

1 23 February 2001 - Certified
2 Vancouver, B.C.

3
4 (PROCEEDINGS RESUMED AT 10:00 A.M.)
5

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

9 THE COURT: Yes. Mr. Foy, you rise on your feet. Do
10 I infer from that that Mr. Thomas has nothing to
11 add from yesterday?

12 MR. FOY: That's correct.

13 And I'll be asking Your Lordship to turn to
14 Chapter 14 of the outline in which we start to
15 address the questions of interpretation of
16 Articles 1105 and 1110 and --

17 THE COURT: These are the -- the two issues which
18 involve the error of law and which will not be
19 addressed under the international act but can be
20 addressed under the Commercial Arbitration Act.
21 Is that correct?

22 MR. FOY: That's correct, My Lord. And I would submit
23 it can be addressed under the Commercial
24 Arbitration Act on a standard of correctness.

25 And I'd like to go directly into the
26 submissions under Article 1105 by taking you to
27 the language of Article 1105 to begin with.

28 THE COURT: Just before you go into that, the previous
29 points that we've been dealing with this week, you
30 have been putting forward as -- in essence, excess
31 of jurisdiction and therefore something that I can
32 address under both acts.

33 Do you -- are there any of them that -- that
34 you say that if I don't agree with you that --
35 that there's an excess of jurisdiction that you
36 would recast or say should be recast as an error
37 of law?

38 MR. FOY: Yes, My Lord.

39 If -- if my friend takes the position that
40 any of the points made to date are either not
41 jurisdictional or not available under the other
42 provisions of the International Commercial
43 Arbitration Act, failure to apply the agreed-upon
44 rules of procedure or the -- the -- contrary to
45 public policy grounds, if my friend takes that

46 position, and if Your Lordship agrees that those
47 are not jurisdictional errors, then I would submit

Charest Reporting Inc. (604) 669-6449

1 that they could be recast as errors of law in this
2 way: First, the question of the proper
3 interpretation of additional facility Rule 53, and
4 the requirement that the -- the tribunal consider
5 all of the questions put to it, could be
6 characterized as an error in law in failing to
7 comply with a mandatory provision of the
8 applicable or -- arbitral rules.

9 That's an important question of law upon
10 which, if we were at that stage, the applicant
11 would seek leave to appeal because, as
12 Your Lordship knows, this was the first
13 arbitration to be conducted under the additional
14 facility rules. And the Court's guidance in
15 respect of the meaning of additional facility Rule
16 53 would be of assistance, and would be of
17 importance not just to these parties, but beyond.

18 The next question of law that could be
19 considered by the Court relates to the failures to
20 have regard to relevant evidence. Your Lordship
21 has in a case of -- I'll be reminded of the
22 reference too, noted that that in itself can
23 amount to an error of law. And we would submit
24 too that if we were under the commercial -- if we
25 are under the Commercial Arbitration Act, that
26 those -- that the tribunal's failure to have
27 regard to the relevant evidence, giving rise to
28 findings which are not based upon a reasonable
29 view of the evidence, could also be re -- reviewed
30 as a question of law.

31 And in fact in that context, My Lord, it may
32 be that the standard of review applicable would be
33 lower, and that the standard of review would be
34 reasonableness simpliciter as opposed to patently
35 unreasonable.

36 MR. COWPER: I -- I -- I seek to raise myself and
37 interject my friend (sic) on that issue, because I
38 do have some concerns respecting the submission he
39 just made. And I think it would be important if I
40 could just take a minute to reflect on that.

41 My friend raised the question of whether I
42 take the position that the issues he's dealt with
43 so far are not matters of jurisdiction. And just
44 to be clear, I believe I have consistently said to

45 Your Lordship and to my friend that we do not
46 accept that the matters asserted as errors of
47 jurisdiction are so. So I think that's been clear

Charest Reporting Inc. (604) 669-6449

1 from the outset.

2 My friend said just a few moments ago that if
3 we were at that stage, we would seek leave to
4 appeal. It -- I've sought to make my position
5 clear, and I apologize if I haven't made it clear
6 to the Court or to my friend, that this proceeding
7 has to include under the statute the consideration
8 of whether leave to appeal should be granted.

9 Your Lordship has not granted leave to appeal
10 on any error of law. And so my friend should
11 address that, if he thinks it's necessary, as part
12 of his case.

13 I should -- I should also say that what I did
14 seek to do earlier this week, and my friend and I
15 subsequently spoke about it, and I'm content to
16 receive it in any form or fashion, was I did seek
17 to say that I was unclear what errors of law on
18 which leave to appeal was being sought other than
19 the two chapters we're just turning to. And I --
20 and that was a genuine uncertainty on my part, and
21 remains one.

22 Now my friend has answered Your Lordship's
23 question this morning. I must say, as counsel I
24 still am unclear with how my friend would frame
25 the questions which have been spoken of for four
26 days now as errors of law on which he would seek
27 leave to appeal.

28 It's a matter of some importance to me
29 because how you frame those may in fact be a
30 matter on which I would make submissions; that is,
31 for example, that I don't agree that those are the
32 errors that arise from the material, or even
33 possible errors, or that they as framed should not
34 have leave to appeal granted for one reason or the
35 other.

36 So I just say to my friend, and I don't -- he
37 doesn't have to do anything right now. But I do
38 wish to say that I think it's an important part of
39 his case, and I've tried to be consistent on this,
40 that he identify all those errors of law. If
41 we're under the act he's relying upon on which he
42 seeks leave, that he deal with the issues of leave
43 and that I have those in a fashion that I can
44 respond to.

45 THE COURT: I wonder, Mr. Foy, if it would be most
46 productive if we left this point.
47 Now, I think you -- I think you have

Charest Reporting Inc. (604) 669-6449

1 Mr. Cowper's point. And I think I was under the
2 same uncertainty that I think he has expressed,
3 and that's what led to the question that I've
4 asked you.

5 MR. FOY: Well, Your Lordship's comments and
6 Mr. Cowper's comments are of assistance. And I
7 think I have orally just identified the two
8 issues. And I will do so in writing, and I will
9 provide that to Your Lordship and to my friend.
10 And I will provide in that writing the reasons why
11 I submit that leave should be granted on the
12 questions posed.

13 THE COURT: Thank you.

14 MR. FOY: I maintain strenuously that the first
15 position and Mexico's primary position is that
16 those errors amount to jurisdictional errors.

17 THE COURT: Oh, I appreciate that.

18 MR. FOY: Thank you, My Lord.

19 The -- I was asking Your Lordship to turn to
20 Article 1105. And I would just, first of all,
21 draw Your Lordship's attention to the heading.

22 THE COURT: I was just going to ask about that.
23 What is the approach to headings in treaties
24 such as -- as NAFTA? I think the general law is
25 that, for instance, headings in statutes are not
26 to be used as a guide of interpretation.

27 MR. FOY: That depends upon the particular act,
28 My Lord. There are -- there are statutes which
29 indicate that headings may be resorted to, as well
30 as preambles and titles, but it varies with the --

31 THE COURT: Yes.

32 MR. FOY: -- interpretive framework.

33 I'm going to -- my friends, who are the
34 experts with the NAFTA, will assist me in
35 answering your question precisely.

36 But you will see in my -- in the course of my
37 submissions that the minimum standard of treatment
38 is a significant -- a -- a part of Article 1105,
39 because it identifies, together with the rest of
40 the text, that we are dealing with a customary
41 international obligation, a customary
42 international obligation that has been called a
43 safety net for foreigners and involves the minimum
44 standard of treatment. And I'll be taking you to

45 authorities that elucidate what that -- what that
46 means.
47 But the -- so that's the first thing I draw

Charest Reporting Inc. (604) 669-6449

1 to your attention, is that it does reflect the
2 customary international law, that this is a
3 minimum standard required at international law to
4 be afforded to all aliens within your
5 jurisdiction. And it notes:

6 [All quotations herein cited as read]

7

8 "Each party shall accord to investments of
9 investors of another party treatment in
10 accordance with international law,
11 including fair and equitable treatment and
12 full protection and security."

13

14 And the importance of the -- the nesting of
15 the fair and equitable treatment obligation
16 underneath the rubric of international law will
17 become -- is important and is my first point, and
18 that is that this is a customary international law
19 obligation, not a separate obligation with some
20 other content.

21 Now -- and I'll take you to the first
22 authority in that respect, and it's at tab 106 of
23 the materials. Tab 106 is a text describing
24 bilateral investment treaties generally and the
25 type of bilateral investment treaties that exist.
26 And at page 58, one of the common standards of
27 treatment, the first page, is fair and equitable
28 treatment. You'll see that full protection and
29 security is another one, and that it -- it, as
30 well, is included in Article 1105.

31 And in discussing the standards under fair
32 and equitable treatment, if you go over to page 59
33 in the first full paragraph, you'll see this:

34

35 "Some debate has taken place over whether
36 reference to fair and equitable treatment
37 is tantamount to the minimum standard
38 required by international law or whether
39 the principle represents an independent
40 self-contained concept..."

41

42 So that debate has take -- where it appears
43 in a treaty. And that debate has taken place
44 amongst the commentators. And it's noted that

45 different views have been held.
46 And then over the page at page 60 the
47 commentator notes that this depends in part upon

Charest Reporting Inc. (604) 669-6449

1 the specific text of the treaty, and at the end of
2 the first full paragraph says:

3

4 "In the North American Free Trade Agreement
5 the fair and equitable standard is
6 explicitly subsumed under the minimum
7 standard of customary international law."
8

8

9 So insofar as the NAFTA is concerned, this
10 debate, whether fair and the -- fair and equitable
11 treatment standard is tantamount to the minimum
12 standard required by international law or some
13 other standard, it's -- in this commentator's
14 view, it's clear that the NAFTA intended it to be
15 the minimum standard of customary international
16 law.

17 And the Canadian statement on implementation
18 of the NAFTA, which is quoted at paragraph 529 of
19 our outline, makes the same point. It states:

20

21 "Article 1105 which provides for treatment
22 in accordance with international law is
23 intended to assure a minimum standard of
24 treatment of investments of NAFTA
25 investors. National treatment provides a
26 relative standard of treatment..."
27

27

28 National treatment, you'll recall Mr. Thomas
29 identified for you, was not a customary
30 international law obligation, but rather a
31 treaty-based, conventional law treatment.
32

32

33 "National treatment provides a relative
34 standard of treatment while this article
35 provides for a minimum absolute standard of
36 treatment based on long-standing principles
37 of customary international law."
38

38

39 This point is a significant one because this
40 tells you that the minimum standard afforded by
41 Article 1105 is not a treaty-based standard like
42 national treatment, most-favoured nation
43 treatment, even tariff reduction rules in the
44 NAFTA. Those are treaty-based obligations.

45 Transparency, another treaty-based obligation
46 which does not exist as an obligation at customary
47 international law.

Charest Reporting Inc. (604) 669-6449

1 What we're dealing with under Article 1105 is
2 customary international law. And what this treaty
3 does is provide access to an arbitral procedure to
4 investors to raise claims based on a violation of
5 customary international law.

6 The logical consequence of this distinction
7 between customary rules of customary international
8 law and -- and treaty or conventional rules is
9 that the transparency obligations of the NAFTA,
10 the treaty-based obligations of the NAFTA, cannot
11 provide content for the minimum standard of
12 treatment at international law.

13 This tribunal's conclusion that a
14 transparency obligation has been breached cannot
15 establish in and of itself a breach of Article
16 1105. And to suggest that this tri -- as this
17 tribunal did, to suggest otherwise is incorrect.

18 Now, the second fundamental principle that
19 informs the content of this standard at customary
20 international law is noted at paragraph 526 in
21 that the principle is fact-driven. And the reason
22 the applicant has emphasized that is because it
23 emphasizes the importance of all of the relevant
24 facts.

25 And I'm going to take you to the types of
26 facts that have been held to amount to a violation
27 of customary international law and demonstrate to
28 you that they are a qualitatively different type
29 than the transparency obligations that were
30 considered to -- considered by this tribunal to
31 give rise to a violation of Article 1105. And you
32 have heard already a significant body of
33 submissions with respect to this tribunal's
34 failure to have regard to relevant facts.

35 Now, in paragraph 528 I summarize in -- in my
36 language what I will take from the authorities as
37 a definition of what has been developed by -- in
38 the -- in the international law cases with respect
39 to this minimum standard. And where a State's
40 conduct falls below that standard, the language
41 that has been used is an outrage, willful neglect
42 of duty, or an insufficiency of governmental
43 action that every reasonable and impartial person
44 would recognize as insufficient.

45 A State's conduct may also fall below the
46 minimum standard when it's demonstrated that there
47 has been a denial, unwarranted delay or

Charest Reporting Inc. (604) 669-6449

1 obstruction of access to courts, gross deficiency
2 in the administration of judicial or remedial
3 process, or a failure to provide guarantees which
4 are generally considered indispensable to the
5 proper administration of justice. And I'll come
6 back to that. But one of the things you'll note
7 is that the United States in their intervention in
8 this before this tribunal pointed out that there
9 was no allegation of denial of justice by the
10 Mexican courts by Metalclad.

11 There's a high standard or a high threshold
12 for the application of -- high threshold of proof
13 for the application of this minimum standard. And
14 again, the language that's used in one of the
15 leading cases is an outrage, bad faith, willful
16 neglect of duty or insufficiency of governmental
17 action so far short of international standards
18 that every reasonable and impartial person would
19 recognize its insufficiency.

20 Now, I don't need to ask you to turn it up,
21 but at tab 114, which is noted under paragraph
22 530, the following examples are given by one of
23 the commentators: where an investor is unlawfully
24 killed, imprisoned, physically ill-treated or
25 their property looted. That's the kind of conduct
26 that has been considered in the context of this
27 minimum standard.

