

1                                   22 February 2001 - Certified  
2                                   Vancouver, B.C.

3  
4       (PROCEEDINGS RESUMED AT 10:01 A.M.)

5  
6 THE REGISTRAR: In the Supreme Court of British  
7 Columbia in Vancouver at this -- on this, the 22nd  
8 day of February 2001, in the matter of the United  
9 Mexican States versus Metalclad Corporation,  
10 My Lord.

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

12 MR. FOY: Thank you, My Lord.

13 I was in the chronology in April of 1995.  
14 And I'm going to ask you to start with tab 60 of  
15 the selected extracts.

16 Just to remind Your Lordship and put it in  
17 context, at this time there was a federal closure  
18 order that was put in place in 1991. Secondly,  
19 there's a federal prohibition on the introduction  
20 of new waste put in place in August of 1994.  
21 There's an audit of the prior contamination, an  
22 audit that is ongoing, in order to determine the  
23 extent of the problem and the means to remediate  
24 it.

25 In the meantime Metalclad, representing to  
26 federal officials that it needs to construct works  
27 for remediation and for the audit -- and if you  
28 see the -- if you go back to the description of  
29 those works, they're at tab 43, you'll see they  
30 basically describe the -- the landfill --  
31 representing to federal officials that they need  
32 to construct those works for the purpose of  
33 remediation, and those federal officials in --  
34 twice in -- at tab 47 and tab 49 reminding  
35 Metalclad of the need for a municipal construction  
36 permit. And having applied for a municipal  
37 construction permit, but that permit not -- that  
38 application not yet having been dealt with,  
39 Metalclad goes ahead and does that construction.

40 Now, at tab 60 there are described meetings  
41 that occurred in furtherance of the audit,  
42 meetings started in April, technical meetings,  
43 including representatives of the State,  
44 representatives of the municipality, university

45 experts, and environmental groups acting as  
46 advisors to the municipality on technical issues,  
47 not surprising given the lack of infrastructure in

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1 this municipality, and including a reference to  
2 Metalclad, and that -- and asking Metalclad to  
3 provide certain information in respect of the  
4 audit. And that's described in the -- in tab 60.

5 Over the -- tab 61 reports the results of the  
6 audit to the public in August of 1995, and I'd ask  
7 you to -- to look at that.

8 We've looked at page 2 of that already, which  
9 was a description of what -- how the contamination  
10 came to -- to be there.

11 Over the page on page 3 at the top it's noted  
12 under the heading "Exposivity" that:  
13 [All quotations herein cited as read]

14  
15 "In two of the three containers..."

16  
17 These are the containers of the contaminated  
18 waste.

19  
20 "...levels of exposivity of up to 100  
21 percent were found in the monitoring of the  
22 covered pits. Due to the risk this  
23 represents, any activity carried out in  
24 them should be done with maximum security  
25 measures."

26  
27 This was due to the presence of volatile  
28 organic compounds. You'll recall that the --  
29 there was dumped both inorganic and organic  
30 compounds mixed in those -- in those containers,  
31 and that's referred to down the page.

32 Over the page, they examine the -- the soil.  
33 And in the fourth line at the top of page 4 it's  
34 noted that:

35  
36 "It became evident that the soil is  
37 contaminated from the inadequate handling  
38 of hazardous wastes in the storage area of  
39 the transfer station."

40  
41 Gasses emitting and other effects on the  
42 healths (sic) of -- of workers are investigated.  
43 And it is noted in the penultimate paragraph:  
44

45 "Because of the above, one cannot put off  
46 the need to carry out the treatment of the  
47 site through a series of programs related

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1 to the workers' protection and the  
2 prevention of possible effects on the  
3 environment: monitoring, safety, cleaning  
4 and control of the drums existing in the  
5 restricted area."  
6

7 They go on to note -- that describes the  
8 existing contamination. And they go on to deal  
9 with the proposed new storage site, the proposed  
10 commercial operations. And they note at page 5,  
11 in the third paragraph on that page, the fact that  
12 in August COTERIN obtained one of its federal  
13 permits subject to certain conditions, and noted  
14 that in September Metalclad acquired most of the  
15 capital of COTERIN, describing that as follows:  
16 With that, Metalclad acquired an environmental  
17 liability, in other words, the liability brought  
18 with the contamination caused by the transfer  
19 station and its treatment, as well as an asset,  
20 which was the authorization to set up a new  
21 disposal centre. The exercise of the rights  
22 coming from that authorization are subject to  
23 compliance with various conditions.

24 And the federal authorities conclude from  
25 their perspective that -- and this is over the  
26 page at the top of page 6:

27  
28 "If proper..." operational  
29 "...construction and operational  
30 precautions are taken, the physical  
31 characteristics of the site are adequate  
32 for the construction of a controlled  
33 hazardous waste deposit site."  
34

35 The -- in their -- in the -- from the federal  
36 perspective, the -- the characteristics of the  
37 physical site would be appropriate for that use.  
38 They go on to note that that requires careful  
39 monitoring and also that they -- the -- to  
40 recognize that the municipality will have to be  
41 involved. And they do that at pages 8 and 9 in  
42 the third paragraph from the bottom, the second  
43 sentence:  
44

45 "The monitoring systems will make it  
46 possible in the future for the company,  
47 authorities and representatives of the

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1 population of Guadalcazar to be able to  
2 verify at all times that the subsoil is not  
3 being contaminated."  
4

5 They go on to talk about participation of the  
6 community in this. And they note the limits of  
7 their jurisdiction. They say:  
8

9 "Ever since we started this, PROFEPA made  
10 known to the municipal authorities its  
11 intent in promoting a mechanism to allow  
12 the population of Guadalcazar to  
13 participate in the monitoring of the  
14 facilities. Given that it is not in the  
15 competence of the federal authorities to  
16 determine the way in which the local  
17 community should be organized for  
18 this...for this end, PROFEPA is hoping that  
19 at the local level that form of  
20 organization will be determined."  
21

22 So the federal authorities want remediation.  
23 They are of the view that the site could be used  
24 for hazardous waste landfill, and they hope that  
25 the municipality will organize itself in a way  
26 to -- to participate in that.

27 In the chrono -- in the chronology at this  
28 time and under the next tab is a draft NAFTA  
29 complaint. At this stage Metalclad is already  
30 considering bringing a claim under the NAFTA.  
31 This is a draft that was not proceeded with. But  
32 I just take you to one paragraph of that at page  
33 15. This was provided to Mexico and was -- was in  
34 Mexico's files.

35 At that time the gravamen of the complaint is  
36 set out in paragraph 15 as follows -- and -- and  
37 you'll note that this complaint names personally  
38 Pedro Medellin, the State official responsible for  
39 environmental matters and states in paragraph 30  
40 at page 15 that:

41  
42 "The gravamen of this complaint is the  
43 sinister, confiscatory, discriminatory,  
44 fraudulent and conspiratorial activities of

45 Medellin in his capacity as an official of  
46 the State of SLP."  
47

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1 That's paragraph 30 at page 15.

2 Now, in November of 1995 and again in  
3 furtherance of the federal authorities' desire to  
4 obtain remediation, and the federal authorities'  
5 determination that from their perspective this  
6 site could be used for hazardous -- for a  
7 hazardous waste landfill, in the exercise of their  
8 regulatory powers INE and PROFEPA, the Attorney  
9 General's office, determined to lift the closure  
10 order, the federal closure order that had been  
11 placed on conditions which are set out in what is  
12 called the Convenio of November 24, 1995.

13 The federal objective is to achieve what it  
14 saw as the results of the audit, to achieve  
15 remediation and was prepared to allow COTERIN five  
16 years of commercial operations to treat and  
17 dispose of the existing contamination.

18 You'll note that the State and the  
19 municipality are not involved in this Convenio.

20 And in the next tab the federal authorities  
21 make the announcement of the Convenio, and note  
22 that the federal -- sorry, that the State and  
23 municipal authorities are not involved.

24 And at tab 64 in the public announcement with  
25 respect to this Convenio it is stated:

26  
27 "Finally, it is important to clarify that  
28 the federal authorities..."

29  
30 This is the last paragraph on -- I'm sorry,  
31 the last paragraph under page 2272, tab 64.

32  
33 "...it is important to clarify that the  
34 federal authorities are a necessary  
35 requirement but not a sufficient one for  
36 the hazardous waste landfill operation.  
37 The company shall comply with the State  
38 legislation in this matter whose  
39 interpretation and application is  
40 exclusively within the local authority's  
41 jurisdiction."

42  
43 Recalling that the municipal permit  
44 requirements are contained in State legislation

45 and are subject to the application and  
46 interpretation by the local municipality.  
47 So at the time of the announcement of the

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1 Convenio the federal authorities make it clear  
2 that they are from their perspective satisfied  
3 with this form of proceeding, but they are not --  
4 their authorization is not sufficient.

5 Now, as I mentioned, neither the State nor  
6 the municipality were involved at this stage. And  
7 under the next tab you have the State response.

8 The State response of November 26th, the next  
9 day, is that the State authorities know nothing  
10 about the terms of the signed agreement. They  
11 note that there was a -- the State land use permit  
12 had been issue -- issued in 1993, but go on to  
13 say:

14  
15 "On the other hand, the power to issue the  
16 construction licence is within the  
17 exclusive jurisdiction of the municipal  
18 authority, and this licence has been denied  
19 to date by the Guadalcazar municipal  
20 council."  
21

22 Note that in their view the coordination  
23 between State and municipalities and the  
24 federation is required. Now, this is no different  
25 really than the statement made by the federal  
26 authorities; each is a -- necessary, but none is  
27 sufficient authorization for this facility.

28 And in the fourth paragraph there, note --  
29 noting that -- what you've heard before in other  
30 documents, that it is strictly necessary to  
31 respect -- to re -- fully respect the will of the  
32 people and of the authority of the free  
33 municipality of Guadalcazar.

34 Now, there -- there are -- the -- there is no  
35 direct municipal response at this time. There is  
36 a legal response that I will take you to in a  
37 moment.

38 But in the chronology, the next document  
39 records the municipal consideration of the earlier  
40 permit application, construction permit  
41 application, that had been made by Metalclad in  
42 November of 1994. And I'd like to point out some  
43 aspects of this -- of this -- this document, which  
44 again is the -- the public minutes -- public

45 record, rather, of a public meeting taking place  
46 in the municipal council on December the 5th.  
47 It notes the -- who's present and the -- of

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1 the municipal councillors and the order of the day  
2 being, number 3:

3  
4 "Resolution regarding the application for  
5 the construction licence dated November 15,  
6 1994 presented before the town hall by  
7 Ariel Miranda, COTERIN, related to the site  
8 denominated as La Pedrera."  
9

10 The -- over the next page, the municipality  
11 reviews its records, its public records, and notes  
12 that in 1991 the -- an application by the same  
13 applicant, COTERIN, had been made and denied in  
14 October of 1991. And that document you've been  
15 taken to; it's at tab 12.

16 They note as well the new administration's  
17 confirmation of that denial. And that document  
18 was dated January 20, 1992, and that's at tab 14.

19 And I remind Your Lordship that those matters  
20 were admitted by Metalclad to be matters of  
21 corporate record of COTERIN. And that's at tab  
22 13, that document.

23 So that earlier history is noted.

24 And then these four reasons are given for the  
25 denial of the permit application: The first  
26 reason is that it's been applied for by the same  
27 applicant and denied once already. The -- and  
28 that's noted under number 1 at the bottom of page  
29 613.

30 Secondly, the municipal council, on the top  
31 of the next page, notes that construction has  
32 already occurred in advance of the application for  
33 a permit.

34 In the third note, the -- and the application  
35 for the -- on its face is purported to be for new  
36 construction, not for work that's already been  
37 done.

38 Focusing on this, it -- they -- the third  
39 reason that is given is that it appears to the  
40 municipal council that this construction -- that  
41 this application is contradictory, and again it's  
42 a repetition of -- on another basis, a substantive  
43 basis, the fact that the construction has already  
44 occurred.

45       And the fourth point that is noted is that it  
46       appears that this construction may have been done  
47       under the aegis of the State land use permit. And

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1 in the municipal council's reading of the State  
2 land use permit, any violation of that permit  
3 results in a nullity or voiding of that permit.

4 And you'll recall when we went to the State  
5 land use permit, which was at tab 19, that it  
6 expressly did not authorize construction. And it  
7 goes on -- the -- the State land use permit goes  
8 on to say that non-compliance with any points in  
9 the -- in the State land use permit invalidates  
10 it. So the municipal council is of the view that  
11 having constructed under the aegis of the State  
12 land use permit, you have invalidated the State  
13 land use permit on its own terms.

14 Then over the page another reason is given,  
15 the fifth reason is given, and that is that there  
16 is present in this public meeting in the town  
17 council a great number of residents of the  
18 municipality who continue to be opposed to the  
19 granting of a construction licence in these  
20 circumstances.

21 And you'll recall the ELSI case in which the  
22 mayor of Palermo was acting in part in requis --  
23 in requisitioning the -- the facilities there in  
24 response to local -- in -- as a representative in  
25 response to local concerns. And that -- there's  
26 an example of that happening here.

27 Now, under the -- on the same page it's  
28 resolved that the -- the permit application is --  
29 first, will be denied and, secondly, that COTERIN  
30 will be notified of this. And I want to emphasize  
31 the notification to COTERIN, because it becomes  
32 relevant in terms of the due process that was  
33 accorded to COTERIN in this respect. The tribunal  
34 in this case was critical of the municipality for  
35 not giving COTERIN an opportunity to be heard  
36 before this was done.

37 Well, in fact, in -- again, in -- in --  
38 notice was given and, you will see in a minute,  
39 legal steps were taken where COTERIN was given a  
40 full opportunity, both back before the municipal  
41 council and then in the courts, to argue its  
42 case.

43 And I'd also ask you to look at -- when  
44 you're looking at this document, to recall the

45 aspects of ELSI that talked about when identifying  
46 whether something was arbitrary at international  
47 law, to look at the legal system as a whole and

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1 the legal context and ask whether or not this  
2 document and the considerations in it reflect  
3 legal consideration or a legal framework for the  
4 consideration of this permit application, and I'd  
5 suggest it clearly does.

6 The municipality goes to its public records.  
7 It looks back and sees what was done by previous  
8 administrations with respect to this same  
9 applicant. It notes certain facts with respect  
10 that have -- that are not disputed. The fact is  
11 construction had occurred in -- and in fact, as  
12 you'll recall, that was done by Metalclad  
13 voluntarily ignoring the advice of its lawyers.  
14 We would prefer to ignore the problem rather than  
15 raise it to the level of attention.

16 The municipality takes a legal view of a  
17 provision of the State land use permit. And it  
18 takes it -- its view of the concerns of the local  
19 inhabitants. It then notifies COTERIN in a -- in  
20 a formal way of its decision.

21 And the next tab describes to you -- this is  
22 a memorandum of -- by one of Metalclad's lawyers  
23 which describes legal proceedings taken by COTERIN  
24 which were not mentioned by the tribunal with  
25 respect to the denial of the municipal permit.  
26 And it also refers to some other legal  
27 proceedings, and I'll just quickly take you  
28 through it.

29 The first set of proceedings that are noted  
30 by the lawyer are the recourse of reconsideration  
31 filed with the municipality against the denial of  
32 the said municipality to grant the municipal  
33 licence to construct the landfill.

34 So having received notice of the denial on  
35 February the 28th, 1996, a petition was filed with  
36 the municipality offering proofs and requesting  
37 the issuance of a resolution, a reconsideration.  
38 The municipality issued a resolution on April 23,  
39 1996 and gave notice on April 29, 1996 denying the  
40 reconsideration.

41 We have prepared -- and they ratified the  
42 denial of granting the construction permit.

43  
44 "We, the lawyers, have prepared and filed

45 a writ of Amparo against the resolution  
46 issued by the municipality."  
47

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1           And you'll recall from the option agreement  
2 that the writ of Amparo was the very remedy  
3 predicted and transparent and available and  
4 identified by this investor when acquiring this  
5 investment.

6           The Amparo is now established in the fourth  
7 federal district court of SLP, and it's referred  
8 to as the dates of what hearing -- of when the  
9 hearing will occur.

10          And it's noted above -- or over the next  
11 page:

12  
13           "In this Amparo we'll also try that, in  
14 the event SLP denies the Amparo, recourse  
15 or revision be handled by the Federal  
16 Supreme Court in Mexico City, although we  
17 cannot assure that such will be the case  
18 because of the nature of the responsible  
19 authority."  
20

21          If you go back to -- just briefly, what  
22 happened to this application in the courts is that  
23 it was initially denied on the -- by reason of the  
24 failure to exhaust more appropriate -- more  
25 administrative remedies that were available. That  
26 denial was appealed. And then that appeal was  
27 abandoned voluntarily in favour of negotiations  
28 with the community.

29          Now, the -- tab 51 of the brief records what  
30 happened to the -- the legal steps as to what  
31 happened with the -- that particular Amparo  
32 action. The recording of the withdrawal of the  
33 appeal was admitted and is at tab 69, one -- one  
34 more tab over.

35          In paragraph 630 of Mexico's brief it was  
36 noted:

37  
38           "On October 31, 1996 COTERIN filed a  
39 motion before the Supreme Court withdrawing  
40 from the appeal regarding the district  
41 judge's decision to reject the Amparo that  
42 it filed challenging the municipality's  
43 denial of the construction permit."  
44

45           And then over the next page is Metalclad's  
46 admission to paragraph 630 where it's noted:  
47

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1            "...admitted claimant notes that it  
2            withdrew its Amparo actions as a  
3            demonstration of good faith in the  
4            negotiations undertaken with the State and  
5            municipality."  
6

7            Those legal proceedings, their initiation,  
8            their abandonment in favour of negotiations, are  
9            not mentioned by the tribunal anywhere in its  
10            award.

11            Now, this memorandum back at tab 67 describes  
12            other legal proceedings that ensued at this time.

13            The next set of legal proceedings that was  
14            discussed but did not ensue are noted at page 2.  
15            It was suggested by Metalclad's lawyers that they  
16            ask the federal SEMARNAP department to file a  
17            lawsuit called a constitutional controversy in  
18            which one authority, one level of authority, the  
19            federal authority, challenges the level of the  
20            other authority, in this case the local authority,  
21            the municipality, on the -- and it was suggested  
22            that they, the federal authority, challenge on the  
23            basis that the municipality was invading the  
24            jurisdiction of the federal authority.

25            Now, the federal authority declined to  
26            initiate that constitutional challenge, and that's  
27            noted here.

28            A third set of legal proceedings under Roman  
29            numeral 2 there refers to another Amparo lawsuit  
30            filed by COTERIN. And this lawsuit was filed  
31            against the acts of the -- the State and State  
32            officials. I don't need to go into the de --  
33            details of that. It too was later -- was  
34            unsuccessful and dismissed, I think in January of  
35            1997.

36            Then we have, under Roman numeral 3, the  
37            Amparo filed by the municipality against the --  
38            against SEMARNAP. And in connection with that,  
39            that -- in -- in that Amparo, what the  
40            municipality was seeking to achieve was its view  
41            that the Convenio violated the August 1994 federal  
42            resolution prohibiting the introduction of new  
43            hazardous waste into this area before  
44            remediation. That was the basis of the

45 municipality's Amparo action that -- described  
46 there.  
47 I think you've already been advised in the

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1 course of the -- taking you through the award that  
2 the municipality was unsuccessful in that  
3 application. An injunction that it obtained  
4 temporarily in the course of that was later set  
5 aside, and that that lawsuit was, for  
6 jurisdictional reasons, unsuccessful.

7 So four sets of different legal proceedings  
8 surrounded the -- or, rather, followed the events  
9 of November of 1995, and they are described  
10 there. The tribunal refers only to one. They  
11 refer only to the municipality's Amparo. And they  
12 criticize the municipality and infer -- for taking  
13 that step, and infer that the municipality lacked  
14 confidence in its jurisdiction for some reason.  
15 The -- none of the other legal proceedings are  
16 referred to.

17 I can skip tab 68 and I can skip tab 70 and  
18 take you to tab 71. And there, having filed a  
19 notice of intent as required under the NAFTA on  
20 October 2, 1996, having done that, Metalclad filed  
21 its notice of claim in January of 1997. So as of  
22 that date, and in fact before some of these  
23 domestic legal proceedings had been finally  
24 resolved, Metalclad is commencing this arbitration  
25 and seeking the appointment of a Chapter 11  
26 tribunal to consider the alleged violations that  
27 it includes in its notice of claim.

28 At this time, as I just mentioned to you,  
29 there were -- COTERIN admitted that they were in  
30 negotiations with the municipality, that they had  
31 withdrawn their legal actions in good faith in  
32 order to negotiate with the municipality.  
33 Negotiations were ongoing.

34 And the next tab, tab 72, records an  
35 agreement of understanding, which is also referred  
36 to from time to time as the Acuerdo in which the  
37 municipality made it clear that it was prepared to  
38 allow operation of the landfill as a deposit for  
39 non-hazardous industrial waste. That appears in  
40 clause 1.3.

41 This preparedness did not result in an  
42 agreement. This -- this document was not to be  
43 considered a binding contract. It was intended to  
44 be a guide for future discussions on the

45 remediation and operation of a non-hazardous waste  
46 landfill. And that appears over the next page in  
47 clause 3.1.

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1       And as Your Lordship is aware, Metalclad was  
2 not prepared to operate solely as a -- a -- as a  
3 non-hazardous industrial waste landfill and  
4 remediate, and by this time of course had, instead  
5 of continuing to -- had launched this NAFTA claim  
6 instead.

7       Now, some eleven months after filing the  
8 notice of intention to bring this claim, and some  
9 eight or nine months after the filing of the  
10 claim, the Ecological Decree is promulgated by the  
11 State. And that's under the next tab of September  
12 30, 1997.

13       I'm going to be coming back to the Ecological  
14 Decree, but I'll just note at the second-last page  
15 of that that it -- it states on its face, page 606  
16 in the fourth article:

17       "Those permits, licences or authorizations  
18 granted before the date of this order come  
19 into use [sic] will be legal."  
20

21       It has no impact upon existing  
22 authorizations. It also gives a 90-day grace  
23 period for irregular ones to become regularized.

24       By this time the -- Metalclad has abandoned  
25 any attempts to either regularize its permitting  
26 situation with respect to the landfill, it has  
27 abandoned the landfill -- and, as the tribunal  
28 points out in my reading of its reasons, this was  
29 never implemented in respect of the landfill. The  
30 landfill -- Metalclad had by January of 1997, once  
31 before this, alleged that its landfill had already  
32 been expropriated.  
33

34       And under the next tab is a letter that  
35 was -- questions were asked about the effect of  
36 this if it were implemented. And answers were  
37 given at tab 74 which indicate that the decree in  
38 its -- at the bottom of that page, that:

39       "The decree in itself does not constitute  
40 any impediment for the municipality which  
41 is able to issue the necessary construction  
42 and operating licences for the operation of  
43 a dangerous residue landfill within a zone  
44

45 protected by the ecological reserve."  
46  
47 Now, there's no finding but -- like many

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1 other things, by the tribunal there -- there's no  
2 finding with respect to the actual effect of the  
3 decree upon this landfill because, as I read their  
4 reasons, it had not been implemented and it was  
5 not necessary for them to do so.

6 But I'm going to be saying more about that  
7 when I deal with the -- with the -- with the point  
8 that I touched upon yesterday when Mr. Cowper and  
9 I were -- were up, and that's the question of the  
10 tribunal's jurisdiction to consider the decree,  
11 the question of whether or not it was an ancillary  
12 claim within the meaning of the rules governing  
13 this arbitration and, if so, what would the  
14 consequences of that. And I -- I'll be coming  
15 back to that later in my submissions.

