authorities are in agreement that
46 the authorization by the State government
47 is necessary to operate such a facility."

1
2 And you'll recall that that was one of the
3 conditions precedent to the payment of
4 three-quarters of the purchase price, approval by
5 the State government.

6
7 "The State government also advised it is
8 essential to have the consent of the
9 inhabitants of Guadalcazar who have
10 repeatedly expressed their opposition
11 publicly and to the mass media. The State
12 government..."

13
14 At the bottom of the page:

15
16 "...acknowledges the imperative and urgent
17 need to have a hazardous waste disposal
18 facility which protects the environment..."

19
20 And notes there their requirements, which is
21 a safe site and their proposals that this should
22 be carried out.

23 And I note B:

24
25 "...with the consent of the population
26 inhabiting the region in which the
27 installation will be located and others
28 which may be affected."

29
30 And C:

31
32 "They must also comply with all the
33 requirements and authorization which the
34 laws set out in a joint federal, State and
35 municipal agreement."

36
37 Indicating clearly that -- to the investor,
38 to everyone, that municipal approval is going to
39 be required in this regard.

40 Now, of course Metalclad knew that from the
41 outset of requiring this investment, either get
42 municipal approval or a court order indicating
43 that it was not necessary. It also notes -- it --
44 the State's position was although they were
45 looking for an operator to deal with this problem,
46 it wasn't necessarily going to be Metalclad. And
47 that's in the last paragraph.

1 Now, I'll note later that, because of the
2 contamination of this site, other sites within the
3 State were offered to Metalclad. But Metalclad
4 was not prepared to spend the time necessary to
5 get federal permits for those other sites. I'll
6 come back to that.

7 Under the next tab we have the response of
8 Metalclad to the -- to the State government and to
9 public opinion. And in the fifth paragraph, the
10 second from the bottom, Metalclad indicates, and I
11 quote:

12
13 "We agree with you, that the..." construct
14 "...that the consensus of the population
15 of Guadalcazar is required in order to be
16 able to construct and operate such a
17 facility."

18
19 And then over the page:

20
21 "We recognize the sovereignty of the State
22 of SLP and the independence of the
23 Municipality of Guadalcazar."

24
25 They had of course recognized that in the
26 agreement whereby this investment was acquired.

27 Now, that document has been reproduced in a
28 couple of places. It's also at tab 32. And so I
29 don't need to repeat that.

30 Now, negotiations had gone on between -- at
31 the State level between Metalclad and the -- an
32 official in the State, Pedro Medellin, responsible
33 for environmental matters at the State level. And
34 the let -- a letter of May 26th from Medellin to
35 Metal -- sorry, yes, to Metalclad through their
36 lawyer notes a number of proposals that were being
37 made at that stage of the -- of the arrangements,
38 because the State did want to promote their -- the
39 goal of having a hazardous waste landfill
40 somewhere in the State.

41 They set out these -- these proposals which
42 did not result in agreements, but in -- indicates
43 the position. And the -- it was suggested that
44 the concrete agreements would include, in number
45 1:

46
47 "Remediation of the final confinement

1 cells of the site known as the transfer
2 station at La Pedrera probably requiring
3 in situ reconfinement and incineration
4 pursuant to the highest technical standards
5 paid for and done by Metalclad."
6

7 So remediation of that site was seen as
8 something that could be done.

9 Then under number 3:

10
11 "The establishment and operation of a
12 hazardous waste landfill in an area of the
13 State to be determined by common agreement
14 where Metalclad will again prepare the
15 local studies required by law and to
16 guarantee in the view of federal, State and
17 municipal authorities safe operations.
18 In such a case, the State government will
19 fully support Metalclad and provide
20 technical information and will facilitate
21 local technical assistance."
22

23 One of the reasons that the prior
24 contamination had led to such extensive opposition
25 to this particular site, it was thought that it
26 would be best to remediate this site and try and
27 find somewhere else that the inhabitants might be
28 content to have a hazardous waste landfill to be
29 determined by common agreement.

30 And then over the page -- and -- and I should
31 note at this stage that Metalclad had at this
32 time, and Mr. Thomas will take you to this in more
33 detail, but plans to have many facilities
34 throughout Mexico of many different types,
35 including -- we mentioned a couple at Santa Maria
36 del Rio and the other -- and another one. So it
37 was also -- the site at La Pedrera was also talked
38 about in here.

39 In number 4, it says:

40
41 "The decision of opening a landfill in
42 La Pedrera to receive hazardous waste in
43 addition to the existing waste will be
44 subject to convincing State and municipal
45 authorities that the facility could operate
46 with high safety standards."
47

1 And B:

2

3 "That the community accepting its
4 operation, such acceptance being assessed
5 jointly by State and municipal authorities
6 and the company, following a truthful and
7 clear proposal to the community of the
8 conditions and implications of operation."
9

10 So the -- from the State perspective they
11 were prepared to assist Metalclad in finding
12 another site. They were prepared -- or they --
13 they were encouraging remediation of this site.
14 And they were prepared to consider operation of
15 this site if the municipality could be convinced
16 and these other conditions would be satisfied.

17 Now, that was not acceptable to Metalclad,
18 and I don't suggest that it was. But it -- it --
19 it would be relevant to one of the findings the
20 tribunal makes that I'll come back to.

21 Now, there was some construction took place.
22 And you recall I -- I referred to the -- a -- a
23 later document quite a bit earlier involving
24 the -- an order of PROFEPA for the installation of
25 a plastic cover and clay of the existing
26 contamination which took place, according to that
27 document -- which were put in place on August 9,
28 1994.

29 And we're getting into the time where --
30 where construction activities appear at the -- at
31 the site; by some records that may have started as
32 early as May. But there -- the point I want to
33 make about it is that there was confusion arising
34 from the documents as to whether that construction
35 involved simply putting this plastic and clay and
36 sealing the existing site, involved remediation
37 work in other words, or involved work being done
38 which was necessary to audit the site, because
39 further audits were being required at the federal
40 level that -- scientific studies having been done
41 earlier had been deemed inadequate. And so work
42 for -- done for the purpose of the audit or work
43 done for the construction of the landfill that you
44 saw in the pictures at tab 6 earlier, which really
45 is some additional holes and a couple of buildings
46 in addition to the covered cell -- the three cells
47 where the contamination is.