28 And I note in paragraph 531 that the -- the
29 conduct must be egregious. Brierly, one of the
30 commentators, states that:

31
32 "The misconduct must be extremely gross."
33

34 And I'd ask you to turn to tab 98, which is
35 that reference. At tab 98 is -- are extracts from
36 the text on The Law of Nations. And at page 280,
37 at the top, the standard was described in one of
38 the cases that is the most often cited case, a
39 decision of the U.S.-Mexican Claims Commission,
40 and it says this:

41
42 "The propriety of governmental acts should
43 be put to the test of international
44 standards. And the treatment of an alien,

45 in order to constitute an international
46 delinquency, should amount to an outrage,
47 to bad faith, to willful neglect of

Charest Reporting Inc. (604) 669-6449

1 duty..."

2

3 And to the language to which I've already
4 referred:

5

6 "Whether the insufficiency proceeds from
7 deficient execution of an intelligent law
8 or from the fact that the laws of the
9 country do not empower the authorities to
10 measure up to international standards is
11 immaterial."

12

13 And he notes:

14

15 "The standard therefore is not an exacting
16 one."

17

18 He goes on to note on the next page some --
19 an aspect of this standard that has already been
20 referred to in other contexts, and that's the
21 question of exhaustion of local remedies. He
22 notes:

23

24 "It is ordinarily a condition of an
25 international claim for the redress of an
26 injury suffered by an alien that the alien
27 himself should first have exhausted any
28 remedies available to him under the local
29 law. The State is not required to
30 guarantee that the person or property of an
31 alien will not be injured. And the mere
32 fact that such an injury has been suffered
33 does not give his own State a right to
34 demand reparation on his behalf.
35 If a State in which an alien is injured
36 puts at his disposal apparently effective
37 and sufficient legal remedies for obtaining
38 redress, international law requires that he
39 should have had recourse too and exhausted
40 his remedies before his own State becomes
41 entitled to intervene on his behalf.

42

43 "The principle of this rule is that a
44 State is entitled to have a full and proper
opportunity of doing justice in its own way

45 before international justice is demanded of
46 it by another State."
47

Charest Reporting Inc. (604) 669-6449

1 And of course in other contexts we've
2 referred you to the facts where in the instant
3 case Metalclad initially resorted to the remedies
4 available under the local law in respect of the
5 denial of the municipal permit, and they -- and
6 later voluntarily abandoned those remedies, before
7 they had been completed, in order to participate
8 in negotiations with the municipality.

9 And over the page -- I'm still with that
10 tab. Over the page, the -- a note is made at the
11 top of 282 that:

12
13 "It is the whole system of legal
14 protection as provided by municipal law
15 which must have...have been put to the
16 test."

17
18 And you'll recall that echoes the comments of
19 the ELSI case where it wasn't the individual acts
20 of the municipal prefect or the mayor of Palermo
21 but the whole system that had to be put on trial
22 to see whether it offended the rule of law, not
23 whether or not correct or incorrect decisions of
24 municipal law were made along the way.

25 Then at page 286 and 287, in speaking of
26 the -- in -- in some cases it's noted that the --
27 the denial of access to the courts can amount to
28 the -- a violation of this minimum standard. But
29 it's noted in -- two-thirds of the way down the
30 page on 286 that:

31
32 "It is nothing but the denial to
33 foreigners of access to the courts that can
34 properly be regarded as a denial of
35 justice."

36
37 And I remind -- as I -- as I -- as I
38 mentioned, the U.S. noted in this proceeding there
39 was never any allegation of denial of justice by
40 the Mexican domestic courts. And there on page
41 287 is the -- where I've taken the quote at the --
42 the second to last paragraph:

43
44 "It will be observed that even on the wider

45 interpretation of the term 'denial of
46 justice' which is here adopted, the
47 misconduct must be extremely gross."

Charest Reporting Inc. (604) 669-6449

1

2 Now, we don't have any of those allegations
3 here. But it gives a nature of the quality of the
4 acts that may give rise to a violation of the
5 minimum standard. And on that point I'd ask you
6 to turn to tab 125 of the same book, and this is a
7 commentary.

8 Over the years international lawyers have
9 attempted to codify the principles of
10 international law, and various draft conventions
11 have been circulated. And Mr. Thomas referred to
12 one. This is a commentary on an earlier draft of
13 a convention. And I just want to note one comment
14 at page 547 of that. And there, in dealing with
15 the international minimum standards of treatment
16 for the protection of aliens, it's noted that --
17 they suggest the codification should include the
18 word there must be a clear violation.

19 And this is in the second paragraph on page
20 2 -- 547. And about five or six lines in that
21 paragraph it says:

22

23 "The requirement of a clear violation
24 precludes the international tribunal from
25 sitting in judgment on close cases of
26 municipal law. International scrutiny
27 should be allowed only in the case of a
28 manifest misapplication of law on the
29 national level."

30

31 Again, echoing in the -- in the context in
32 which we're -- in which this tribunal was acting,
33 the tribunal's insertion of itself as a municipal
34 Mexican appellate court to decide close issues of
35 municipal law are not the types of approach taken
36 when determining whether the international
37 standard, the minimum standard, has been
38 violated. That's a -- that's a basis, not just a
39 juris -- that's not just a jurisdictional excess,
40 as we've already noted, but it also is in error in
41 that that -- as pointed out here, that's not what
42 is intended by the municipal standard -- by the
43 international standard.

44 Now, at the bottom of page 154 of my

45 materials I refer to the Neer case, which I've
46 already taken you to the quote there, which was
47 quoted by Brierly. There an American citizen was

Charest Reporting Inc. (604) 669-6449

1 murdered by a group of armed men on his way home
2 from a mine. A claim was filed alleging that the
3 Mexican authorities had shown an unwarranted lack
4 of diligence in pursuing the -- the -- the
5 perpetrators.

6 And the commission found there was no denial
7 of justice. They -- they noted that other things
8 could have been done, but at the top of page 155:

9
10 "It's not for an international tribunal to
11 decide whether another course of procedure
12 taken by the local authorities might have
13 been more effective."

14
15 And then there's quote about -- an outrage
16 is -- is referred to, and has been adopted by the
17 commentators as the leading statement of the types
18 of -- of actions that -- that would violate this
19 standard.

20 Now, the next portion of the brief deals with
21 the -- the ELSI case. We've already referred to
22 the ELSI case in another context. Here some of
23 the facts are repeated. And it's noted that there
24 was no denial of the minimum standard found in the
25 circumstances in which the mayor had requisitioned
26 this plant, allowed the employees to occupy it.
27 The plant was allowed to go into bankruptcy. And
28 despite this, in a 16-month delay in ruling on an
29 administrative appeal of the mayor's action, the
30 International Court of Justice found there was no
31 breach of the international minimum standard. And
32 I have already in the course of earlier
33 submissions referred you to the text which I've
34 quoted at paragraph 541.

35 Now, instead of having regard to the leading
36 authorities on the content of the minimum standard
37 of international law, instead of having even a --
38 a reference to the texts or to the requirement for
39 an outrage or bad faith or egregious conduct, what
40 this tribunal did was find a violation of its view
41 of a treaty obligation of transparency and said
42 that that amounted to a violation of Article 1105.

43 Now, as we've already noted, it's a logical
44 inconsistency once you've concluded that you're

45 dealing with customary international law to inform
46 the content of that by reference to treaty law.
47 And I -- we're not submitting that it wasn't open

Charest Reporting Inc. (604) 669-6449

1 to this tribunal to look to other portions of the
2 NAFTA as context, but we are submitting that it
3 was error for this tribunal to in -- to find
4 content for the obligation of -- in Article 1105
5 elsewhere in the NAFTA.

6 Looking at the rest of the NAFTA as context,
7 one sees that transparency obligations are dealt
8 with elsewhere and were not intended to be dealt
9 with in an article recording the parties'
10 negotiation of the minimum standard of treatment
11 of customary international law.

12 And I'd ask -- I'd remind the Court of the --
13 the Hudson case in Quebec to which I referred
14 earlier in which a municipality passed a bylaw
15 regulating pesticides, where pesticides were also
16 regulated at the federal and provincial level.
17 And the companies engaged have taken the case to
18 the Supreme Court of Canada, alleging that the
19 juris -- the municipality doesn't have that
20 jurisdiction.

21 If this duty was applied to Canada as re --
22 being responsible for the actions of that
23 municipality, it would on its face violate the
24 transparency obligation that this tribunal has
25 imposed upon Mexico. It is today unclear whether
26 the municipality has that jurisdiction. The
27 central government in Canada has not resolved all
28 doubt and uncertainty about that.

29 And on this tribunal's view, Canada will have
30 fallen -- fallen below the minimum standard of
31 treatment owed to aliens at international law.
32 And in my submission that is simply incorrect.

33 I'll turn from there to Article 1110.
34 Article 1110, as Your Lordship is aware, prohibits
35 expropriation except on certain conditions.

36
37 "No party may directly or indirectly
38 nationalize or expropriate an investment of
39 an investor of another party in its
40 territory or take a measure tantamount to
41 nationalization or expropriation of such an
42 investment."

43
44 In expropriation cases normally the first

45 question that one asks is: Did the claimant have
46 a property right? The next question is: Did the
47 actions of the government authority constitute a

Charest Reporting Inc. (604) 669-6449

1 taking of that property and, thirdly, are the --
2 is the claimant entitled to compensation and, if
3 so, in what amount?

4 Asking those questions in this context, as
5 the tribunal has approached them, the first
6 question becomes: Did the plaintiff have a
7 property right to a hazardous waste landfill?

8 We know that COTERIN owned some land prior to
9 Metalclad's acquisition of it. We know that
10 COTERIN owned some land and had a partially
11 permitted landfill. Metalclad was aware of the
12 need for further permits or a court order before
13 it could have an operational hazardous waste
14 landfill. We know that from the very document
15 whereby it acquired this investment.

16 We also know that, from a -- another piece of
17 evidence that -- which was referred to in part
18 yesterday, that Metalclad hired, at the time of
19 the acquisition of COTERIN, Mr. Rodarte, and that
20 he was described as being in charge of,
21 facilitating and accelerating the grant of
22 permits. And he was hired September of 1993, we
23 think, or perhaps earlier.

24 But by September of 1993, you'll recall that
25 the -- COTERIN had the initial federal permit;
26 they got that in January of 1993. They had the
27 land use permit in May of 1993. And in August of
28 1993 they had another federal permit.

29 And in September of 1993 a -- Metalclad
30 acquired the investment, making provision for the
31 next -- the -- the -- making provision in its
32 agreement for the permits it didn't have, either
33 municipal permit or a court order permitting it to
34 operate.

35 Now, if we accept the juridical facts as they
36 were and not step into the shoes of a Mexican
37 court of appeal, then at that time we know a
38 municipal permit was applied for by Metal -- by
39 COTERIN and not obtained. We know that a court
40 order was applied for and not obtained. We know
41 that Metalclad voluntarily chose to negotiate with
42 the municipality rather than pursue those
43 remedies.

44 So it has a partially permitted landfill, one

45 of the juridical facts. It has still a partially
46 permitted landfill. And rather than seek to
47 either get a court order to turn that into an

Charest Reporting Inc. (604) 669-6449

1 operational landfill, or a municipal permit, it
2 seeks to negotiate with the municipality. And the
3 municipality is prepared to allow it to operate,
4 not as a hazardous waste landfill, but as a
5 non-hazardous waste landfill. Now, there was no
6 agreement to that effect.

7 The document indicating the municipality's
8 preparedness was a non-binding agreement, but the
9 fact is the -- it indicates their willingness to
10 consider that. Metalclad was not satisfied with
11 that, and abandoned that pursuit in favour of this
12 arbitration, alleging that it had a property right
13 to a fully permitted hazardous waste landfill.

14 And accepting the juridical facts as they
15 were that was, on their own documents, clearly not
16 the case. They didn't have the municipal permit;
17 they'd applied for it and it was denied. And they
18 didn't have the court order.

19 Now, on this view, Metalclad never acquired a
20 property right to a hazardous waste landfill, and
21 it follows none was taken from it. Not having
22 acquired that property right, it cannot have been
23 said to have been dispossessed of it. And the
24 prerequisite, the first prerequisite to an
25 expropriation, the taking of some property or
26 property rights, has not been made out.

27 Now, the tribunal did not approach it in this
28 way, as we know. The tribunal -- instead of
29 having regard to the juridical facts as they
30 existed, the tribunal inserted itself into Mexican
31 domestic law and acted as if it was a Mexican
32 court to hold that in the tribunal's view of
33 Mexican domestic law, Metalclad had acquired the
34 right to operate a hazardous waste landfill when
35 it obtained the federal permit, which right they
36 say was denied to Metalclad by the municipality in
37 some way.

38 Now, it's very interesting that the
39 tribunal's view was not Metalclad's view. If --
40 if Metalclad's view in September of 1993 was that
41 they had a federal permit and therefore had
42 acquired the right to a -- operate a hazardous
43 waste landfill, they would have never provided in
44 the amendment to the -- to the option agreement

45 anything about any further permits. They wouldn't
46 have hired Mr. Rodarte to facilitate the obtaining
47 of further permits. It would have been

Charest Reporting Inc. (604) 669-6449

1 unnecessary.

2 But even accepting the tribunal's view that
3 the -- Metalclad had obtained a right to a --
4 operate a hazardous waste landfill, there's
5 another difficulty with their reasoning, and
6 that's the failure to have regard to the
7 preparedness of the municipality to allow
8 operation of the landfill as an industrial waste
9 landfill, not a hazardous waste landfill.

10 If the municipality, and -- and I don't
11 accept this, but if the municipality's actions
12 took anything from Metalclad -- if you assume it
13 had the right to a hazardous waste landfill, then
14 what the municipality took was the difference
15 between the value of a hazardous waste landfill
16 and a non-hazardous waste landfill.

17 The tribunal didn't approach it that way.
18 The tribunal assumed that -- ignored that fact of
19 the municipality's preparedness and assumed that
20 the entire operation had been taken. And there
21 was never any evidence to show that a
22 non-hazardous waste landfill has no economic
23 value.