16 Now, what I've done by taking you through the  
17 documents themselves is I -- is that I have  
18 covered most but not quite all of Chapter 11 of  
19 the outline. And I just note that those  
20 paragraphs of Chapter 11 that I haven't touched  
21 upon expressly, I con -- in my recitation of the  
22 documents themselves, I continue to adopt and  
23 commend to Your Lordship.

24 I'd ask you though to turn briefly to a  
25 portion that I haven't dealt with, and that's at  
26 page 121 at paragraphs 408 and following, issues  
27 with respect to Mexican domestic law.

28 Now, Your Lordship is aware that in --  
29 Mexico's position was that it was no part of this  
30 tribunal's jurisdiction to interpret or decide  
31 issues of Mexican domestic law as if a Mexican  
32 appellate court. And these submissions are made  
33 in the alternative to that and really simply to  
34 point out that in the determinations that this  
35 tribunal did engage in, they again failed to have  
36 regard to significant and relevant matters.

37 Those are set out at paragraphs 408 and  
38 following, and I'll summarize them simply as  
39 follows: First, the tribunal referred to -- made  
40 this finding at the top of page 122, holding:

41  
42 "...that the exclusive authority for  
43 siting and permitting a hazardous waste  
44 landfill resides with the Mexican federal

45 government."  
46  
47 The -- I have mentioned to you countless

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1 federal documents -- November 1994, the -- the  
2 announcement of the Convenio -- just this morning,  
3 and many others that indicate that the federal  
4 authorities themselves did not take that position,  
5 that they were a necessary but not a sufficient  
6 authority or authorization for the siting of a  
7 hazardous waste landfill.

8 This tribunal says that:

9

10 "This finding is consistent with the  
11 testimony of the Secretary of SEMARNAP and,  
12 as stated above, is consistent with the  
13 express language of the..."

14

15 Federal law.

16 Now, what the tribunal failed there to refer  
17 to was the evidence of the secretary of SEMARNAP  
18 who testified:

19

20 "Any project in our country requires  
21 municipal, State and federal approval."

22

23 The tribunal failed to have regard to the  
24 constitutional principles affecting the  
25 jurisdiction of municipalities. It made no  
26 reference to the text of municipal laws, the  
27 applicable municipal laws. And I took  
28 Your Lordship to those laws, saying that these  
29 permits were required where there was a, quote,  
30 significant impact on the environment. And I took  
31 you to that language in the -- in COTERIN's own  
32 permit application in which they referred to that  
33 language and said, as a means of justifying their  
34 application, that this project has a significant  
35 impact on the environment.

36 We took you to the permitting history of the  
37 site. And again, the tribunal makes no reference  
38 to the permitting history of this particular site  
39 and the assertion of jurisdiction by the try -- by  
40 the municipality of the consideration of  
41 environmental considerations.

42 Your Lordship will recall from the terms of  
43 the original denial, from the terms of the  
44 subsequent denial, that the municipality itself

45 considered it was entitled to take into account  
46 the risks generated by the project and the views  
47 of the local inhabitants with respect to those

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1 risks.

2 There's also no reference to the rele --  
3 relative expertise of the -- of the expert  
4 testimony with respect to Mexican domestic law.

5 The -- Metalclad filed a report prepared by a  
6 1994 graduate of the University of Arizona who was  
7 an LL.M. candidate at a university in Monterey,  
8 Mexico.

9 Mexico filed two reports, one from two former  
10 justices and a scholar, and a third from the  
11 university, the institute of legal research at the  
12 federal university.

13 Although the president of the tribunal  
14 indicated to the parties during the course of the  
15 hearing that they would be requested to address  
16 the expertise of the relative -- of the -- the  
17 relative expertise of the experts that -- of the  
18 reports that were received, the tribunal itself  
19 never addresses that issue.

20 They also -- as I've mentioned a number of --  
21 of times, and this really ties back to the -- to  
22 the earlier submissions, also never failed to ask  
23 themselves the correct question, and that was:  
24 Well, was there a mechanism open to foreign  
25 investors to resolve any issues as to the extent  
26 of the municipality's jurisdiction?

27 Now, I'd like to, before handing the podium  
28 over to my colleague, Mr. Thomas, just briefly  
29 note the following: In the -- in the short time  
30 since yesterday afternoon I have, primarily by  
31 reference to Metalclad's own documents, shown you  
32 a very different version of the events than you  
33 can glean from reading the award.

34 If we were under the -- if we are under the  
35 Commercial Arbitration Act and the reasonableness  
36 simpliciter standard applies to questions of law,  
37 I will argue that the tribunal acted upon a view  
38 of the facts that could not reasonably be  
39 entertained. And I take that language from your  
40 summary of the -- that issue as a question of law  
41 in one of the -- in the Beazer case. And I would  
42 say that the tribunal, on all of the points that  
43 I've set out in the written outline, acted upon a  
44 view of the facts that could not reasonably be

45 enter -- entertained.  
46 If we are under the International Commercial  
47 Arbitration Act and we are applying the patently

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1 unreasonable standard, I would say that the  
2 result -- the result that the tribunal expressed  
3 as the -- Mexico did not have a transparent and  
4 predictable framework for foreign investors, that  
5 that result was patently unreasonable. Mexico did  
6 provide a transparent and predictable framework.  
7 It provided the means for an investor to identify  
8 the applicable laws and order its affairs. It  
9 applied -- it -- it provided for the means to  
10 obtain legal advice and to identify the legal  
11 steps necessary to resolve issues of Mexican  
12 domestic law.

13 And I've shown you the documents where this  
14 investor in taking up this very investment in the  
15 amendment agreement ordered its affairs against  
16 the prospect that the municipality might deny the  
17 permit, and referred in that document to having  
18 taken legal advice, to which you've been referred,  
19 referred in that document to the legal means  
20 necessary to resolve any legal issues, the writ of  
21 Amparo, which steps it instituted and then later  
22 abandoned voluntarily in favour of negotiations  
23 with the municipality.

24 All of this the tribunal did not refer to by  
25 reason of its imposing a duty on the central  
26 government to remove all legal doubt and  
27 uncertainty for the benefit of foreign investors.  
28 And I say that that in the result is patently  
29 unreasonable.

30 In my submission you don't see in these facts  
31 an established hazardous waste landfill fully  
32 permitted being taken away by a municipality. You  
33 see instead illegal construction in advance of  
34 permitting, prior contamination, and the  
35 municipality's refusal of a proposed investment  
36 rather than the taking of an investment, a refusal  
37 based upon reasonable grounds arising both from  
38 that prior contamination and the conduct of the  
39 applicant.

40 You see as well the municipality prepared to  
41 allow another use of this land, non-hazardous  
42 waste landfill. But most importantly you see,  
43 from the transparency perspective and this  
44 perspective, this investor at the time of

45 acquiring this investment being aware of this as a  
46 prospect.  
47 I would like now to turn over the podium to

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1 my friend -- or my colleague Mr. Thomas. I will  
2 be coming back to the final portions of the brief  
3 at the end.

4 MR. THOMAS: My Lord.

5 THE COURT: Yes, Mr. Thomas.

6 MR. THOMAS: I am now going to turn to a -- another  
7 distinctive feature of investor-State  
8 arbitration.

9 We've made the point already that  
10 investor-State arbitration differs fundamentally  
11 from private international commercial  
12 arbitration. And the topic that I'm going to  
13 address now is a further example of where  
14 investor-State differs. And I'm going to be  
15 discussing the emphasis that is placed upon the  
16 tribunal's compliance with the governing arbitral  
17 rules.

18 With respect to this part of our submission,  
19 Mexico will argue that, if the international act  
20 applies, then this Court has jurisdiction to  
21 review this set of errors by virtue of article --  
22 or Section 34(2)(a) of the International  
23 Commercial Arbitration Act, which allows judicial  
24 intervention where the arbitral procedure was not  
25 in accordance with the agreement of the parties,  
26 and Section 34(2)(b), the award is in conflict  
27 with the public policy of British Columbia.

28 Now, if the application is governed by the  
29 Commercial Arbitration Act, then we say that under  
30 Section 30 there would be a loss of jurisdiction  
31 to the tribunal by virtue of its failure to deal  
32 with the questions that it was obliged to deal  
33 with. This could be characterized either as a  
34 loss of jurisdiction or a denial of natural  
35 justice. But in either event we say that it's  
36 arbitral error within Section 30 of that act.

37 Now, I'm going to begin this part of the  
38 presentation, My Lord, by discussing the ICSID  
39 annulment process with respect to a specific  
40 issue, which is the obligation or the duty which  
41 is imposed upon the tribunal to deal with every  
42 question submitted to it.

43 And if you turn to paragraph -- or to page  
44 139 of the outline of the argument, it's after tab

45 13, you'll see that at paragraph 472 we've quoted  
46 Article 53 of the ICSID additional facility  
47 arbitration rules. And this was the applicable

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1 rule for this particular tribunal, and it states:

2

3 "The award shall be made in writing, shall  
4 deal with every question submitted to the  
5 Tribunal and shall state the reasons upon  
6 which it is based."

7

8 And we point out at paragraph 473 that  
9 Article 53 of the rules that governed our  
10 arbitration is derived from similar language in  
11 the ICSID Convention's Article 48(3) which  
12 states:

13

14 "The award shall deal with every question  
15 submitted to the Tribunal, and shall state  
16 the reasons upon which it is based."

17

18 Among the publications that ICSID issues is  
19 something called ICSID Review - Foreign Investment  
20 Law Journal. And at paragraph 474 of the outline  
21 we quote Professor Christoph Schreuer's comment on  
22 ICSID Article 48. So this comment, we say,  
23 applied to ICSID Article 48 is applicable to  
24 Article 53 of our additional facility rules.

25 And Professor Schreuer states:

26

27 "The requirement that the award must deal  
28 exhaustively with the dispute as submitted  
29 by the parties is one of the general  
30 principles underlying arbitration. A  
31 tribunal may not hand down a partial award  
32 leaving questions submitted to it  
33 undecided. This principle is mandated by  
34 the parties' will underlying the  
35 arbitration, as well as by requirements of  
36 procedural economy. An award that is not  
37 comprehensive and exhaustive of the  
38 parties' questions is the obverse of an  
39 excess of powers committed through a  
40 decision on questions that have not been  
41 submitted to the tribunal."

42

43 In his article, which is included in the  
44 materials, Professor Schreuer summarizes some of

45 the criteria that had been developed by ICSID  
46 annulment committees when reviewing arbitral  
47 tribunal decisions under the convention.

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1           And we quote a paragraph at -- at  
2 paragraph 477, where he says:

3  
4           "The reasons need not deal with all  
5 arguments that the parties presented to the  
6 tribunal. The reasons are complete if they  
7 address all arguments of the parties that  
8 were accepted as necessary or relevant for  
9 the decision. They must also address all  
10 arguments made by the parties that were  
11 rejected and which, had they been accepted,  
12 would have changed the decision's outcome."  
13

14           Now, another commentator on the convention is  
15 in fact the former -- really the man who is  
16 credited with the drafting of the convention and  
17 the former general counsel of the World Bank,  
18 Dr. Aron Broches. And at paragraphs 478 and 479  
19 we cite two of his articles where he discusses the  
20 annulment process. And I direct you to the first  
21 quote where Dr. Broches says about the requirement  
22 to address every question raised by the party:  
23

24           "Moreover, the explicit requirement to  
25 deal with such questions constitutes a  
26 fundamental procedural protection of the  
27 parties against arbitrary decisions.  
28 Failure of a tribunal to observe it is a  
29 serious departure from that fundamental  
30 rule of procedure which is a ground for  
31 annulment under Article 52..."  
32

33           And then in the -- in paragraph 479 we quote  
34 Dr. Broches where -- where he responds to a  
35 suggestion by Professor Michael Reisman of Yale  
36 University that a tribunal may decline to answer  
37 questions that are submitted to it. And he calls  
38 that contention formalistic and incorrect. He  
39 says:

40  
41           "The formalistic approach leads to the  
42 absurd result that a tribunal may pick and  
43 choose among the questions submitted to it  
44 by a party and deal only with those on

45 which it will base a reasoned award, acting  
46 as if the other questions had not been  
47 raised."

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1

2 Now, in Mexico's submission that is precisely  
3 what happened in this particular arbitration. The  
4 tribunal dealt only with the questions on which it  
5 sought to base the award, acting as if the other  
6 questions had not been raised.

7 And I do want to emphasize that at the  
8 international level this is viewed -- this  
9 requirement to deal with every question in the  
10 award is viewed as a procedural protection.

11 There is law in Canada with respect to  
12 private international commercial arbitrations that  
13 say that the award -- the -- the reasons in the  
14 award are not part of the arbitral process.

15 We referred you to a case, and I'll come to  
16 it in some time, and Metalclad relies upon this  
17 case as well. It's called Food Services. And I'm  
18 going to distinguish that case and show that it  
19 does not bear upon the questions that confront the  
20 Court in this particular application. But at the  
21 international level it's very clear in  
22 investor-State, as understood by the ICSID, that  
23 this is a procedural protection; it's part and  
24 parcel of the arbitral process.

25 And I would add that Mexico entered into this  
26 arbitration with the expectation that the  
27 arbitration would be conducted in accordance with  
28 the agreement of the parties. It filed lengthy  
29 written pleadings. It filed many contemporaneous  
30 documents, many of which were of Metalclad's own  
31 making, to inform the tribunal of the factual and  
32 the legal issues which this claim gave rise to.

33 And you will note, as I take you to some of  
34 these ICSID cases, you cannot help but be struck  
35 by the much more thorough treatment of the  
36 evidence and the legal submissions by these other  
37 ad hoc tribunals under the ICSID when compared to  
38 the work of this tribunal. Mexico expected that  
39 this tribunal would discharge its obligation in  
40 the same way.

41 Now, a number of essential questions were  
42 raised by Mexico in the -- in this particular  
43 arbitration, and the -- the first issue of course  
44 is what is a question. And I'm going to take you

45 to some of these cases to illustrate how this  
46 issue has been approached at the international  
47 level.

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1 The first case is a case called Klockner.

2 Mr. Foy has referred to it. It's at tab 31 of the  
3 materials, Volume 1. Oh, I'm sorry.

4 Is it Volume 2?

5 MR. FOY: Yes.

6 MR. THOMAS: I'm sorry, Volume 2.

7 I should note that there are four annulment  
8 decisions. Three of them have been published.  
9 The fourth is unpublished to our knowledge.

10 We're also instructed by ICSID that there are  
11 two more annulment proceedings that are underway  
12 at present, but there's been nothing published  
13 with respect to those.

14 Now, Klockner -- I just want to reiterate.  
15 We did make the point a couple of days ago,  
16 My Lord. But the ICSID convention permits one of  
17 those tribunals to apply the domestic law of the  
18 host State. And so when we're looking at this  
19 case, we're looking at it not for its treatment of  
20 the law, we're looking for its analysis of  
21 questions. What were the questions which were put  
22 to the tribunal?

23 Klockner was a -- a claim brought by a  
24 company that was -- that built a fertilizer  
25 factory in Cameroon that turned out to have  
26 performance problems. And a commercial dispute  
27 between the government of Cameroon and Klockner  
28 arose. Klockner commenced an arbitration. And in  
29 the event its claim was dismissed. The claim  
30 presented to the arbitral tribunal was essentially  
31 a breach of contract claim.

32 Now, when Klockner lost the arbitration, it  
33 commenced an annulment procedure. And it alleged  
34 numerous grounds of annulment under the -- Article  
35 52 of the Convention.

36 We're not going to be going through the  
37 various grounds; we're just going to be looking at  
38 this issue of the question.

39 And if you'd turn to paragraph 131 of the  
40 annulment committee decision, it's under the  
41 heading "Failure to Deal with Questions Submitted  
42 to the Tribunal," it says in the -- in the -- the  
43 second paragraph at the very bottom of the page:  
44

45 "According to a general principle embodied  
46 in Article 48(3), the award must deal with  
47 every question submitted to the tribunal.

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1       Given the relative ambiguity of the term  
2       'questions,' it should first be noted that  
3       these may be formulated separately at the  
4       end of an application or a memorial or  
5       constitute part of an argument. It may  
6       therefore be that certain questions  
7       submitted to the tribunal are presented  
8       formally in the main text of the parties'  
9       documents rather than, for example, in the  
10      form of final conclusions or submissions."

11  
12      And if you go to paragraph 132 over the page,  
13      it talks about Klockner's approach to it. And it  
14      says in the second paragraph after it -- in its  
15      application, it says:

16  
17      "This approach is misleading. In order to  
18      judge the admissibility and then the  
19      validity of the complaints, it need only be  
20      determined whether these essential  
21      arguments constituted or involved questions  
22      submitted to the tribunal and whether the  
23      tribunal dealt with them in the award,  
24      regardless of whether it undertook any  
25      study of them."

26  
27      Now, in this case the complaints that  
28      Klockner made -- again, they're with respect to  
29      national law -- one complaint was that it had been  
30      found to have an obligation of result when it  
31      constructed this -- this facility. And it argued  
32      that it didn't have an obligation of result. The  
33      tribunal failed to deal with that issue. The  
34      annulment committee said that that complaint was  
35      borne out.

36      It argued that it -- the tribunal had failed  
37      to examine the conditions under Cameroon's law for  
38      wrongful inducement to contract. That was  
39      rejected.

40      It argued that the tribunal had taken no  
41      account of its pleas regarding contractual  
42      limitations of warranties and liability. That was  
43      accepted.

44      It argued that the tribunal had taken no

45 account of Cameroon's acknowledgment of its debt  
46 and its arguments regarding that. That was  
47 accepted.

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1           And it argued that there had been no -- the  
2 issue that it had advanced with respect to the  
3 rules of French law limiting a -- a supplier's  
4 liability for hidden defects and time-barred  
5 claims was also established by the annulment  
6 committee that that had not been addressed in the  
7 award by the tribunal.

8           Now, in examining the complaints that were  
9 made by Klockner, the tribunal looked back at the  
10 pleadings of the parties.

11          And I know that from the material that we've  
12 received so far it's been suggested that this is a  
13 very narrow scope of review and that you shouldn't  
14 be looking beyond the award.

15          Well, in this type of exercise the annulment  
16 committee accepted that it was appropriate to look  
17 at the pleadings of the parties, because as an  
18 international proceeding it's done in writing  
19 primarily.

20          And of course it makes sense. How can you  
21 determine whether or not the tribunal has failed  
22 to deal with questions which have been submitted  
23 to it if you're confined to the award?

24          So if you take a look at -- at paragraph 149  
25 for example, My Lord, just as an illustration, it  
26 just talks about this complaint, and it says:

27  
28           "It must be noted that the award says  
29 nothing on this essential question and  
30 contains no reason on this topic or, more  
31 precisely, no expressed reason."  
32

33          And then it goes through.  
34          And at the bottom of the page it says that:

35  
36           "The tribunal could have referred to or  
37 adopted the respondent's arguments in its  
38 counter-memorial, or it could have used  
39 reasoning analogous to that which it  
40 employed at page 136 of the award to reject  
41 the counterclaim."  
42

43          So it's looking at the pleadings.  
44

45 "Be that...be that as it may, it's not  
46 for..." this committee "...for the  
47 committee to imagine what might or should

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1           have been the arbitrator's reasons any more  
2           that it should substitute correct reasons  
3           for possibly incorrect reasons, or deal ex  
4           post facto with questions submitted to the  
5           tribunal which the award left unanswered."  
6

7           So that was the approach.

8           Yeah. That's paragraph 151 (sic), bottom of  
9           the page, My Lord, the last paragraph on the  
10          page.

11          And then over the page, top of page 152,  
12          the -- the second paragraph to conclude on this  
13          point:

14  
15          "The ad hoc committee can only note that  
16          the complaint is not only admissible but  
17          well-founded given the failure to state  
18          reasons and to deal with the claimant's  
19          pleas concerning the application of  
20          contractual clauses limiting liability."  
21

22          That's just an example of the approach that  
23          the -- that the annulment committee took to the  
24          examination of the question and the review of the  
25          award in light of the pleadings.

26          And this award was annulled completely on a  
27          variety of different grounds.

28          I'm concerned only with the analysis that  
29          this tribunal -- that the annulment committee  
30          employed in terms of determining whether or not  
31          questions had been addressed by the tribunal.

32          Now, I note again from the first section of  
33          Metalclad's pleadings that they've noted that the  
34          arbitrators in this case were very eminent. We  
35          don't disagree.

36          But I want to point out that in Klockner the  
37          tribunal that was annulled included the former  
38          president of the International Court of Justice.  
39          It was presided over by Dr. Arechaga. You may  
40          recall I cited before the Southern Pacific  
41          Properties case; he was the presiding arbitrator  
42          in that. He presided over the Klockner arbitral  
43          tribunal. And he and two other very distinguished  
44          arbitrators were party to that award. One

45 dissented. But the fact of the matter is that  
46 Dr. Arechaga was annulled by this committee.  
47 In fact, I'm instructed by an expert in ICSID

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1 arbitration -- Mr. -- Mr. Alvarez probably already  
2 knows this -- that this is called the Arechaga  
3 syndrome, where a -- a president who is a very,  
4 very well established and internationally  
5 recognized expert presided over -- presides over a  
6 new proceeding, doesn't understand the nuances or  
7 doesn't take account of the nuances and -- with  
8 the subsequent effect that his decision is  
9 annulled. And that's what happened in Klockner.

10 Now, in Amco another very eminent arbitral  
11 tribunal was annulled as well. And Amco was a  
12 case -- it's at tab 4 of the -- of the cases. It  
13 was a claim brought by a company against the  
14 government of Indonesia.

15 And this was a case where the foreign  
16 investor had entered into a joint venture with a  
17 company, an Indonesian company, which was  
18 controlled by the Indonesian army. Apparently  
19 this is quite common in Indonesia. And they  
20 developed a hotel complex. A commercial dispute  
21 arose between the parties. And there was a  
22 breakdown in the relationship between the joint  
23 venture parties. And eventually the military in  
24 Indonesia seized the hotel complex and occupied  
25 it. And this gave rise to this claim under the  
26 ICSID Convention.

27 Now, I would note parenthetically, I -- I  
28 don't think I have the original decision, but the  
29 original decision actually rejects the contention  
30 by Amco that this was an act of expropriation by  
31 the force -- the use of ar -- of military force to  
32 take control of the complex. It said that it did  
33 not constitute an expropriation at international  
34 law. But I say that just parenthetically, because  
35 Mr. Foy will be coming back to this issue in his  
36 arguments on the law.

37 But what you find again is the annulment  
38 committee being presented with questions about --  
39 that are raised by -- by Indonesia in this  
40 annulment proceeding saying that there are issues  
41 that were not addressed by the arbitral tribunal.

42 And if you look at paragraph 30 of the  
43 annulment committee decision, it says:  
44

45 "The ad hoc committee has before it an  
46 Indonesian claim of nullity relating to an  
47 alleged failure on the part of the tribunal

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1 to answer all of the questions submitted to  
2 it in disregard of the requirement of  
3 Article 48(3) of the Convention."  
4

5 And then it sets out the specific claim.  
6 It goes down to the bottom of the page,  
7 paragraph 32:  
8

9 "The ad hoc committee believes that the  
10 obligation set out in Article 48(3) of the  
11 convention to deal with every question  
12 submitted to the tribunal and to state the  
13 reasons upon which the award is based  
14 confined its sanction in the annulment  
15 section of the convention."  
16

17 And it then goes on to say at the bottom of  
18 that paragraph:  
19

20 "Such an omission could however amount in  
21 particular situations to a serious  
22 departure from a fundamental rule of  
23 procedure and to a manifest excess of  
24 power."  
25

26 And then on -- over the page at paragraph 37,  
27 after having gone through the issue in greater  
28 detail, it says:  
29

30 "For the above reasons, the ad hoc  
31 committee affirms its jurisdiction to  
32 decide the claim of Indonesia that the  
33 tribunal seriously departed from a  
34 fundamental rule of procedure when it  
35 refused to consider other grounds for the  
36 revocation for PT Amco's investment  
37 licence."  
38

39 So it had -- it establishes that it has  
40 jurisdiction to review the claim.

41 Now, in the event that claim was decided not  
42 to have been made out, the decision was annulled  
43 on other grounds. But again, it indicates an  
44 approach taken by the tribunal to this issue of

45 whether or not questions have been addressed by  
46 the tribunal.  
47 Now, there is a third case, and I'll only

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1 direct you to two paragraphs of it before I get  
2 into the balance of the proceedings, and this is  
3 a case called the MINE case. It's called MINE v.  
4 Guinea, and it's at tab 38.