1 Stop work order -- a stop work order was
2 issued by the municipality on June the 6th upon
3 some of this activity occurring. And this is the
4 response from Metalclad to that stop work order.
5 And this is dated June 8th, 1994. And it's to the
6 municipal president of Guadalcazar from
7 Metalclad. And it notes, first of all:

8
9 "Metalclad anticipates being able to give
10 you co-operation of the company."
11

12 And in the next paragraph they are confident
13 they can elaborate a plan of action that will
14 satisfy the requires of the community. And they
15 want to inform you that as a result of what is
16 agreed between the municipal and the ecological
17 coordination and environmental matter of the State
18 government the past June 6th, in the document
19 attached to your memo, the activities in the site
20 were suspended that same day. So by reason of
21 this action they -- activities were suspended.
22

23 "However, it's important to take notice
24 that when the works were suspended, the
25 edge that protects the cells from the
26 currents of the rainwater was left
27 unfinished. Without this edge, the
28 currents of water, they're abundant right
29 now, may find their way towards the dam."
30

31 And they say that -- they ask that they be
32 allowed to continue with fixing that aspect of it
33 so that there's not further contamination or -- or
34 transfer of contamination, and notes:

35
36 "Due to what has been exposed here and
37 taking into consideration the will of our
38 company to co-operate with the municipality
39 and at the same time attend at these
40 demands, we ask to meet with you as soon as
41 possible."
42

43 So they're asking to meet with the
44 municipality in response to an order from the
45 municipality that -- work stop, which they agree.
46 They say -- they suspend that, but ask for some
47 permission to -- to do some additional work or

1 some work necessary to protect against
2 environmental harm.

3 And they write to the municipal president in
4 June proposing a number of things. And this is a
5 translation of that. And at the bottom of the
6 page they're proposing, A, to clean the site with
7 the proper infrastructure, to invest a large
8 amount of money, to do a number of other things,
9 to allow the municipality to directly supervise
10 the activities, preferentially hire residents,
11 actively participate with the municipality.

12 And the -- Metalclad requested that they be
13 given an opportunity to demonstrate that it was
14 possible to professionally operate a hazardous
15 waste landfill without risks to health or the
16 environment of the community and with benefits for
17 the people. He offered to provide information
18 showing how developed countries have done it, and
19 invited the municipal official to jointly
20 elaborate a working plan that would satisfy the
21 community and leave distress, miscommunication and
22 other types of error behind in order to promote
23 regional development in compliance with municipal,
24 State and federal laws.

25 The next document is a more detailed proposal
26 for Metalclad in July of 1994 identifying the
27 steps they propose in order to get municipal
28 approval. They talk about remediating at a cost
29 of \$3 million, investment in construction of the
30 infrastructure to confine in an adequate manner or
31 incinerate at the site the waste that has been
32 deposited there before, including operation. And
33 they give estimates of the costs of these things,
34 a number of the same things that we referred to
35 earlier in the proposals as to their view of the
36 benefits for the municipality that would be
37 flowing from this.

38 So they're proposing this to the town council
39 so that they can carry out the cleanup and
40 operation of the landfill. And they're --
41 Metalclad's position throughout is -- is as
42 consistent as the municipality's is. The
43 municipality wants remediation first without the
44 introduction of new hazardous waste. Metalclad
45 wants remediation to occur concurrently with the
46 introduction of new hazardous waste, an operation
47 of a new hazardous waste landfill.

1 And they're never able to bridge that gap.
2 Again, there -- this is just a letter to
3 the -- the next tab, tab 37, is a letter to the
4 chairman of Metalclad from one of the law firms
5 retained by Metalclad in Mexico in July of 1994,
6 noting that they -- the -- they can't operate this
7 landfill at present because of the opposition of
8 the municipal authorities and some local
9 ecological groups.
10 Again, we're -- we're well aware of the --
11 the opposition by now. And this is -- just
12 confirms it.
13 The next document is again -- and I remind
14 Your Lordship, they -- there was some activity
15 going on at the site at this time, either sealing
16 up the existing contamination or remediation
17 work. As it turns out, there's -- actually what's
18 happening is construction of the other facilities
19 that you saw in the pictures.
20 But in the course of doing that work,
21 Metalclad is representing -- COTERIN is
22 representing to the federal authorities that the
23 work it's doing involves remediation. And this
24 is -- this portion of the translation notes -- of
25 this document notes that:
26
27 "Since Metalclad acquired COTERIN on
28 September 9, 1993 the only work that has
29 been performed is..."
30
31 And then it's noted:
32
33 "...installation of a water tank,
34 remediation, strengthening the borders,
35 remediation of a bridge..."
36
37 Or a small dam, rather.
38
39 "All such activities are part of the
40 landfill's regular maintenance program."
41
42 So that's what the federal authorities know
43 of -- of what's going on at that time. And that
44 document is also under the next tab, or at least
45 the translation of it in the counter-memorandum is
46 there.
47 Now, in August of 1994 lawyers for Metalclad,

1 the Mexican counsel for Metalclad, write recalling
2 a -- a meeting that has occurred with respect to
3 this -- this issue, a meeting with Ariel Miranda.
4 And I'll -- I'll be reminded precisely what his
5 position was. Okay. He was the local manager of
6 COTERIN. And these points were discussed with
7 him, and I'll start with point 2:

8
9 "He mentioned to me the already discussed
10 and decided matter to apply for a building
11 licence in La Pedrera, Guadalcazar."

12
13 So the lawyers have already discussed with
14 the local manager for Metalclad the need to apply
15 for and the decision to apply for a building
16 permit from the municipality.

17
18 "If it is denied, to proceed before a
19 federal judge filing a petition to obtain
20 from him an order constraining the city
21 council to grant the building licence."

22
23 That would be the writ of Amparo mentioned in
24 the amended option agreement.

25
26 "I informed him..."

27
28 The lawyer informed the local manager:

29
30 "...about the fact that this was already
31 mentioned some time ago."

32
33 The need to do this.

34
35 "With the additional information that the
36 building licence was applied for by COTERIN
37 and denied..."

38
39 And that was in 1991, you'll recall that.

40
41 "...and for such reason there is no
42 certainty of the results if we proceed as
43 mentioned. In any event, if this is
44 Metalclad's decision, we may go ahead as
45 requested since there's nothing to lose
46 except by the city council to refer us to
47 the previous denial of the licence, chances

1 are that..." being made "...in the name of
2 a new applicant...if we make the name in
3 the new applicant, the city council will
4 not refer to the previous denial. And if
5 this is so, this new denial will give us
6 the opportunity to go to the Federal
7 Court."
8

9 So either way, whether they deny it, if we do
10 it in the name of COTERIN or in the name of the
11 new applicant, we can go to the Federal Court.
12

13 "In order to proceed as requested, please
14 provide us with..."
15

16 Certain documents.
17

18 "We await your instructions in this
19 respect."
20

21 Now, he also notes there that opposition
22 continues because they discuss in point 4:
23

24 "Up till now Ariel Miranda doesn't know
25 for sure if the Guadalcazar priest is still
26 misleading the people about the landfill,
27 because nobody was sent last Sunday to
28 check if he talked against the opening of
29 the landfill."
30

31 So in the local community in public places
32 the opposition is still apparent to the lawyers of
33 Metalclad, to Metalclad itself.