24 And on the authorities it is clear that the
25 prohibition of the optimal economic use of
26 property, the highest and best use of property,
27 does not amount to an expropriation. There are
28 many regulations, rules, governmental acts that
29 interfere with property right -- property holder's
30 rights to benefit from the highest or optimal
31 economic use of the property. No one would
32 suggest that a -- that that amounts to an
33 expropriation.

34 Particularly you will not find in customary
35 international law, which is -- again, is the
36 standard of expropriation which was referred to in
37 Article 1110, authorities for that proposition,
38 that prohibition of an optimal use can be equated
39 with an expropriation.

40 So even if one accepts the tribunal was
41 correct in its -- in -- in what we say was an
42 excess of jurisdiction to insert itself and find
43 as a matter of Mexican domestic law that Metalclad
44 had a certain right, then it does not follow that

45 that -- that the -- all of the economic use of
46 this land and -- and the permits was taken from
47 it.

Charest Reporting Inc. (604) 669-6449

1 But there's another way to look at the
2 municipality's actions and to again demonstrate
3 that they do not give rise to an expropriation.
4 Again, a -- on this view, I'll accept that the
5 tribunal was correct to act as a Mexican appellate
6 court. The fact remains that on the evidence the
7 municipality was acting in its view of the public
8 interest, in its view to protect the public that
9 it helped from the dangers arising from the
10 introduction of new hazardous waste.

11 Now, the federal government did not share
12 that view. But the fact remains that -- the fact
13 that the federal government didn't share that
14 view, that doesn't make the federal view correct,
15 nor does it make the municipality's view totally
16 irrelevant, as this tribunal did in paragraph 98
17 of its reasons when it concluded that because the
18 federal authorities were satisfied on
19 environmental grounds, that was the end of the
20 inquiry.

21 Now, I've already noted that paragraph 98 is
22 contrary to the federal authority's own views at
23 the time, at the time the federal authorities
24 announced the Convenio, the same day they
25 announced that this was a necessary but not
26 sufficient authorization.

27 So the tribunal has -- has taken a view of
28 the Convenio that the federal authorities
29 themselves did not take. And that, you'll recall,
30 is at tab 64 of my selected extracts. And I don't
31 need to take you back to it.

32 So the fact that the federal government and
33 the municipal government didn't share the same
34 view as to the risks to the public from the
35 dangers associated from the introduction of new
36 hazardous waste in my view doesn't make the
37 federal view correct, nor does it render the
38 municipal view irrelevant.

39 And I'd like you to recall the -- the Rascal
40 case, which was at tab 41 of the materials. In
41 the facts in that case, you'll recall the
42 municipality, acting in its view of the -- what it
43 viewed as risks to the local population,
44 determined to resolve to close a topsoil

45 processing operation.
46 Now, the facts in that case demonstrate -- if
47 you go back to the trial judgment and the Court of

Charest Reporting Inc. (604) 669-6449

1 Appeal judgment, you'll see that the provincial
2 authority, the W -- the WCB, who had a
3 responsibility for the safety of workers, didn't
4 share that view and thought that the operations
5 were not unsafe or in any way a risk to the local
6 inhabitants.

7 Neither one of those views was sufficient.
8 The fact is the municipality had its view,
9 exercised its view in the -- in -- in its view of
10 the protection of the public from dangers
11 arising. And again, in the exercise of those
12 regulatory powers, the Courts have held that that
13 does not amount to an expropriation.

14 And I recall -- remind Your Lordship that the
15 preamble to the NAFTA preserves the parties'
16 flexibility to safeguard the public welfare.

17 So I say on three different views of the --
18 of the case the tribunal's award, the tribunal's
19 characterization of there having been an
20 expropriation of a fully permitted, hazardous
21 waste landfill, cannot be made out.

22 And in the course of the remainder of the
23 text I have provided authorities/references to
24 support some of the generalized statements that
25 I've made, for example, that -- under paragraph
26 550, that expropriation is not established by
27 interference with the economically optimal use of
28 a property. I mean, I think that's -- that's a
29 standard that Your Lordship would be -- would be
30 familiar with. There are many Canadian laws and
31 regulations which do that and which do not amount
32 to an expropriation.

33 The traditional view of what amounts to
34 expropriation at international law requiring a
35 taking has been confirmed in one of -- by another
36 NAFTA tribunal, and I note that in paragraph 556
37 of my materials. And there, the general notion of
38 a taking is -- is defined.

39
40 "The term 'expropriation' carries with it
41 the connotation of a taking by a
42 government-type authority of a person's
43 property with a view to transferring
44 ownership of that property to another

45 person, usually the authority that
46 exercised its de jure or de facto power to
47 do the taking."

Charest Reporting Inc. (604) 669-6449

1

2 And the -- there's a commentator again that
3 makes the propos -- or supports the proposition
4 that I advanced that the -- this provision,
5 Article 1110, states the traditional view of
6 customary international law.

7 And you have heard already that it -- there
8 was evidence that it was not intended to adopt the
9 U.S. standards on expropriation or any of the
10 other national standards, but rather the customary
11 international law standard.

12 And I note at paragraph 560 the authority for
13 the proposition that I've noted that:

14

15 "Diminution in value is to remain
16 uncompensated so long as rights of use,
17 exclusion...exclusion and alienation
18 remain."

19

20 Metalclad started out with a partially
21 permitted landfill and has a partially permitted
22 landfill with rights of use, rights of exclusion,
23 and the right to alienate.

24 The -- the tribunal in this case, after --
25 other than its statement of Article 1110 and then
26 its -- the paragraph "thus," which we've quoted
27 and referred to already, refers to only one
28 decision, and that's the Biloune case. And I deal
29 with the Biloune case at paragraphs 562 and
30 following. And according to the tribunal in
31 Metalclad, this -- this case resembles in a number
32 of pertinent respects that of Biloune.

33 Paragraph 563 I note the distinguishing
34 features between the two cases. First, in Biloune
35 the investor and his company had obtained a right
36 to construct. They had a property right that I've
37 already argued that Metalclad didn't get quite
38 that far. The site concerned had been leased by
39 the government of Ghana to the Ghana tourist
40 development company, a corporation owned by the
41 Ghanaian government for a period of 50 years.

42 Mr. Biloune's company entered into a lease to
43 renovate, expand and operate a restaurant resort
44 at the site. His company obtained financial and

45 other benefits from the Ghana investment centre
46 which contractually undertook not to expropriate
47 investment. So that's how this dispute got in

Charest Reporting Inc. (604) 669-6449

1 front of a -- a tribunal. It was by reason of a
2 contractual obligation not to expropriate.

3 And the company commenced the work on the
4 project before a building permit was applied for.
5 This is the -- the point of similarity that the
6 tribunal refers to. In fact, that earlier
7 construction had taken place without a permit on
8 the personal instructions of the former dictator
9 whose instructions were not subject to
10 examination.

11 Now, one year after construction commenced a
12 demand for the produc -- production of the
13 building permit was made. When it could not be
14 produced, a stop work order was issued, and five
15 days later the project was partially demolished.
16 And that demolition took place five days before
17 what -- the notice had been given that --
18 requiring the builder to produce something within
19 six days. So they started demolishing even before
20 they allowed the -- the builder to respond to the
21 notice that had been given.

22 But then went on. This is what they did.
23 After the stop work order, the demolition, they
24 summonsed Mr. Biloune. And then they arrested him
25 late at night by plainclothes paramilitary police,
26 when by Ghanaian law arrests should take place by
27 daylight. They detained him for 13 days without
28 charge.

29 The requirement of filing -- they also asked
30 him to file an assets declaration, but being
31 detained and unable to obtain any of his records,
32 that was difficult for him to do. And then they
33 deported him without the possibility of re-entry.
34 Those acts, the stop work order, the demolition,
35 the arrest, the detention and the deportation had
36 the effect of causing the cessation of work on the
37 project.

38 Given the central role of Mr. Biloune in
39 promoting, financing and managing, his expulsion
40 from the company effectively prevented it from
41 further pursuing the project. In the view of the
42 tribunal, such prevention from pursuing its
43 approved project would constitute constructive
44 expropriation of the contractual rights.

45 Now, where do you see in the facts before our
46 tribunal a resemblance in a number of pertinent
47 respects to that of Biloune? In my submission

Charest Reporting Inc. (604) 669-6449

1 there are none. The -- the -- the act -- the
2 conduct in Biloune that was held to constitute an
3 expropriation might as well have -- they didn't
4 have jurisdiction to determine whether or not this
5 would also amount to a breach of the minimum
6 standard of treatment, but this is the kind of
7 activity, unlawful arrest, detention, deportation
8 without allowing him back into the country, that
9 may -- they didn't have jurisdiction to consider
10 that -- may have amounted to a violation of the
11 minimum standard of treatment.

12 It is totally unlike this case, especially
13 when you examine the activities of the
14 municipality. The municipality issues the stop
15 work order, responds in court, goes to court
16 itself with respect to the Convenio, and then
17 negotiates allowing them to operate as a
18 non-hazardous waste landfill.

19 Where's the arrest? Where's the
20 deportation? Where's the other unlawful acts
21 giving rise to a constructive expropriation?
22 The -- the case is simply not comparable.

23 And the fact that this tribunal, our
24 tribunal, had to have recourse to such a
25 demonstrably different and unlike case demons --
26 without any other analysis, demonstrates the reach
27 that they have taken in their application of
28 Article 1110. And in my submission they've gone
29 beyond the proper application of that section.

30 And I note in paragraph 565 some of the
31 additional differences. The -- in Biloune, the --
32 the permit, the so-called permit required:

33
34 "It was not in dispute that the earlier
35 construction on the site had not benefited
36 from a construction permit from which the
37 tribunal drew the conclusion that a permit
38 was not indispensable even if it was
39 required by the letter of the law."

40
41 You required that -- you'll -- you'll recall
42 that the dictator had said go ahead and start
43 construction and that his orders were not subject
44 to review.

45 In contrast, in this case, in Metalclad, the
46 municipality had been consistent in asserting its
47 permitting authority. It had done so when COTERIN

Charest Reporting Inc. (604) 669-6449

1 was owned by Mexican nationals in 1991 with
2 respect to the same proposal. It had done so
3 again in 1995. Metalclad was well aware of that
4 in advance. It wasn't something that was sprung
5 on them retroactively as had been the case in
6 Biloune. And of course there was no question of
7 Metalclad's investors being arrested, held without
8 bail, searched for their assets and being
9 summarily -- summarily deported from Mexico.

10 So the sole authority relied upon by this
11 tribunal is -- is completely distinguishable.

12 THE COURT: Would this be a convenient time to take
13 the morning break?

14 MR. FOY: Thank you, My Lord.

15 THE REGISTRAR: Order in chambers. Chambers is
16 adjourned for the morning recess.

17

18 (MORNING RECESS)

19 (PROCEEDINGS ADJOURNED AT 11:05 A.M.)

20 (PROCEEDINGS RESUMED AT 11:22 A.M.)

21

22 THE COURT: Mr. Foy.

23 MR. FOY: Thank you, My Lord.

24 Just to wrap up the section on expropriation,
25 I would commend to Your Lordship the rest of the
26 written materials.

27 I'll just emphasize at paragraph 581 a point
28 I made earlier, that in its intervention with
29 respect to the meaning of expropriation, the
30 United States took the position that it was the
31 intent of the parties to reflect customary
32 international law. And the United States
33 reflected that position in its statement of
34 administrative action. Neither of the other
35 parties has ever expressed a view contrary to this
36 public statement. Customary international law
37 recognizes only two categories of expropriation,
38 direct and indirect. And the language tantamount
39 to -- I think it was before the tribunal common
40 ground that meant equivalent.

41 And in reliance upon the rest of the written
42 submissions with respect to the interpretation of
43 Article 1110, those are my submissions with
44 respect to it.

45 Now, I'd like to return to another issue that
46 Mr. Cowper requested that I address prior to
47 closing. And I've handed up to Your Lordship a

Charest Reporting Inc. (604) 669-6449

1 supplementary outline which deals with the
2 question of the tribunal's consideration of the
3 Ecological Decree.

4 The outline can be added to your book. And
5 the authorities that are behind the outline can be
6 added at the end of the authorities. They follow
7 in tab sequence from -- on -- in the last book.

8 And I'm going to ask Your Lordship to look at
9 this additional outline, and then go back to page
10 127 of the -- of my outline.

11 But just to remind Your Lordship why we're
12 dealing with this issue, the tribunal used the
13 following language to refer to the Ecological
14 Decree. They said in paragraph 69 that they:

15
16 "...do not attach to it controlling
17 importance."

18
19 They said in paragraph 109 that it was:

20
21 "...not strictly necessary for its
22 conclusion..."

23
24 They said in paragraph 111 that it was not
25 essential to the Tribunal's finding of a NAFTA
26 violation. They went on to say that the decree,
27 if implemented, would in their view amount to an
28 expropriation. And they said that in -- again in
29 paragraph 111. And in my submission those
30 passages make it clear that this tribunal was not
31 for jurisdictional reasons prepared to rely upon
32 the Ecological Decree to find a NAFTA violation.

33 Mr. Cowper has indicated that he takes a
34 different view of the reading of the award, and he
35 will -- he'll get to that in due course.

36 I'm going to now submit that if my reading is
37 wrong, if this was -- if the Ecological Decree was
38 essential to the tribunal's finding of a NAFTA
39 violation or a part of the tribunal's finding of a
40 NAFTA violation, then it exceeded its jurisdiction
41 in considering that Ecological Decree.

42 And in the new outline I've reminded the
43 Court that it's a cornerstone of the law of
44 arbitrations that the parties consent to it and

45 comprehend the specific issues to be resolved by
46 the arbitration. And the tribunal only has
47 jurisdiction to consider those specific issues.