5 This is the most recent published annulment  
6 decision of the ICSID. And it's worth noting that  
7 Dr. Broches, the former general counsel of the  
8 World Bank whose passages I quoted to you before,  
9 presided over this annulment committee. And I'd  
10 just direct you to paragraphs 4.11 and 12, 4.11.  
11 They're at page 86.

12 And at paragraph 4.10 the committee says:

13  
14 "An ad hoc committee retains a measure of  
15 discretion in ruling on applications for  
16 annulment. To be sure, its discretion is  
17 not unlimited and should not be exercised  
18 to the point of defeating the object and  
19 purpose of the remedy of annulment. It may  
20 however refuse to exercise its authority to  
21 annul an award where an annulment is  
22 clearly not required to remedy procedural  
23 injustice and annulment would unjustifiably  
24 erode the binding force and finality of  
25 ICSID awards.

26 "In the course of the proceedings  
27 MINE has advanced the argument that a  
28 series of annulments of ICSID awards might  
29 impair the effectiveness and integrity of  
30 ICSID as an international institution for  
31 settlement of disputes between States and  
32 foreign investors. The committee was  
33 accordingly urged to keep this  
34 consideration in mind in its examination of  
35 Guinea's application."  
36

37 At 4.12:

38  
39 "MINE's argument wrongly assumes that  
40 frequent annulments will necessarily be the  
41 result of overly strict tests applied by  
42 ad hoc committees. It overlooks the  
43 possibility that such frequent annulments  
44 may reflect neglect by arbitrators, parties

45 or counsel of requirements flowing from the  
46 specificity of ICSID arbitration as defined  
47 in the Convention and the arbitration

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1 rules. A pure statistical approach for  
2 which there is, in any event, no  
3 significant basis at the present time is  
4 wholly inappropriate as a measure of  
5 ICSID's effectiveness."  
6

7 Now, I direct you to that comment by the  
8 committee because it might be argued that were the  
9 Court to accede to the various submissions by the  
10 United Mexican States in this proceeding, that  
11 somehow its exercise of the corrective  
12 jurisdiction of the Court would undermine the  
13 effectiveness of Chapter 11. Well, the point  
14 that's made by the annulment committee is that if  
15 there is a form of review provided for, in that  
16 case it's a form of review under the convention,  
17 it's a form of review that can be exercised.

18 Now, I mentioned to --

19 THE COURT: You say --

20 MR. THOMAS: -- you, My Lord --

21 THE COURT: You say "it might be argued." As I read  
22 Mr. Cowper's first argument, he is arguing it.

23 MR. THOMAS: I -- okay. Well, I just -- on the basis  
24 of the International Commercial Arbitration Act I  
25 didn't see the argument in -- in -- I --

26 Let me put it this way, My Lord --

27 THE COURT: It is implicit.

28 MR. THOMAS: It's implicit. I don't see it explicit,  
29 but I anticipate it.

30 My Lord, we referred you to a decision of the  
31 B.C. Supreme Court in Food Services. And I -- I  
32 note that that -- that is indeed cited by the  
33 respondent. And I just want to take a few minutes  
34 to talk about that case.

35 THE COURT: I wonder, would it be convenient to take  
36 the morning break now?

37 MR. THOMAS: That would be fine.

38 THE COURT: We'll take the recess.

39 THE REGISTRAR: Order in chambers. Chambers is  
40 adjourned for the morning recess.

41

42 (MORNING RECESS)

43 (PROCEEDINGS ADJOURNED AT 11:15 A.M.)

44 (PROCEEDINGS RESUMED AT 11:31 A.M.)

45

46 THE COURT: Yes, Mr. Thomas.

47 MR. THOMAS: My Lord, before the break we were -- I

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1 was just about to take you to the Food Services  
2 case. It's at tab 28 of the -- of the  
3 authorities.

4 Now, this was an application to enforce a --  
5 an American arbitration association award pursuant  
6 to the International Commercial Arbitration Act.  
7 And the respondent sought to resist enforcement  
8 under the act. The Court rejected the  
9 respondent's arguments. And its principal finding  
10 is at the bottom of paragraph -- of page 228 under  
11 the heading, the bold heading, "Did the Respondent  
12 Waive its Right to Oppose Enforcement of the  
13 Award?" And it -- and it -- the Court starts by  
14 quoting Section 36 of the act, which sets out a  
15 number of grounds in which enforcement may be --  
16 may be opposed. And then it notes that:

17 "In the agreement to arbitrate, the  
18 parties waived the benefit of Section 36 of  
19 the act."  
20

21  
22 And you'll see there's a precise contractual  
23 clause. It says:

24 "Waiver of Section 36 of the International  
25 Commercial Arbitration Act of British  
26 Columbia. The parties intend that any  
27 award entered by the arbitrators in this  
28 case shall be final and binding subject to  
29 enforcement either in Canada and/or the  
30 United States. In this regard, both  
31 parties hereby expressly waive any  
32 entitlement they have or may have to rely  
33 upon the provisions of Section 36."  
34

35  
36 And over the page, paragraph -- at page 229,  
37 paragraph 16, it is stated by the Court:

38 "The only possible conclusion is that the  
39 parties waived their right to oppose  
40 enforcement of the award under Section 36.  
41 And the respondent's grounds for opposing  
42 enforcement cannot be supported as they  
43 clearly fall under that waiver."  
44

45  
46  
47

Now, My Lord, that's the principal finding of  
the Court. I'll come back to the -- the next

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1 reasons. But the first point is that of course  
2 under 1136 of NAFTA, the NAFTA parties have  
3 expressly not waived, if I can say it that way,  
4 their right to re -- to resist the enforcement of  
5 the award.

6 As you'll recall, Article 1136 permits --  
7 requires a period of 90 days following the  
8 rendering of the award, during which time a  
9 disputing party, not necessarily the NAFTA party,  
10 may apply to the Court to set aside the award.

11 So on the -- on the actual point of law that  
12 is determined by this Court in this particular  
13 case, there's a turning on the finding that by  
14 contract the parties to this private international  
15 commercial arbitration agreed not to seek the  
16 protection of -- of the -- of the grounds that are  
17 afforded in Section 36 of the act.

18 Now, the Court did go on to say that in any  
19 event it would address the other arguments of the  
20 respondent.

21 And in this case the objection of the -- of  
22 the party resisting enforcement was the failure of  
23 the arbitrator to provide written reasons. And  
24 you see that set out at page 230 at paragraph 21  
25 where it says that:

26  
27 "Article 28(2) of the international  
28 arbitration rules requires the arbitrators  
29 to state the reasons upon which the award  
30 is based."

31  
32 And it goes on to note that:

33  
34 "In this matter written reasons were not  
35 issued."

36  
37 The Court finds that this is not a part of  
38 the arbitral process.

39 Now, we of course have just taken a look at  
40 the international -- at the -- at the  
41 international level of the ICSID where the duty to  
42 state the reasons and deal with every question  
43 submitted by the parties is considered to be part  
44 of the arbitral process. So in my submission this

45 is an example of what Mustill and Boyd pointed out  
46 in the text that Mr. Foy referred you to a couple  
47 of days ago where they say that to take the way in

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1       which a -- one particular form of arbitration  
2       operates and to apply the reasoning to another  
3       quite different form of arbitration is to engage  
4       in analytical error. And the fact of the matter  
5       is is that at the international level there is a  
6       much greater concern in investor-State on the  
7       requirement that the award deal with every  
8       question submitted to the tribunal.

9       So in our respectful submission the obiter  
10       comments of this court decision do not in any way  
11       preclude Your Lordship from examining the practice  
12       in the ICSID Convention and seeing that that is in  
13       fact much more relevant and applicable to an  
14       after-Chapter-11 tribunal decision than an  
15       ordinary, private international commercial  
16       arbitration award.

17       It's an entirely novel question. And we  
18       submit that the idea that the Food Services case  
19       should bind the Court with respect to its  
20       consideration of this issue is not persuasive.

21       And I would note in this regard that reasons  
22       in a private arbitration do not necessarily serve  
23       any kind of purpose, and they certainly don't  
24       serve a public purpose, whereas reasons in a NAFTA  
25       arbitration do serve a public purpose. They serve  
26       the purpose of a NAFTA party where, if liability  
27       has been established, which is rare at  
28       international law, the State is able to determine  
29       why its actions have been found to constitute a  
30       breach of an international treaty.

31       Reasons also inform the citizens of a State.  
32       As you are aware, these -- these disputes are  
33       matters of significant public importance and  
34       public attention. And citizens want to know why a  
35       State may have been held internationally  
36       responsible for a given claim.

37       And of course the reasons are of assistance  
38       not only to the investor who brought the claim,  
39       but to future -- future investors as well. And  
40       that's the point that a Mr. Highet made at the  
41       beginning of his dissent in the Waste Management  
42       case, where he says:

43  
44       "I feel obliged to set out my reasons in

45 detail because of the precedential effect  
46 of this decision."  
47

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1 Yes, it's not binding on any other party  
2 other than the parties to the dispute, but the --  
3 the informal precedential value of these awards  
4 cannot be ignored.

5 Now, what were the failures in the instant  
6 case?

7 Mr. Foy has already directed Your Lordship to  
8 what Mexico considers to be patently unreasonable  
9 findings of fact made by the tribunal. And in our  
10 submission, these could equally be characterized  
11 as a -- the result of a series of failures by the  
12 tribunal to deal with questions presented to it by  
13 the respondent, Mexico. And in Mexico's  
14 submission, had the tribunal addressed the  
15 substantive Mexican defences -- both factual and  
16 legal, had they been accepted -- they could have  
17 changed the outcome of the case.

18 And this is the approach that the ICSID  
19 tribunal is -- the annulment committees are  
20 taking. It has to examine where the tribunal  
21 looked at the questions, at questions which, if  
22 accepted, could have changed the outcome of the  
23 case.

24 As I mentioned to you before in the Klockner  
25 case, it need only be determined whether these  
26 essential que -- arguments constituted or involved  
27 questions submitted to the tribunal and whether  
28 the tribunal dealt with them in the award,  
29 regardless of whether it undertook any, quote,  
30 study of them.

31 And as you saw in the Amco case, this is not  
32 only a procedural issue, it can amount to an  
33 excess of jurisdiction as well.

34 Now, we are -- what I propose to do, My Lord,  
35 is to group these failure to -- the failure to  
36 consider questions into four sets: the first is  
37 liability, the second is damages, the third is  
38 evidence of bad faith on the part of the claimant,  
39 and the fourth concerns a relationship between the  
40 claimant and a witness that was tendered by it who  
41 was a former federal environmental official.

42 Liability. You've already seen from  
43 Mr. Foy's re -- review of the award and from the  
44 documents that there's no mention in the award of

45 the prior contamination of the site. And this was  
46 a matter which was addressed at length in the  
47 counter-memorial filed by the respondent, in the

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1 rejoinder, in the post-hearing submission, and at  
2 the hearing. In fact, Mexico opened its defence  
3 by projecting those three photographs that you  
4 have had put before you before the tribunal to  
5 illustrate the nature of the contamination of the  
6 site in 1991.

7 This was not done to blame Metalclad. It  
8 was -- Mexico always recognized that it was done  
9 by the previous owners of COTERIN. It was done to  
10 illustrate the basis for the local opposition to  
11 the construction of the landfill and its opening.  
12 And it was done to illustrate that the  
13 municipality, being the government which is  
14 closest to the local residents, did not share the  
15 view of the federal government. This is not  
16 unheard of in -- in feder -- in federations.

17 Now, I have a -- one short binder of  
18 additional materials. These are selected extracts  
19 from the record which have been provided to my  
20 friends. And I'm just going to take you through  
21 some of the evidence, My Lord.

22 At tab 1 is a witness statement by a -- a man  
23 who lived near the landfill, Juan Antonio Romo.  
24 And it's a short witness statement. He goes  
25 through his background, the -- his awareness that  
26 in 1993 Metalclad bought the site, and that he was  
27 concerned about the need for remediation, and he  
28 wasn't very trustful of the plans to reopen the  
29 site.

30 He said that they tried to convince him, in  
31 paragraph 6, that a landfill for hazardous waste  
32 was not dangerous. And he said, well, if the  
33 waste is not dangerous, why is it being brought to  
34 this place. And then he refers to the  
35 demonstration on March the 10th, 1995 where the  
36 buses came. And he -- they saw that visitors were  
37 coming to -- to look at the place.

38 On the next page, he believes that his family  
39 was affected personally. His daughter was born  
40 with a malformation, encephalitis I believe it  
41 is. And he says in paragraph 9 that the thing  
42 that scared him the most was that at the same time  
43 three other children were born with the same  
44 malformations. And he asked the doctor in the

45 hospital if this could be a result of the  
46 landfill. And the doctor did not ask yes to my --  
47 answer yes to my question, rather, he refused to

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1 properly document the case.

2 Now, the evidence of Mr. Romo is illustrative  
3 of the concern that local residents had about the  
4 landfill. And the -- we have -- we sought to make  
5 this point: that whether it's based on science or  
6 not, these are legitimate concerns on the part of  
7 local residents.

8 We did attach evidence. And if you turn to  
9 tab 2, you'll see that this is a -- a paper that  
10 was prepared by a witness who provided written  
11 testimony to the proceeding. He was not called  
12 for cross-examination. His name was Dr. Fernando  
13 Diaz Barragan.

14 And Dr. Diaz Barragan attached a paper that  
15 he had prepared with some colleagues called  
16 "Genotoxic Monitoring of Workers at a Hazardous  
17 Waste Disposal Site in Mexico." If you look down  
18 at the bottom left-hand corner of the page, it  
19 says it's a paper presented at the joint  
20 United States-Mexico Conference on -- I think  
21 that's waste, transport and interactions of metals  
22 held 14-16 April 1993.

23 And in the middle of that -- in the three  
24 columns there, My Lord, in the middle of the page,  
25 under the heading "Materials and Methods," you'll  
26 see that it said:

27  
28 "Twelve males employed at the dump site  
29 during four to eight months and seven  
30 individuals from El Huizache..."

31  
32 The nearby village,

33  
34 "...with similar socioeconomic and  
35 nutritional status agreed to participate as  
36 the exposed and controlled individuals  
37 respectively. Each subject completed a  
38 questionnaire regarding general health  
39 condition and drinking and smoking habits.  
40 Peripheral blood samples for all the  
41 subjects were obtained early in the  
42 morning, transported to the laboratory, and  
43 processed within 24 hours."  
44

45       And if you just turn over the page, under --  
46       in the middle of the next -- in the middle column  
47       of the next page, under the heading "Discussion":

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1  
2 "A significant increased level of  
3 chromosomal damage was detected among the  
4 cultured lymphocytes of high-risk workers.  
5 This exposure was found to increase with  
6 exposure time."  
7

8 And then on the right-hand column midway down  
9 the page:

10  
11 "One of the workers showed ten times the  
12 average amount of damage found in the  
13 exposed group. Even if we exclude this  
14 individual from the analysis, the  
15 difference between groups is still  
16 significant."  
17

18 And then at the bottom of the page it says:

19  
20 "The results of this study help to  
21 integrate the data of an early  
22 toxicological assessment and show the  
23 relevance of analyzing several biological  
24 end points. Although the damage found  
25 could not be attributed to a particular  
26 substance, there is a clear correlation  
27 between the yield or chromosomal  
28 aberrations with the duration of exposure  
29 which demonstrates individuals were exposed  
30 to toxic substances."  
31

32 Now, again, these were workers at the site in  
33 1991. We're not attributing the health effects  
34 there to Metalclad.

35 What we did in adducing this kind of evidence  
36 was to again underscore that this was a -- an  
37 issue which was of -- of great concern to people,  
38 and that there wasn't just fear, that there was --  
39 there were documents such as this which were  
40 available in the local community, in San Luis  
41 Potosi in the State, because this was a matter  
42 which was outside -- fell outside the boundaries  
43 of the municipality. It was a matter that  
44 non-governmental organizations in the State and

45 nationally were concerned about.  
46 Now, Mexico also filed two witness statements  
47 by a former senior official of the United States

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1 Environmental Protection Agency, named -- her name  
2 was Marcia Williams. In fact, she was called as a  
3 witness and was cross-examined at the hearing.  
4 And Ms. Williams had extensive experience in the  
5 problems of siting hazardous waste landfills in  
6 the United States due to the NIMBY factor, not in  
7 my backyard factor.

8 And her counter -- her expert reports can be  
9 found at counter-memorial annex 3 and rejoinder  
10 expert report Volume 13, and her cross-examination  
11 is in Volume 3 of the transcript. Again, lengthy  
12 reports dealing with the high-risk nature of this  
13 type of investment, it's a -- where it was  
14 discussed by her expert reports. She testified.  
15 There is no mention in the award of this part of  
16 Mexico's defence.

17 Now, there's no question, and Mr. Foy has  
18 taken you through the results of Metacla --  
19 Metal -- Metalclad's due diligence when it -- it  
20 bought the site, when it entered into the option,  
21 modified the option agreement to provide for this  
22 contingency for the resolution of the municipal  
23 permit issue, et cetera.

24 It knew it had to do due diligence. And I  
25 turn you to -- to tab 3 which is a memorandum  
26 dated February the 12th, 1993 from Mr. Jim Faus  
27 and Mr. Michael Tuckett to Grant Kesler, and it's  
28 a proposal from Aldrett Brothers on sale of  
29 Guadalcazar landfill site. And he introduces the  
30 subject of this potential for Metalclad to buy the  
31 property for a total of \$2 million. He says:

32  
33 "As we know, Mexicans love to negotiate.  
34 My guess is that this number is two to  
35 two-and-a-half times what they might  
36 ultimately take for the property."  
37

38 And then in uppercase letters:

39  
40 "BUT SOMETHING IS WRONG HERE. THIS IS TOO  
41 EASY!"  
42

43 And so he proposes that they get their Mexico  
44 City lawyer to prepare a draft purchase agreement

45 that gives them due diligence. And then he says  
46 at the bottom:  
47

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1           "The purchase of the property should be  
2           contingent on certain things being as they  
3           have been represented."

4  
5           Again, this time instead of uppercase  
6           letters, in italics:

7  
8           "Just because they have a permit to  
9           operate does not mean that they will."

10  
11           So after having been alerted to the  
12           possibility of this investment, Metalclad does its  
13           due diligence. And as Mr. Foy has indicated, it  
14           made amendments to the option agreement.

15           Now, you'll recall, My Lord, that in the  
16           award, and it's at paragraph 45, the tribunal  
17           deals with the demonstration on March the 10th,  
18           1995.

19           And Mexico -- this was a -- a -- this figured  
20           prominently in the pleadings from Metalclad. And  
21           Mexico's defence was that the demonstration was by  
22           private citizens and non-governmental  
23           organizations and their acts were not attributable  
24           to the Mexican State.

25           And I'm going to refer you in a few minutes  
26           to this notion of attributability at international  
27           law. But you see that at paragraph 45 of the  
28           award, there's a reference to tactics of  
29           intimidation and Metalclad's assertions that  
30           police blocked traffic. Now, again, you don't see  
31           anything in terms of what Mexico's defence was on  
32           that issue.

33           And if you turn to tab 4, we filed a witness  
34           statement from the priest of the parish of  
35           Guadalcazar. And the priest testifies about how  
36           he became actively involved in the opposition  
37           movement to the landfill. At -- at paragraph 11  
38           he says:

39  
40           "At the end of 1993 several people  
41           appeared at La Pedrera. It seemed as if  
42           the owners had changed and everything was  
43           indicating a new activity at the site.  
44           Therefore, I joined some citizens of the

45 municipality of Guadalcazar and together we  
46 decided to constitute a group called Frente  
47 Pro Defenca de Guadalcazar."

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1  
2       The front -- the defence front of  
3 Guadalcazar.

4  
5       "We had the support of Dr. Angelina Nunez,  
6 the founder of Pro San Luis Ecologico.  
7 This group was concerned about our problems  
8 and supported the population of Guadalcazar  
9 throughout."

10  
11       This is the priest, by the way, that  
12 Mr. Neveau refers to that needs a little earthly  
13 guidance. He becomes an agitator against the --  
14 the landfill.

15       At paragraph 21 he discusses the  
16 demonstration, bottom of page 4 -- 3, and he  
17 says:

18  
19       "The second time I went to La Pedrera was  
20 on March the 10th, 1995. Regarding this  
21 event, I would like to state that contrary  
22 to what has been expressed by the company,  
23 the demonstration arose from the roots of  
24 the community. In other words, the city  
25 council and State officials did not have  
26 anything to do with an authentic  
27 manifestation of the will of the people. I  
28 consider that the reopening was the last  
29 straw. We were informed of the supposed  
30 inauguration of the landfill by the local  
31 newspapers of SLP. Once again, the  
32 population had been ignored and deceived.  
33 I remember that the people joined together  
34 with the only purpose of defending their  
35 health and their families. In a short time  
36 many people came together in order to try  
37 to stop the reopening.

38       "In my case, I do not remember seeing  
39 armed people during the manifestation. On  
40 the contrary, the only armed people that I  
41 remember were the people that were guarding  
42 the landfill."

43  
44       And then he says that they have the

45 demonstration. And he says that it appeared that  
46 some workers at the site were under instructions  
47 to break it up.

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1

2 "However, I remember that such efforts  
3 were in vein until the municipal president  
4 arrived. I understand he had not been  
5 informed of or invited to the company's  
6 celebration.

7

8 "After we noticed that we had  
9 achieved our objective of making it clear  
10 in a public way that the general population  
11 did not agree with the reopening of the  
12 site, we returned to Guadalcazar."

12

13 This was not the only testimonial evidence  
14 that was adduced by Mexico with respect to this  
15 demonstration. And of course it's ignored.

16

17 I might add, by the way, My Lord, that  
18 Mexi -- Metalclad actually adduced a videotape of  
19 the demonstration, we -- which we reviewed. And I  
20 don't happen to have it in my possession, but I'm  
21 sure Mr. Pearce could come up with it.

21

22 There's no evidence of armed guards or police  
23 in the videotape. It's a -- a group of angry  
24 people, mainly women, engaged in a shouting match  
25 with workers at the site. We can get that tape if  
26 you'd like to see it.

26

27 Now, why is this relevant at international

27

28 law?  
29 Well, tab 20 of the ELSI case, which Mr. Foy  
30 took you through, deals with this kind of issue at  
31 international law. And I'd ask you to turn to  
32 paragraph 103.