34 What I'd like to -- this -- this -- I'd like
35 to go to the response to this, because this is
36 copied to Mr. Dan Neveau, one of the principals
37 of -- of Metalclad, or decision-makers in
38 Metalclad. And his response to the lawyers is at
39 tab 42. And this is a memo from Dan Neveau to
40 Mr. Garcia Leos:
41

42 "...re your letter dated August 17, '94.
43 This is in response to the above-referenced
44 letter.
45

46 "Following up on your points..."
47

47 I'll go to number 2:

1
2 "...regarding the application for the
3 building licence in La Pedrera, I am of the
4 opinion we should probably not apply for
5 the permit. We have the authority from
6 PROFEPA to construct and maintain the
7 project."
8
9 That's the federal authority.
10
11 "I would like your opinion whether or not
12 this authority supersedes the licence to
13 construct."
14
15 Whether federal authority supersedes the
16 municipal authority.
17
18 "I don't know that it does us any good to
19 go before a body such as the city council
20 and know that we are going to obtain a
21 negative result. I think I would rather
22 ignore the problem rather than raise it to
23 a level of awareness. I think we need to
24 discuss this further."
25
26 He also makes a comment on the -- on the
27 priest and the opposition. He says:
28
29 "I'm also very interested in this priest.
30 I understand we've got some action
31 regarding the archbishop."
32
33 It goes on:
34
35 "Seems to me that this guy who is
36 answering for the right hand of God needs a
37 little earthly direction."
38
39 And he expresses in paragraph 5 frustration,
40 seeing Metalclad as a multinational company of
41 some -- it says he's -- he experiences frustration
42 to be continued like a sec -- continued to be
43 treated:
44
45 "...like a second-class citizen with no
46 respect. That will only serve to thwart
47 any industrialization of the State that may

1 occur from other multinational companies
2 who have less patience than we do."
3

4 Now, he's asked here -- first of all, his
5 lawyer has said we've already discussed the issue
6 of the need to apply for a building licence from
7 the municipality.

8 We know that they've -- and -- and if they
9 deny it, that we'll go by way of writ of Amparo to
10 resolve the issue. We've known that since
11 September of 1993. Mr. Neveau says, well, I'm not
12 really sure. I'd like your opinion on this
13 subject. And I'd like to go to tab 51, which is
14 the witness statement of Garcia Leos, or an
15 extract from the witness statement. Garcia Leos
16 was the recipient of this -- of this memo.

17 And as with Mr. Altamirano, this witness,
18 Mr. Garcia Leos, was not required for
19 cross-examination. And he says this:

20
21 "They..."
22

23 And he's talking about Metalclad.
24

25 "...told me that they had been informed
26 that as an activity regulated by federal
27 law there were no requirements for a
28 municipal construction licence. They also
29 stated that they knew that in 1991 the
30 municipality had refused to issue such a
31 licence to the previous owners of the
32 site. I informed them that whoever had
33 advised them that they did not need a
34 permit was wrong.

35 "On August 17, 1994 I wrote to
36 Mr. Xavier Guerra to set out how Metalclad
37 should apply for the municipal permit. I
38 did not receive a reply from Mr. Guerra.
39 Instead, I received a written response from
40 Dan Neveau in September. He wrote to me
41 stating that in his opinion we should not
42 request the permit because Metalclad had
43 already obtained PROFEPA's authorization to
44 build and operate the project. He also
45 stated that an application to the
46 municipality was not a good idea.
47 Mr. Neveau told me he preferred to ignore

1 this problem rather than applying to the
2 municipal authorities.
3 "Later on, in response to
4 Mr. Neveau's request for my opinion, I
5 informed him that whomever told him that no
6 local licence was required was wrong, and
7 that a construction licence was necessary
8 for a project of this size and importance."
9

10 Going back to the tribunal and Mexico's
11 failure to ensure a transparent and predictable
12 framework, the investor has obtained legal
13 advice. Has -- there's -- a question arises, as
14 often is the case in complex matters. He's
15 requested a legal opinion as to whether a
16 municipal permit's required. And he obtains a
17 Mexican legal opinion which says, yes, it's
18 required. He's also given advice of the means,
19 the legal means, to resolve that issue if that
20 advice is not satisfactory, i.e. the writ of
21 Amparo.

22 Remem -- recalling what ELSI said about
23 looking at the conduct of the State in the context
24 of its entire legal system and not simply the
25 mayor of Palermo's issuance of the requisition
26 order, but as against the entire system, and
27 with -- this tribunal in my submission made
28 patently unreasonable errors in that finding by
29 failing to have regard to this very evidence.
30 None of this is referred to by the tribunal.

31 Like the case involving the board of
32 education case, that -- there, the one letter that
33 had been written by the teacher that had been
34 neglected to be referred to led the Supreme Court
35 of Canada to identify serious error. And in my
36 circumstances the -- and I'm going to come back to
37 the tribunal's award and identify other places,
38 but the tribunal's finding in paragraph 99 that
39 there was a failure to ensure a transparent and
40 predictable framework on the basis of the legal
41 advice given, the structuring of the investment
42 itself cannot -- cannot stand.

43 I -- I also pause at this point to -- to note
44 another of the tribunal's findings that
45 Metalclad -- I'm going to get to the actual permit
46 application which comes up in November of this
47 year, but the tribunal found that Metalclad made

1 that application, quote, in the full expectation
2 the permit would be granted. And again, here
3 Mr. Neveau says I don't know that it does us any
4 good to go before a body such as a city council
5 and know we are going to obtain a negative result.

6 How the tribunal could find that Metalclad,
7 quote, had the full expectation the permit would
8 be granted against this evidence not referred to
9 is in my submission patently unreasonable. And
10 I'll show you additional evidence with respect to
11 that expectation.

12 I mean, the expectation was, if there was an
13 expectation, was that there would be a denial, and
14 that we'll then proceed through the court process
15 to resolve the issue as to whether or not the
16 municipal permit is necessary.