Charest Reporting Inc. (604) 669-6449

1 Now, of course the import of the Ecological
2 Decree, which was passed some nine months after
3 the filing of the notice of claim and eleven
4 months after the filing of the notice of intent to
5 claim, could not have been -- was not and could
6 not have been raised in the notice of intent to
7 submit a claim.

8 In its notice of claim Metalclad asserted
9 that its investment had already been
10 expropriated. And I note in paragraph 3 that the
11 decree was not announced until September 20,
12 1997. So clearly when this arbitration was
13 commenced, the parties could not have been taken
14 to have at that time consented to the submission
15 to the tribunal of questions relating to the
16 Ecological Decree. And the question then becomes,
17 well, was Metalclad entitled to amend its claim to
18 include a new claim.

19 And Article 48 of the ICSID Arbitration
20 (Additional Facility) Rules allows for tribunals
21 to consider only additional claims if they are
22 incidental or ancillary, and that language is
23 taken from Article 48. Article 48 permits the
24 party to present an incidental or additional claim
25 or counterclaim provided the claim is within the
26 scope of the parties' arbitration agreement.

27 In paragraph 7 I've re -- and I should add, I
28 don't have direct authority on Article 48
29 interpreting Article 48. What I have is some
30 authorities interpreting the procedure in the
31 International Court of Justice in which there's no
32 direct equivalent to a rule permitting the
33 submission of additional or ancillary claims, but
34 the practice has developed of allowing that to
35 occur in certain circumstances.

36 Those cases demonstrate in paragraph 7 that
37 an incidental claim is not one that simply has
38 some factual connection or similarity to the
39 existing claim; a closer connection is required.
40 The new claim must have been implicit in the
41 original claim, or must arise directly out of the
42 question which is the subject matter of the
43 original claim.

44 And you'll find that -- that language I take

45 from the first case that is cited there which, if
46 you add it to the back of your book, would be tab
47 134. And I refer there to paragraph 67 where the

Charest Reporting Inc. (604) 669-6449

1 International Court of Justice refers to -- says
2 this:

3
4 "The Court, however, is of the view
5 that..."

6
7 And I needn't bother you with the facts
8 relating to the claim, but:

9
10 "...for the claim to the overseas assets of
11 the British phosphate commissioners to be
12 held to have been as a matter of substance
13 included in the original claim, it is not
14 sufficient that there should be links
15 between them of a general nature. An
16 additional claim must have implicit in the
17 application or must arise directly out of
18 the question which is the subject matter of
19 that application. The Court considers that
20 these criteria are not satisfied in the
21 present case."

22
23 The tribunal goes on in the next paragraph to
24 note that:

25
26 "If the new claim requires the tribunal to
27 consider new questions and evidence that
28 could not have been anticipated when the
29 original claim was presented, it's not
30 implicit in the original claim and does not
31 arise directly out of the original claim."

32
33 And in our submission any claim based upon
34 the Ecological Decree was not an incidental or
35 ancillary claim that might have been permitted
36 under Article 48 of the additional facility
37 rules. It was not implicit in the original notice
38 of claim, it -- it couldn't have been. It -- it
39 didn't happen until months later. It was
40 logically impossible for it to have been implicit
41 in that notice of claim. And it did not arise
42 directly out of it. It was a fundamentally
43 separate claim.

44 The Ecological Decree covers an area much

45 larger than the La Pedrera site. It's intended to
46 protect endemic species, cacti, in a very large
47 desert area. It's not directed at this site,

Charest Reporting Inc. (604) 669-6449

1 although this site is included within its ambit.

2 Now, had the Ecological Decree been before
3 this tribunal, the tribunal would have to consider
4 one of the things that it expressly said it didn't
5 consider: What would be its impact if
6 implemented? And there would be evidence
7 necessary to adduce -- to address the question of
8 what would its impact have been?

9 Now, you'll recall that by this time this
10 landfill is abandoned. And you would be looking
11 at a very different expropriation claim. The -- a
12 claimant would be bringing forward a claim saying
13 I have an abandoned hazardous waste landfill, and
14 this Ecological Decree expropriates it; that would
15 be the nature of the claim. That's a totally
16 different claim than the claim considered by this
17 tribunal and would lead to an examination of
18 different evidentiary issues. What was the
19 effect -- effect of the decree upon this facility?

20 And now recognizing that the -- that Mexico
21 maintained its objection to the tribunal's
22 jurisdiction to consider the ecological tree --
23 decree, and taking the position that the decree --
24 any finding of the decree by this tribunal was not
25 a basis upon which the -- the tribunal was
26 prepared to identify a violation of the NAFTA, in
27 our outline we have also gone on to just
28 demonstrate some of the issues that might arise if
29 you were dealing with that issue. And I take you
30 back to paragraph 128 of the outline.

31 Of course, there's no findings by the
32 tribunal with respect to these issues, because
33 they weren't addressing the effect of the
34 ecolog -- it's page 128.

35 THE COURT: 128.

36 MR. FOY: Paragraph 430. Because they -- they weren't
37 considering such a claim.

38 But there are some things that I can just
39 point out that were already in the record. As I
40 mentioned, the purpose of the decree was to
41 protect a species of cacti. The Convenio had
42 already had provisions in it dealing with the
43 protection of cacti. The -- in -- in the
44 negotiations with the federal authorities

45 Metalclad had already been required to make
46 provision to protect cacti, and that -- that's
47 noted in the public announcement of the Convenio.

Charest Reporting Inc. (604) 669-6449

1 And therefore it may well have been, if
2 this -- if this issue were -- were mooted, that
3 this decree would have absolutely no effect
4 because cacti were already being protected by
5 other provisions of the federal authority.

6 I also noted earlier, when taking you to the
7 document itself, the -- the decree, the provision
8 of it, that it expressly preserved any valid
9 permits.

10 Well, recall as well that this is a State
11 decree and could say nothing about federal permits
12 or municipal permits, that each of those
13 jurisdictions are autonomous and separate, and it
14 could have no effect on the federal permit or the
15 municipal permit. It was -- simply could have
16 effect on -- and purported to have no effect on
17 State permits.

18 The decree also permitted the establishment
19 of new activities provided certain things were
20 met. And I've noted that in paragraph 433.

21 And I've noted in paragraph 434 the extent of
22 the coverage of the decree. This is a -- a decree
23 covering 188,000 hectares. The total area of the
24 landfill was 800 hectares, and only 5 percent of
25 that was to be utilized. The decree was the
26 product of -- wasn't directed at this facility,
27 but was the product of a process spanning several
28 years that began with detailed studies of the
29 regional flora.

30 There were studies dating back to the '50s in
31 support of this decree, and more significant ones
32 performed since the '90s. Those studies concluded
33 that this region was the place with the highest
34 concentration of cacti species in the world,
35 including several threatened species.

36 Now, the -- leaving aside the effect -- the
37 legal effect of the decree, which was not known,
38 because it had not been implemented in respect of
39 an abandoned site, but that would be an inquiry,
40 there might also be an inquiry with respect to the
41 statements that had -- that had been made by the
42 governor or alleged to have been made by the
43 governor at the time of the promulgation of the
44 decree. And press statements were alleged to have

45 been made that indicated it was his view that this
46 would interfere with the operation of Metalclad's
47 proposal of a hazardous waste landfill. Even if

Charest Reporting Inc. (604) 669-6449

1 that were the case, it may be that it would not
2 have interfered with the operation of a
3 non-hazardous waste landfill as the municipality
4 was prepared to allow.

5 Again, that would have to be an issue that
6 would be mooted during the course of determining
7 whether it had been implemented or its effect on
8 implementation. That hadn't happened because
9 Metalclad had, nine months before the decree was
10 promulgated, already brought this claim asserting
11 that its investment had been expropriated.

12 Lastly, of course there would be a completely
13 different damages calculation if you're dealing
14 with the -- this completely different case. The
15 effect of the decree on an abandoned landfill may
16 be something diff -- and the damages caused
17 thereby might be something quite different than
18 the damages calculated by this tribunal, none of
19 which was dealt with by the tribunal in my view
20 because the tribunal was, for jurisdictional
21 reasons, not prepared to base its decision of any
22 violation of the NAFTA upon the Ecological
23 Decree.

24 And returning to the first point made, I
25 think the tribunal was wise in that regard,
26 because in my submission such a claim would not be
27 incidental or ancillary or arising out of the
28 original subject matter of this complaint -- of
29 this claim. And it would have been an excess of
30 jurisdiction for them to consider -- consider
31 the -- the Ecological Decree in that respect.

32 THE COURT: You've been using the phrase that -- it's
33 somewhat different from what's quoted in the -- in
34 your outline. You've been using the phrase
35 "incidental or ancillary."

36 MR. FOY: Yes.

37 THE COURT: But the words in paragraph 6 of your --

38 MR. FOY: Or additional.

39 THE COURT: -- of your supplementary is "or
40 additional."

41 MR. FOY: Hum?

42 MR. COWPER: It says "additional."

43 MR. FOY: Yes, My Lord. It's also entitled "Ancillary
44 Claims."

45
46
47

"Except if the parties otherwise agree, a party may present an incidental or

Charest Reporting Inc. (604) 669-6449

1 additional claim or counterclaim..."

2

3 That's what's quoted in paragraph 6 of my
4 materials.

5

6 "...provided that such ancillary claim is
7 within the scope of the arbitration
8 agreement of the parties."

9

10 And in my submission the authorities
11 identifying ancillary claims -- and I have none
12 with respect to Article 48 precisely, as I
13 mentioned -- have interpreted that as set out in
14 paragraph 7.

15 Those are the submissions of the petitioner,
16 the United Mexican States. I don't propose to --
17 to attempt to sum them up in -- in a short
18 fashion. I leave them with Your Lordship.

19 THE COURT: Thank you, Mr. Foy.

20 I understand now that we're going to be
21 hearing from you, Mr. de Pencier.

22 MR. de PENCIER: Yes. Thank you, My Lord.

23 If I might just say at the outset I am asking
24 you to end the morning session now. I'll tell you
25 the reason.

26 My books of authorities have been running
27 around the country since Tuesday night. They've
28 only just been located, I gather, in the banquet
29 and catering facility of my hotel. How they got
30 there, it's not clear. I haven't seen them yet.

31 I'd like the opportunity to go and recover
32 them so I can give them to you and to my friends.
33 And I would ask that we end the morning now, and
34 come back at 1 o'clock, and therefore have the
35 same break as you've been taking this week. And I
36 have no doubt that I'll be able to finish in just
37 over an hour.

38 THE COURT: Um-hum. I was going to raise with you
39 again, Mr. Cowper, as to whether you wished to
40 start today.

41 The matter that I had this morning completed
42 this morning. In any event, I'd misunderstood
43 what the registrar had said yesterday. They were
44 not looking for extra time this afternoon. And I

45 should also apologize to your partner, that it had
46 nothing to do with your partner, although he did
47 appear this morning.

Charest Reporting Inc. (604) 669-6449

1 I take it though that your preference --
2 although you are eager to begin, as you've told
3 me, your preference is that you would be eager to
4 begin on Monday.

5 MR. COWPER: No. My preference would be to do it
6 today, if -- if Your Lordship has time, and to
7 start today. But the only thing I'm conscious
8 of -- of is that Your Lordship has heard a great
9 deal in the week. But if Your Lordship's ready to
10 hear me, I'm quite ready to start. I -- I -- I
11 mean that.

12 I could use a -- an hour usefully but I'm
13 also eager and willing to start on Monday. I'm
14 really completely in your hands. I could use an
15 hour to deal with the outline of my submissions,
16 and that might be a useful time spent. But as I
17 said, our -- I'm saying this, and Mr. Parrish is
18 thinking about the photocopier that's whirring
19 somewhere in the downtown core.

20 But I think I could use the time usefully if
21 Your Lordship is still so minded. But I also
22 am -- am -- am very happy -- I'm content to say we
23 have lots of time for our submissions next week.
24 If Your Lordship wants to hear an outline of where
25 I'm going, I'm -- I would enjoy and like to take
26 advantage of that opportunity.

27 THE COURT: Um-hum. I -- I think that would be
28 useful. I think if I had an outline, it would
29 assist me in -- in reviewing your more detailed
30 submissions when I peruse them over the weekend.

31 You've made a reference to a photocopier
32 whirring away. I wonder if -- if realistically
33 what we should do is adjourn now for lunch but
34 just reconvene at 2 o'clock.

35 We can hear Mr. de Pencier for slightly over
36 a hour, and then in the remaining time you could
37 then provide your outline.

38 MR. COWPER: Yes, that would be fine.

39 Thank you, My Lord.

40 MR. de PENCIER: Thank you, sir.

41 THE COURT: We'll reconvene at 2 o'clock.

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

44

45 (NOON RECESS)
46 (PROCEEDINGS ADJOURNED AT 11:44 A.M.)
47 (PROCEEDINGS RESUMED AT 2:00 P.M.)

Charest Reporting Inc. (604) 669-6449

1

2 THE COURT: Yes, Mr. Foy.

3 MR. FOY: My Lord, I've handed up to you the answers

4 to your questions and Mr. Cowper's questions with

5 respect to the situation if it is determined that

6 some of the issues are not jurisdictional, and

7 I'll leave that with you. It would be properly

8 inserted just before the start of Chapter 14.

9 THE COURT: Yes, Mr. de Pencier.

10 MR. de PENCIER: I'll try and do this without

11 electrocuting myself, My Lord.

12 Could I hand these up, please?

13 My Lord, I will be referring to the Attorney

14 General's outline of argument, of course. I will

15 be referring to the award of the tribunal. And I

16 will refer you several times, and only several

17 times, to the two volumes of authorities that I've

18 just handed up.

19 My Lord, the Attorney General's oral

20 submissions will emphasize four points made in the

21 outline, the first, that the architecture of NAFTA

22 Chapter 11 and other provisions of the NAFTA

23 are -- distinguishes Chapter 11 arbitration from

24 private commercial arbitration, a matter that is

25 directly related to the appropriate standard of

26 review, among other issues that have arisen here.