32

33 This was a -- a case under a -- a friendship,  
34 commerce and navigation treaty between Italy and  
35 the United States. And at paragraphs 103 -- or  
36 paragraph 103 you'll see references to the treaty  
37 obligations that were imposed upon Italy and the  
38 United States by virtue of the agreement. And if  
39 I take you to paragraph 103, it says:

39

40 "Paragraph 1 of Article Roman numeral 5  
41 provides that the nationals of each party  
42 shall receive the most constant protection  
43 and security for their persons and property  
44 and shall enjoy in this respect the full

45 protection and security required by  
46 international law."  
47

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1           This is not identical language but it's --  
2           it's similar language to Article 1105.  
3           Now, the United States alleged in this case  
4           that the fact that the workers of the plant that  
5           was requisitioned by the mayor of Palermo had  
6           occupied the plant, they basically took possession  
7           of the plant, they didn't want to allow it to be  
8           shut down by the -- by the owners, that this was a  
9           violation of this -- this obligation and the  
10          obligation -- a similar obligation in a succeeding  
11          bilateral treaty between the parties.  
12          So you see at paragraph 105 there's a --  
13          the -- the contentions of the United States set  
14          out.  
15  
16          "It's the contention of the United States  
17          that once the plant had been requisitioned  
18          ELSI's employees began an occupation of the  
19          premises which continued, so far as the  
20          United States was aware, up to the  
21          reopening of the plant."  
22  
23          And the United States attributes an injurious  
24          consequence, the deterioration of the plant and  
25          related material and equipment, and that it  
26          impeded its trustee in bankruptcy.  
27          At the bottom, paragraph 107, the Court  
28          says:  
29  
30          "That there was some occupation of the  
31          plant by the workers after the requisition  
32          is something that Italy has not sought to  
33          deny."  
34  
35          And the Court of Appeal of Palermo referred  
36          in passing to the circumstances of the  
37          requisitioning authority having tolerated the  
38          unlawful act of occupation of the plant by the  
39          workers.  
40  
41          "It appears, nevertheless, to have been  
42          a...a peaceful occupation, as may be  
43          learned from ELSI's own administrative  
44          appeal..." of -- of the "...to the prefect

45        against the requisition."  
46  
47        The Court -- the International Court says:

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1  
2 "It is difficult to accept that the  
3 occupation seriously harmed the interests  
4 of ELSI in view of the evidence produced by  
5 Italy that measures taken by the mayor of  
6 Palermo for the temporary management of the  
7 plant permitted the continuation and  
8 completion of work in progress in the  
9 months following the requisition."

10  
11 And then it goes down:

12  
13 "The Court of Palermo, however, found  
14 itself unable to establish..." any damage  
15 "...that any damage to the plant had been  
16 caused by the occupying workers."

17  
18 Now, the central finding here, paragraph 108:

19  
20 "The reference in Article 5 to the  
21 provision of constant protection and  
22 security cannot be construed as the giving  
23 of a warranty that property shall never in  
24 any circumstances be occupied or  
25 disturbed. The dismissal of some 800  
26 workers could not reasonably be expected to  
27 pass without some protest."

28  
29 And the Court rejects the United States'  
30 argument that its investment was denied full  
31 protection and security at international law.

32 So when we made this defence, because you --  
33 as you notice, there is some discussion in the  
34 award about the totality of the circumstances, and  
35 there's this reference in paragraph 45 to  
36 Metalclad asserts, and that there's been tactics  
37 of intimidation, we adduced evidence and we made  
38 argument about this because there is a basic  
39 principle and question of international law about  
40 attributing the acts of private citizens to the  
41 State in order to establish international  
42 responsibility. Of course, the award is silent on  
43 these questions.

44 Now, another issue going to li -- another

45 question going to liability was Metalclad's  
46 knowledge of the situation as demonstrated by its  
47 own documents. And Mr. Foy has taken you through

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1 that. I don't need to repeat that evidence.

2 But Mexico's defence on this essential  
3 question, because it went to the very finding of  
4 the tribunal that Mexico failed to -- to provide a  
5 transparent and predictable in -- investment  
6 environment, this evidence, all -- most of which  
7 was Metalclad's -- of Metalclad's own making which  
8 was admitted by Mexico, is not addressed.

9 And if the tribunal had been required to deal  
10 with Mexico's question here, which is Metalclad's  
11 actual knowledge significant enough to amend the  
12 option agreement, that was a question, the  
13 consideration of which could have changed the  
14 outcome of the case to apply the ICSID approach.

15 The next -- and the final point on -- on the  
16 question of liability is that -- concerns this  
17 whole question of domestic legal remedies which  
18 Mr. Foy has -- has already addressed. And I don't  
19 intend to -- to reprise the evidence. What I  
20 intend to do is point out the legal significance  
21 of this in Mexico's defence.

22 I have already indicated to you this notion  
23 of attributability. And if you would turn,  
24 My Lord, to the last -- I think it's the last tab  
25 of materials. I think it's in the secondary  
26 sources, tab 133, tab 133. This is a -- these are  
27 the draft articles of -- on State responsibility  
28 prepared by the international law commission. And  
29 the international law commission is an agency of  
30 the United Nations which assists in international  
31 law making and the study of international law.

32 These draft rules have been in various  
33 iterations being developed for about 50 years. It  
34 looks like they're supposed to be adopted this  
35 year by the general assembly. But what I'm about  
36 to refer you to is pretty trite. If you look at  
37 the top of the second page, Article 2, it says:

38  
39 "Elements of an internationally wrongful  
40 act of a State. There is an  
41 internationally wrongful act of a State  
42 where conduct consisting of an action or  
43 omission is attributable to the State."  
44

45           And then as you go through Article 4 you'll  
46           see attribution to the State; Article 5,  
47           attribution to the State, the same in Article 6,

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1 7, 8, et cetera.

2 The point is -- is that when international  
3 tribunals examine the question of international  
4 responsibility, they have to be satisfied that the  
5 acts complained of are attributable to the State.

6 Now, this question of attributability arose  
7 not only with respect to the demonstration, it  
8 applies with respect to Metalclad's exercise of  
9 its domestic legal remedies.

10 As Mr. Foy has pointed out, the -- before  
11 they took the Amparo, they should have gone to the  
12 State administrative tribunal. Having done so,  
13 that would then give the Amparo court jurisdiction  
14 under Mexican law.

15 Metalclad went directly to Amparo.

16 Now, the effect of what this tribunal has  
17 done is this: It said that the -- the refusal of  
18 the municipal permit was improper. And so  
19 implicit in that finding is that a Mexican court  
20 seized with the matter would find that the  
21 municipality acted ultra vires. Metalclad did not  
22 take that -- have that issue resolved. It went to  
23 court, and then abandoned its remedies. The  
24 tribunal steps into the place of the Mexican court  
25 and makes Mexico internationally responsible for  
26 Metalclad's failure to properly exhaust its  
27 remedies.

28 And we made the point in the very beginning  
29 of the post-hearing submission where we said that  
30 the choice of going to the Amparo court directly  
31 was not attributable to Mexico. The abandonment  
32 of domestic legal remedies in favour of  
33 negotiation with the municipality was not  
34 attributable to Mexico. But the effect of the  
35 determination by this tribunal is to impose  
36 international liability upon Mexico for actions  
37 taken by Metalclad. Again, the point was made at  
38 the outset of our post-hearing submission; it's  
39 not addressed in the award.

40 Mr. Foy has pointed out already that the  
41 award fails to deal with the Acuerdo between the  
42 municipality and -- and Metalclad which dealt with  
43 the idea that metal -- that the site could be  
44 operated as a non-hazardous industrial waste

45 landfill, again, not addressed in the award.  
46 So that's my first cluster of issues,  
47 My Lord. That deals with liability.

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1 I think what I'll do is now turn to the  
2 question of damages. And what I think I'll do is  
3 introduce the damages, because I want to talk  
4 about one case. And then it would probably be an  
5 appropriate time -- actually, one case and some  
6 State practice, and then it would be appropriate  
7 to take a -- take a break.

8 Again, as I understand from the materials  
9 that we've received from Metalclad to date,  
10 it's -- it is their contention that if this  
11 application is governed by the International  
12 Commercial Arbitration Act, then the Court has no  
13 jurisdiction to examine the record of the  
14 underlying procedure. And I -- I take from that  
15 they -- the contention is that you are restricted  
16 to the four corners of the award.

17 Now, Mr. Foy has already set out a series of  
18 arguments, and this is an additional argument from  
19 the perspective of this -- of this duty that's  
20 imposed upon the tribunal to deal with every  
21 question.

22 But in the damages part of my argument there  
23 is an additional ground that -- that Mexico is  
24 raising here, and that is that this award is  
25 contrary to the public policy of British  
26 Columbia.

27 Now, I'm going to start this presentation by  
28 saying let's just forget about all the things that  
29 I've said about the -- the unusual nature of  
30 investor-State arbitration and the NAFTA, and  
31 public rights and all that. Let's assume that  
32 this award was a private international commercial  
33 arbitration between two parties, and it's a  
34 one-off contract, and no precedential value  
35 whatsoever to the -- to the award.

36 I'm going to direct Your Lordship to a  
37 decision of a Court which is in one of the most  
38 arbitration-friendly, unobtrusive, laissez-faire  
39 jurisdictions in the world, and it's the Paris  
40 Court of Appeal.

41 As Your Lordship will know, the Paris --  
42 the -- Paris is the seat of the International  
43 Chamber of Commerce Court of Arbitration. It's  
44 a -- a centre of international commercial

45 arbitration. And the French courts have had vast  
46 experience in reviewing international commercial  
47 arbitrations there.

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1           Now, I'm going to refer you to a case which  
2 was not contained in our outline. We were unaware  
3 of the case's existence when we -- when we  
4 completed the outline. But when -- when we found  
5 the case and reviewed it, we sent a copy over to  
6 my friend on February the 13th. And it's a case  
7 called European Gas Turbines, and it is at tab 132  
8 of the materials.

9           You don't have it?

10 MR. ALVAREZ: Haven't seen it yet.

11 MR. THOMAS: Okay. We sent it over to you on February  
12 the 13th.

13 MR. ALVAREZ: I guess we'll see it.

14 MR. THOMAS: You'll see it.

15 THE COURT: Sorry, what tab again was it?

16 MR. THOMAS: 132.

17           Now, My Lord, having read the outline, you're  
18 going to be aware of Mexico's view that Metalclad  
19 filed a claim that was misleading and deceptive.  
20 And we put this argument in the outline on the  
21 grounds of deceptive action.

22           This decision is a decision of the Court of  
23 Appeal, the Paris Court of Appeal, with respect to  
24 an international arbitration where the damages  
25 claim of the claimant was based on an -- a set of  
26 expenditures. It's claimed that it made  
27 expenditures that it didn't make.

28           There are two -- there were two grounds that  
29 were alleged by the -- by the respondent for -- or  
30 for the applicant to this particular case to have  
31 it set aside. The first one involves corruption;  
32 I'm not dealing with that. The second deals with  
33 fraud in the arbitral proceedings.

34           And if you turn behind the long French  
35 version of the case, there's a report from the  
36 yearbook of commercial arbitration in English.  
37 And I'd like you to take a look at page 205. It's  
38 at the bottom of the page, page 205, of the  
39 English version of the report. And at paragraph  
40 22 it states:

41  
42           "Second ground for a nullity. The award is  
43 contrary to international public policy as  
44 its enforcement would lead to sanctioning

45 of fraud committed by Westman during the  
46 arbitral proceedings. EGT maintains that  
47 Westman committed a fraud by submitting to

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1 the arbitral tribunal a detailed report of  
2 expenses certifying that they were incurred  
3 in order to perform its task whereas it did  
4 not bear any of these expenses. It  
5 maintained that these necessarily affected  
6 the decision of the arbitral tribunal."  
7

8 Paragraph 24:  
9

10 "Westman denies that it sought to mislead  
11 the arbitral tribunal, noting that its  
12 expenses report contains the following  
13 words, 'the amount of the commission for  
14 this kind of activity is speculative and is  
15 not calculated or determined on the basis  
16 of the expenses borne,' and also denies, in  
17 any case, that the alleged fraud influenced  
18 the decision of the arbitral tribunal."  
19

20 Now, the arbitral tribunal or the court, the  
21 Paris Court of Appeal, reviews this. And two  
22 important points arise; the first is that it says  
23 that if an allegation of breach of public policy  
24 is made, it has the jurisdiction to review the  
25 underlying record. And in fact it actually took  
26 new evidence before the Court itself.

27 So it said that where the -- where the matter  
28 is before it and it involves an allegation of  
29 breach of international public policy, it has the  
30 jurisdiction to look beyond the award at the  
31 evidence itself.

32 And if you look at the very end of that tab,  
33 My Lord, we had a translation done by counsel that  
34 we consulted on this point at the last page. And  
35 it's an English translation of one of the  
36 paragraphs of the French part of the award that's  
37 not contained in the summary in the ICSID year --  
38 in the ICA yearbook. And this is what the Court  
39 had to say:  
40

41 "Whereas the authority acknowledged as  
42 appertaining to the arbitrator in  
43 international cases to evaluate the  
44 lawfulness of a contract by reference to

45 the rules of international public order and  
46 to sanction its unlawfulness in particular  
47 by declaring it to be void implied in

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1 connection with an action to set aside  
2 based on the argument that recognition or  
3 enforcement would be incompatible with  
4 international public order..."

5  
6 And he cites the section of the code of civil  
7 procedure:

8  
9 "...that the control of the award carried  
10 out by the judge dealing with the action to  
11 set aside extends to all legal and factual  
12 elements of the case that might e.g.  
13 warrant the application or otherwise of the  
14 rule of international public order and, if  
15 it is so warranted, to rule on the  
16 lawfulness of the contract in light of that  
17 rule."

18  
19 This -- the Paris Court of Appeal reviews the  
20 evidence it was submitted by the claimant in the  
21 arbitration below, and it concludes that:

22  
23 "It would be contrary to international  
24 public policy to enforce the award in  
25 France given the evidence that was adduced  
26 by the claimant in the arbitration below  
27 with respect to its expenditures."

28  
29 And it said that:

30  
31 "The way in which that evidence was  
32 presented was a fraud and not a mere slight  
33 of hand or mere artfulness."

34  
35 Now, that's, as I mentioned to you, in an  
36 arbitration-friendly centre where this was an  
37 ordinary international commercial arbitration.

38 I'm going to layer upon that some  
39 international law to which Mexico referred in its  
40 post-hearing submission dealing with the whole  
41 question of espousal of a claim by a State.

42 And you'll recall that I mentioned to you at  
43 the outset that in the absence of investor-State  
44 arbitration, the normal course of events would be

45 for the State to espouse the claim as its own at  
46 international law. So in this case it would be  
47 the United States espousing the claim of

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1 Metalclad.

2 And it -- if you'll turn to paragraph 483 of  
3 Mexico's outline, you'll see a -- a quote from the  
4 United States Secretary of State, Mr. Seward. And  
5 we make the point that a State would refuse to act  
6 in espousing a claim once evidence of deception  
7 arose in the claim that they had been asked to  
8 look at. And Secretary Seward states:

9

10 "Nations cannot afford to have the  
11 intercourse which the interests of their  
12 citizens require to be kept open, subjected  
13 to the annoyances and risks which would  
14 result from the admission of fraud or  
15 duplicity into such intercourse. It has  
16 therefore become a usage, having the  
17 authority of a principle, in the  
18 correspondence between enlightened  
19 governments, in relation to the claims of  
20 citizens or subjects, that any deception  
21 practised by a claimant upon his own  
22 government in regard to a controversy with  
23 a foreign government, for the purpose of  
24 enhancing his claim, or influencing the  
25 proceedings of his government, forfeits all  
26 title of the party attempting such  
27 deception to the protection and aid of his  
28 government in the controversy in question,  
29 because an honourable government cannot  
30 consent to complicate itself in a matter in  
31 which it has itself been made or attempted  
32 to be made the victim of a fraud, for the  
33 benefit of the dishonest party."

34

35 And note the words "any deception" by an  
36 investor or any -- yeah, sorry, any -- any  
37 deception for the purpose of enhancing his claim  
38 or influencing the proceedings of his government.  
39 As I say, we made lengthy post-hearing submissions  
40 on this for reasons which will become very clear  
41 to you.

42 What we say with respect to damages, My Lord,  
43 is that Metalclad proffered false and deceptive  
44 evidence of the damages that it claimed to have

45 suffered, that the tribunal failed to perceive  
46 this fact fully, because it failed to deal with  
47 the questions that Mexico addressed to it on

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1 damages. It did walk around the edges of the  
2 deception. But it failed to carry out the  
3 necessary examination of the record that would  
4 have led it to reject any claim for a substantial  
5 monetary award with the effect that Metalclad was  
6 awarded a sum of money to which it was not  
7 entitled. And this is due largely to the  
8 tribunal's failure to address all the questions  
9 and evidence that was put before it in this  
10 proceeding.

11 And I'm going to suggest that this part of  
12 our submission on damages, which I will take you  
13 through after the break, is going to illustrate  
14 the wisdom of the ICSID approach to the need to  
15 deal with all questions that are submitted by a  
16 party, because in failing to address Mexico's  
17 questions, the tribunal acted unfairly in  
18 contravention of the governing rules, and it  
19 committed an injustice.

20 Now, I will -- we've got five minutes. I  
21 might as well just give you the -- or do you want  
22 to -- it's actually three minutes according to my  
23 watch.

24 THE COURT: It's up to you, whichever you wish to do.

25 MR. THOMAS: Okay. I'm going to leave you with an --  
26 with some thoughts over the course of the lunch  
27 break.

28 The deception in this case is that Metalclad  
29 repeatedly claimed that it spent \$20.5 million to  
30 acquire the land and to construct the landfill  
31 which was the subject of the NAFTA claim.

32 Now, you'll see that the tribunal did not  
33 accept the 20.5 million; it deducted certain  
34 expenses which it said were not attributable to  
35 the landfill. We're going to demonstrate that it  
36 did not do what it said it was doing.

37 But what Metalclad did was to file an  
38 expert's report which asserted that the  
39 construction cost of this landfill was \$20.5  
40 million. It was repeatedly asked by Mexico to  
41 prepare a detailed listing of its expenditures.  
42 And I'll go into the reasons why we asked that  
43 after the break.

44 It refused to do that throughout the

45 proceeding. Rather, it based its figure on a --  
46 initially a single piece of paper given by their  
47 CFO to the expert who included it in his report.

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1 And Mexico was put in the position of having to  
2 disprove this global figure of \$20.5 million.

3 Now, if you turn to tab 6 of the selected  
4 extracts, this is an excerpt from the expert  
5 report that Metalclad proffered in the first round  
6 of the proceeding. You'll see the title of the  
7 appraiser at the top, American Appraisal  
8 Associates. And this is the section of the report  
9 entitled "Construction Cost of La Pedrera." At  
10 paragraph 176 it says:

11  
12 "The construction and investment costs of  
13 the La Pedrera project are as follows on  
14 table 3."  
15

16 And if you look down, you'll see in the first  
17 section it's -- this is the investment in  
18 Confinamiento, that's really COTERIN, 1.151  
19 million, five hundred dollars (sic), and then  
20 investment in a company called ECOPSA,  
21 \$19,323,028. It describes this: The \$1,151,500  
22 was the purchase price for COTERIN. The balance  
23 of \$19,323,028 represents the Metalclad  
24 expenditures for the analysis of the site and the  
25 development and construction of the La Pedrera  
26 facility as it exists today. The total cost to  
27 Metalclad was almost \$20.5 million.

28 Then paragraph 177:

29  
30 "The accumulated schedule of the ECOPSA  
31 construction cost history..."  
32

33 Notice this, construction cost history is  
34 shown at Figure 14, which is over the page. And  
35 when you turn that page, My Lord, you'll see  
36 Figure 14, again construction cost history.  
37 There's no ifs, buts or maybes about this. And  
38 you'll see a series of bar graphs going from 1991  
39 to 1996. Note, in 1992 -- the highest  
40 expenditures are in the fourth quarter of 1992.  
41 And you have already heard evidence that they did  
42 not get introduced to the COTERIN investment until  
43 February of 1993. I'll come back to this later  
44 on.

45       The next page is another heading, "Cumulative  
46       Cost History." And then paragraph 178 again very  
47       explicit, very plain:

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1  
2 "These costs are only the out-of-pocket  
3 expenditures by Metalclad incurred in the  
4 acquisition, permitting, construction and  
5 subsequent validation of the La Pedrera  
6 property's ability to meet or exceed all  
7 federal environmental regulations. Other  
8 indirect and intangible impacts of the  
9 La Pedrera non-startup are identified and  
10 discussed in Section 10."  
11

12 And before we break, My Lord, I'll just refer  
13 you to the last page of this expert's report that  
14 was tendered by Metalclad, paragraph 223:  
15

16 "Before arriving at our opinion of value of  
17 the La Pedrera going concern, we personally  
18 inspected the designated property and  
19 examined historical records of the design  
20 and construction of the designated property  
21 and studied market conditions. To develop  
22 our opinion of value, we considered the  
23 three generally accepted approaches to  
24 value, the cost approach..."  
25

26 Et cetera.  
27 And then paragraph 224:  
28

29 "The cost approach establishes a value  
30 based on the cost of reproducing or  
31 replacing the property less depreciation  
32 from physical deterioration and functional  
33 and economic/external obsolescence if  
34 present and measurable."  
35

36 Paragraph 225:  
37

38 "In the appraisal of a development  
39 property, the cost approach which indicated  
40 a historical cost of nearly \$20.5 million  
41 (see Table 3) incurred primarily in 1993  
42 and 1994 was limited solely to the tangible  
43 assets."  
44

45        Maybe just before we break, just one more  
46        minute, My Lord.  
47        If you turn to paragraph -- or to tab 7,

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1 you'll see excerpts from Metalclad's pleadings.  
2 That's the expert report I've just looked at.  
3 These are the pleadings, page 29, the underlining  
4 at the top:

5  
6 "This \$20 million landfill in La Pedrera is  
7 the only landfill built since the NAFTA."  
8

9 Next page, middle paragraph, paragraph 3:

10  
11 "Whereafter approval and knowledge by  
12 federal and State officials, including  
13 municipal officer, of claimant's physical  
14 construction of its landfill facility and  
15 claimant's expenditure of U.S. \$20 million  
16 into the Mexican economy for the labour,  
17 equipment and materials to construct the  
18 landfill."  
19

20 Next page, paragraph 11, I've underlined the  
21 end of the paragraph:

22  
23 "...a direct investment of U.S. \$20 million  
24 while still being denied the benefit of its  
25 investment."  
26

27 My Lord, I think that's an appropriate point  
28 to stop. We'll pick up on this after the break,  
29 if I might.

30 THE COURT: All right. Yes. We'll take the luncheon  
31 recess now.

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

34  
35 (NOON RECESS)  
36 (PROCEEDINGS ADJOURNED AT 12:32 P.M.)  
37 (PROCEEDINGS RESUMED AT 2:02 P.M.)  
38

39 THE COURT: Please continue, Mr. Thomas.

40 MR. THOMAS: Thank you, My Lord.

41 Before we broke, My Lord, we were reviewing  
42 excerpts from the experts' report in the memorial  
43 where the claimant alleged that it spent 20.5  
44 million for the labour, equipment and materials to

45 construct the landfill.  
46 Now, My Lord, I'm going to pass up to you  
47 a -- some charts which are going to expedite this

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1 analysis based on record evidence. And it -- I  
2 hope that this will focus the inquiry and make it  
3 much more manageable and easy -- easy to follow.  
4 I've given a copy to my friend.

5 When Mexico began to look at the claim, it  
6 saw that -- in the Table 3 that was in the  
7 experts' report, that there were expenditures  
8 being claimed for 1991 and 1992 when of course  
9 COTERIN had not yet appeared on the scene. And so  
10 it instructed its experts -- we had two financial  
11 experts dealing with valuation, Mr. Kevin Dages  
12 and Dr. Mark Zmijewsky. And to spell his name for  
13 the court reporter, it's Z-m-i-j-e-w-s-k-y. We  
14 asked them to examine what was going on with  
15 Metalclad and its investment in Mexico.