17 Now, here's another -- I -- and I now return
18 to tab 43.

19 THE COURT: Do you intend to skip tab 41?

20 MR. FOY: No, My Lord, I didn't.

21 Yes. I wanted to. Thank you, My Lord. I
22 jumped ahead to the -- that's right. I went from
23 40 to 42 and then onwards. And now, you're right,
24 I'm back to 41.

25 This again relates to some of the
26 construction work that was ongoing and a site
27 visit by Federal officials on August 16 as to the
28 nature of the construction. And it's noted that:

29
30 "On August 30th, PROFEPA issued a
31 resolution on its August 16 verification
32 visit finding inter alia that COTERIN had
33 been doing some work at the site, but it
34 was justified to prevent an environmental
35 hazard. Transfer station did not fully
36 comply with the applicable technical
37 requirements. Shutdown stickers should be
38 removed on a provisional basis, but only so
39 that COTERIN can conduct some further
40 remedial work."

41
42 You'll recall, Your Lordship, that the --
43 from 1991 on this transfer station had been
44 subject to a federal shutdown order. Now, dealing
45 with this -- allowing some work to be done to
46 prevent an environmental hazard and some other
47 further remedial work. And then it goes on, it

1 says:

2

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"COTERIN must arrange for a comprehensive environmental audit by an independent expert to assess the situation at the site and prepare a detailed list of the origin, location and quantity of hazardous waste in the containment cells. COTERIN shall inform PROFEPA of the results of the audit and shall not operate at the proposed site or accept further deliveries of waste until the environmental audit and remedial work are completed."

This was taken -- this becomes an issue, a separate issue, as between the municipality and the federal authorities. The municipality takes this to be an order that this -- the closure order, the federal closure order, shall not be lifted until the environmental audit and remedial work are completed. Until remedial work is completed there will be -- that was the municipality's position.

And the municipality later became embroiled in litigation to attempt to establish its view that this federal order required remediation before any lifting of the closure order. And that's important, because the tribunal -- that's the -- it turns into the municipality's Amparo against the Convenio.

Later I'm going to show you the Convenio, which is the lifting of the federal closure order before a remediation has occurred. And following that, the municipality took the position that that violated this order, this resolution, and sought to enforce this resolution by -- in the courts. That's why I referred to this at this stage.

Now, that's just an extract of -- of the -- of a larger document, which is -- is set out behind that. And you'll look at the clause, the particular clause in -- that was relied upon later by the municipalities at page 7321, which says:

"The introduction to the installation of any type of waste is strictly prohibited so long as the studies are not realized and the remediation actions take place."

1
2 I'm now at tab 43. And this is September of
3 1994 where Metalclad through its local
4 representative, Ariel Miranda, is writing to the
5 federal Attorney General's office, PROFEPA, again
6 describing the work that they are doing and
7 propose to do.

8 And here they're saying COTERIN is -- is
9 doing the environmental audit. They've been
10 ordered to do an environmental audit. And we need
11 to do some works in order to do that audit. We
12 are requested to practice engineering and general
13 maintenance works which allow us to maintain the
14 landfill in good condition. A remediation program
15 in situ will derive (sic). It says:

16
17 "For the mentioned actions, it's necessary
18 to build some civil connections among which
19 we can mention..."

20
21 And they note an evaporation pond and some
22 other works.

23
24 "We believe that these works can be
25 developed in a parallel to the audit in
26 order to comply with the requirements of
27 such authority."

28
29 So they're representing to the federal
30 authorities that they need to do some works in
31 order to comply with the audit.

32 The response to this document is at tab 47.
33 And here the federal authorities in response to
34 the letter of September 20, 1994, in which was
35 mentioned the need to construct some works in --
36 as -- as part of the -- in order to conduct the
37 environmental audit and the possible remediation
38 of the site:

39
40 "I wish to inform as follows: The State
41 delegation under my responsibility does not
42 oppose your company conducting construction
43 of the works mentioned above in the
44 understanding that your company shall
45 obtain the corresponding construction
46 permits for the described works from the
47 municipal and State authorities in

1 accordance to their respective
2 jurisdiction."
3

4 Now, this -- there again we -- we're now in
5 November of 1994. We have had advice to Metalclad
6 with respect to the need for a municipal
7 construction permit from Metalclad's own lawyers,
8 from the State governor, from the federal
9 authorities, from their own documents whereby they
10 acquire this investment. And yet in the original
11 memorial that was filed in this case, the
12 statement was made by Metalclad that not until
13 December of 1995 did any State or local official
14 allege that such a permit was necessary. And
15 that's in the memorial at paragraph 17 for your
16 notes.

17 The original claim in this case in the
18 memorial in our submission -- and I should add,
19 the memorial did not include with it the amended
20 option agreement. That document Mexico had to
21 discover by going through, I think it was
22 securities filings in -- in the Securities and
23 Exchange Commission in order to obtain. Mexico
24 had to discover that in fact Metalclad knew from
25 the outset about the need for the municipal permit
26 in order to rebut the allegation that not until
27 December '95 did any State or local official
28 allege that such a permit was necessary.

29 The claim as presented in the original legal
30 opinion presented by Metalclad was that the --
31 such a requirement could not be discovered by a
32 reasonable investor. I've demonstrated that --
33 that it was not only discovered -- discoverable,
34 but discovered, and that that pleading was -- was
35 simply false.

36 This is -- this communication from the
37 federal officials in November of '94 saying, you
38 know, your company shall correspond with the
39 necessary permits for the municipal and State
40 authorities is completely consistent with the
41 original permit in that -- of -- granted by the
42 federal authorities in November of 1993 in which,
43 as Mr. -- January of 1993. And I took you to the
44 witness statement earlier describing that that
45 was -- permit was stated to be without prejudice
46 to the need to acquire approvals at the other
47 levels of government. That was known from the

1 outset.

2 Now, the -- the other fact that I've been
3 eliciting during the course of these most recent
4 documents is that the construction that was
5 occurring around this time, August/September 1994,
6 was construction in relation to remediation and
7 the audit. And that was admitted in the -- under
8 the next tab, tab 44. I have an extract from
9 Mexico's materials referring to this letter
10 describing the work as maintenance work, and that
11 was admitted.

12 Paragraph 456 of -- of our document noting
13 this work was necessary to do some maintenance
14 work was -- was admitted. And that's the next
15 document in that page where, in Metalclad's
16 admissions and denials, paragraph 456 is
17 admitted.