27 The second submission is that you should

28 employ the Supreme Court of Canada's pragmatic and

29 functional approach in determining the appropriate

30 standard of review and not simply apply

31 authorities in cases of private commercial

32 arbitration.

33 The third submission is that the tribunal

34 exceeded its jurisdiction by interpreting NAFTA

35 Article 1105 to give it content or coverage based

36 on other NAFTA provisions while at the same time

37 ignoring the well-known body of international

38 customary law which establishes both the type and

39 the magnitude of government action that the

40 minimum standard of treatment properly proscribes.

41 And fourthly, I will submit that the tribunal

42 exceeded its jurisdiction in interpreting portions

43 of NAFTA Article 1110 concerning indirect

44 expropriation or measures tantamount to

45 expropriation.
46 Otherwise, sir, I will let the written
47 outline speak for itself, and I won't elaborate

Charest Reporting Inc. (604) 669-6449

1 further on other points made in it.

2 My Lord, you will have noted that Canada's
3 submission was structured by reference to the
4 amended petition filed by Mexico and to Mexico's
5 outline of argument, particularly in the absence
6 of the respondent having joined the issues. And
7 particularly in Part 4 of the Attorney General's
8 outline, the position on the basis for relief that
9 have been advanced by Mexico, the Attorney General
10 summarizes Mexico's legal position on six issues
11 of interpretation and agrees with or elaborates on
12 those positions.

13 In doing so, the outline really for
14 convenience cites portions of the Mexican
15 outline. This was done to avoid undue
16 repetition. And frankly, it was done for my own
17 benefit and those of my colleagues as we attempted
18 to digest a very comprehensive outline which
19 Mexico filed.

20 The citations of Mexico's brief were not made
21 to engage in the argument between the parties on
22 the factual disputes that relate to these six
23 issues, these six interpretive issues. But I
24 should say that in view -- or to the extent that
25 the tribunal's interpretive errors do depend on
26 its view and its findings about the facts, that
27 Canada does not accept the tribunal's views and
28 findings, but I will say no more on that.

29 THE COURT: Say that again.

30 MR. de PENCIER: Sir, to the extent that the
31 tribunal's interpretations or misinterpretations,
32 as I would put it, do depend on its findings of
33 fact and its view of the facts, Canada does not
34 accept the tribunal's view and findings.

35 THE COURT: Because you don't -- you don't accept
36 their interpretation.

37 MR. de PENCIER: That's right. And often, sir, as you
38 will have seen, the questions of interpretation
39 and the tribunal's view of the facts are closely
40 interwoven. To the extent possible we've -- we
41 try and separate the two, and I will try and
42 separate the two and concentrate strictly on
43 questions of interpretation on the law. But the
44 fact is it's -- it -- the two cannot be

45 hermetically divided. But, as I say, I will say
46 no more about the findings of fact of the
47 tribunal.

Charest Reporting Inc. (604) 669-6449

1 Sir, the first issue that the Attorney
2 General addresses is the characterization of NAFTA
3 Chapter 11 dispute settlement. Now, Mr. Cowper
4 has expressed some concern to me about the
5 Attorney General's submissions on this question
6 given that she takes no position on the question
7 of which British Columbia arbi -- arbitration
8 statute applies.

9 I make two responses, sir, that first of all
10 and primarily Canada is a party to this agreement,
11 and it is entirely appropriate for Canada as a
12 party to make submissions and to take a position
13 on something -- on -- on the proper
14 characterization of its agreement. And indeed I
15 would say it would be surprising if Canada did not
16 make its position clear on something so
17 fundamental.

18 Secondly, as the outline makes clear, the
19 primary purpose of the Attorney General's
20 submissions on -- on this point are related to
21 the -- the primary purpose is to go to the
22 appropriate standard of review, and that is
23 something that -- that the Attorney General can
24 speak to you on, clearly. But this
25 characterization does have implication for other
26 issues that have arisen in this proceeding.

27 For example, it is because Chapter 11
28 proceedings are about public measures and of
29 interest to more than just the disputing parties
30 in a -- in a private commercial arbitration that
31 Canada submits that Chapter 11 tribunals have to
32 be particularly scrupulous in their consideration
33 of and recital of the evidence they consider. The
34 proper characterization of Chapter 11 proceedings
35 has already been reflected in positions in this
36 court concerning the applications to intervene and
37 on public access and transparency of the
38 proceedings.

39 And I would say that any reflection of the
40 Attorney General's submissions on this issue --
41 any reflection on the choice of B.C. arbitration
42 statute is merely incidental. And again, I remind
43 you that we've taken no position on that
44 question.

45 Sir, the first point then is this issue:
46 What does distinguish Chapter 11 arbitration from
47 private commercial arbitration?

Charest Reporting Inc. (604) 669-6449

1 You may recall that on the second morning
2 Mexico argued that Metalclad -- the -- the
3 relationship between itself and Metalclad was
4 fundamentally one of a regulator and a regulatee --
5 and regulatee or a regulated entity. And the
6 Attorney General agrees with that characterization
7 and says that in fact this is the type of
8 relationship which is primarily captured by
9 Chapter 11.

10 Sir, I'd ask you to turn to Article 1101.
11 1101, as you know, is the scope and coverage
12 article of Chapter 11, and it begins:

13
14 "This chapter applies to measures adopted
15 or maintained by a party relating to, (a),
16 investors of another party; (b),
17 investments of investors of another party
18 in the territory of the party; and, (c)..."
19

20 Goes on dealing with articles at that are not
21 at issue here.

22 The important point, sir, is that Chapter 11
23 is concerned with measures. Now, you've been
24 taken to the definition of measures before, but
25 I'd like to take you back to it. And it's found
26 in Article 201, and that's at the bottom of page
27 2-1. And the definition of measures includes any
28 law, regulation, procedure, requirement or
29 practice.

30 Sir, this definition is intended to -- to
31 capture government exercising its legislative, its
32 regulatory, its administrative powers. And
33 therefore, when thinking about the primary purpose
34 or the fundamental character of Chapter 11, it is
35 not the type of activity of the NAFTA investor, be
36 it a -- a -- relating to a contract, relating to a
37 real estate investment, relating to a concession
38 agreement, relating to a construction project,
39 it's not that type of activity or the mere fact
40 that an investor is actually engaged in one -- in
41 such an activity in a party's territory. That's
42 not the point. It is the adoption or maintenance
43 as Article 1101 tells us. It is the adoption or
44 maintenance by a government of a government

45 measure relating to the investor and its
46 investment that gives rise to Chapter 11
47 arbitration.

Charest Reporting Inc. (604) 669-6449

1 The fact that Chapter 11 arbitration deals
2 with public measures, such as those that regulate
3 an investor and its investment, is emphasized by
4 other provisions in Chapter 11 and other portions
5 of the NAFTA that place caveats or -- or
6 exclusions on the scope and application of
7 Chapter 11.

8 And if I could take you back to 1103, sir,
9 you'll note in 110 -- excuse me, 1101, I
10 apologize.

11 1101(3) points out that Chapter 11 does not
12 apply to measures adopted or maintained by a party
13 to the extent they are covered by the financial
14 services chapter.

15 1101(4) points out that the chapter is not to
16 be construed to prevent a party from providing a
17 whole series of -- of public services or public
18 functions.

19 Sir, Article 1111, several pages over, deals
20 with -- the title is "Special Formalities and
21 Information Requirements." And again, it talks
22 about the sorts of legal or regulatory or
23 administrative activities of government with
24 respect to the -- the formalities of the
25 establishment of investments, their legal
26 constitution under the laws of the NAFTA party
27 governing the territory in question.

28 In 1111(2), the requirement about the routine
29 provision of information and the recognition that
30 it's a -- certainly one that we know of in Canada
31 that nevertheless confidential business
32 information always has to be protected when
33 information is collected by government.

34 And, as you may know, federal legislation
35 such as the Income Tax Act or the Customs Act,
36 which requires individuals and companies and other
37 entities to provide information, includes
38 safeguards to ensure that the information that is
39 collected is treated in an appropriately
40 confidential fashion.

41 Sir, I believe you've seen reference to
42 Article 1114, which indicates in sub (1):

43
44 "Nothing in this chapter shall be

45 construed to prevent a party from adopting,
46 maintaining or enforcing any measure
47 otherwise consistent with this chapter that

Charest Reporting Inc. (604) 669-6449

1 it considers appropriate to ensure that
2 investment activity in its territory is
3 undertaken in a manner sensitive to
4 environmental concerns."

5
6 And the second article, again that
7 governments shouldn't take measures that might
8 encourage investment by relaxing health, safety or
9 environmental measures.

10 I won't take you to it, sir, but another
11 example in Chapter 21, there's a -- a large
12 carve-out, if I might call it that, of taxation
13 measures.

14 And therefore, when you see the combined
15 effect of all these sections, it's very clear that
16 what Chapter 11 is aiming at, it is aiming at the
17 operation of a government as a government, not the
18 operation of the government as a player in any
19 particular commercial marketplace. And that's the
20 heart of Chapter 11.

21 Sir, in the Attorney General's outline in
22 paragraph -- paragraphs 8 through 16 there are a
23 series of submissions that point out to you some
24 of the distinctions that exist between Chapter 11
25 arbitration and private commercial arbitration.

26 And there -- they represent a -- a wide
27 variety of provisions of the NAFTA, provisions
28 that permit the conv -- the parties to the treaty,
29 to have a role in particular Chapter 11 disputes,
30 even when they have no direct "commercial"
31 interest in the matters, provisions that provide
32 some public access to the proceedings.

33 And I note, and I won't take you to them, the
34 review of decisions of at least three Chapter 11
35 tribunals that have recognized this, that there is
36 a -- there is a -- a public character to these
37 proceedings that answers or belies any suggestion
38 that the usual cloak of confidentiality, which one
39 would find in a private commercial arbitration, of
40 necessity applies.

41 We've noted in paragraph 15 that in one case
42 non-parties have participated in a Chapter 11
43 arbitration. And I say "non-parties" with both a
44 small P and a capital P. The capital P parties of

45 course being the parties to the NAFTA itself.
46 And this is the Methanex case where the
47 tribunal received and considered petitions from

Charest Reporting Inc. (604) 669-6449

1 four non-governmental organizations. That in
2 itself was an act of allowing non-parties to
3 participate. And then it decided that it had the
4 authority to receive what have been described as
5 amicus submissions from such parties.

6 Now, the tribunal -- as we've indicated in
7 the material, the tribunal did not decide to
8 actually receive submissions from those parties.
9 It deferred that decision to later in the
10 proceedings. This issue arose very early in the
11 Mex -- in the Methanex case. But again, it's
12 another indication of how different Chapter 11
13 proceedings are from private commercial
14 arbitration as -- as it is well established.

15 And finally, sir, we point out that the NAFTA
16 itself in Article 2022 and in annex 2001.2(8)
17 deals specifically with private international
18 commercial arbitration.

19 And you may recall the Lysyk article that was
20 cited to you by Mexico in one of the early days of
21 the hearing. It's at tab 113 of Mexico's
22 authorities. I won't ask you to turn to it. But
23 you may recall that it begins its discussion of
24 developments in private commercial arbitration
25 with a review of Article 2022, goes through
26 developments in various jurisdictions, cases.
27 There's not one mention of Chapter 11 in that
28 article.

29 In summary, sir, Chapter 11 arbitration is a
30 special sort of a beast.

31 And this takes me to the second submission on
32 the standard of review. This is covered in the
33 Attorney General's outline in paragraphs 17
34 through 30. And the Attorney General submits that
35 the pragmatic and functional approach of the
36 Supreme Court of Canada to determining the
37 standard of review of inferior bodies ought to be
38 applied by this Court.

39 Sir, Chapter 11 tribunals must consider
40 disputes arising from the application of
41 government measures just as administrative
42 tribunals consider disputes arising from the
43 application to particular -- the application of
44 particular laws or regulations or of

45 administrative action to regulated individuals or
46 entities.
47 Therefore, what this Court, I submit, is

Charest Reporting Inc. (604) 669-6449

1 doing or is engaged in on an application to set
2 aside a Chapter 11 award is far more like judicial
3 review of administrative action than it is the
4 review of contractual interpretation as is
5 typically the case where the decision about
6 private commercial arbitrator is taken to the
7 Court.

8 The pragmatic and functional approach to
9 setting the standard of review for administrative
10 action is a principled approach. And it's
11 designed to accommodate almost an infinite variety
12 of circumstances. Indeed the Supreme Court of
13 Canada seems to take an infinite number of
14 opportunities to -- to come back to the subject.
15 This is sometimes very difficult to keep abreast
16 of.

17 But, sir, Chapter 11 cases can involve the
18 full range of government measures, and they can
19 involve investment which, as you know, is defined
20 extremely broadly in 1139, in NAFTA Article 1139.
21 And the Attorney General submits that the
22 practical and functional approach is best suited
23 to respond to all the possible circumstances that
24 can arise on an application of this sort.

25 Sir, the submission goes on to urge you in
26 applying the pragmatic and functional approach, it
27 urges you not to accord enormous deference to this
28 tribunal. And in paragraphs 25 and 26 and 27 of
29 the outline the Attorney General notes features of
30 Chapter 11 tribunals that support this
31 conclusion.

32 And I would ask that you turn to page 11 of
33 the submission. And if I might just summarize,
34 sir, in paragraph 25, in the middle of the
35 paragraph, we point out that Chapter 11 tribunals
36 are currently appointed ad hoc and for single
37 cases, but there is no Chapter 11 secretariat or
38 in-house specialists or other institutional
39 hallmark of expertise or special authority.

40 In paragraph 26 we point out that Chapter 11
41 tribunals are not protected by a privative
42 clause. Of course Article 1136(1) provides that
43 the awards of Chapter 11 tribunals, quote:
44

45 "...shall have no binding force except
46 between the disputing parties and in
47 respect of the particular case."