16 Metalclad is a -- a publicly traded company.  
17 It trades on the NASDAQ small capitalization  
18 market. And as a result it files reports with the  
19 United States Securities and Exchange Commission.

20 So Mr. Dages and Dr. Zmijewsky reviewed all  
21 of Metalclad's announcements to the market and  
22 disclosures in its SEC filings from 1991 on to  
23 about 1997.

24 And the table which I've passed up to  
25 Your Lordship is a -- simply a graphic  
26 representation of Metalclad's various Mexican  
27 projects. And if you look at the middle of it,  
28 you'll of course see a -- there's a date,  
29 September 8th. That's COTERIN. It should be  
30 September 9th, but that's COTERIN.

31 THE COURT: Um-hum.

32 MR. THOMAS: Of course, that's the investment that is  
33 the subject of this dispute.

34 At the very top you'll see in 1991 a company  
35 called Eco Administracion. And I would ask you to  
36 just write in beside that Santa Maria -- Santa  
37 Maria del Rio, because we refer to it as the  
38 Santa -- Santa Maria del Rio project.

39 And these companies, My Lord, are the --  
40 they're all -- these are all taken from record  
41 evidence.

42 If you look at tab 8 of the materials -- I  
43 won't go through them in great detail, but I'll  
44 just point out that the first report, there's an

45 excerpt -- this is an organizational chart from a  
46 Metalclad document, it's called a Mexican --  
47 "Mexico Project Status Report." And you'll see

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1 at -- at the page following the title page,  
2 there's a -- a series of -- of names of companies  
3 listed there that Metalclad has described on its  
4 organizational chart and what they do.

5 And then behind it are excerpts from various  
6 investments that they announced. And the first  
7 one is November 26, 1991. And if you turn to the  
8 second page of that announcement, about midway  
9 down the page you'll see:

10  
11 "The company also announced today the  
12 completion of the acquisition of all of the  
13 outstanding shares of Environ Technologies  
14 Inc., ETI."

15  
16 It goes on to say that:

17  
18 "ETI owns 49 percent of the shares of  
19 Eco Administracion, a company organized to  
20 develop, construct and operate an  
21 integrated waste management facility at a  
22 site Eco has secured near San Luis Potosi  
23 in Central Mexico."

24  
25 And then in the next paragraph it just notes  
26 that the shareholders of ETI include Mr. Kesler,  
27 who is the -- also the CEO of Metalclad, and  
28 Mr. Robertson. And it discloses that they're both  
29 officers and directors and shareholders of  
30 Metalclad. So they were shareholders of ETI. And  
31 ETI in turn owned 49 percent interest in Eco  
32 Administracion. And ETI was sold to Metalclad in  
33 exchange for Metalclad stock in November of 1991.

34 The next press release is January,  
35 February -- March 2nd, 1992. And you'll see it.  
36 It's a --

37  
38 "Metalclad announces today a second joint  
39 venture to build, own and operate a  
40 state-of-the-art hazardous waste processing  
41 facility in Veracruz, Mexico."

42  
43 And this is to be 120,000-tonne-per-year  
44 waste processing plant at a 200-acre site in the

45 State of Veracruz.  
46 And then over to the next announcement, April  
47 20th, 1992, Metalclad announced the organization

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1 of a third joint venture corporation in Mexico  
2 known as Eliminacion to bring the number of joint  
3 venture Mexican corporations to pursue its toxic  
4 and hazardous waste treatment business to three.  
5 And it goes on to say where they're identify --  
6 where they're located, San -- San Luis Potosi,  
7 Veracruz and Tamaulipas, T-a-m-a-u-l-i-p-a-s, for  
8 the court reporter.

9 The sites for the development of waste  
10 disposal facilities have been acquired in the  
11 States of San Luis Potosi and Veracruz, and a site  
12 has been acquired in Tamaulipas.

13 So these carry on. There's a number of  
14 announcements. And then there's -- at the end  
15 there's a 1996 SEC annual report which lists in  
16 some detail the company's activities.

17 If you were to turn to the page -- at the  
18 bottom it's 1523.450.

19 THE COURT: Um-hum.

20 MR. THOMAS: Bottom of the page, you'll see a  
21 reference to ECOPSA which is on our list here.  
22 And ECOPSA is active in developing additional  
23 projects in Mexico, including, 1, an additional  
24 hazardous waste landfill and treatment facility  
25 near the heart of industrial Mexico. And then  
26 over the page, number 2, an industrial waste  
27 treatment and disposal facility; number 3, an  
28 incineration project; number 4, an aqueous waste  
29 treatment facility; 5, PCB exporting; and 6,  
30 BFI-Omega. And that talks about recycling.  
31 And -- and it has various branches in Guadalajara,  
32 Aguascalientes, San Luis Potosi, et cetera,  
33 et cetera. And there's further development  
34 activities underway for branches in Toluca,  
35 Veracruz and one other city in Mexico.

36 Now, the evidence that emerged during the  
37 course of the proceeding, My Lord, is that  
38 Metalclad took all of these other projects and its  
39 U.S. overhead and lumped it in and called it the  
40 direct cost of acquiring the land and constructing  
41 the landfill.

42 The memorial was very explicit that the \$20.5  
43 million was for labour, equipment and materials to  
44 construct the landfill. In fact, what the company

45 did was to roll all of these other projects and  
46 its U.S. overhead into the 20.5 number, and in our  
47 submission thereby inflate the number in order to

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1 obscure what its actual expenditures were.  
2 And if you think back to the words of  
3 Secretary of State Seward, in our submission this  
4 was a deception which was intended to enhance the  
5 company's claim. In our submission it was  
6 positive prevarication.

7 There's no doubt that nowhere in the first  
8 pleading was there any reference to these other  
9 companies and nowhere in the experts' report was  
10 it disclosed that these other companies and the  
11 overhead was being included in the \$20.5 million  
12 claim.

13 Now, we pursued this at the hearing.

14 Actually, before I just proceed, if you would  
15 turn to tab 9 of our materials, this is a -- an  
16 excerpt from one of the four experts reports on  
17 damages, the financial side of damages. We had  
18 other experts who did reports on hazardous waste  
19 valuation. But this was on the damages.

20 And this is the rejoinder report of  
21 Mr. Dages. And you'll see that at the bottom of  
22 that page, page 8, in bold letters he says:

23  
24 "Claimants have significantly altered  
25 their representations concerning the nature  
26 of their 20.5 million alleged investment in  
27 COTERIN."  
28

29 And he then proceeds to list, as I have  
30 before lunch, the various references in the  
31 memorial and the expert report to how they  
32 described the 20.5 million. And then he goes and  
33 he looks at their reply declaration that was  
34 filed -- for the first time we had in the reply a  
35 statement from their chief financial officer,  
36 Mr. Dabbene. And he goes through Mr. Dabbene's  
37 reply declaration and sees that there's changes in  
38 the way in which the 20.5 million is described.  
39 It's now described as a -- an investment or a  
40 total investment, or the Mexican development  
41 costs. It's no longer the actual costs of  
42 acquiring the land and constructing the landfill.  
43 So you see a substantial change in the way in  
44 which the expert and their chief financial officer

45 described the monies claimed to have been  
46 expended.  
47 Now, if you'd just turn back to the first

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1 page of that report, page 8, what Mexico was  
2 trying to do when it asked for a detailed listing  
3 of expenditures was to have the chief financial  
4 officer say, okay, the cost of the land was this,  
5 the cost of acquiring COTERIN was this, the cost  
6 of the engineering contract was this, the  
7 materials was this, the labour, et cetera. We  
8 wanted something that our expert could then look  
9 at and vouch.

10 And the idea was that since there was so many  
11 investments that were being announced by  
12 Metalclad, it was appropriate for us to determine  
13 whether this investment alleged to be expropriated  
14 and what costs were actually attributable to it.  
15 We wanted a facility-specific screen of all of the  
16 costs that Metalclad said were related to that.  
17 We never got that throughout the entire  
18 proceeding.

19 Now, if you'll turn to tab 11 first, I'm  
20 going to take you to a few excerpts from the  
21 cross-examination of the chief financial officer  
22 and -- and the CEO. And at tab 11, line 8, we  
23 discuss this issue with Mr. Dabbene:

24  
25 "Q. Now, we've looked at your declaration  
26 very carefully, Mr. Dabbene. We do not see  
27 an express statement in the declaration  
28 that Metalclad spent 20.5 million on the  
29 landfill project. Do you have a sentence  
30 in your declaration you can take us to that  
31 says Metalclad spent 20.5 million on the  
32 landfill project?

33 A. If I can review my statement.  
34 Please do."

35  
36 And then he tries to find it and then he  
37 says:

38  
39 "A. Those may not be the exact words, but  
40 I believe it's somewhere in there. I don't  
41 see those words specifically, no. No."

42  
43 But he -- the answer goes on:  
44

45 "But the title of the reply is addressing  
46 the 20.5 million spent on the landfill.  
47 Q. Well, that's just the point,

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1 Mr. Dabbene. We don't see, and you've just  
2 admitted, that there's no express statement  
3 in your declaration that Metalclad spent  
4 20.5 million on the landfill project, is  
5 there?

6 A. My review now doesn't see that  
7 specifically.

8 Q. Right. Just to confirm, Mr. Dabbene,  
9 to the present day Metalclad has not  
10 submitted any detailed list of expenditures  
11 of the 20.5 million on the landfill  
12 project, has it?

13 Not one consolidated list. We provided the  
14 individual details by the years in  
15 question."

16  
17 And you might just highlight that, My Lord,  
18 because I'm going to come back to that later on.

19  
20 "Q. Is it your contention, Mr. Dabbene,  
21 that you've provided an itemized list of  
22 all expenditures on the landfill?

23 A. No."

24  
25 Then if you'd turn back to tab 10,  
26 Mr. Dabbene having admitted that he did not  
27 actually swear that the company spent 20.5  
28 million, he's swearing under oath, he did not  
29 actually swear that they spent 20.5 million on the  
30 landfill as represented by the -- by the company  
31 and the experts, and he admits that they don't  
32 have an itemized list of expenditures, I take  
33 Mr. Dabbene -- at tab 10 I take him to that  
34 statement in the memorial where they claim to have  
35 expended 20.5 on labour, equipment and materials  
36 into the Mexican economy. And at line 11:

37  
38 "Now, I just want to confirm that we should  
39 not understand that -- that phrase to mean  
40 that the \$20 million referred to there were  
41 just expended on the acquisition of the  
42 land and the construction of the landfill.  
43 Is that correct?

44 A. The 20 million does not? Can you

45 repeat that, please?  
46 Yes. I just want to confirm that we should  
47 not take the meaning of paragraph 3 to be

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1 that Metalclad spent \$20 million to acquire  
2 the land and spend on land and equipment  
3 and on materials specifically for the  
4 landfill itself.

5 A. I believe the 20 million that -- the  
6 acquisition of the landfill itself was the  
7 culmination of the effort that required 20  
8 million in expenditures. That's my  
9 response.

10 Q. Yes, your response. But your  
11 response, if I can put that back to you,  
12 Mr. Dabbene, is that we should not  
13 interpret this to mean that the 20 million  
14 was spent simply on the acquisition of land  
15 and the construction of the landfill,  
16 correct?

17 A. That's correct."  
18

19 Tab 11 -- sorry, tab -- tab 12. We've gone  
20 over tab 11 already. This is re-examination --  
21 I'm sorry, continued re-examination:  
22

23 "Mr. Dabbene..."  
24

25 This is line 8:  
26

27 "Mr. Dabbene, I just want to wrap up this  
28 morning's discussion of the other Mexican  
29 projects that Metalclad was engaged in."  
30

31 We'd gone through these other earlier  
32 projects:  
33

34 "Just to confirm, nowhere in the memorial  
35 is there a reference to the inclusion of  
36 the cost of these other projects in the  
37 20.5 million expenditure, correct?

38 A. I believe that's correct.

39 And nowhere in Mr. Nichols' appraisal is  
40 that fact mentioned, correct?  
41

42 Correct."  
43

43 We went to this -- through this with  
44 Mr. Kesler, the chief executive officer of

45 Metalclad, if you turn the page, turn to tab 13,  
46 the bottom of that first page, line 21:  
47

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1 "Mr. Kesler, I'd just like to confirm  
2 something before I go into a new area of  
3 cross-examination. You're of course aware  
4 that Metalclad has advanced the figure of  
5 20.5 million in expenditures which were  
6 incurred in connection with the COTERIN  
7 project. Is that correct?

8 A. Yes.

9 Q. And in fact the company's appraiser,  
10 Mr. Nichols, who provided an expert report,  
11 described the 20.5 million expenditures as  
12 being related to the brick and mortar  
13 expenses for constructing the landfill. Is  
14 that correct?

15 A. No. It includes a lot more than  
16 that. The 20.5 includes overhead, soft  
17 costs, permitting, political relations,  
18 community relations and a host of other  
19 things leading up to the construction.  
20 And would you confirm for the tribunal,  
21 Mr. Kesler, that the 20.5 million also  
22 includes expenditures which were incurred  
23 by Metalclad in respect of the 3 Mexican  
24 projects that we discussed this morning?  
25 It does.

26 Q. It does. In fact, if we were to take  
27 for example Mr. Robertson's severance in  
28 September of 1993, the \$230,000 which were  
29 paid to Mr. Robinson, that was included as  
30 a COTERIN-related expenditure, correct?  
31 Correct."

32

33 I'll just stop parenthetically, My Lord.

34 Mr. Robertson was an officer and director of  
35 the company who disagreed with the management of  
36 the company and left in the summer of 1993 before  
37 COTERIN is acquired.

38 His severance package was approved on the  
39 date of the board meeting that approved the  
40 COTERIN acquisition. And Mr. Robertson's  
41 severance payment -- he had a gross settlement of  
42 \$230,000 -- is included as a COTERIN-related  
43 expenditure in this description of the direct cost  
44 of buying the land and acquiring the landfill.

45       And Mr. Kesler says -- and this is a very  
46 important statement, the next statement:  
47

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1 "Well, it wasn't included as a  
2 COTERIN-related expense; it's a part of the  
3 20.5 million, as is every other salary and  
4 overhead expenditure that we made during  
5 the entire period of time leading up to the  
6 construction of the project."  
7

8 So he's just told us that all of their salary  
9 and overhead expenditure has also been included in  
10 that sum.  
11

12 "Q. And, for example, cash payments to  
13 Lucia Ratner would also be included in that  
14 figure as well, correct?

15 A. It would for the same reason."  
16

17 Now, I'll go ahead and highlight. Lucia  
18 Ratner is the wife of a federal environmental  
19 official at the time. And we'll go into her  
20 relationship and his relationship with Metalclad  
21 later on.

22 Now, My Lord, if you turn to tab 14, I'd ask  
23 you to actually take out tab 14 because it will  
24 assist you in following what I do next.

25 You'll recall that Mr. Dabbene testified that  
26 he had provided some information relating to  
27 expenditures in particular years.

28 What Mr. Dabbene did was he attached to his  
29 witness statement in Exhibit 15 a set of  
30 handwritten -- photocopies of handwritten ledgers  
31 taken from Metalclad's books in 1993 and 1994.

32 Now, Mr. Dabbene didn't join the company  
33 until 1996, but he went back and he took some  
34 ledgers, and he provided them as evidence of  
35 expenditures on the COTERIN landfill. No  
36 receipts, proof of payment, accounts or documents  
37 of the like were ever filed by Metalclad in this  
38 proceeding.

39 So we had these ledgers that were given to  
40 us. They were handwritten ledgers, and they're  
41 incomplete. They only deal with certain classes  
42 of expenditures.

43 And so what Mr. Dages did was to take the  
44 handwritten ledgers and to put them into a typed

45 format. And you'll see it's across the top,  
46 "Payments Made by Metalclad for Accounting,  
47 Consulting and Legal Services, 1993/1994." And

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1 then he has a reference number, the date, the  
2 payee. And then he has three columns: accounting,  
3 consulting or legal.

4 Now, we took Mr. Dabbene through some of  
5 these expenditures. And if you'll turn to tab 15,  
6 we'll start off with the first one -- question, at  
7 line 3:

8  
9 "You're not suggesting, are you, that it's  
10 appropriate to take, for example, all of  
11 Metalclad's expenses associated with the  
12 Santa Maria del Rio incinerator and  
13 allocate them to COTERIN, are you?

14 A. Yes.

15 Q. You're suggesting that?

16 Yes."

17

18 And he goes on to say that this is part of  
19 the investment in the landfill.

20 So what he's done is he's taking expenses  
21 relating to Eco Administracion back in 1991, '92  
22 and '93 and rolling them into the direct cost of  
23 constructing the landfill as it was represented  
24 originally.

25 I should note Mr. Dabbene has tried -- has  
26 changed the characterization at this point.

27 Now, if you turn the page to 129 on the  
28 right-hand side of the next page, we say at line  
29 7:

30

31 "All right. Well, Mr. Dabbene, let's go  
32 back to our Exhibit 20, which is Mr. Dages'  
33 transcription of the handwritten ledgers  
34 that you attached to your witness  
35 statement.

36 Okay.

37 I want to turn to legal expenses, first of  
38 all. Could you turn to Items 69, 70 and 71  
39 on the list?"

40

41 And, My Lord, those are on the second page,  
42 69 to 71. And I ask him whether he sees them.

43

44 "Yes."

45

46 Question -- and they're respectively

47 D. Neveau, Electrometrics, a payment of \$60,000;

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1 G. Kesler, \$60,000; Ron Robertson, \$60,000.  
2 Now, at line 22 of the cross-examination:

3  
4 "I'm quite prepared to take you to the SEC  
5 filing, Mr. Dabbene, that shows that  
6 these..." permits were issued -- or  
7 "...these payments were made for the  
8 issuance of a construction permit for the  
9 Santa Maria del Rio project. Would you  
10 like me to take you to that?

11 A. No. I'll accept it.

12 Will you accept that?

13 So you consider that the payment of these  
14 bonuses to these three Metalclad directors  
15 and officers for the issuance of federal  
16 permits for a separate project is a  
17 COTERIN-related expense?

18 Yes.

19 By the way, when we look at Mr. Neveau's  
20 listing at number 69, it says  
21 'Electrometrics' behind that. Do you see  
22 that?

23 Yes.

24 Do you know what that project was all  
25 about?

26 I believe it was the name of his consulting  
27 firm that he was employed by.

28 All right."

29  
30 Then over the page, My Lord, to line 2:

31  
32 "Okay. So if I look at Item 278..."

33  
34 So if we turn over to 278 here, this is  
35 now -- you might note the date. It's October  
36 15th, 1993. So this is -- it's important to keep  
37 in mind these are all 1993 expenses.

38  
39 "Q. Okay. So if I look at Item 278 --  
40 let's switch over to Item 278 -- I see a  
41 payment of \$50,000 on October 15th, 1993 to  
42 Electrometrics Research Inc. That would be  
43 Mr. Neveau's company, do you think?

44 A. I think it could be.

45 Q. All right. I see the same day the  
46 next payment is to Mr. Kesler for \$50,000.  
47 Do you see that?

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1 A. Yes.  
2 These are both listed -- all listed as  
3 legal expenses, Mr. Dabbene. Is that  
4 right?  
5 A. On your sheet here, that's correct.  
6 Q. Well, they're taken from your  
7 handwritten ledgers.  
8 A. I'll accept that as well.  
9 Q. Now, would you turn to Item 87? Is it  
10 your practice to allocate board member fees  
11 to legal expenses, \$43,000?"  
12  
13 He says that his practice is to present them  
14 on a different chart of accounts, his own practice  
15 is.  
16 Then we go through further payments to  
17 Mr. Kesler, Mr. Neveau and Mr. Robertson.  
18 And then in the middle of page 132 there,  
19 My Lord, at line 12, you'll see another aspect of  
20 the cross-examination.  
21  
22 "If you turn to Item 126, I see a payment  
23 on May 17th, 1993 to Lucia Ratner Diaz  
24 Gonzales. Do you see that?  
25 A. Yes.  
26 And that is for \$10,000?  
27 A. Correct.  
28 Is Ms. Ratner a lawyer?  
29 A. I don't know. It's before my time.  
30 Do you know who she is?  
31 It's before my time. There's probably  
32 several names here I don't know."  
33  
34 Well, My Lord, I'll instruct you that that's  
35 the wife of the federal environmental official.  
36 Then over the page we review the payment of  
37 \$207,000, again under the legal expenses, to  
38 Mr. Robertson, and point out that he's been -- he  
39 had left the company prior to the acquisition of  
40 COTERIN. Line 14:  
41  
42 "Would you turn to Item Number 254,  
43 Mr. Dabbene? And that's September the  
44 30th, 1993, consulting expense for CATSA,

45 \$36,667. CATSA was a separate company, was  
46 it not?  
47 A. By that date, I believe so.

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1 A. [sic] Yes. Turn over the page to Item  
2 289. Do you see that?  
3 Yes."

4  
5 You go to 289.

6  
7 "Terry Douglas, October 26th, 1993,  
8 \$10,000. Mr. Douglas was one of the  
9 original shareholders in Environ  
10 Technologies Inc., was he not?

11 A. I believe that's correct.  
12 Then 292, another wire to CATSA for  
13 47,500. Do you see that?  
14 Yes.

15 Again, that's a separate business from  
16 COTERIN, correct?

17 A. At that time it's a separate legal  
18 entity, if that's the question.  
19 And would you go to Items 320 and 321?  
20 November 29th, 1993 we have another legal  
21 expense to Mr. Grant Kesler for \$100,000.  
22 And below him, Dan, question mark,  
23 \$100,000. Do you see that?

24 A. Yes.  
25 Neither Mr. Kesler nor Mr. Neveau were  
26 providing legal services to the company,  
27 were they?

28 A. I assume not. I don't know.  
29 Then Item 325, wire to Rodarte and  
30 de la Fuente."

31  
32 At line 3 on page 135:

33  
34 "Mr. de la Fuente was a Mexican  
35 shareholder who sold his shares to..."  
36 Metal "...Eco-Metalclad in 1992, was he  
37 not?

38 I don't recall a list. I wasn't there.  
39 All right. I'll instruct you that he had  
40 shares in Eco Administracion, Eliminacion  
41 and Descontaminadora, and that in November  
42 of 1992 he sold those shares to Metalclad,  
43 to Eco-Metalclad Corporation.

44 A. Okay. I'll accept that.

45 Q. And none of those projects had  
46 anything to do with COTERIN, did they?  
47 A. What were the dates?

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1 Q. He sold the shares in November 1992.  
2 And I'm asking you whether any of the three  
3 projects which we went through already had  
4 anything to do with COTERIN.

5 A. Perhaps.

6 Q. All right. The name 'COTERIN' in 1992  
7 wasn't out there.

8 A. Correct."

9

10 And then it should be question.

11

12 "In fact, Metalclad's evidence in this  
13 proceeding is that it was not introduced to  
14 the COTERIN opportunity until February of  
15 1993, correct?

16 A. That's correct.

17 Are you aware of Mr. Neveau's educational  
18 qualifications?

19 Not specifically, no.

20 Is he a lawyer?

21 I don't believe so."

22

23 Well, the record evidence is he's not a  
24 lawyer.

25 Now, if you turn to tab 16, My Lord, after we  
26 complete that cross-examination, Mr. Civiletti,  
27 who is Metalclad's party-nominated arbitrator,  
28 says at line 7:

29

30 "Arbitrator Civiletti: I have one  
31 question, Mr. President."

32

33 This is to Mr. Dabbene.

34

35 "Your answer about there being detailed  
36 records available to prior auditors when  
37 the auditors were -- outside auditors were  
38 doing more and more work for the company in  
39 those early years in response to the  
40 president's question does not change your  
41 testimony that the 20.5 million summarized  
42 in the schedule that you have referred to  
43 includes not only the landfill project but  
44 all other, or 3 or 4 other, projects of

45 Metalclad in which they invested in various  
46 ways and expended monies in various ways  
47 for the establishment of, in effect,

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1 Metalclad business in Mexico. Isn't that  
2 true?  
3 The Witness: That's true."