18 This becomes relevant to one or the other
19 findings made by the tribunal with respect to the
20 fact that this construction occurred prior to the
21 issuance of a construction permit, and that the
22 municipality was -- was aware of that. And
23 I'll -- I'll come back to that. The construction
24 that was occurring was represented by Metalclad to
25 be remediation construction.

26 Now, where -- when it appeared to the
27 municipality that it may be going beyond that, and
28 recalling that there had been a stop work order
29 originally in June, another stop work order, a
30 handwritten stop work order, was delivered by the
31 municipal officials to the site of -- on October
32 26th, 1994.

33 So some construction activity has already
34 occurred. The municipality has issued one stop
35 work order and construction has continued to
36 occur. They've issued another. And at this
37 stage, Metalclad decides to apply for a municipal
38 construction permit.

39 And that's thematically a new topic and would
40 be a convenient point to break.

41 THE COURT: Very well. We'll take the afternoon
42 break.

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

45

46 (AFTERNOON RECESS)

47 (PROCEEDINGS ADJOURNED AT 3:06 P.M.)

1 (PROCEEDINGS RESUMED AT 3:20 P.M.)

2

3 THE COURT: Thank you.

4 MR. FOY: Thank you, My Lord.

5 I was at November 1994, tab 46, indicating
6 that after this most recent stop work order by the
7 municipality, the handwritten one of October 26th,
8 1994, Metalclad took steps to apply for the
9 municipal -- municipal permit.

10 And I -- I pause here to just note that -- or
11 to recognize that, yes, this was a handwritten
12 stop work order. This municipality, as I
13 indicated at the outset, does not have a developed
14 infrastructure or the means to enforce its -- its
15 orders in a -- in the same way as a very developed
16 municipality that we -- we might be familiar
17 with. And I make no apology for that. It's a
18 fact. And it's a fact that should be remembered
19 as part of the background and context of this --
20 of the facts that are -- are before you and were
21 before the tribunal.

22 But in any event, the -- at tab 46 again you
23 have the lawyer for Metalclad sending to the local
24 representative the laws that are -- the applicable
25 laws with respect to the application for the
26 municipal construction permit. And as I
27 mentioned, these laws, like all municipal
28 legislation, is included in the -- included in
29 State legislation, just as municipal laws here are
30 included in provincial legislation.

31 And in particular the lawyer sends Articles
32 122 and 123 of the general bylaw of the Ecological
33 and Urban Code of the State, as well as Article 63
34 and 64 of the Ecological and Urban Code.

35 And you'll recall in the original permit
36 application in 1991, in August of 1991, that
37 Articles 63 and 64 of the Ecological and Urban
38 Code were the articles relied upon by COTERIN at
39 that time in order to apply for a construction
40 permit. The articles were discoverable. They
41 were transparent. They were capable of being sent
42 by the lawyer to Metalclad. And translation of
43 those, the articles of -- that are sent, are --
44 are included. And they include the requirements
45 for the application for a construction licence,
46 what you have to indicate. They include the
47 documents that must be attached. And they include

1 in the articles here the cases in which a
2 construction licence is required and that -- as
3 well for new construction.

4 And as well in Article 64 you'll note down
5 the page in the fourth paragraph from the bottom,
6 the -- a repetition of the legal advice that was
7 contained in the -- in the witness statement to
8 which I referred where Garcia Leos said that
9 whoever told you you don't need a permit is wrong;
10 you'll need one where the works are of such
11 significance as -- as this one, and that's from
12 the law. It says:

13
14 "...where the construction or work are
15 located in centres of strategic population
16 or that they generate significant impact in
17 its area of influence."

18
19 And the phrase that was used by the lawyer at
20 tab 51 in his witness statement was:

21
22 "A construction licence was necessary for a
23 project of this size and importance."

24
25 And I -- I contrast that to other
26 construction in the municipality, recalling that
27 there was no commercial activity in this
28 municipality, that the activities of the
29 inhabitants included subsistence farming and
30 ranching. It's not surprising that there were not
31 records of other construction permit applications
32 of this type or of any type, but there was with
33 respect to this very same proposal. The August --
34 the 1991 application used the same laws. And the
35 lawyer advised that for a project of this size and
36 importance that will generate significant impact
37 in -- in its area of influence the Article 64 is
38 engaged.

39 And I've already taken you through the -- the
40 document in the next tab in which the federal
41 authorities again at the same time as they're
42 deciding to do this by reason of the municipal
43 stop work order, they're being advised by the
44 federal authorities make sure that you get your
45 municipal permits and State permits.

46 And then the lawyer writes again on November
47 14th, 1994. And you'll see that this letter is

1 addressed to Eco Administracion and Dr. Rodarte.

2 By this time Dr. Rodarte is -- and you'll
3 hear as -- precisely when, he is now acting for
4 Metalclad, and has been for some time. That's
5 another issue, and we'll come back to that.

6 But this is asking for more information with
7 respect to completing the application, because not
8 enough has been -- the municipal permit
9 application, because not enough has been provided,
10 so please send me these essential documents. And
11 he notes, the lawyer notes:

12
13 "The lack of documents mentioned above
14 obviously will lead to a negative response,
15 because the municipality will take
16 advantage of every omission, as little as
17 it might be, to refuse to issue the
18 construction permit."
19

20 Now, he knows of the municipal opposition.
21 He's -- everyone's alive to that, everyone except
22 the tribunal that said that Metalclad applied in
23 the full expectation that the permit would be
24 granted. That's not the advice Metalclad had from
25 its lawyers.

26 He also gives them some advice about the
27 closure order. He notes:

28
29 "Next Wednesday, November 16 is the last
30 day to present an Amparo action against..."
31

32 And I'll call that the closure order.

33
34 "...by virtue of which the provisional
35 closure order was issued."
36

37 He's giving legal advice that you have at
38 least two remedies here. One is to take the
39 position the municipality has no business at all
40 in this area and challenge the closure order;
41 alternatively, you can apply for the municipal
42 construction permit. And I'll come back to -- to
43 the significance of that.