Charest Reporting Inc. (604) 669-6449

1

2 So there is something of a -- of a finality
3 clause at the very least.

4 The same article goes on to specifically
5 allow for awards to be revised and annulled or to
6 be set aside, and provides a time period for
7 disputing parties to seek annulment or set-aside.

8 At the end of that paragraph we note that
9 tribunals can also be subject to binding
10 interpretations of provisions of the NAFTA by the
11 commission which is the -- comprised of the
12 parties' trade Ministers. And this is found in
13 Article 1131(2), another indication that the
14 tribunals are not necessarily to be left alone in
15 their work and are to -- are -- they're able to be
16 scrutinized closely by a -- from a variety of
17 points of view and by a variety of bodies.

18 In paragraph 27 we note the limits on the
19 authority of Chapter 11 tribunals. They only have
20 the power to make an award of monetary damages or
21 restitution. And their authority to order interim
22 measures of protection is likewise limited. And
23 that's found in Articles 1135 and 1134.

24 It's quite clear from Article 1121 that these
25 tribunals cannot strike down an impugned measure
26 or issue any form of injunctive, declaratory or
27 other extraordinary relief.

28 So, sir, these are the sorts of factors that
29 when one applies the pragmatic and functional
30 approach are indices that a high degree of
31 deference is not -- is not due to these tribunals.

32 Sir, I'd then move to the minimum standard of
33 treatment, and this is dealt with in our outline
34 at paragraph 31 through 64.

35 And as you have read from our outline, the
36 Attorney General says that the tribunal, that
37 it -- it got the context and object and purpose of
38 1105 wrong, and it got the coverage or the content
39 of 1105 wrong.

40 Now, I don't think there's any dispute about
41 the applicable rules for interpreting the NAFTA.
42 Mexico has referred to them. I know Mr. Cowper's
43 material is referring to them. There's a brief
44 review of them in paragraphs 34 to 42 of the

45 Attorney General's outline.
46 Perhaps the -- the central rule, and it flows
47 from Article 31 of the Vienna Convention, is

Charest Reporting Inc. (604) 669-6449

1 summarized in paragraph 34 of the Attorney
2 General's outline, that the -- there is an
3 obligation to interpret the NAFTA in good faith in
4 accordance with the ordinary meaning to be given
5 to the terms of the treaty in their context and in
6 light of the treaty's object and purpose.

7 Now, sir, our first submission is that in its
8 approach to 1105 the treaty failed to understand
9 the context and object and purpose of the
10 agreement. And I would ask, sir, that you turn to
11 the award, please. And paragraphs 70 and 71 are
12 the portion of the award -- the award under the
13 heading "Applicable Law."

14 And in these two paragraphs the tribunal
15 isolates one particular objective of the NAFTA as
16 set out in Article 102(1) and one portion of the
17 NAFTA's lengthy and complex preamble. It isolates
18 them. It singles them out. There is no
19 acknowledgment of the other objectives or the
20 other preambular recitals of the -- of the
21 parties. And this is -- this leads -- this is the
22 first step of the tribunal down the wrong road.

23 Now, concerning the NAFTA objective in
24 question, Mexico has also pointed out that the
25 tribunal understa -- or misunderstands, excuse me,
26 this isolated objective. And this is the -- the
27 portion of Article 102(1)(c), and if I could ask
28 you to turn to that, sir, because I'm going to
29 refer to sub (c) and to the chapeau, the initial
30 wording of sub (1) as well.

31 Article 102(1):

32
33 "The objectives of this agreement as
34 elaborated more specifically through its
35 principles and rules, including national
36 treatment, most-favoured-nation treatment
37 and transparency, are to: (c) increase
38 substantially investment opportunities in
39 the territories of the parties."
40

41 Well, that's what the objective says. But
42 the paragraph -- or the -- the tribunal in its
43 award in paragraph 75 tacks on to that, and -- and
44 if I can quote from the award:

45
46 "...and ensure the successful
47 implementation of investment initiatives."

Charest Reporting Inc. (604) 669-6449

1

2 An objective that does not exist in the text
3 of the NAFTA.

4 So the tribunal's wrong already in its
5 understanding. It's -- it's misunderstood this
6 objective. But it's also wrong when it attributes
7 to this article of the NAFTA a transparency
8 objective. And if I could take you to paragraph
9 70 of the award, at the bottom of page 23, the
10 second sentence, the third line of the paragraph
11 begins:

12

13 "In addition, NAFTA Article 102(2) provides
14 that the agreement must be interpreted and
15 applied in light of its stated objectives
16 and in accordance with applicable rules of
17 international law. These objectives
18 specifically include transparency and the
19 substantial increase in investment
20 opportunities in the territories of the
21 parties, NAFTA Article 102(1)(c)."

22

23 Well, sir, 102(1)(c) makes no mention of
24 transparency. And even the chapeau of 102(1)
25 distinguishes between the objectives which are
26 listed in the sub-articles and principles and
27 rules, which included national treatment,
28 most-favoured-nation treatment and transparency.
29 In other words, transparency is not an objective
30 in 102(1). Transparency, national treatment,
31 MFN -- most-favoured-national treatment, excuse
32 me -- are examples of principles and rules by
33 which the text of the agreement is to elaborate
34 the objectives set out in the list below.

35

36 So it's for the text of the NAFTA, the text
37 on national treatment obligations, on
38 most-favoured-nation obligations, on transparency
39 obligations, on other obligations to elaborate or
40 give effect to the NAFTA's objectives. It's for
41 the parties to agree on the text of these
42 principles or rules, national treatment,
43 most-favoured-nation treatment, transparency
44 obligations, as examples, as well as other
principles and rules. It is not for a Chapter 11

45 tribunal to join the parties at the drafting table
46 by adding new obligations because they feel that
47 there are some additional objectives in the NAFTA,

Charest Reporting Inc. (604) 669-6449

1 and to try and join the parties some years after
2 the negotiation was completed.

3 So the tribunal misunderstood Article 102(1)
4 in at least -- in at least two fundamental ways.

5 Sir, the Attorney General's outline in
6 paragraphs 42 and 46 then deal with the preambular
7 resolution in question, the one that is isolated
8 or mentioned by the tribunal in paragraph 71.

9 And we say that in interpreting the NAFTA the
10 tribunal ought to have had recourse to the entire
11 preamble, that there are other provisions of that
12 preamble which have obvious pertinence to this
13 case and which were apparently ignored by the
14 tribunal.

15 And paragraphs 43 and 45 of the Attorney
16 General's outline point several of those out to
17 you; 43 begins a -- on the bottom of page 15. And
18 it notes that there are 15, a total of 15
19 preambular statements. The tribunal considered
20 one. And there's several others, at least three
21 others, for example, that have clear application
22 in this case that the tribunal had no regard for
23 in its interpretive approach, the resolution that
24 the parties through their agreement, their resolve
25 to -- to put in a free trade area in a manner
26 consistent with environmental protection and
27 conservation, their resolve to promote sustainable
28 development, their resolve to strengthen the
29 development and -- and enforcement of
30 environmental laws and regulations, and down in
31 paragraph 45, their resolve to preserve their
32 flexibility to safeguard the public welfare.

33 Sir, had the tribunal taken a balanced
34 approach, had it considered the entire tribunal as
35 part of the context of the NAFTA and in
36 interpreting the provisions of the NAFTA, it's our
37 submission that it would have come to a different
38 result.

39 So in -- in summary, the -- the tribunal
40 interpreted NAFTA 1105 to include a transparency
41 obligation based on a demonstrably faulty and
42 incomplete understanding of the context, the
43 object and purpose of the agreement.

44 The outline, sir, then turns to the

45 question: Well, what is the content of 1105 as
46 opposed to what it isn't? And the point has been
47 made several times to you that -- that the content

Charest Reporting Inc. (604) 669-6449

1 of 1105 comes from customary international law.

2 Now, Mr. Foy reviewed this with you this
3 morning, and I won't repeat what he says. But I
4 do adopt the analysis he put to you.

5 There was some -- there's been some
6 reference, sir, and I'll -- I'll just add this
7 discrete point: There has been some reference to
8 you on this point to the Canadian statement on
9 implementation, and a portion of that is found at
10 tab 72 of Mexico's authorities. And this is
11 the -- the provision you recall or the portion
12 that describes 1105 and its source in customary
13 international law.

14 I thought it might be of assistance, sir,
15 just to bring your attention -- I'll pass these to
16 my friends as well -- sir, these are additional
17 extracts from that statement of -- on
18 implementation, just to give you some context and
19 perhaps to an -- anticipate a question that you
20 might ask or someone might ask: Well, what
21 exactly is a statement on implementation? What --
22 what value does it have to the Court?

23 And I would just like to take you and -- to
24 the introduction on the first page of the
25 extract. This statement on implementation for the
26 NAFTA sets out the government of Canada's general
27 approach to trade policy in the 1990s, the role of
28 the NAFTA in that context. And this is what I
29 would emphasize:

30
31 "The government's interpretation of the
32 rights and obligations contained within the
33 agreement and reflected in the NAFTA
34 Implementation Act of 1993, and the
35 specific goals and measures the government
36 will pursue to ensure that Canadians will
37 benefit to the maximum extent possible from
38 Canada's participation in the NAFTA."
39

40 So we're told here, sir, that this is a
41 statement of the government's interpretation of
42 the rights and obligations contained in its
43 agreement.

44 And the second page of that extract, sir,

45 is -- is about six pages on, and it's the end of
46 the introductory part of the statement. The last
47 section is entitled "Purpose of Statement on

Charest Reporting Inc. (604) 669-6449

1 Implementation." And I'd just point out the first
2 paragraph:

3
4 "The pages that follow set out in concise
5 form the government's understanding of the
6 rights and obligations set out in the
7 NAFTA. For each chapter the statement sets
8 out what the agreement says, how Canada has
9 implemented the agreement in domestic law,
10 and what other actions the government will
11 undertake to ensure that Canadians will
12 benefit from the agreement."
13

14 So on this discrete point, sir, that -- that
15 is how Canada describes this statement. This
16 statement is not a law. It is not a regulation.
17 I'm not aware that it has been interpreted by a
18 Court in this country. But nonetheless it is
19 Canada's understanding and Canada's interpretation
20 of its agreement at the time the agreement was
21 implemented, and therefore should be of some
22 assistance to the Court in understanding what the
23 NAFTA obligations are and what they mean.

24 Now, sir, Mr. Foy this morning reviewed with
25 you some of the cases from customary international
26 law and some of the scholarly writings on the
27 minimum standard of treatment or that relate to
28 the NAFTA's formulation minimum standard of
29 treatment. And he pointed out with respect to one
30 or two cases how the circumstances in those cases
31 is so different from the circumstances here. And
32 in paragraphs 51 through 54 of the Attorney
33 General's outline, a number -- some of the cases
34 Mr. Foy referred to and others are referred to.

35 And if I might just summarize how the facts
36 in those cases where breaches of international
37 norms have been found seem to stand in stark
38 contrast to what is described in the tribunal's
39 award.

40 Sir, Metalclad's property was not destroyed
41 in the case of a battle between government and
42 guerillas, as was the case in the Asian
43 Agricultural Products case, which is mentioned in
44 paragraph 54 of the outline, and a copy of which

45 is at tab 31 of Canada's authorities.
46 Metalclad's property was not looted and
47 destroyed by government troops, as in American

Charest Reporting Inc. (604) 669-6449

1 Manufacturing and Trading Inc., which is referred
2 to in paragraph 56 of Canada's outline, and
3 there's a copy at tab 32 of the authorities.

4 Ownership and control of Metalclad's property
5 was not taken by government, as was the case in
6 Amco, which is reviewed at paragraph 53 of the
7 outline, and a copy is at tab 29 of the
8 authorities.

9 Metalclad's employees were not taken hostage,
10 as in the case concerning U.S. diplomatic staff
11 and consular staff. This is paragraph 53 in tab
12 30.

13 They were not arbitrarily or illegally
14 arrested and detained for 19 months before being
15 given a hearing, as in the Roberts case, paragraph
16 51, tab 26.

17 They weren't arrested without being informed
18 of the charge and suffering gross mistreatment
19 while in custody, as in the Way case which is
20 paragraph 51, tab 27, or the Faulkner case,
21 paragraph 51, tab 23.

22 There was no grave irregularity in court
23 proceedings, no undue delay in commencing court
24 proceedings against Metalclad, and no
25 intentionally severe sentence, as in the Chatten
26 case, which is reviewed at paragraph 51 and copies
27 at tab 25.

28 Sir, as the authors cited by Canada in
29 paragraphs 60, 61 and 62 of the outline note,
30 actions that breach minimum international
31 standards are actions that are egregious. They're
32 extreme. They're flagrant. They're gross.

33 Now, the Metalclad tribunal took no
34 cognizance of these established norms. Instead,
35 it exceeded its jurisdiction by creating a
36 transparency obligation under the rubric of 1105,
37 an obligation the parties did not negotiate, and
38 by imposing a duty on NAFTA parties to clarify
39 legal or regulatory uncertainty that does not
40 exist in the NAFTA.

41 Sir, I turn then to expropriation, the fourth
42 point. It's covered briefly in the outline at
43 paragraphs 65 to 67.

44 Sir, the outline submits that the tribunal

45 exceeded its jurisdiction by failing to
46 distinguish between interference, which is not
47 compensable, and expropriation, which is. By the

Charest Reporting Inc. (604) 669-6449

1 merging -- or the merging of the two is in effect
2 a rewriting of the NAFTA obligation.

3 Had the NAFTA parties wanted their
4 expropriation article to extend to mere
5 interference with property rights, they would have
6 so provided. And you've been referred, sir, to
7 the Algiers Declaration which established the
8 Iran-U.S. Claims Tribunal and the different
9 approach and the more expansive approach it took
10 on just this matter.