4  
5 Now, My Lord, if you would turn to the second  
6 table in the charts that I've provided to you,  
7 the -- this is a -- this is a -- an analysis of  
8 the interest rate calculation by the -- by our  
9 expert. We had to figure out what precisely the  
10 tribunal did.

11 The tribunal determined -- and I'll take you  
12 to -- to the damages part of the award in more  
13 detail. But he -- it determined that the -- the  
14 date of the expropriation was the den -- the date  
15 of the denial of a municipal permit. It didn't  
16 specify December the 5th, 1995, but that was the  
17 date it was denied, at least the first time. So  
18 it's not very precise about when it is, but -- it  
19 could be the permit denial in '96, but it's -- we  
20 take it as '95, December '95. And then they  
21 awarded pre-award interest from that up to the --  
22 October -- up to October the 15th of the year  
23 2000.

24 So our expert simply backed out the  
25 interest. And you'll see -- about the seventh or  
26 eighth line down you'll see:

27  
28 "Final arbitration award, \$16,685,000."  
29

30 THE COURT: Um-hum.

31 MR. THOMAS: And then he's backed out the interest.  
32 And he says that the implied interest is  
33 \$4,119,085.

34 So we -- by our calculation the implied  
35 original award is, up there on the top right,  
36 twelve million, six hundred and eighty-five -- six  
37 hundred and sixty-five thousand, nine hundred and  
38 fifteen dollars.

39 Now, if I -- I would ask you, My Lord, if you  
40 would get your copy of the award, because I'd like  
41 to just reprise what the -- what the tribunal said  
42 about what it was doing in the damages  
43 calculation.

44 And if you'd turn to paragraph 122, you'll

45 see that the -- the tribunal agrees with the  
46 parties that fair market value is best arrived at  
47 in this case by reference to Metalclad's actual

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1 investment in the project. So there had been some  
2 argument about whether it should use a discounted  
3 cash flow analysis because Metalclad claimed \$90  
4 million in damages and lost profits, et cetera,  
5 plus loss of market capitalization. But the  
6 tribunal decides that it should be Metalclad's  
7 actual investment in the project.

8 And then if you turn the page, at page 123 --  
9 or paragraph 123, it says:

10  
11 "Metalclad asserts that it invested \$20.5  
12 million in the landfill project basing its  
13 value on its United States federal income  
14 tax returns and auditor's work papers of  
15 capitalized cost for the landfill reflected  
16 in a table marked 'Schedule A' and produced  
17 by Metalclad as Response 7AA in the course  
18 of document discovery."  
19

20 And, My Lord, we've included that in this  
21 chart here. It's right behind the implied  
22 interest rate calculation. It's a -- you'll want  
23 to look at the back of it here because it fits  
24 with the -- our analysis of the tribunal's  
25 calculation.

26 So this is the -- this Table 7AA is quite  
27 similar to the Table 3 that was put in the  
28 Triple A report that I started off by referring  
29 you to. Some of the numbers don't quite match,  
30 but it comes out to the same total, twenty  
31 point -- 20,474,528.

32 Now, if you look at paragraph 124, they  
33 record that Mexico challenges the correctness of  
34 these calculations on several grounds, one of  
35 which is the lack of supporting documentation for  
36 each expense item claimed. You'll see later on  
37 that there were more -- many more grounds, but  
38 that's what they decide.

39 And they decide that the tax filings of  
40 Metalclad together with the independent audit  
41 documents supporting them are to be accorded  
42 substantial evidential weight.

43 Then they go on to say in 125:  
44

45 "The tribunal agrees, however, with  
46 Mexico's position that costs incurred prior  
47 to the year in which Metalclad purchased

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1 COTERIN are too far removed from the  
2 investment."

3  
4 So the tribunal will reduce the award by the  
5 amount of the costs claimed for 1991/92. So they  
6 got that part.

7 One -- paragraph 126, then they talk about  
8 subsequent costs. And they talk that -- about the  
9 fact that Metalclad had bundled all these other  
10 investments in there as the cost -- the direct  
11 cost of the landfill. And at the bottom of that  
12 paragraph it says, the third line up:

13  
14 "The tribunal does not consider it  
15 appropriate to apply the concept of  
16 bundling in the present case. The tribunal  
17 has reduced accordingly the sum payable by  
18 the government of Mexico."

19  
20 So it appears to have disaggregated these  
21 other projects.

22 And then paragraph 127 on remediation, they  
23 point out that since legal title of the landfill  
24 site rests with COTERIN, when -- if a payment is  
25 made under this award, it's going to come to an  
26 end, and therefore it has to relinquish that. And  
27 then it says:

28  
29 "The fact that the site may require  
30 remediation has been borne in mind by the  
31 tribunal and allowance has been made for  
32 this in the calculation of the sum payable  
33 by the government of Mexico."

34  
35 Now, you'll note when they go -- when they go  
36 through their damages calculation they talk about  
37 making allowance for removing pre-COTERIN  
38 activities, but -- debundling and remediation.  
39 But they don't specify, in remediation debundling,  
40 what they've taken out.

41 And the problem is this, My Lord -- I'm going  
42 to take you through this. And it's -- it's  
43 illustrated very graphically in Table 3.

44 The starting point is the \$20,474,528; that's

45 the sum that Metalclad claimed. And then  
46 according to paragraph 125 we are to subtract the  
47 1991/1992 costs. So that takes off \$4,861,000.

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1 And that yield -- yields a subtotal of  
2 \$15,613,528. Then they tell us that we are to  
3 subtract remediation as per paragraph 127.

4 And if you'll turn to tab 17 of the materials  
5 I've provided you, the expert for Metalclad filed  
6 this Table 4. And if you look down to the third  
7 line, you'll see that they -- they have \$1 million  
8 per year for 3 years for the remediation expense.  
9 And over the page, the expert indicates that the  
10 projected remediation expense is estimated by  
11 Metalclad, and it's expected to be advanced by  
12 Metalclad and ultimately returned to it by way of  
13 an offset of royalty payments to the original  
14 owners of the site. But he was given that figure  
15 of \$3 million for the cost of remediation by  
16 Metalclad.

17 Now, here's the problem: If we take off \$3  
18 million, we get to a subtotal of \$12,613,528, but  
19 the fully debundled figure is \$12,565,915, and the  
20 difference between taking out 1991 and 1992 and  
21 remediation, and their fully debundled figure is  
22 only \$47,613.

23 Now, we know that the tribunal said that it  
24 did not consider bundling to be appropriate to  
25 apply in this case and it's reduced the sum  
26 payable accordingly. But it's allocated only  
27 \$47,000 for all of Metalclad's non-COTERIN, Mexico  
28 expenses and its U.S. corporate overhead for 1993  
29 to 1996.

30 Now, you'll note when I took you through the  
31 cross-examination of Mr. Dabbene I was focusing on  
32 exhibits relating to expenditures made in 1993,  
33 because the tribunal said they've taken out '91  
34 and '92. Well, Mexico challenged the idea that  
35 they should be able to pay \$180,000 to 3 directors  
36 for the issuance of a federal permit to another  
37 project and claim that as a COTERIN expense.

38 If we take \$180,000 off, we're below their  
39 fully debundled award by \$132,387.

40 And you'll recall that I mentioned that  
41 Mr. Robertson was paid that \$207,000 to leave  
42 that -- when he left the company before they  
43 acquired the -- COTERIN. If we take out the  
44 \$207,000, we already have a deficit of 339,000 --

45 it's 387,000 (sic). And that's just with two  
46 inappropriate items that were included as evidence  
47 of expenditures on this project.

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1 Now, if you tur -- skip over Table 3A,  
2 because I'll come back to that, and 3B. But just  
3 note, My Lord, that Table 4 is a -- an analysis of  
4 what we did with Mr. Dabbene.

5 We challenged over 85 percent of the  
6 accounting, consulting and legal expenses that he  
7 had in that -- in that one slice that we were  
8 given access to in that -- in those handwritten  
9 ledgers that related to 1993/'94. Over 85 percent  
10 of those were challenged as being expenses that  
11 had nothing to do with COTERIN, keeping in mind  
12 that the premise that we started from, which was  
13 that this 20.5 million was for the direct cost of  
14 buying the land, buying the materials and paying  
15 for the labour and the engineering.

16 I -- I should point out one other thing. The  
17 tribunal finds that the date of expropriation  
18 is -- if it is December of 1995, Metalclad has  
19 also of course included in its Table 3, 1996  
20 expenditures, and there's 1.259 million for 1996.  
21 But that's not our central concern here.

22 Our central concern here is the complete  
23 disconnect between what the tribunal said it was  
24 doing and what the record evidence before it,  
25 Metalclad's record evidence, for example, of  
26 remediation costs, was.

27 Now --

28 THE COURT: But you don't know that that's the figure  
29 that the tribunal took.

30 MR. THOMAS: The -- there's two figures on the  
31 record: \$3 million, and Metalclad had an  
32 advertisement that it published in January of 1994  
33 saying that it had \$5 million available to  
34 remediate the site. That's the only record  
35 evidence.

36 Now, they don't tell us because -- as I  
37 pointed out to you, when you go through the  
38 paragraphs, when it comes to remediation and  
39 debundling, they don't tell you what they took  
40 out.

41 THE COURT: And -- and they used the phrase "an  
42 allowance."

43 MR. THOMAS: Well, that's what the record evidence  
44 was.

45 THE COURT: Um-hum.  
46 MR. THOMAS: Now, it appears that they've subscribed  
47 to Mexico's defence that there had to be -- I

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1 mean, they say in paragraph 122 "actual  
2 expenditures on La Pedrera." So they appear to  
3 have accepted Mexico's defence that there had to  
4 be some kind of project-specific screen applied to  
5 find the damages in terms of actual expenditures.

6 And so one can say, well, it's obvious that  
7 they've rejected Mr. Dabbene's testimony that they  
8 should be able to claim all these other  
9 expenditures as green field project development  
10 expenses.

11 But I'm going to show you why we don't  
12 believe that they acted in accordance with the  
13 governing rules of the arbitration here in terms  
14 of addressing questions that were put to them.

15 If you turn to Table A, or 3A, again we --  
16 we take out '91/'92, we take out remediation, we  
17 get to 12.6. Our expert reviewed their SEC  
18 filings. And he found that for the years 1994/'95  
19 they lumped all of their expenditures into Mexican  
20 landfill development. In '93 it was a separate  
21 line item in the final statements. And in '96  
22 it's a separate line item. But in '93 and '94  
23 everything's lumped into that.

24 Now, what happened was that in 1996 Metalclad  
25 and its auditors went back and restated the  
26 landfill expenses.

27 And if you look at the -- the number here  
28 on -- under the -- on this table, you'll see  
29 subtract the expenditures from May 1993 to  
30 December 1996 that were reclassified out of  
31 Mexican landfill, which -- which expenditures  
32 Mr. Dabbene admitted were included in the 20.5  
33 million claimed investment. So for the financial  
34 year ending December -- December 31st, 1996, going  
35 back 3 years, they reclassified \$11,323,051 out of  
36 the Mexican landfill business.

37 Now, if you take out that, and I'll take you  
38 to Mr. Dabbene's admission, the resulting award is  
39 one million, two hundred and ninety thousand, four  
40 hundred and forty-seven dol -- four hundred and  
41 seventy-seven dollars. And that's from May '93  
42 on. That leaves out first quarter 1993. And if  
43 you look at their own evidence for first quarter  
44 '93, they expended \$1.338 million.

45 Now, if you'll turn to tab 18, this is an  
46 excerpt from Mr. Dages' rejoinder report. And  
47 it's entitled "My Choice of the 1996 10K Disclosed

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1 Balance." Keep in mind we -- we're working from  
2 their aggregate -- their consolidated U.S.  
3 financial statements. We don't have anything  
4 that's project-specific given to us. So he says:

5  
6 "The Metalclad December 1996 10K footnote  
7 language concerning the accounting policies  
8 pertaining to and the actual level of  
9 Metalclad's Mexican landfill investment is  
10 fairly complete and accurate as well as  
11 consistent for all years from 1994 to  
12 1996."

13  
14 And then he looks at -- looks at note A.

15  
16 "During..." 19 "...fiscal '94 the company  
17 acquired COTERIN which owns a landfill  
18 site. Capitalized cost consist of  
19 acquisition, development and construction  
20 costs, including engineering, consulting,  
21 environmental studies, permitting and legal  
22 costs associated with the landfill."

23  
24 And then he says in note B:

25  
26 "Included in property, plant and equipment  
27 at December 31st, 1996 is approximately  
28 \$3,875,000 representing the company's  
29 investment in its hazardous waste treatment  
30 facility in Mexico. Additionally, the  
31 company has recorded goodwill of  
32 approximately \$697,000 associated with this  
33 facility."

34  
35 And then you look at -- underneath there  
36 where he has property, plant and equipment,  
37 hazardous waste treatment facilities.

38 Now, notice the word "facilities," because  
39 Mr. Dages has something to say about that.

40 And if you look at paragraph 32 of Mr. Dages'  
41 report, he says:

42  
43 "Most importantly, by virtue of its  
44 separate line item identification, the..."

45 3.8 hundred "\$3,875,641, hazardous waste  
46 treatment facility's balance as of December  
47 31st, 1996 appears to have had some

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1 facility-specific screen applied.  
2 Therefore, the amount presumably represents  
3 expenditures reasonably attributable to the  
4 announced 1996 Metalclad waste treatment  
5 facilities in..." progress "...in process:  
6 COTERIN, Santa Maria del Rio, Veracruz,  
7 Tamaulipas and two other additional  
8 facilities, one of which was subsequently  
9 identified as Aguascalientes.

10 "However, adopting such a number  
11 remains a fallback position at best for  
12 three reasons: first..."  
13

14 The exact terminology is in the plural. He's  
15 talking about facilities.  
16

17 "Second, claimant has not provided the  
18 detailed expenditures or support underlying  
19 the 10K balance of 3.8 million. In our  
20 prior report we note this, and we subtract  
21 out \$650,000 as the estimate of the portion  
22 of the 3.875 million attributable to  
23 disclosed land acquisitions at Santa Maria  
24 del Rio and Veracruz."  
25

26 And then he talks about the auditor's  
27 opinions relating to Metalclad's consolidated  
28 financial statements taken as a whole, not to any  
29 elements. And the COTERIN facility would be an  
30 element.

31 And then at paragraph 36 Mr. Dages makes the  
32 point:  
33

34 "The difference between claimant's 20.5  
35 million alleged investment and my fallback,  
36 COTERIN-specific estimate is simple. It's  
37 not, however, pre-development costs,  
38 development costs, pre-acquisition costs,  
39 pre-acquisition development costs, or even  
40 what was capitalized versus what was  
41 expensed. We simply differ..." with re  
42 "...on specificity with regard to  
43 COTERIN.

44 "Claimant effectively suggests that

45 the respondent and the tribunal accept  
46 virtually every 1991 to 1994 Metalclad  
47 expenditure outside of the strictly

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1 insulation business expenses as part of its  
2 alleged COTERIN investment. I suggest that  
3 the starting point must be expenditures  
4 reasonably attributable based upon  
5 unambiguous documentary evidence to the  
6 COTERIN project, the subject of the  
7 arbitration."  
8

9 And then he points out that their own 10Ks  
10 and press releases are showing that during the  
11 peak COTERIN investment years on their chart, '92  
12 to '94, they disclose four, five and ten Mexican  
13 projects respectively.

14 And then he points out how they change their  
15 allocation, the statement of the expenses, in  
16 paragraphs 38 and 39. And he points out that the  
17 difference in the restatement at the end of  
18 1993 -- '96 is dramatic. At paragraph 40 he  
19 says:

20  
21 "The difference is dramatic. Exhibit 5  
22 compares the relevant line items from  
23 Metalclad's May 1996 and December 1996  
24 10Ks. The differences attributable to the  
25 reclassification for the years ending May  
26 '94 to May '96 alone totalled \$9.4  
27 million."  
28

29 And if you look at the back of that tab,  
30 My Lord, at tab 18 there, the same tab, we include  
31 Exhibit 5 from Mr. Dages' report where he does the  
32 comparison of the lumped-in version of the  
33 expenses, which is in the upper part of the  
34 exhibit, and the restated expenses. And he points  
35 out that to the end of May '9 -- '96 they've  
36 reclassified 9.382904 out of the landfill  
37 category.

38 Now, if you took a -- take a look at tab 19  
39 at line 16, the question to Mr. Dabbene:

40  
41 "Did you bring the reclassification of  
42 those expenses to the tribunal's  
43 attention?  
44 No.

45 Are those 11 --  
46 A. Did not change what they were there  
47 for.

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1 Q. Are the 20 million part of the -- are  
2 the 11 million part of the 20.5 million?

3 A. Yes."

4

5 Now, I'm not going to go into great detail  
6 about this, but Mr. Dages' second report spends  
7 pages analyzing Mr. Dabbene's declaration, because  
8 Mr. Dabbene doesn't attach his 1993 10K which  
9 shows that landfill's broken out. He only  
10 attaches the 1994 10K which is photocopied twice  
11 and represented as a 1993 10K and a 1994 10K, but  
12 they're different formats to the photocopy.

13 And he -- and he doesn't include the 1996  
14 10K, which supports Mexico's position that you  
15 need to have some kind of project-specific screen  
16 applied. In other words, their own auditors in  
17 1996 have -- and -- and Metalclad, have restated  
18 what should be allocable to COTERIN and the other  
19 facilities. But Mr. Dabbene's witness statement  
20 doesn't include any evidence to show that that  
21 change in classification was taking place.

22 So if you take out the 11 million, roughly  
23 \$11 million, you get to a resulting award, if  
24 you're using the record evidence for remediation,  
25 of \$1,290,477. And that, My Lord, is before we  
26 take into consideration first quarter 1993,  
27 because that's the -- that's the gap between what  
28 was clearly taken out by the tribunal and the May  
29 1993 onwards expenses.

30 And if we just take half of what they say  
31 they spent in first quarter 1993 and take out  
32 \$669,296 we get down to \$621,181.

33 Now, we put this, all of this, in front of  
34 the tribunal, but there was an entirely different  
35 set of evidence that was put before the tribunal  
36 which led to an even lower number. If you look at  
37 page -- at -- at tab 20, this is a letter that was  
38 sent by the tribunal to the parties during the  
39 middle of the arbitration. And they wanted our  
40 closing submissions to be directed to certain  
41 issues. I've just included the last page where  
42 they ask some questions about valuation, and it's  
43 at -- it's their question numbered 9. It says:  
44

45 "In relation to NAFTA 1110 does the  
46 evidence support all..." of the "...all the  
47 methods of determining market value

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1 referred to by the experts, e.g..."

2

3 And then if you drop down and look at number

4

2:

5

6 "...cost less depreciation."

7

8 Cost less depreciation is of cour -- is a --

9

one of the --

10

May I have my NAFTA?

11

-- one of the methods of valuing fair market

12

value under the NAFTA. If you look at Article

13

1110, paragraph 2, it's saying:

14

15 "Compensation shall be equivalent to the

16

fair market value of the expropriated

17

investment immediately before the

18

expropriation took place."

19

20 And then the last sentence:

21

"Valuation criteria shall include

22

going-concern value, asset value, including

23

declared tax value of tangible property."

24

25

26 So the tribunal was quite properly asking

27

about costs less depreciation. And we were

28

pleased to deal with that, because we had

29

requested repeatedly that Metalclad provide tax

30

returns of its Mexican subsidiaries. We had all

31

of these different ventures that were being

32

announced, and we wanted to see the tax returns.

33

We didn't get very far. But at -- finally the

34

tribunal issued an order and a few of the tax

35

returns were given to us.

36

And if you turn to tab 21, you have a table.

37

And behind it in quite small print, but it's there

38

just to provide you the evidence -- behind it are

39

the Mexican tax returns for COTERIN, which owned

40

the landfill, and ECOPSA, which was going to run

41

the landfill.

42

And you'll recall, My Lord, that ECOPSA was

43

formerly Eco Administracion. It was renamed in

44

1994. In May of 1994 in a reorganization

45 Metalclad turned Eco Administracion into ECOPSA.  
46 Now, Mr. Dages did a -- an exchange rate  
47 calculation, which is there. We put this before

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1 the tribunal in closing. And you'll see that the  
2 declared asset value of COTERIN for December 31st,  
3 1996, as declared to the Mexican tax authorities  
4 on that first page, is \$136,000, it's \$136,339.

5 And then if you look at ECOPSA, its declared  
6 tax value is \$3,295,469. And if you look up to  
7 that line three to four lines up, other fixed  
8 assets and deferred charges, there's a large chunk  
9 of the 3 million -- the 3.2 million, 1.9 --  
10 actually, \$1,954,343. That's -- 59.3 percent of  
11 the total of the declared asset value of ECOPSA is  
12 other fixed assets and deferred charges.

13 Now, if you'll turn to tab 22, I'll take you  
14 to this part of the argument with the tribunal.  
15 Line 9 it starts at, on the first page, page 168.

16  
17 "If you turn to Exhibit 7, you will see  
18 tax returns filed by Mr. Dabbene and  
19 Metalclad for December 1996 for COTERIN  
20 which is, of course, the company that owns  
21 the landfill and ECOPSA, which was supposed  
22 to be operating it. The name of the tax  
23 return is in a bar code in the upper right  
24 corner."

25  
26 We identify that. And then we identify tab  
27 8, which is this table which I've just shown you  
28 from Mr. Dages, where he took the tax returns and  
29 put them into a legible format. And I indicate  
30 what the values are according to their own tax  
31 returns. So Mr. Lau -- President Lauterpacht is  
32 off mic, then he comes back and he says:

33  
34 "Now, just so I can get my notes straight,  
35 we've passed comparative sales and now  
36 we're on to the second situation and have  
37 been for some time, right?

38 Yes.

39 In fact that's correct, Mr. President. In  
40 fact there are two parts to the second  
41 one. We've dealt with the asset value.  
42 That was the \$20.5 million figure that was  
43 represented in the memorial in the Triple A  
44 report.