44 The -- he goes on to say:

45
46 "If we do not challenge these acts before
47 the indicated date through an Amparo

1 action, the result will be that the closure
2 will become final, in which case there will
3 be no appellate recourse. It is also true
4 that the result of the Amparo action is
5 uncertain."
6

7 He's not clear whether they're going to
8 succeed or not, but the courts are there and
9 available.

10 According to Garcia Barragan -- Garcia --
11 Garcia Barragan is another Mexican lawyer who
12 advises Metalclad throughout the proceedings. He
13 believes that the decision to contest or not the
14 closure order through an Amparo action should be
15 taken in consideration of the political aspect.
16 This would entail the reaction of the current or
17 future municipal council in relation to the fact
18 that their decisions were contested by an Amparo
19 action. He's basically saying, you know, if we
20 start a fight at this stage, it has an impact on
21 the reaction of the municipality. But he, Garcia
22 Leos, advises:

23
24 "We should also take into consideration
25 that we cannot get the suspension of the
26 refuted acts because they have already
27 occurred."
28

29 They've already constructed. They've already
30 done some construction without a construction
31 permit.
32

33 "We would also put in danger the current
34 work that is being carried out at
35 La Pedrera, notwithstanding the supposed
36 closure, and this could be a ground for a
37 final closure order."
38

39 He's saying you've already put yourselves at
40 legal -- illegal jeopardy by reason of proceeding
41 with construction in advance of obtaining a
42 permit.
43

44 "Regarding the above, I would appreciate
45 it if you could give me any indication
46 whether I should present the Amparo
47 action..."

1

2

That's against the closure order.

3

4

"...or not because of...in case of the former, I need time to prepare."

5

6

7

8

Now, I'll take you from there, tab 48 and that letter, to -- back to tab 51, where in his witness statement Garcia Leos elaborates, and it's tab 51, paragraph 50. He says:

9

10

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21

"In November 1994, after the municipality issued a shutdown order, Metalclad decided to apply for the permit. I reviewed a draft application for the municipal construction licence concerning the work that COTERIN wanted to carry out at...La Pedrera...at the La Pedrera site after Mr. Ariel Miranda requested me to do so."

22

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This draft had been drafted by someone else.

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"I also recommended to the client it file an Amparo action against the municipal shutdown order. However, in a telephone conversation Garcia Barragan, Metalclad's lawyer in Mexico City, told me that the decision should consider the political aspects of such an action which could mean the possible reaction of the municipal authorities that could lead to a definite or a definitive closing of the site. Nevertheless, I did not share his opinion, therefore the company decided not to exercise its legal rights."

They took Barragan's advice rather than Leos'.

"On November 15, 1994, therefore, the application for the municipal construction licence was presented to the municipality."

So of the two choices available, challenge the closure order and the entire jurisdiction or accede to the jurisdiction and make the permit

1 application, Metalclad chose the latter. And he
2 notes:

3
4 "On November 15...therefore, the
5 application for the municipal construction
6 licence was presented to the municipality.
7 By this act, according to Mexican law, the
8 company accepted the legitimacy of the
9 permit requirement."

10
11 Now, I'm going to remind Your Lordship that
12 neither you nor the tribunal has to determine the
13 correctness or incorrectness in Mexican domestic
14 law of the advice that's being given here or
15 whether or not that act amounts to an estoppel or
16 an acquiescence in the legitimacy of the
17 requirement at Mexican domestic law. That was not
18 the issue before this tribunal. It's not the
19 issue here. The issue here was whether or not
20 there was a violation of international law by the
21 failure to provide a transparent and predictable
22 framework for Metalclad's business planning and
23 investment.

24 These documents and the advice of the laws
25 that we've referred to demonstrate that, like
26 other investors, Metalclad had been given complete
27 advice on the predictable framework for ordering
28 its affairs. Make this application; if you're
29 unsuccessful, let's go -- we'll go to the courts
30 by way of a writ of Amparo.

31 And it's that that had to be tested at the
32 international level, not the intricacies of the --
33 of the particular legal advice, not whether the
34 municipality is correct in its assertion of its
35 jurisdiction or the extent of it, or the -- or
36 that Metalclad's view of that jurisdiction is --
37 is -- is correct, but whether or not there was a
38 predictable and transparent mechanism available to
39 foreign investors to resolve any issues like
40 that.

41 Now, the -- the application is made in
42 November, and I just want to -- to turn to that.
43 I'll come back to the document at 49. November
44 15th, in five pages, the municipal construction
45 license application is -- is attached and -- or
46 is -- is set out, and then it appears at tab 52.

47 And you'll note that the -- the application

1 is made in the name of COTERIN. The -- the advice
2 to perhaps move this into a different name is not
3 taken. The application is made and it -- I'm now
4 at -- under tab 52 in the -- on the third page in,
5 page 8536. And the first paragraph notes that the
6 application's made by COTERIN. The second notes
7 that it's made pursuant to a number of sections,
8 including Section 63 and 64 of the Ecological and
9 Urban Code, the same sections, the transparent
10 sections, that were a matter of corporate record
11 to Metalclad before it purchased this investment.
12 And it describes the proposal, a -- a hazardous
13 waste landfill that's proposed to be built,
14 recalling construction's already occurred, and a
15 stop work order has been issued; describes the
16 facilities intended to be built.

17 And then at -- over the next page it sets out
18 the legal basis for this application, referring to
19 the Ecological and Urban Code, the same law,
20 providing and regulating the municipal
21 construction permit, and noting that the
22 Municipality of Guadalcazar is empowered to issue
23 it. This is Metalclad's document.

24 And then in Roman numeral 8 down that page,
25 noting the -- the advice that it had been -- that
26 it had received, and the terms of the -- of the
27 law:

28
29 "It is necessary to request the municipal
30 construction licence in any place in the
31 entity where the constructions or works
32 will generate a significant impact in the
33 influenced area and environment due to its
34 dimensions and necessities of framework,
35 services and transport so as in the case of
36 risks it may generate."
37

38 As -- as Garcia Leos had advised, the
39 construction licence was necessary for a project
40 of this size and importance.

41 Now, that application is made. And at tab 53
42 the lawyers for Metalclad note that that's been --
43 been done and on --
44

45 "On November the 15th, on which Ariel
46 Miranda picked up from my office the
47 application, we've not had any news about

1 the development of this matter. I know
2 from indirect information that the
3 municipal president is against granting it
4 and is waiting for the new city council to
5 decide, since I don't want to be confronted
6 with a short deadline to appeal against any
7 decision of the city council. Please
8 inform me as soon as possible."
9

10 So again, the lawyers are -- are giving
11 advice that you can anticipate denial of this
12 permit. We already know that. And again, it's --
13 it's apparent to -- to everyone except the
14 tribunal, who says that this application was made
15 in the full expectation the permit would be
16 granted. I mean, that cannot stand with these
17 documents.

18 Now, what happened here at the municipality
19 was a change in administration. Every three years
20 the administration changes. And it changed in --
21 almost immediately thereafter by the end of
22 December. And a new administration came in in
23 January.