11 The tribunal offers no textual analysis. It
12 offers no reference to authority. It offers no
13 interpretive principle to explain its findings of
14 how interference with property rights is
15 expropriation of authority. It merely leaps to a
16 conclusion in our submission. And for that
17 reason, sir, its findings on indirect
18 expropriation and on measures tantamount to
19 expropriation are -- are -- are unconvincing and
20 cannot stand.

21 Sir, those are the submissions of the
22 Attorney General of Canada. Thank you very much.

23 THE COURT: Thank you, Mr. de Pencier.

24 It would probably be more convenient if we
25 took a break before you begin, Mr. Cowper.

26 We'll take the afternoon break.

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

29

30 (AFTERNOON RECESS)

31 (PROCEEDINGS ADJOURNED AT 2:48 P.M.)

32 (PROCEEDINGS RESUMED AT 3:00 P.M.)

33

34 THE COURT: Yes, Mr. Cowper.

35 MR. COWPER: Thank you, My Lord.

36 The -- the delivery van was scheduled to
37 arrive at the 3 o'clock break, so it's coming.
38 But we took a little bit of an early break, and
39 I'd like to start if I may.

40 And let me say at the outset that with
41 respect to what I intend to deal with between now
42 and at the break, I'll come back to each of these
43 points in greater detail next week. And so I
44 don't think you need to be too concerned about

45 either making notes or -- or -- or the precision
46 of what I have to say. I'm really intending to
47 introduce you to the position of Metalclad as a

Charest Reporting Inc. (604) 669-6449

1 whole. And I'm going to try this afternoon to
2 focus on what in my submission this case is and
3 should truly be about. Okay?

4 So in general let me say at the outset, as
5 Your Lordship knows, it's our submission that the
6 international act clearly applies, that the
7 international act provides statutory guidance to
8 your Lord -- to Your Lordship with respect to the
9 review of this award, and that that's governing,
10 and that the Court of Appeal's judgment in
11 Quintette is a binding authority on the
12 interpretation of the statute.

13 So with respect to the first substantial
14 issue, I take issue with both the general
15 characterization of the jurisdiction invoked for,
16 I guess, most of this week by my friend, and I
17 also take issue with the application of domestic
18 standards of review as they have been developed on
19 review from administrative tribunals in Canada. I
20 say that within the international act you find
21 both your jurisdiction and the limitations on that
22 jurisdiction.

23 With respect to the issue of interpretation
24 and whether the Commercial Arbitration Act applies
25 or the international act applies, Mr. Alvarez next
26 week will give you a very thorough and
27 comprehensive presentation based upon the argument
28 which was filed last week. But let me, if I may,
29 this afternoon try to deal with what I think is a
30 very short means of assessing the overall
31 landscape of that issue.

32 Chapter 11 firstly creates a privately
33 enforceable right on the part of an investor
34 against a State party for the violations of the
35 standards of investor protection embodied in the
36 substantive protections of that Chapter.

37 In this case the central issues were fair and
38 equitable treatment and compensation for
39 expropriation.

40 This is a trilateral investment treaty.
41 Within the treaty itself the disputes are termed
42 "investment disputes." That's how they're
43 called, and the procedure that's set out for the
44 determination of them is for the determination and

45 enforcement of awards arising out of investment
46 disputes.
47 Now, the treaty in this case constitutes both

Charest Reporting Inc. (604) 669-6449

1 the agreement to arbitration and the waiver of
2 sovereign immunity that would otherwise apply.
3 It's not the case that Mexico's submission to
4 arbitration is found in its domestic law. In
5 other words, it isn't the case that Mexico passed
6 a statute saying you can take us to arbitration in
7 respect of investment disputes, rather the
8 relationship between this investor and Mexico's
9 created by the treaty itself. And the mechanism
10 for the resolution of that dispute, which is to be
11 resolved in accordance with the treaty, is
12 stipulated by the treaty and the rules which were
13 made available to the investor and the parties
14 under the treaty.

15 For the purpose of my present point though,
16 the treaty offers to those investors three
17 arbitral regimes for the administration of what it
18 terms "an investment dispute." All three regimes
19 are generally in place to adjudicate international
20 commercial and investment disputes.

21 And you -- you'll recall that the additional
22 facility ICSID actually has the word "investment"
23 in its acronym.

24 The treaty provides for the enforcement of
25 Chapter 11 investment disputes by reference to two
26 arbitral conventions which are parallel in the
27 narrow grounds for refusal to the Model Law. And
28 you'll recall that 1135(7), which is the
29 enforcement provision which is applicable to this
30 award, refers to the New York Convention or the
31 Inter-American Convention which are both arbitral
32 conventions parallel to the Model Law, which is
33 our international act.

34 The international act defines commercial as
35 including but not limited to a relationship that
36 arises from investing. That's P in the list of
37 specific relationships that confer jurisdiction on
38 the Court with respect to the international act
39 that is distinct from the commercial act.

40 So the Chapter 11 rights of an investor to
41 challenge State measures against its investment on
42 the basis of treaty guarantees creates the
43 relationship, which includes the arbitral
44 submission, the agreement to arbitrate, and it

45 arises out of investing in a State, in this case
46 Mexico.
47 And I say with respect that is a fairly

Charest Reporting Inc. (604) 669-6449

1 conclusive chain of references to and a consistent
2 and -- and, if you will, parallel chain of
3 concepts relating to investment from the very
4 beginning of the relationship through to the
5 reference in the international agreement. And
6 I'll let Mr. Alvarez develop that point further.
7 But, with respect, in my submission that point is
8 very straightforward.

9 Now, I'd like to then deal, if I may, with
10 the next important question, which is: What do we
11 submit to you is the proper approach to the issues
12 which arise from the award? And I say with
13 respect that the central issue in this case could
14 be framed in this way: Was it within the
15 jurisdiction of the tribunal to apply the
16 guarantees of fair and equitable treatment and
17 expropriation with compensation having regard to
18 the objectives of the treaty? That's -- that, I
19 say with respect, is the proper question here as
20 viewed under your jurisdiction under the
21 international act.

22 And in my submission to ask that question
23 properly, having regard to the terms of the act
24 and what the act requires us to do under its
25 provisions, is almost to answer the question which
26 is: This arbitral tribunal was put in place by
27 the parties to address and answer the question of
28 whether or not there was a breach of 1105 and 1110
29 under the treaty. And I'll come back to you
30 before I leave and say when they deal with each of
31 those questions, they state that test and they
32 answer that test.

33 All that you've heard this week is that in
34 the course of assessing whether or not the
35 investor was accorded fair and equitable
36 treatment, the arbitrators had regard to the
37 objectives of the treaty as a whole. That's a
38 state -- that's a question of construction on
39 which international lawyers can have a vigorous
40 debate, and -- and it's already started. This is
41 in some ways the beginning of the debate, but it's
42 a debate about construction. And the arbitral
43 tribunals who are constituted under Chapter 11
44 will carry on that debate. But, with respect,

45 it's not a debate in which the domestic courts of
46 either Mexico or Canada or the United States have
47 a useful role.

Charest Reporting Inc. (604) 669-6449

1 With respect to two narrow points, I thought
2 I would draw Your Lordship's attention to some
3 features of the agreement which I think are of
4 importance in relation to the question of whether,
5 within the document itself, a -- a informed reader
6 would regard an arbitrator as being warned off
7 other sections as opposed to being asked to have
8 regard to the treaty as a whole.

9 And we'll come back to this next week. But
10 since the Vienna Convention it has been considered
11 a straightforward point, and long before. It's
12 really just a codification of treaty
13 interpretation, that when one interprets a treaty,
14 one interprets a treaty having regard to its
15 treatment, to its -- sorry, purposes and objects
16 and its provisions as a whole.

17 Now, in this case if you turn, if you would,
18 to the NAFTA, and you turn to 1131, which is the
19 governing law in Chapter 11. Do you have that
20 My Lord? It's page --

21 THE COURT: Yes, I have it.

22 MR. COWPER: -- 11-19 --

23 THE COURT: Um-hum.

24 MR. COWPER: -- (1), which is the article prescribing
25 the governing law for the tribunal. It -- it
26 commands -- it authorizes the tribunal to decide
27 the issues in dispute in accordance with this
28 agreement, capital A, and applicable rules of
29 international law.

30 The agreement is not Chapter 11. The
31 agreement is the treaty. And if you go to, just
32 briefly -- and we'll have to probably try your
33 patience with this next week, but if you just go
34 to 102 for the parallel and immediate reference to
35 transparency, which is at page 1-1 and was dealt
36 with just a few moments ago by Mr. de Pencier.
37 The objectives of this agreement under Article
38 102(1) --

39 THE COURT: Yes, I'm with you.

40 MR. COWPER: -- that is again the treaty, including
41 Chapter 11, but also including the other
42 provisions.

43 And if we skip the -- the -- the subordinate
44 clause there, starting with "as elaborated":

45
46
47

"The objectives of this agreement,
including national treatment,

Charest Reporting Inc. (604) 669-6449

1 most-favoured-nation treatment and
2 transparency are to..."

3

4 Et cetera.

5 Now, I'll come back to this next week, but
6 it -- it's fresh in your mind. I don't agree with
7 Mr. de Pencier. I don't think he has interpreted
8 that treaty sentence in accordance with the rules
9 of English in the way that he did this morning. I
10 don't -- I don't connect the phrase "as
11 elaborated" more specifically in the way that he
12 does, and I'll deal with that in detail next week.

13 I say that it's quite clear that the
14 objectives of this agreement -- and then there's
15 a -- a -- I always forget the right grammatical
16 phrase, but there's a clause which starts "as
17 elaborated" and finishes "roles," and then
18 "including" is in reference to "agreement."
19 That's why the word "as elaborated" is there.

20

21 "The objectives of this agreement,
22 including national treatment,
23 most-favoured-nation treatment and
24 transparency."

25

26 But for the purposes of my present case and
27 this proceeding before Your Lordship, whether
28 Mr. de Pencier, who I assume is skilled in the
29 schools of treaty interpretation, or the tribunal
30 or I are right or wrong, what I say to you with
31 respect is that is what, under the proper and fair
32 reading of Chapter 11, is left to the arbitral
33 regime for arbitral panels to decide subject to a
34 very important point, which is this treaty
35 actually contemplates the parties having a means
36 of controlling the interpretations which are given
37 to the treaty. And you've heard Mr. de Pencier
38 this morning say, well, you'd expect us to be
39 concerned and interested, but the commission which
40 is created as part of the treaty has a role,
41 interpretive role, to provide binding
42 interpretations of treaty provisions which are
43 binding on the parties.

44 That isn't composed of judges. It's not

45 composed of arbitrators. It's not composed of
46 anybody other than cabinet-level officials or
47 their designated delegates from the three

Charest Reporting Inc. (604) 669-6449

1 countries. But it requires of course those three
2 persons to agree on the interpretation before they
3 can pronounce in a way that's binding upon future
4 tribunals.

5 So the first point I make is that in relation
6 to 1105 it is squarely an issue of interpretation
7 of the treaty which is squarely in my submission
8 within the jurisdiction of the tribunal. It's the
9 very matter on which you appoint people who have
10 the kind of CVs that these three gentlemen have.

11 It's also, I -- in my submission, to be
12 inferred that the reason why you have panels in
13 part is because of the finality of their
14 conclusion of the dispute. Each of the parties,
15 both the investor and the State, have a right to
16 appoint a member to the panel and then there's a
17 neutral. And I think that is in part because of
18 the finality of the arbitral regime that's
19 contemplated by the agreement.

20 And I note, and we'll come back to this
21 later, but I note that Mexico's appointee -- and
22 I'm not going to pronounce his name correctly, but
23 Mr. Siqueiros -- is a person who, shortly after
24 Mr. Thomas and I were born, had already written a
25 book, a textbook on international law.

26 Mr. Lauterpacht, or I -- I guess Sir
27 Lauterpacht, is the -- as I understand it, the
28 head or the president of the Lauterpacht School of
29 International Law at Cambridge University, has
30 written numerous textbooks. And in reading over
31 the submissions which were addressed to him by
32 Mr. Thomas in -- in part and other counsel, I
33 noticed that on several occasions his books were
34 cited to him; in other words, his formal
35 pronouncements on international law were relied
36 upon by the parties as forming a persuasive basis
37 and statement of international law for the
38 tribunal.

39 Mr. Civiletti, as I understand it, and I
40 haven't read his in detail, is a former Attorney
41 General of the United States and a distinguished
42 jurist in his own right.

43 Now, let me just come back and say this, and
44 that is: With respect to my friend's treatment of

45 the award, in several respects, in several
46 material respects, I must dissent from my friend --
47 my friend's interpretation of what the tribunal

Charest Reporting Inc. (604) 669-6449

1 held and what the tribunal had regard to and what
2 the tribunal found. And I'm going to come back to
3 this on Monday, but I -- and I've lost count of
4 them, but my friend and I take very different
5 views of the findings of the tribunal, and just to
6 warn you ahead of time, almost stem to stern with
7 respect to this case.

8 And I'll just take, with respect to 1105, if
9 Your Lordship has the award handy -- and this will
10 take me the better part of a morning next week,
11 but with respect to the tribunal's decision
12 respecting 1105, if you go to paragraph 74, which
13 is the beginning of the awards treatment of the
14 issue, the tribunal says -- after quoting NAFTA
15 1105 says:

16
17 "For the reasons set out below..."

18
19 Are you with me?

20 THE COURT: I am.

21 MR. COWPER: Yes.

22
23 "...the tribunal finds that Metalclad's
24 investment was not accorded fair and
25 equitable treatment in accordance with
26 international law and that Mexico has
27 violated NAFTA's Article 1105(1)."

28
29 And then if you go to the end of the section,
30 which is, I believe, chapt -- Section 101, it says
31 in conclusion -- I think that's -- those are my
32 words, but the conclusion -- conclusory paragraph
33 is paragraph 101, that:

34
35 "The tribunal therefore holds that
36 Metalclad was not treated fairly or
37 equitably under the NAFTA and succeeds on
38 its claim under Article 1105."