45 Yes.  
46 And we dismissed that.  
47 We've now moved to the declared tax value

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1 of tangible property or other criteria  
2 which is the express language of Article  
3 1110. We've referred to the tax return  
4 filed by the two Mexican subsidiaries.  
5 Mr. Dages, by the way, would not let me  
6 complete this discussion of the tax return  
7 without noting that there is almost \$2  
8 million of other fixed assets and deferred  
9 charges. And he would not be prepared to  
10 let this go as un -- as necessarily in any  
11 way relating to the landfill. And the  
12 reason of course is that we know ECOPSA  
13 owns a piece of land at Santa Maria del Rio  
14 that was originally purchased in 1991 for  
15 the land -- for the incinerator that  
16 Metalclad was going to build there. So we  
17 were not prepared to accept that that  
18 should be rolled into ECOPSA, and  
19 considered to be part of the declared asset  
20 value of ECOPSA.  
21 President Lauterpacht: Yes, I see that,  
22 1.954.  
23 Mr. Thomas: Yes. Mr. Dages said he would  
24 not let that go without vouching.  
25 President Lauterpacht: That is the case of  
26 bunching of the expenses involved  
27 elsewhere. Is that right?  
28 Who knows. This is the company that was  
29 set up in March of 1994. You may recall in  
30 the facts this is the one, this is Eco  
31 Administracion which was supposed to  
32 operate the incinerator at Santa Maria del  
33 Rio. You'll recall I went into this in  
34 some detail on Friday with Mr. Kesler. In  
35 March of 1994..."  
36  
37 Actually, that was misspoken. It was a -- it  
38 was May.  
39  
40 "...it becomes Ecosistemas del Potosi. So  
41 who knows what's loaded into this in terms  
42 of asset value.  
43 President Lauterpacht: Okay."  
44

45 Then Mr. Civiletti says:  
46  
47 "Well, do you contend that the cost

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1 approach is not very helpful?  
2 Well, sir, it's a lot closer to what our  
3 expert believes to be the figures than the  
4 20.5 or the market capitalization or the  
5 DCF.  
6 Arbitrator Civiletti: So depending on how  
7 you calculate this and how you calculate  
8 the remediation liability, it might be a  
9 negative figure.  
10 It's quite possible, sir.  
11 Is that one of your contentions?  
12 We don't have the detail.  
13 The frustration here on the part -- it  
14 comes from -- out of the expert's report is  
15 the complete lack of detail notwithstanding  
16 repeated requests. It's not for us to  
17 prove up what -- the investment of -- what  
18 had been expended. We have no idea and  
19 we're not prepared to assume that what has  
20 been spent has been spent in relation to  
21 this investment."  
22  
23 And then Mr. Civiletti says:  
24  
25 "Well, do -- you do contend that whatever  
26 it is..."  
27  
28 If you flip over the page:  
29  
30 "...only those factors of cost or expenses  
31 that are directly attributable to  
32 La Pedrera are appropriate as  
33 considerations of potential damages?  
34 That's correct."  
35  
36 So here we have the -- one of the arbitrators  
37 himself saying that if you take the tax returns  
38 and add the -- and add the remediation liability,  
39 it might be a negative value. And of course we --  
40 we argued this, and we argued it in our  
41 post-hearing submission.  
42 There's nothing in the award that deals with  
43 this issue, which is -- which is clearly seen by  
44 the arbitrator as being one of the ways to value

45 this investment. And the NAFTA says you're --  
46 that's one of the criteria you look at, is that --  
47 is the declared tax -- the declared asset value in

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1 the tax returns.

2 THE COURT: Mr. Thomas, I think we'll take the  
3 afternoon break.

4 MR. THOMAS: Okay.

5 THE COURT: I might be a -- a minute or two longer  
6 than the 10 minutes. I have to talk to a couple  
7 of people during the break.

8 MR. THOMAS: Thank you.

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

11

12 (AFTERNOON RECESS)

13 (PROCEEDINGS ADJOURNED AT 3:10 P.M.)

14 (PROCEEDINGS RESUMED AT 3:27 P.M.)

15

16 THE COURT: Yes, Mr. Thomas.

17 MR. THOMAS: My Lord, thank you.

18 My Lord, I -- I finished off the discussion  
19 of the declared tax values with the point that the  
20 tribunal did not address this question in the  
21 award.

22 I -- I pointed out to you earlier that --  
23 that if this act, if this application is governed  
24 by the International Commercial Arbitration Act,  
25 then the public policy ground in -- in Section 34  
26 is available to the Court.

27 We -- I'd like to direct you to the excerpts  
28 on public policy in the analytical commentary.  
29 You recall that Mr. Foy mentioned to you that the  
30 act allows the Court to -- to look to the  
31 analytical commentary of UNCITRAL. And at tab 91  
32 there are two paragraphs that are relevant,  
33 actually three paragraphs. It's the secondary  
34 sources binder.

35 THE COURT: That's what I had first, yes, and looked  
36 at it.

37 MR. THOMAS: Yes, secondary sources binder, tab 91.

38 And if you'd turn to page 30 --

39 THE COURT: Sorry, mine --

40 MR. THOMAS: Yeah, tab 91 of the secondary sources.

41 THE COURT: My secondary sources starts at tab 96.

42 MR. THOMAS: Sorry, tab 9 -- no, it's tab 91.

43 Oh, sorry, there's two of them. Just a  
44 moment, please.

45 THE COURT: Oh, there's -- tab 91 in the statutes and  
46 treaties.  
47 MR. THOMAS: Yes, sorry, sorry.

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1           At page 36, please. And, yes, at the bottom  
2 of -- of page 36, paragraph 296:

3  
4           "In discussing the term 'public policy' it  
5 was understood that it was not equivalent  
6 to the political stance or international  
7 policies of a State but comprised the  
8 fundamental notions and principles of  
9 justice. It was noted, however, that in  
10 some common law jurisdictions the term be  
11 interpreted as not covering notions of  
12 procedural justice while in legal systems  
13 of the civil law tradition inspired by the  
14 French concept of order publique,  
15 principles of procedural justice were  
16 regarded as being included.

17           "It was observed that the divergence  
18 of interpretation might have contributed to  
19 a concern expressed earlier that paragraph  
20 2 did not cover all serious instances of  
21 procedural injustice."

22  
23           And then paragraph 297:

24  
25           "The commission, after deliberation, was  
26 agreed that the provisions should be  
27 retained, subject to the..."  
28 dele "...deletion of the words or any  
29 decision contained therein which were  
30 superfluous. It was understood that the  
31 term 'public policy,' which was used in the  
32 1958 New York Convention and many other  
33 treaties, covered fundamental principles of  
34 law and justice in substantive as well as  
35 procedural respects. Thus, instances such  
36 as corruption, bribery or fraud in similar  
37 serious cases would constitute a ground for  
38 setting aside. It was noted in that  
39 connection that the wording 'the award is  
40 in conflict with the public policy of the  
41 State' was not to be interpreted as  
42 excluding instances or events relating to  
43 the manner in which an award is arrived  
44 at."

45  
46       And then over at paragraph 303 on the other  
47 page:

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1  
2 "It was understood that an award might be  
3 set aside on any of the grounds listed in  
4 paragraph 2 irrespective of whether such  
5 ground had materially affected the award."  
6

7 I'm going to submit to you, My Lord, that  
8 this commentary by the United Nations commission  
9 shows a -- somewhat of a change of attitude with  
10 respect to public policy in that it does not  
11 require a materiality requirement as the New York  
12 Convention hitherto understood required. And of  
13 course this is a guidance that is open to this  
14 Court.

15 Now, what should the tribunal have done with  
16 the damages situation? Again, we have to keep in  
17 mind that this is investor-State arbitration as  
18 opposed to the espousal of the claim by the  
19 investor-State. There is an extensive body of  
20 public international law that says that where  
21 States advance a claim, they're under the duty of  
22 utmost good faith when they make the claim.

23 And in Mexico's submission, a State that was  
24 mindful of its obligation to advance a claim in  
25 the utmost good faith would not take the  
26 investor's U.S. corporate overhead and these other  
27 projects and describe them as a \$20.5 million  
28 expenditure for the direct cost of acquiring the  
29 land and building the landfill.

30 Of course there's no filtering or screening  
31 of the claim by the United States in this  
32 instance. So the first question in our submission  
33 is what should the tribunal have done when it was  
34 presented with this issue of deception? And we  
35 believe that there were a variety of responses.

36 The first is it could have held that due to  
37 Metalclad's attempt to enhance its claim, to use  
38 the words of Secretary of State Seward, the  
39 deception in the claim rendered the claim  
40 inadmissible.

41 In Mexico's submission what happened here was  
42 very similar to what happened in the European Gas  
43 Turbines case where the tribunal accepted a set of  
44 expenditures which were proven to be unreliable.

45 And this is of fundamentally -- fundamental  
46 importance for the NAFTA parties. It cannot be  
47 right and proper for a claimant to be able to step

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1 into this extraordinary right which has been given  
2 to it by this treaty and misrepresent its  
3 damages. And it cannot be right to be rewarded by  
4 having the tribunal use the misrepresented sum as  
5 the point of departure for the subtraction  
6 exercise that it engaged in. And since the  
7 tribunal neglected its duty, it's -- Mexico looks  
8 to the Court to exercise its corrective function.

9 Now, the second approach that the tribunal  
10 could have taken was that it could have decided,  
11 well, the claim is still admissible. But it then  
12 should have subjected the damages alleged with  
13 heightened skepticism. It should have considered  
14 how the very, very low declared tax value of these  
15 two companies remained in stark disparity with  
16 great discrepancy between those numbers and the  
17 numbers that the tribunal arrived at.

18 And in our submission after it dawned on  
19 Arbitrator Civiletti that these other companies  
20 had been rolled into the number that had been  
21 misrepresented to the tribunal, it had a duty to  
22 examine this other record evidence. And this  
23 record evidence was not difficult to review. It  
24 was all set out in great detail by Mr. Dages'  
25 initial report filed with the counter-memorial,  
26 and his second report filed with the rejoinder.

27 The tribunal says that it relies upon the  
28 auditors' work payments. Well, the auditors were  
29 the ones who came back with the restatement of the  
30 expenses in 1996. And Metalclad itself filed the  
31 tax return for the Mexican tax authorities with  
32 respect to COTERIN and ECOPSA.

33 So in our submission the misrepresentation of  
34 the \$20.5 million figure led to a damages award  
35 which was the -- the tribunal states was supposed  
36 to be the actual expenditures on the landfill, and  
37 it did not deal with that in accordance with the  
38 record evidence which was before it which clearly  
39 gave rise to serious doubt of how you could have  
40 the -- such a disparity between these numbers.

41 At chart -- at Table 5, My Lord, I've just  
42 summarized five questions that we consider to be  
43 essential damages questions that could have been  
44 addressed or should have been addressed: the

45 effect of the misrepresentations, not only on the  
46 damages but on the credibility of the claim as a  
47 whole, and I'll be getting into this later on; the

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1 significant discrepancy between the negative  
2 award, the -- the mis -- the reclassification of  
3 expenses; the extent to which non-COTERIN Mexican  
4 expenditures should have been debundled; payments  
5 to the Mexican government official's wife,  
6 et cetera. So these set out in very summary form  
7 what the tribunal should have been looking at in  
8 light of the evidence that was put before it.

9 And we submit that this damages award has to  
10 be set aside for four reasons. It was advanced in  
11 a deceptive fashion, and that cannot be consistent  
12 with the public policy of British Columbia.

13 In our submission it offends the most basic  
14 notions of morality and justice in British  
15 Columbia, to hold out through your expert that  
16 this is your construction cost, and to -- and to  
17 allege that in your pleadings which have been  
18 reviewed by counsel, reviewed by the CEO of the  
19 company.

20 It should be set aside because the tribunal  
21 failed to deal with the declared asset value of  
22 COTERIN. It should be set aside because of  
23 restatement. And there is authority in Canada  
24 that it is contrary to public policy to require  
25 the payment of an award that includes the  
26 reimbursement of bribes. And there is a decision  
27 of the Quebec Court of Appeal, I won't bother to  
28 take it to you there (sic). It's a very short  
29 decision, it's at tab 67. And it's the Transport  
30 de Cargaison case which said -- where the Quebec  
31 Court of Appeal said that if a -- an award  
32 includes repayment for bribes, it is contrary to  
33 the public policy of Quebec.

34 Now, My Lord, I started off the damages  
35 analysis by referring you to the ICSID cases that  
36 deal with annulment and the whole issue of  
37 establishing a question and the tribunal's  
38 obligation to deal with the question.

39 And in my submission what I've just taken you  
40 through with respect to, for example, the -- the  
41 tax returns illustrates the wisdom of the ICSID  
42 rule. It demonstrates why, as Dr. Broches calls  
43 it, it's a fundamental procedural protection of  
44 the parties against arbitrary decisions.

45       And it illustrates Dr. Broches' comment which  
46       I gave to you before, which is that he said you  
47       cannot pick and choose, the tribunal cannot pick

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1 and choose and decide the que -- the -- the issues  
2 as if other questions had not been raised. These  
3 were raised.

4 Now, there's a decision of the ICSID which  
5 I -- again, I averted to before, but I just want  
6 to take you back to it. It's the MINE decision.  
7 It's at tab 38 of the cases, Volume 2, tab 38.  
8 And if you'd turn to tab -- or -- or paragraph  
9 6.99 in the annulment decision, you'll see:

10  
11 "The committee will first mention..."

12  
13 At 6.99, page 107, it said -- the paragraph  
14 begins:

15  
16 "The committee will first mention two  
17 instances in which the tribunal failed to  
18 deal with questions raised by Guinea, the  
19 answer to which might have affected the  
20 tribunal's conclusion. Failure to address  
21 these questions constituted a failure to  
22 state the reasons on which that conclusion  
23 was based."

24  
25 And then if you drop down to 6.101:

26  
27 "If Guinea's argument..."

28  
29 And no need to go into the argument.

30  
31 "...had been accepted, it would have meant  
32 a radical reduction of the damages claim."

33  
34 And then going on further down that  
35 paragraph:

36  
37 "They raise, therefore, important issues.  
38 The tribunal either failed to consider them  
39 or did consider them but thought that  
40 Guinea's arguments should be rejected. But  
41 that did not free the tribunal from its  
42 duty to give reasons for its rejection as  
43 an indispensable component of the statement  
44 of reasons on which its conclusion was

45 based."

46

47 And for that reason, the damages part of the

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1 MINE award was set aside by the annulment  
2 committee.

3 And in our submission that's precisely what  
4 we're talking about in this case. We have two  
5 compelling areas of evidence that have been  
6 reviewed in detail by the experts and addressed in  
7 submissions, and the award simply -- it's as if  
8 they never were raised.

9 Now, I'd just -- I've been told by my  
10 colleagues -- I haven't had a chance to read it,  
11 but I'm told that Metalclad has argued -- well,  
12 there's a provision of the ICSID arbitration rules  
13 that allows you to go back to the tribunal if it  
14 hasn't stated a -- reasons on a particular issue.  
15 We -- we are well aware of that. We looked at it  
16 carefully. But we also looked at what the ICSID  
17 annulment committees had to say about that.

18 And the -- the best statement of this is in  
19 the Amco v. Indonesia case we went over this  
20 morning. You need not turn to it, but I'll just  
21 read you (sic). It's paragraph 35, and it says:

22  
23 "In the present case Indonesia alleges  
24 that the tribunal had disregarded facts and  
25 arguments which, had they been considered,  
26 could have obliged the tribunal to abandon  
27 the very bases of its award. If the  
28 tribunal had accepted as valid any of the  
29 arguments invoked in the application for  
30 annulment, their insertion in the award  
31 would have contradicted what had hitherto  
32 been the main lines of reasoning of the  
33 award. Thus, the tribunal would have been  
34 obliged to modify the rationale of the  
35 award. However, the full or partial  
36 annihilation of the reasoning and the  
37 conclusion of the award is the very task  
38 which the convention allots to an ad hoc  
39 committee created pursuant to the annulment  
40 provision.

41 "It follows that the remedy provided  
42 by Article 49.2 would be inadequate to cope  
43 with the allegations set out in the  
44 application before the present committee.

45 Further, in line with the international law  
46 rule that a claimant does not need to  
47 exhaust inadequate remedies before

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1           resorting to remedies believed to be more  
2           efficient, Indonesia could have recourse to  
3           the annulment process. And for the above  
4           reasons, the committee reaffirms its  
5           jurisdiction."  
6

7           So we looked at all of these issues, not just  
8           the issues of damages, but the issues that Mr. Foy  
9           raised where record evidence provided of -- of  
10          Metalclad's own documents which went directly  
11          against what the tribunal ended up doing. And we  
12          decided that it did not make sense to go back to  
13          the tribunal because it should be dealt with by a  
14          Court as a whole when looking at what this  
15          tribunal did.

16          Now, I'll speak a little bit about the other  
17          issues relating to bad faith.

18          You -- I should -- you'll -- you'll not be  
19          surprised, My Lord, by the fact that there's no  
20          discovery within the meaning -- as we understand  
21          it, at this type of international proceeding. And  
22          therefore the respondent is reliant upon the good  
23          faith of the claimant to provide documents  
24          requested of it. And I've already told you about  
25          the international law relating to States reviewing  
26          claims that they are about to espouse.

27          Now, we argued very forcefully in our  
28          post-hearing submission that the international law  
29          duties that appertain to a State should apply to  
30          the investor who is allowed to step into the steps  
31          (sic) of the State because this is such an  
32          extraordinary right to prosecute a claim. And  
33          it's in our post-hearing submission at pages 84 to  
34          95. So we spent 11 pages of the post-hearing  
35          submission dealing with this issue.

36          We have identified in our outline of  
37          materials two what we call material deceptions in  
38          the pleadings. And we think that they're of  
39          fundamental importance because they related to the  
40          truth of the pleadings and the testimony provided  
41          by Metalclad. They related to the company's  
42          knowledge of a municipal permit issue. And they  
43          related to the damages issues that we just  
44          discussed.

45 Now, you'll recall that Mr. Foy had taken you  
46 to a passage of the memorial where Metalclad  
47 alleged that not until December 1995, December

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1 1995, did any State or federal official -- I'm  
2 sorry, any State or local official allege that  
3 such a permit was or is needed. That's at  
4 paragraph 17 of the memorial.

5 Well, Mr. Foy took you to two letters from  
6 federal officials in November of 1994 which  
7 informed Metalclad of the federal view that they  
8 should apply for the municipal permit. And  
9 Metalclad was forced to admit in its reply that it  
10 was a matter of corporate record that in fact the  
11 municipality had previously denied the -- the  
12 application for the permit when it was applied for  
13 in 1991.

14 Now, if you look at tab 40 -- 24 of our  
15 selected evidence, you'll see a conclusion from an  
16 expert report, a different expert. This time it  
17 was a legal expert that had opined about the  
18 alleged opacity of Mexican law. And look at  
19 conclu -- the last conclusion under paragraph 5,  
20 the last paragraph:

21  
22 "It is not clear that a municipal  
23 construction permit was required for the  
24 La Pedrera landfill. But given these  
25 facts, we opine that if it was required, it  
26 was reasonable and even highly likely that  
27 Metalclad, diligently acting in good faith,  
28 would have been unaware of this  
29 requirement."  
30

31 Now, My Lord, I'm asking you, take the  
32 amended option agreement which specifically  
33 addresses the municipal permit issue and put that  
34 against an expert report that's filed with this  
35 tribunal that it was reasonable and even highly  
36 likely that diligently acting in good faith  
37 Metalclad would have been unaware of this  
38 requirement.

39 We think it's contrary to public policy in  
40 B.C. to allow a claimant to -- to make that kind  
41 of pleading, and -- and bring in an expert -- this  
42 is the second expert report that did it -- bring  
43 in an expert that makes a demonstrably false  
44 representation as a conclusion, when you know in

45 the concrete evidence, which is not supplied with  
46 the memorial, the -- the amended option agreement,  
47 that this is not Metalclad's actual knowledge at

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1 the time that they acquire the investment.

2 Now, the memorial implied -- My Lord, you --  
3 you'll recall that I -- in cross-examination the  
4 witness has admitted that nowhere in the memorial  
5 had there been any reference to the three other  
6 projects, ECOPSA, Descontaminadora and -- and  
7 Contaminantes. There was no reference to those,  
8 and there was no indication in the memorial that  
9 they were rolling in the costs for those.

10 And in the memorial at paragraph 13 the  
11 memo -- memorial states that Mexican -- Metalclad  
12 officers first met Mexican -- met federal  
13 officials at a conference in New York City in  
14 October of 1992.

15 Now, keep in mind Metalclad's issued a press  
16 release in November of '91 relating back to  
17 their -- the investment in Eco Administracion by  
18 Mr. Kesler and his colleagues in August of '91.  
19 And look at the -- and the last sentence of the  
20 paragraph states:

21  
22 "Metalclad officers had studied the  
23 hazardous waste needs in Mexico with a view  
24 toward..." enter "...toward entering the  
25 market under appropriate conditions."  
26

27 Well, the fact of the matter is they were  
28 already in Mexico. It wasn't studying the  
29 hazardous waste needs from the view to making the  
30 investments; it was already there.

31 And if you look at tab 26 of the selected  
32 extracts, this is an excerpt from Mr. Kesler's  
33 first witness statement where he testifies:

34  
35 "Our interest in Mexico began in the fall  
36 of 1991. For the remainder of that year,  
37 and..." for 19 "...and 1992, we worked on a  
38 project with some executives at Ford, Bacon  
39 & Davis who wanted to build a hazardous  
40 waste incinerator in San Luis Potosi."  
41

42 Well, that was his project. It wasn't their  
43 project. It was his project. And the implication  
44 of his testimony is that it's somebody else who's

45 wanting to make the investment in Mexico. Well,  
46 this is the company that he and other Metalclad  
47 investor -- or Metalclad officers are shareholders

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1 in that they end up selling to Metalclad.

2 And we say this was calculated to deceive  
3 because, number 1, by presenting the claim as if  
4 COTERIN was their first investment in Mexico, they  
5 pled that they were unaware of the municipal  
6 permit that was sprung on them two years after  
7 they made the investment.

8 But, as Mr. Foy has shown you with the  
9 selected extracts of evidence, the first  
10 investment that they made in the very same State  
11 of San Luis Potosi, we had evidence of two  
12 construct -- municipal construction authorizations  
13 given by other municipalities in the same State.

14 So if your first investment has got municipal  
15 permits, how can you plead that you're taken by  
16 surprise in your fourth investment?

17 This was done to lay the foundation for the  
18 claim that together with this expert's report that  
19 they didn't know about the municipal permit, that  
20 they were taken by surprise by this untransparent  
21 legal system.

22 Now, the second reason they did this was of  
23 course for the damages, to roll in all these other  
24 damages.

25 And the third reason, My Lord, is that we  
26 submit that it was done to obscure a relationship  
27 between Metalclad and a federal official who filed  
28 two witness statements on their behalf and then  
29 refused to attend to the tribunal for  
30 cross-examination.

31 We posed a series of questions to the  
32 tribunal in our closing about good faith. And at  
33 tab 28 you'll see submissions made there. And we  
34 actually stated:

35  
36 "I do wish to conclude the legal  
37 submissions with a set of questions..."  
38

39 This is at line 10:

40  
41 "...if I may, because this is a matter of  
42 considerable importance to the respondent,  
43 and it is the question of the way in which  
44 the claim has been presented. Is there a

45 duty of candour? Did they have a duty to  
46 fairly disclose the facts surrounding the  
47 investment?"

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1

2 We objected to their vexatious pleadings.

3 We objected to the way in which they stated  
4 the evidence. They misstated the evidence. Two  
5 significant pieces of evidence were misstated. We  
6 identify that for the tribunal.7 We said they're of enormous importance to the  
8 respondent, and we'd be grateful if the tribunal  
9 would consider these in the course of making its  
10 award. Of course the award says nothing. Why is  
11 it so important? Because it's open season on the  
12 NAFTA parties if this type of behaviour is allowed  
13 to be tolerated.14 We have no discovery. We're in an ad hoc  
15 tribunal, and we rely upon the good faith of a  
16 claimant. And you cannot allow claimants to  
17 misrepresent their damages, misrepresent their  
18 actual knowledge of these types of issues. It  
19 goes centrally to the issues that the tribunal was  
20 supposed to pass on.21 At least if they complied with Article 53 we  
22 would know what the tribunal thinks about these  
23 questions. Perhaps the tribunal thinks it's okay;  
24 they awarded them \$12.6 million. We need to know  
25 for future claimants. These awards are of very  
26 great public significance to the NAFTA parties.27 Now, the last issue, My Lord -- we're taking  
28 a -- I can do this last issue in about 20 minutes  
29 if you're -- 15 minutes or 20 minutes, and that  
30 would allow Mr. Foy to begin anew tomorrow.