24 The new administration -- and again, this
25 is -- this is directly contrary to a finding of
26 the tribunal. The tribunal said that there was no
27 consideration given of the application until a
28 year later in December of '95 when the application
29 was dismissed. In fact, that -- that's not the
30 case.

31 This document at tab 54 again is a document
32 from the municipal council, one of its public
33 records, that -- pointing out the landfill
34 problem. And this is on February the 13th, 1995.
35 So this is the new administration having just come
36 into -- into power.

37 And the -- the municipal president at this
38 time testified. And he testified that in fact in
39 his administration there was no bureaucratic
40 continuity; everyone who worked for the municipal
41 council was replaced on the election of the new
42 administration. But, notwithstanding that, the --
43 the municipal council took up the issue and
44 noted:

45
46 "On this point..."
47

1 The records note:

2

3 "On this point, the municipal president
4 stated that he could not decide the issue
5 regarding the landfill independently. The
6 municipal council affirmed their support
7 for the denial of the landfill's opening.

8 And the president states the discussions
9 with these individuals will only be held in
10 council meetings. And with respect to
11 general matters, the proposal to create an
12 environment committee is approved."

13

14 Now, you'll recall I referred very briefly to
15 the environmental Regidor, who had been
16 responsible for -- at the municipal level for
17 environmental matters. This administration
18 proposes to create a committee to response -- be
19 responsible for those matters. And the municipal
20 president is saying I'm not going to deal with
21 this alone. I'm going to -- the municipal council
22 as a whole is going to have to deal with this.

23 It's -- there -- everyone is well aware.

24 They had -- people had campaigned on the --
25 against the opening of the landfill. Everyone was
26 well aware of the local opposition. And he's
27 saying this is not -- this is not your normal
28 case; we have to deal with this as a whole.

29 Now, the -- this occurs in February. What's
30 happening at this time, according to Metalclad's
31 documents, its SEC filings, is that the
32 construction that had started under the rubric of
33 remediation and had continued -- started in -- in
34 '94, had -- had continued, is accelerated. And
35 according to Metalclad's press releases, the
36 construction is completed by March of 1995, so
37 completed that they -- Metalclad proposed to have
38 a grand opening of a landfill facility.

39 So they filed a -- a permit application in
40 November of 1994. They fully anticipate its
41 denial, but it hasn't yet been formally denied.
42 They continue construction in the face of that
43 with their lawyers' advice that they go to court
44 if the -- against the closure order or they can
45 apply for the permit. And if they do apply for
46 the permit, they acquiesce in the municipality's
47 jurisdiction.

1 And they then continue construction at -- and
2 say that it's, on their documents, completed by
3 March, so before the municipality's had any --
4 has -- other than this February note, has dealt
5 with -- with the application.

6 Now, I'm going to come back to that, because
7 the tribunal makes a virtue out of this illegal
8 construction, saying that the munici -- the
9 Metalclad constructed openly and without
10 resistance, and municipal officials sat on their
11 permit application and then denied it because it
12 had already been constructed. The fact is on
13 Metalclad's evidence it was already constructed by
14 March.

15 And what Metalclad represented to the
16 shareholders in this letter on paragraph -- or tab
17 55 is that construction began, according to them,
18 on May 16, 1994. Several factors delayed the
19 beginning of commercial operations, they say. And
20 they say they were asked to proceed slowly, using
21 only local labour, institute a social development
22 program.

23 But now they say, and this is March 6th, '95
24 they say to the public:

25
26 "I'm happy to say that the project has the
27 full political support from the president,
28 Ernesto Zadeo, at the top, who was recently
29 praised by the Mexican investment board in
30 recognition of his support for our project,
31 on down to the environmental enforcement
32 agencies of Mexico, the governor of the
33 State of SLP, Governor Unzeuta, to the
34 community of Guadalcasar and the
35 microcommunities that surround our site
36 known as La Pedrera."
37

38 I'll just -- I'll just leave that. It -- in
39 terms of the international issues, it's -- it's
40 really not -- it doesn't add a lot other than to
41 note that -- this point in the sequence.

42 Now, the -- Metalclad proposes to have an
43 opening of this facility. And the -- they're
44 advised by the Mexican embassy not -- not to do
45 that on March the 8th, 1995. And that's at tab 56
46 where the Mexican embassy notes:
47

1 "We've been informed today that the
2 authorization to operate the Metalclad
3 facility and SLP is still pending of
4 approval."

5
6 You'll recall not only is the municipal
7 permit application outstanding, but there is still
8 a federal closure order, has been since 1991.

9
10 "We received notification of this from the
11 representative in Washington, the Secretary
12 of the Environment for Mexico.
13 Accordingly..."

14
15 They're advised:

16
17 "...it would be premature to make the
18 public announcement of the Metalclad
19 opening before this matter is resolved by
20 the Attorney General for the protection of
21 the environment."

22
23 PROFEPA.

24
25 "So please contact me as soon as possible
26 to discuss this."

27
28 And you'll know from reading the tribunal's
29 reasons that there was what was originally billed
30 as a grand opening, later billed as a facilities
31 tour on March the 10, 1995, at which there was a
32 demonstration against any introduction of
33 hazardous waste to the -- to La Pedrera. There
34 are assertions and allegations made by Metalclad
35 with respect to State sponsorship of -- of that,
36 and a -- I'll come back to that.

37 The fact is there was a demonstration. It
38 dispersed after a few hours. And one might have
39 expected there would have been a demonstration
40 when one's announcing a grand opening of a -- of a
41 facility that's subject to a federal closure
42 order, a municipal closure order, and at which
43 permit applications are outstanding.

44 You'd also -- that demonstration, I should
45 say, was attended by a number of people who -- I
46 mean, demonstrations happen around these kinds of
47 facilities. And not all of the people who

1 demonstrate at such actions, not all of their
2 actions are attributable to the State. Very often
3 non-governmental organizations, citizens, other
4 individuals will demonstrate and will interfere
5 with ingress and egress of people. That's a
6 common manifestation in a democracy, and in my
7 submission does not -- when it's dispersed after a
8 day, doesn't amount to much of anything other than
9 a demonstration. The tribunal took it further,
10 and I'll come back to that.