31 THE COURT: Yes. Go ahead.

32 MR. THOMAS: Would you -- okay.

33 The last issue which was raised and addressed  
34 to the tribunal concerned this affiliation between  
35 Metalclad and a witness that it tendered.36 You heard Mr. Foy refer to Mr. Rodarte  
37 Ramon. And Mr. Rodarte Ramon was the local  
38 federal environmental official in San Luis Potosi  
39 in 1991. You may recall these comments about the  
40 municipality's objecting to his arrogance.41 Mr. Rodarte filed a witness statement, and  
42 it's at tab 29. And in the very last para -- it's  
43 the second-to-last paragraph, at the last page of  
44 his witness statement, he says:

45  
46  
47

"After leaving my employment as technical  
director of the environmental border plan,

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1 I was hired by a subsidiary of Metalclad  
2 for which I worked since September of 1993  
3 in the capacity of external environmental  
4 consultant."

5  
6 So he's saying in this statement that he  
7 started working for Metalclad in September '93.

8 And if you go to the previous page, the first  
9 full paragraph, there is a contention here in this  
10 case, a lot of disputed facts about a -- a meeting  
11 between the governor of the State with Metalclad.  
12 And if you look at that paragraph, in the -- in  
13 June of 1993, second -- second sentence:

14  
15 "SEDESOL sent me to the meeting with  
16 Metalclad and Governor Sanchez Unzeuta, at  
17 which time Sanchez Unzeuta expressed his  
18 support and issued to Metalclad, quote,  
19 intention letter."  
20

21 Now, if you'll turn to tab 31, you'll see a  
22 press release issued by Metalclad on June 16th,  
23 1993. And Mr. Rodarte Ramon has just testified  
24 that he joined Metalclad in September of '93. And  
25 one of Metalclad's many Mexican corporations is a  
26 company called CATSA. And it says:

27  
28 "Metalclad..."  
29

30 Et cetera,  
31

32 "...has announced the recent opening of an  
33 environmental management consulting group.  
34 The consulting group, CATSA, will be a  
35 wholly owned subsidiary of Eco Metalclad  
36 and will be headquartered in Mexico City  
37 with a branch in San Lois Potosi.  
38 Dr. Humberto C. Rodarte has been appointed  
39 the director general of CATSA."  
40

41 So Dr. Rodarte is -- has been appointed the  
42 director general of CATSA on June 16th, 1993.

43 Now, he's testified in his first statement he  
44 actually joined Metalclad in September. And he

45 testifies of course that he's been sent by the  
46 federal government to this meeting in June with  
47 the governor.

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1           Now, we became aware of this, of course, and  
2 we -- we -- we made the point in our  
3 counter-memorial that Mr. Rodarte's testimony  
4 about the meeting with the governor is not very  
5 credible because he's obviously in a conflict of  
6 interest. He apparently was still working for the  
7 government, but he'd just been announced as the  
8 director general of Metalclad's consulting firm.

9           Now, when we made that we had no idea what  
10 Mr. Rodarte actually was up to. And if you turn  
11 to tab 31, first of all you'll see his second  
12 witness statement. And you'll see that he's now  
13 amended in -- a clarification of dates of work.  
14 And he says in paragraph 3:

15  
16           "I worked for Metalclad from June of 1993  
17 to March of 1996."

18  
19           So now he's making it clear that he was wrong  
20 to say that he was there starting in September.

21           And he then goes on to say he's fully aware  
22 of the law and policy of the government of Mexico  
23 precluding employees from working for private  
24 companies. And he declares that:

25  
26           "At no time did I violate this..." law or  
27 policy -- or "...this policy or law."

28  
29           In fact he goes on to the very end. And  
30 there had been a dispute in -- in the previous  
31 round of pleadings about Metalclad and its lawyers  
32 and counter- -- allegations and  
33 counter-allegations. And at paragraph 39 he gives  
34 character evidence about Mr. Kesler. He says:

35  
36           "Unfortunately, seeking and offering  
37 bribes is too common in Mexico, especially  
38 in State and local politics and business.  
39 But this is simply out of line with  
40 everything that I know about Mr. Kesler and  
41 the people I worked..." at "...worked with  
42 at Metalclad."

43  
44           Now, after he filed this witness statement,

45 if you'll turn to para -- to tab 32, Mexico  
46 discovered that his wife was made a shareholder of  
47 the first investment in Mexico in August of 1991

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1 when he was the local environmental representative  
2 for the federal government. So she was made --  
3 and it was a very closely held company. There  
4 were five -- there were four original Mexico --  
5 Mexicans, and she was added as a fifth subscribing  
6 shareholder. And then there was this company,  
7 ETI, with four American shareholders. And ETI  
8 held 49 percent. The Mexicans held 51 percent of  
9 Eco Administracion, and she was made a shareholder  
10 of 400 shares of the company. Later on of course  
11 ETI becomes part of Metalclad.

12 And in February of 1993 Mrs. Rodarte enters  
13 into a stock exchange agreement with Mr. Kesler on  
14 behalf of Eco Metalclad. You see the recital  
15 where she says that she's a Mexican nationale  
16 (inflection) married with Mr. Huberto -- that's a  
17 typo -- Rodarte. She identifies her address. And  
18 she's the sole and legal owner of 400 shares of  
19 series A capital stock of Eco Administracion.

20 This is a very unusual agreement, because she  
21 agrees to exchange her shares in Eco for shares in  
22 Metalclad. And she becomes entitled to the  
23 issuance of shares in the payment of cash when  
24 federal environmental permits are issued to  
25 Metalclad's various Mexican investments.

26 And it's a particularly strange agreement  
27 because she's not just entitled to the -- the  
28 payments for the permits issued to Eco; she's  
29 issued to -- she's entitled to payments of cash  
30 and shares for permits issued to other projects  
31 that she's not even a shareholder in in the first  
32 place.

33 And it's not just the listed ones, it's also  
34 corporations mentioned in statement 3. We don't  
35 know what statement 3 is. We've never been able  
36 to get our hands on the document.

37 And if you take -- take a look at page 7 of  
38 that agreement, My Lord, you'll see that she  
39 becomes entitled to a payment of 30,000 shares of  
40 Metalclad stock on the date of a final permit for  
41 construction of plant number 1 for Eco  
42 Administracion. You see that in paragraph A.

43 So she signs this agreement. Mr. Kesler  
44 signs the agreement. And lo and behold, about one

45 or two days later, a federal permit is issued  
46 there. That's the one that also triggered the  
47 bonus payments to the Metalclad officers. And she

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1 gets 30,000 shares, which our expert at the time  
2 calculated to be worth about \$150,000 U.S.

3 And then, as you've seen in the -- in the  
4 cross-examination of Mr. Dabbene, you saw a  
5 reference to payments in the legal expenses  
6 ledger.

7 THE COURT: Um-hum.

8 MR. THOMAS: Tab 34 -- sorry, 35 is a letter signed by  
9 Mr. Kesler to their Mexico City lawyer. And he  
10 says that:

11

12 "With respect to the agreements to  
13 exchange stock in Eco Administracion, it's  
14 my suggestion we advance \$10,000 in the  
15 case of Lucia and 20,000 in the case of  
16 Jose de Jesus de la Torre so that a certain  
17 amount of cash is paid along with the  
18 delivery of the shares in Metalclad  
19 Corporation."

20

21 By the way, we were never able to establish  
22 who Jose -- Jose de Jesus de la Torre is.

23 The fellow who organized these companies in  
24 the beginning gave a witness statement. He said  
25 I've never heard of this fellow. I don't know how  
26 he would be in a position to convey shares to  
27 Eco-Metalclad. But we've never been able to track  
28 that down.

29 Now, the secretary of environment, Julia  
30 Carabias, filed a very short statement in the  
31 rejoinder where she said I've been made a -- made  
32 aware of these -- these documents. And it appears  
33 that -- that Mr. Rodarte Ramon has committed  
34 various irregularities or irregularities committed  
35 by Metalclad in conjunction with Mr. Rodarte  
36 Ramon. And it said that she -- it caused her to  
37 be concerned as they severely affect the  
38 credibility of the company, and that they would be  
39 carrying out a detailed investigation.

40 The witness statement of Mr. Hermosillo is at  
41 tab 37. Mr. Hermosillo is one of the original  
42 shareholders of Eco Administracion and the  
43 subsequent two companies. He was forced out in a  
44 shareholders dispute with Metalclad in 1992/93.

45 And Mr. Hermosillo, in his witness statement at  
46 paragraph 10, he goes through these --  
47 organization of these various companies. And at

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1 paragraph 10 he says:

2

3 "I've been asked to identify Lucia Ratner,  
4 a series A shareholder in Eco, who..." is  
5 not a member of the "...who was not a  
6 member of the Mexican group and who advised  
7 whether Grant S. Kesler knew of her  
8 identity when Eco was incorporated."  
9

10 This is paragraph 10:

11

12 "Lucia Ratner is the wife of Humberto  
13 Rodarte Ramon. Mr. Rodarte Ramon was a  
14 subdelegate of SEDUE in San Luis Potosi at  
15 the time that Eco was incorporated. Grant  
16 S. Kesler knew Lucia Ratner was his wife  
17 and approved of the issuance of 400 series  
18 A shares to her."  
19

20

21 Mr. Hermosillo was identified by Metalclad as  
22 a witness whom they wished to cross-examine. And  
23 he came to Washington. And midway through the  
24 first week of the hearing he was excused from  
25 testimony. And that's at tab -- I don't need to  
26 go through it. At tab 38 you'll see the exchange  
27 between Mr. Pearce and the president of the  
28 tribunal, and the president confirming that  
29 Mr. Hermosillo, among others, has been allowed to  
30 go.

31 Then Mr. Kesler took the stand, and at tab  
32 39, middle of the page, line 11:

33

34 "Is it your testimony that you had not  
35 known of Mr. Rodarte in August of 1991 when  
36 his wife was made a shareholder of Eco  
37 Administracion?"

38 A. I did not know him in August 1991, nor  
39 did I know Lucia Ratner.

40 Q. Now, you're aware, Mr. Kesler, that  
41 Mr. Hermosillo has testified in his witness  
42 statement that he -- or that you were fully  
43 aware that Ms. Ratner was the wife of a  
44 local SEDUE environmental official,

45 correct?  
46 A. I know he testified to that. It's not  
47 correct.

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1 Q. You're aware that Mr. Hermosillo was  
2 in Washington yesterday available to be  
3 cross-examined?

4 A. Yes."

5

6 Then later on the relationship is reviewed.  
7 And I'd ask you to turn to page 109 of the  
8 transcript. And at about line 8, Mr. Kesler has  
9 testified in writing that he arranged a duty  
10 for -- a dinner for Ms. -- Mr. Rodarte and  
11 Ms. Ratner in April of '93.

12

13 "A. I indicate that's where I first met  
14 her, was when we hosted a dinner for  
15 Humberto and his wife and his children."

16

17 And then we go on, and we say:

18

19 "Well, how did that come to be arranged?

20 A. I believe they were in Orange County  
21 to visit -- to attend Disneyland, if I'm  
22 not mistaken. We made some contact, and I  
23 said let me take you to dinner.

24 Q. At this point you knew that  
25 Mr. Rodarte was working for the federal  
26 government because he testifies that  
27 sometime in early 1993 he introduced  
28 Metalclad to the COTERIN opportunity,  
29 correct?

30 A. Yes.

31 Now, Mr. Kesler, when you had dinner with  
32 him in April of 1993, did the penny drop  
33 that this Lucia Ratner, who was married to  
34 this individual who had introduced  
35 Metalclad to the COTERIN opportunity, was  
36 the same Lucia Ratner who had been one of  
37 the original shareholders in Eco  
38 Administracion?

39 I have no recollection of it. I don't  
40 remember even thinking about that or  
41 thinking that.

42 When did you realize that?

43 A. Realize what?

44 When did you realize that one of the

45 original shareholders in Eco Administracion  
46 was the wife of a local environmental  
47 official?

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1 A. Okay. At the time we made that stock  
2 exchange agreement..."

3  
4 He's now referring to February of 1993.

5  
6 "...she was not the wife of a local  
7 environmental official.

8 No. At that time she's the wife to the  
9 special advisor to the president of INE.

10 A. That's correct.

11 Q. Right?

12 A. And we would have been aware of it at  
13 the time."

14  
15 So at the time that he enters into the stock  
16 exchange agreement which provides for the payment  
17 of cash and shares to Mrs. Ratner, he's aware that  
18 Mr. Rodarte Ramon is a special advisor to the  
19 president of federal permitting authority.

20 We discovered some more about Mr. Rodarte.  
21 At tab 41 -- he left Metalclad's employment in  
22 1996. And there's a -- an agreement whereby he  
23 wraps up his affairs with Metalclad. And if you  
24 look at the second page at tab 40 you'll see  
25 recital F. The parties are doing recitals. And  
26 he says that he acted as intermediary on behalf of  
27 the sellers in the sale of the shares of the  
28 capital stock of COTERIN, which is also a  
29 subsidiary of Metalclad, without the sellers  
30 having paid him the commission he agreed with  
31 them.

32 Obviously, we identified Mr. Rodarte Ramon,  
33 because he made some fundamental testimony with  
34 respect to assurances given to Metalclad. He's,  
35 for example, the witness who testifies that in  
36 November of 1994 Metalclad is told to humour  
37 the -- the locals and apply for the permit, it's  
38 going to be forthcoming.

39 We wanted to cross-examine Mr. Rodarte, and  
40 Mr. Rodarte declined to attend the hearing. So we  
41 were deprived of that opportunity.

42 So we have a situation where his wife  
43 receives 30,000 shares of Metalclad stock. And we  
44 were able to find two -- a letter and, it appears,

45 another payment of \$10,000 each. And of course  
46 this is the -- the cash payments are rolled into  
47 the damages that are being asked of Mexico to

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1 reimburse.

2 Now, what is the relevance of all this?

3 Well, there's -- first of all, there's the public  
4 policy issue. But also just on the merits of the  
5 case, I want to read you just a couple of  
6 paragraphs, and then I'll complete for today.  
7 Sorry, two -- two more things, I'll -- from the  
8 witness statement of Mr. Altamirano.

9 Keep in mind Mr. Altamirano was the -- a  
10 federal witness -- federal official who issued the  
11 permit, the two permits for COTERIN. And his  
12 testimony -- remember, he's not called as a  
13 witness. His testimony is this, paragraph 26:

14  
15 "I remember that to my great surprise in  
16 September 1993 Mr. Humberto Rodarte Ramon  
17 quit at SEDUE and became a corporate  
18 representative for Metalclad. I do not  
19 recall his official title, but my  
20 impression was that he was in charge of  
21 facilitating and accelerating the granting  
22 of permits for the La Pedrera project.  
23 Once he joined Metalclad, he facilitated  
24 the communications and translation during  
25 our discussions."

26  
27 And then he goes on to say:

28  
29 "I also remember that Mr. Rodarte Ramon  
30 gave the impression that he believed that  
31 they would prevail over the State and  
32 municipal concerns. He thought the  
33 influence of the federal government could  
34 tilt the decision in favour of the  
35 project."

36  
37 Mr. Altamirano says:

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

45  
46  
47

Now, Mr. Altamirano's statement was filed in  
our counter-memorial before Mexico became aware of

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1 the true nature of Mr. Rodarte's relationship both  
2 with Metalclad through his wife and with COTERIN  
3 through his commission.

4 Well, it's obvious that Mr. Rodarte Ramon is  
5 going to say that the federal government is going  
6 to be able to force this thing through; he's going  
7 to collect \$100,000 from the vendors, and he's  
8 also got this relationship with Metalclad. He's a  
9 consultant as well by the time he actually comes  
10 out in the open about it.

11 And Metal -- then the award says that Met --  
12 it -- it accepts Metalclad's claim that it relied  
13 on good faith on federal assurances. And in  
14 paragraphs 80, 85, 87 and 88 it speaks of the  
15 assurances. And then it finds at paragraph 99:

16  
17 "The totality of these circumstances  
18 demonstrate a lack of orderly process and  
19 timely disposition in relation to an  
20 investor of a party acting in the  
21 expectation that it would be treated fairly  
22 and justly in accordance with the NAFTA."  
23

24 And then it says at 107:

25  
26 "These measures..."  
27

28 These are the denial of the permit and the  
29 municipality's court action.  
30

31 "...taken together with the  
32 representations of the Mexican federal  
33 government on which Metalclad relied amount  
34 to an indirect expropriation."  
35

36 Well, we say there was no good faith reliance  
37 on assurances coming from this man. And I want to  
38 point out that on this part of the case there were  
39 no contemporaneous documents that supported  
40 Metalclad's contention about the assurances. This  
41 was a testimonial part of the case.

42 So we submit that it was another question  
43 that should have been addressed by the tribunal.  
44 It will be helpful for us to know for future cases

45 that if a -- an official who ends up giving  
46 evidence on behalf of a claimant and is in an  
47 improper relationship with the claimant is to be

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1 given weight as an ordinary witness, that's an  
2 important fact for the NAFTA parties to know.  
3 Well, My Lord, I said I'd take 20 minutes. I  
4 think that's a good place to stop for today.  
5 THE COURT: Are you finished or are you --  
6 MR. THOMAS: I'm pretty well finished, yeah.  
7 THE COURT: I mean, I'm quite happy to have you  
8 complete if you wish.  
9 MR. FOY: Check your notes and finish tomorrow.  
10 MR. THOMAS: I'd like to check my notes. I may have  
11 a -- a very short 5, 10 minutes tomorrow.  
12 THE COURT: Okay, that's fine. Whatever your  
13 preference is.  
14 If I could address timing then before we  
15 adjourn for the day, where do we sit in terms of  
16 the timing?  
17 MR. FOY: Mr. Thomas will check his notes and, as he  
18 mentioned, finish. And then I will take you back  
19 to the final issues. And we'll be, I estimate, at  
20 least an hour.  
21 THE COURT: Has there been any discussion as to the  
22 order of --  
23 MR. COWPER: Yes. I think just --  
24 THE COURT: -- of the other presenters, because the --  
25 the normal rule when there's parties to action is  
26 that all the parties that are -- are in support of  
27 a particular position go first, and then we hear  
28 the contrary parties. And I -- I read Canada's  
29 submission, and I know it sides with Mexico.  
30 MR. COWPER: Yes. I think we have agreement on that  
31 and -- with a minor variation. It -- I think -- I  
32 actually think we addressed this earlier, but I  
33 think we'd agreed that Canada and Quebec would go  
34 after Mexico.  
35 The one variation on that is Mr. Giles asked  
36 my agreement to have him lifted from tomorrow so  
37 that he could do it on Monday on the basis he'd be  
38 less than a hour and -- even if he had to  
39 interrupt me. And I said that was fine just to  
40 accommodate his calendar. So I understand  
41 Mr. de Pencier's ready to go tomorrow. So if my  
42 friend is an hour in the morning or an  
43 hour-and-a-half, and Mr. de Pencier says he'll be  
44 two hours or less, then we're -- we will be in

45 shape for Monday.  
46 Now, I have two requests of Your Lordship.  
47 That may mean that there's time tomorrow for us to

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1 start, and I'm quite happy to do that. I don't  
2 want to do it if it's late Friday afternoon and  
3 you're -- and -- and it's not the right time to  
4 start.

5 I do have a second question, which is we --  
6 we will have our document ready. We have all of  
7 the binders of authorities and extracts in place,  
8 all of the tab references take some time to go.  
9 So it may not be possible to get a -- a -- an  
10 argument with all the tab references in, but I can  
11 get that for you tomorrow if you wish.

12 So if you can give me a -- some direction on  
13 that, I'm -- I'm happy to -- to go over till  
14 Monday and start after -- after Mr. Giles goes or  
15 to give you what remains of tomorrow afternoon.  
16 I'm completely in your hands, although I -- I'd  
17 like to know now rather than tomorrow.

18 THE COURT: Part -- part of the reason that I'm making  
19 the inquiry is that I have another matter at  
20 9 o'clock tomorrow morning that's scheduled for an  
21 hour. And at the conclusion of the break,  
22 Mr. Registrar said that they had contacted the  
23 registry saying that they would probably need more  
24 than an hour, and could they attend at 4 o'clock  
25 tomorrow afternoon for I think he said 20 minutes,  
26 half an hour. It happens to be --

27 MR. COWPER: Well --

28 THE COURT: -- one of your partners.

29 MR. COWPER: -- I suggest, just to seize him of  
30 that -- one of my partners is doing that to me?

31 THE COURT: Yes.

32 MR. COWPER: Yeah, well, that's what they're like on a  
33 good day.

34 Well, I -- my suggestion then is that we -- I  
35 won't do anything tomorrow. I will hand up  
36 Your Lordship the untabbed reference, if you'd  
37 like it.

38 THE COURT: I would like that for the weekend.

39 MR. COWPER: And so you can have that.

40 And otherwise I think it sounds as if we're  
41 going to probably enable you to hear the other  
42 matter sometime in the afternoon if the schedule  
43 is right. Mr. de Pencier says yes. So I think  
44 you'll have a substantial part of the afternoon

45 for the other matter.  
46 THE COURT: But having -- having gone down that  
47 route --

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- 1 MR. COWPER: Yes.
- 2 THE COURT: -- I don't want us to lose time tomorrow  
3 which we'll need next week, in other words, we  
4 won't finish next week because we're --
- 5 MR. COWPER: Oh, I -- I have -- we will finish.
- 6 THE COURT: We will finish.
- 7 MR. COWPER: I -- I will finish, absolutely. No.  
8 No. I -- I will finish.
- 9 THE COURT: Yes, Mr. Foy?
- 10 MR. FOY: I just had -- I would too -- too -- I have  
11 received some draft arguments, and I too would  
12 appreciate receiving the argument that is intended  
13 to be filed as soon as possible.
- 14 MR. COWPER: Well, I've told my friend, I gave him  
15 what I -- I undertook to give him last night. I  
16 actually, I gather, pushed the wrong button so  
17 there was one -- at 1 o'clock in the morning I  
18 gave him 5 instead of 6 chapters, but with the --  
19 with the exception of the introduction and the  
20 final submission on the scope of relief, my friend  
21 has my argument. So I -- I -- he's got it.
- 22 MR. FOY: That's of assistance, My Lord.
- 23 MR. COWPER: And he'll get it -- he'll get it in a  
24 fancier form, but I'll give it to everybody in  
25 a -- in a bound form tomorrow.
- 26 THE COURT: Do I take it, Mr. Cowper, just if I could  
27 ask you this directly, given that you don't think  
28 that we have a time concern for next week, I --  
29 I -- I'm inferring or reading between the lines  
30 what you're saying is that you would prefer to  
31 wait until Monday morning to start your  
32 submissions.
- 33 MR. COWPER: I'm actually really eager to start, but  
34 Monday morning is fine. And the one thing that  
35 happens with Monday is that I'm -- I'm probably  
36 able to -- to get a faster start. But I'm -- I'm  
37 actually -- I'd actually rather start tomorrow  
38 afternoon, but I think the right thing to do, both  
39 in terms of getting us done and having  
40 Your Lordship fresh, if you -- if you have even --  
41 a better hour spent flipping through our argument  
42 would probably be better spent, even if it was  
43 tomorrow, rather than me starting for an hour  
44 tomorrow. But I'm -- I'm -- as I say, I'm quite

45 happy to start tomorrow afternoon and eager and  
46 willing to go, but I --  
47 THE COURT: Well, I just wish to do whatever is the

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1 most efficient.

2 MR. COWPER: I -- I think --

3 THE COURT: I don't want to unnecessarily lose time.

4 MR. COWPER: Right. I don't think we'll be in any  
5 difficulty with time.

6 THE COURT: Very well then.

7 When I have the other matter come before me  
8 tomorrow, I'll canvass with them returning at  
9 maybe 3 o'clock or something like that.

10 MR. COWPER: Fine, My Lord.

11 THE COURT: Thank you, counsel.

12 THE REGISTRAR: Order in chambers. Chambers is  
13 adjourned until the 23rd of February at 10 a.m.

14

15 (PROCEEDINGS ADJOURNED AT 4:25 P.M.)

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