11 Now, the -- that attempt to open was also
12 commented on by -- to Metalclad by their own
13 lawyers at paragraph 57 in which they say in the
14 second paragraph:

15
16 "We consider that the approach worked out
17 by Dan Neveau consisting in the
18 organization of the opening event without
19 the necessary written consent of the State
20 and local authorities affects directly the
21 good relationship which for so many months
22 has been developed with lots of efforts
23 with many people, with Pedro Medellin."
24

25 You'll recall I took you earlier to proposals
26 that had been made by Pedro Medellin to allow
27 remediation of this site and the search for sites
28 in other locations and the possible opening of
29 this site if the community could be brought
30 on-board. And what the lawyers are saying is that
31 this premature organization of the opening, just
32 as the embassy was saying, has had a negative
33 impact with the -- with the progress that you're
34 trying to make.

35 Now, the next document is in March of 1995.
36 And this is addressed from the municipality to the
37 municipal president and the secretary to the
38 then-secretary of the environment at the federal
39 level, who are concerned about the possible
40 opening of this -- of this facility. There's been
41 this grand opening/facilities tour. There's been
42 this demonstration. There's been this
43 construction activity in advance of construction
44 permit. You have a municipality without a lot of
45 infrastructure and with -- concerned about its
46 ability to enforce -- to ensure no new hazardous
47 waste comes to this contaminated site. And they

1 write to the federal officials indicating they
2 intend to defend their autonomy, the first
3 paragraph:

4
5 "We constitute a united municipality, and
6 we intend to defend our rights and
7 autonomy."
8

9 They're concerned about the fact that permits
10 were issued by others, leading to the irreversible
11 damage, they call it, of the hazardous waste
12 landfill. They're concerned about the intent to
13 reopen it. And they repeat in the third paragraph
14 the municipal government has -- at all times has
15 refused to grant authorization, and on the
16 contrary are requesting the total closure and
17 sanitation of the site. Again, the municipality's
18 position consistently throughout is we want
19 remediation. And they're asking for assistance at
20 the federal level to -- in -- in that regard.

21 They note that:

22
23 "Secretary, we are sure that as Mexicans,
24 the same political constitution protect us,
25 and we have the right to express our
26 inconformity."
27

28 They're going to express that right in a
29 later way by actually going to -- seeking Amparo
30 against the Convenio themselves. Again, part of a
31 legal, ordered environment under the constitution
32 which ought to be open to a -- both the
33 municipality and Metalclad, and was.

34
35 "We are not in favour of allowing the
36 reopening the landfill. And on behalf of
37 interests different from those of the
38 municipality..."
39

40 They're worried about the damage to the
41 environment, gets even more -- more polluted.
42 The -- they want remediation. And I -- I'll go
43 back now to the -- to tab 49.

44 One of the reasons they want remediation is
45 that -- you'll recall that I referred to the
46 August 30, 1994 resolution which prohibited the
47 introduction of new hazardous waste.

1 I just want to take you to the document at
2 tab 49, because COTERIN requested a clarification
3 with respect to that -- that document, and it's
4 noted here. And you're --

5
6 "You've asked about the resolution of
7 August 30, 1994 requesting to operate the
8 hazardous waste landfill at the end of the
9 audit. And I inform you as follows..."

10
11 That the prohibition imposed continues, and
12 the audit does not end with the studies, but with
13 the completion of the corrective actions, at the
14 bottom of the page, of -- of remediation.

15
16 "Accordingly", it is ratified..."

17
18 Over the page.

19
20 "...that COTERIN shall not introduce any
21 type of waste into the confinement until
22 the prevailing situation of the site is
23 known through the studies referred to, and
24 the correct measures established in such
25 audit are performed. Neither shall COTERIN
26 operate the hazardous waste landfill until
27 the total remediation of the site."

28
29 It goes on:

30
31 "I do not omit to mention that your
32 represented company shall obtain the
33 corresponding permits and authorizations
34 from the competent State and municipal
35 authorities."

36
37 Again, federal advice in November of '94
38 about the need to satisfy the State and municipal
39 authorities and, in the municipality's view, the
40 prohibition on any operation until total
41 remediation.

42 The audit continues and the opposition
43 continues. And a document at tab 59, a May 24
44 PROFEPA memorandum, discusses the solutions that
45 might be available for the problem. It notes a
46 number of -- of facts. And I'll just skip through
47 them. It notes at the bottom of the first page

1 I've included that -- of those declaring
2 themselves against the reopening of the landfill.
3 It notes the opposition of non-governmental
4 organizations, including Greenpeace and local
5 environmental organizations. It notes that the
6 press is predominantly reflected at the thought of
7 the diverse sectors that are against the landfill.
8 It talks about solutions that there might
9 be. It notes in the second paragraph under this
10 point that:
11
12 "From the legal point of view the
13 construction of the landfill has been
14 considered proper. It is because of this
15 that presently the company has obtained the
16 issuance of corresponding federal and State
17 authorizations lacking only the
18 construction licence, which is a matter of
19 municipal competence."
20
21 Notes, notwithstanding the above:
22
23 "The construction and operation of the
24 landfills contravene the environmental
25 disposition in matters of dangerous
26 residues."
27
28 Noting:
29
30 "The company began the construction works
31 without counting on the authorizations in
32 matters of environmental impact in the
33 operation of landfill control wastes."
34
35 Grave irregularities were discovered.
36 With respect to the reopening, they note,
37 over the page, that we'd like to have a landfill,
38 but -- and we could approve it and fine the
39 company and do various things. On the other hand,
40 they note in the fourth paragraph on -- on that
41 page:
42
43 "One must not forget that the municipality
44 has an element in its favour, the lack of
45 the authorization of the construction
46 licence."
47

1 The federal authorities are never asserting
2 that they have the ability to completely override
3 the municipality. The -- their advice, both in
4 November of '94 and earlier, is -- and from the
5 earliest permit, is, don't forget, get the
6 municipal authorization as well.

7 And that point's noted in the -- in the third
8 paragraph under that heading, reopening of the
9 landfill and implications.

10

11 "It is worth noting that the federal
12 authorizations are granted without
13 prejudicing the local authorizations."
14

15 And then you'll recall that language from
16 Mr. Altamirano's witness statement and the January
17 '93 permit, without prejudice to the need for
18 local authorizations.

19 Now, My Lord, I see the -- it's almost
20 4 o'clock. I'm about to enter into a new topic.
21 I think it would be convenient, for me at least,
22 to take a break at this stage.

23 THE COURT: Yes. I'm prepared to adjourn for the
24 day. We'll reconvene at 10 o'clock tomorrow
25 morning.

26 THE REGISTRAR: Order in chambers. Chambers is
27 adjourned until the 22nd of February at 10 a.m.

28

29 (PROCEEDINGS ADJOURNED AT 3:59 P.M.)

30

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