39
40 Now, my friend submitted to you during the
41 course of his submissions that the tribunal had
42 found a breach of Chapter 18, and that was the --
43 the foundation of its award. And in Monday
44 morning he took you through the award in support

45 of a conclusion that what this award did was find
46 a breach of an obligation State-to-State that the
47 investor was not entitled to have advantage of or

Charest Reporting Inc. (604) 669-6449

1 to take recourse from.

2 In my submission, on any fair interpretation
3 of the award, they did not do that. And that's
4 why earlier I said that I say the fair question
5 and the proper question is whether it's within
6 their jurisdiction to apply that principle having
7 regard to the transparency objectives of the
8 treaty.

9 Now, with respect to the content of 1105, and
10 your -- you've got already a number of
11 international law textbooks. And I don't know if
12 Your Lordship has over your career had a hobby of
13 reading international law, but you're not going to
14 be surprised to find out --

15 THE COURT: No.

16 MR. COWPER: -- that there's a vigorous disagreement
17 between international lawyers as to what fair and
18 equitable means, what its content is and how it's
19 to be applied to the specific circumstances. And
20 my friends have replied upon various statements by
21 various jurists about the minimum standard.

22 There's a dispute, and a substantial dispute,
23 about whether references to the minimum standard
24 are appropriate to even refer to when the
25 obligation is fair and equitable treatment. Some
26 jurists would say those are two very, very
27 different promises: Fair and equitable treatment
28 being a much more objective and difficult measure
29 for a State to adhere to than minimum treatment.

30 Two or three things I will say though, and
31 that is virtually all of the commentators agree
32 that what is fair and equitable is fact-intensive,
33 that it requires an assessment of the facts having
34 regard to the general concept that a State must
35 act fairly and treat an investor fairly and
36 equitable.

37 Secondly, nobody suggests there's a formula.
38 It's not that the international lawyers believe
39 that words like "fairness" and "equity" have a
40 crystalline purity that one ought not to pollute
41 by any other kind of concept; they are by their
42 nature general. And they have reference and they
43 sound in notions of fairness and equity which of
44 course have parallels and, if you will, resonance

45 in various systems of law, including the common
46 law, in a variety of respects.
47 So far tribunals under Chapter 11 have not

Charest Reporting Inc. (604) 669-6449

1 agreed with the governments that fair and
2 equitable is equal to the -- the -- the least
3 minimum standard which, for example, the 1926 case
4 my friend referred to this morning had in mind
5 shortly after World War I. And we'll refer that
6 to you yesterday -- next week.

7 I will say this though -- and part of what's
8 fascinating about this case is that what's
9 interesting about Chapter 11 is that it does on an
10 international sphere between these three countries
11 something which governments have experienced time
12 after time for generations, which is when you
13 create private rights by legislation or by law,
14 people will call you to account for that conduct.
15 And so when you give a citizen a right to sue
16 government for governmental conduct, the -- the
17 citizen will come forth to the third party and say
18 that government has not fulfilled the law which it
19 passed. And in that process generation after
20 generation governments are surprised to find that
21 people often conclude that they haven't fulfilled
22 the standards which they thought were
23 straightforward.

24 What's happened in this case, and what --
25 one -- just look at the charter, it's the most
26 obvious example, if you look at the debates in the
27 Senate in 1982 about what the legislatures thought
28 would happen with the Charter, they thought it
29 would be an almost, you know, insignificant
30 change, there would be a few miscellaneous
31 statutes, amendments and that sort of thing. And
32 nobody predicted that citizens would come forth
33 and say, hold it a second, I'm holding you to
34 account for the constitutional rights you've given
35 me.

36 Now, on the international stage what's
37 happened is in the -- in the past, as Mr. Thomas
38 has said earlier, if my client had lost everything
39 that it had invested in Mexico, it would have to
40 obtain the sponsorship of the United States to
41 commence an international dispute to go any
42 further. It would have to convince the
43 bureaucrats in charge of whatever State Department
44 it was a member of that their particular claim was

45 worth surrendering potentially sovereign
46 relationships, international understandings,
47 concerns about the State's own legislative

Charest Reporting Inc. (604) 669-6449

1 objectives in order to pursue a private right.

2 What Chapter 11 represents is a right by a
3 private citizen to call on the international stage
4 governments to account for standards such as fair
5 and equitable treatment. That's exactly what it
6 was intended to do. The fact that governments are
7 surprised that tribunals after hearings such as
8 this have concluded that they haven't acted fairly
9 and equitably ought to surprise no one.

10 My next point relates to Article 1110. And I
11 really have two points I'd like to make today, and
12 that is I'd like to start first, if I may, with
13 the points made by my friend concerning the
14 Ecological Decree. And in our submission it will
15 be necessary for Your Lordship if you conclude
16 that my friend is successful with respect to his
17 attack on the tribunal's treatment of 1105, and
18 it's within your jurisdiction to have regard to
19 that error on some standing under the relevant
20 statute, that you then have to consider 1110, and
21 that you have to consider both grounds of 1110.

22 And the reason I say that is because it's
23 clear on either statute and on the cases which
24 apply that Your Lordship has to conclude that the
25 errors in the aggregate would make a difference.
26 And indeed, in -- we can come back to this, but
27 you'll see this -- there's actually a mandate to
28 sever any error under the -- one of the statutes.
29 And that's a specific mandate that's -- that's
30 provided to you under the -- under the act.

31 Now, let me start at the second, because it's
32 one which deals with the -- the tribunal and what
33 it said. And I'd like to turn you to Article
34 10 -- I'm sorry, paragraph 109. And this is the
35 second footing that my friend referred to you in
36 part this morning.

37 My friend this morning said to you that at
38 various places the tribunal said that as to the
39 Ecological Decree it was not necessary -- and I'm
40 not going to quote him this morning, but not
41 necessary for its conclusion, I think was the
42 phrase that he referred to. And I'd like to refer
43 you to all of 109 which is at page 35 of the
44 award.

45 THE COURT: Oh, of the award. I'm sorry.
46 MR. COWPER: I'm sorry.
47 THE COURT: I thought you referred to --

Charest Reporting Inc. (604) 669-6449

1 MR. COWPER: What did I say?

2 THE COURT: -- his submission.

3 MR. COWPER: Oh, no. I'm sorry.

4 THE COURT: You may have spoken correctly, I just
5 misheard you.

6 109 of the award, yes.

7 MR. COWPER: Do you want me to be louder, quieter or
8 clearer?

9 THE COURT: Just continue.

10 MR. COWPER: Thank you, My Lord.

11 At paragraph 109, I just want to read you the
12 whole paragraph, because it starts with -- the
13 phrase "not strictly necessary" starts with
14 although:

15
16 "Although not strictly necessary for its
17 conclusion, the tribunal also identifies as
18 a further ground for a finding of
19 expropriation, the Ecological Decree issued
20 by the governor of SLP on September 20,
21 1997. This decree covers an area of..."

22
23 Et cetera,

24
25 "...that includes the landfill site and
26 created therein an ecological preserve.
27 This decree had the effect of barring
28 forever the operation of the landfill."
29

30 Now, two points: My friend submitted to you
31 today that it was not an independent ground, and I
32 say it clearly is.

33 Secondly, he said the tribunal did not make a
34 finding of the effect of the decree. And I say
35 the final sentence of that paragraph does so.

36 A third point which arises from another part
37 of the award which I need to take you to is
38 whether or not the tribunal found it necessary to
39 find jurisdiction as to this point. And I believe
40 my friend said this morning that the tribunal
41 expressed doubt about its jurisdiction over the
42 decree because of the fact that the decree was
43 made after the claim was filed.

44 Now -- and I -- I may have misunderstood him,

45 but the point I'm dealing with is whether or not
46 the tribunal made a finding of jurisdiction. And
47 as to that issue, I'd like you to turn, if you

Charest Reporting Inc. (604) 669-6449

1 could, earlier to the section which starts at
2 paragraph 59 and goes to 69. And it starts at
3 page 19, goes through to page 23. And it's -- if
4 I could read paragraph 69 for -- to you:

5
6 "The tribunal thus finds that although the
7 Ecological Decree was issued subsequent to
8 Metalclad's submission of its claim, issues
9 relating to it were presented by Metalclad
10 in a timely manner and consistently with
11 the principles of fairness and clarity.
12 Mexico has had ample opportunity to respond
13 and has suffered no prejudice. The
14 tribunal therefore holds that consideration
15 of Ecological Decree is within its
16 jurisdiction but, as will be seen, does not
17 attach to it controlling importance."
18

19 Now, that conclusion is after the better part
20 of four pages of discussion about the question of
21 whether this claim is properly a claim that can be
22 brought having regard to Article 1120 and Article
23 48 of the additional facility rules. And I won't
24 read that to you today, but I will say that with
25 respect to that issue, the tribunal is clearly in
26 my submission within not only its jurisdiction but
27 within its process.

28 It is exercising a discretion of whether to
29 allow an additional claim under the additional
30 facility rules under Article 48. And
31 Your Lordship noted this morning that there -- I
32 think they're phrased incidental or additional
33 claims, and it had regard to the types of things
34 which any adjudicator would have in any context,
35 which is: Is it fair and proper and appropriate
36 for those claims to be included in these hearing?
37 And they concluded that it was within their
38 jurisdiction. So I say that there's a clear
39 finding of jurisdiction. There's a clear finding
40 that it constituted an expropriation.

41 Now -- and I'm going to pass on to my next
42 point. But their references to it not being of
43 controlling importance or being a further ground
44 are classic statements that they are an obiter

45 dicta, that they were unnecessary for the final
46 conclusion, but they're expressed as a further
47 ground of their award.

Charest Reporting Inc. (604) 669-6449

1 And my friend in his submission says, well,
2 because they're obiter dicta, therefore they're
3 not a ground of the award. And with respect,
4 that's a confusion of categories, because whether
5 something is obiter dicta or not governs whether
6 or not it's binding upon a subsequent
7 decision-maker if you're applying the principles
8 stare decisis. It isn't a determination of
9 whether or not it's a ground of decision for that
10 adjudicator.

11 And obviously even in this proceeding there
12 are occasions, and I have found one, where a trial
13 judge makes two findings; one, the first finding,
14 another alternative finding; Court of Appeal
15 reverses the first finding, comes to the second
16 finding, has two, and then concludes the second
17 finding is sound, and the appeal is dismissed.

18 So I say in parallel that situation with
19 respect to expropriation is before Your Lordship.

20 With respect to the first part of
21 expropriation -- and -- and I'll deal with this in
22 detail of course next week. All I wish to say
23 today about that is this, and that is: My friend
24 this morning urged upon you the view that the
25 tribunal somehow applied the notion of
26 interference with property rights rather than
27 expropriation. Now, of course I've just read you
28 a finding where they said it barred forever the
29 operation of the landfill, but let me deal with it
30 on a more general basis.

31 In my respectful submission my friend's
32 treatment of the facts that were before the
33 tribunal has been incomplete and has not fairly
34 stated the issues between the parties. He has not
35 in some ways even attempted to tell Your Lordship
36 how the parties confronted each other in their
37 evidence. He stated Mexico's views of certain
38 facts but, as you'll see next week, in many, many
39 instances he has failed to state Metalclad's
40 position or Metalclad's evidence.

41 I'll take a very narrow point with respect to
42 the representations of officials. Your --
43 Your Lordship asked my -- my friend whether or not
44 he was saying there was no evidence. And he said,

45 well, there is some evidence. And he then
46 referred you to a paragraph of, I think,
47 Mr. Altamirano's evidence.

Charest Reporting Inc. (604) 669-6449

1 But there is a -- a whole body of evidence
2 that was led by Metalclad about the
3 representations they received. And the
4 fundamental adjudicative problem the tribunal had
5 was you had a large body of witnesses for Mexico,
6 both written and oral, telling the tribunal
7 those -- those representations were not made, that
8 they were -- that any such representation is
9 inconsistent with the paperwork. And then you had
10 a large body of Metalclad witnesses saying you bet
11 they were received, we depended upon them, we put
12 and built this facility on the basis of those
13 representations, and they took a very different
14 view of the paper and the permits and the
15 historical paperwork.

16 There are two things though that arise out of
17 that. And that is the most fundamental difficulty
18 I have with my friend's submissions, is that
19 they're ahistorical. If you read the tribunal's
20 award and you reflect on what we've heard this
21 week, my friend dwelt intensively on events that
22 occur in '91 or '92 or '93 and then for the most
23 part is quiet.

24 And yet if you read the tribunal's award,
25 they pick up the story after noting the background
26 of what happened in '91 and what happened in '92
27 and '93, and then they deal in detail with how
28 this facility was built, how it was permitted by
29 the federal authorities, what the Convenio was,
30 what it represented.

31 As to those facts, my friend's argument is
32 largely silent. But it's those facts which
33 constitute the finding of the tribunal that
34 Metalclad acted in good faith on the
35 representation of federal officials, that the
36 municipality dealt in bad faith with Metalclad,
37 that it didn't follow its process, that it
38 exceeded its jurisdiction, and that the
39 governments of Mexico knew that it was exceeding
40 its jurisdiction, and that this was interfered
41 with, this project was interfered with in a very
42 improper, arbitrary and in fact outrageous
43 fashion, and I'll come to this next week.

44 But those facts are ones which this week my

45 friend has scarcely troubled the Court with, and
46 it's important in a process like this. And this
47 is, as my friend told you, a case of first

Charest Reporting Inc. (604) 669-6449

1 impression.

2 What is Your Lordship's task here? I think
3 at the very outset it is important for
4 Your Lordship to understand what were the issues
5 which confronted the tribunal, because before you,
6 on a threshold basis, ought to even consider
7 inquiring into this, you ought to know what is the
8 character of the fight between these parties, what
9 underlies the findings that are here.

10 When the tribunal says that several federal
11 permits were issued, what does that do to the
12 events of '91 and '92? So I say on two things:
13 Firstly, my friend's recitation of facts is
14 incomplete and ahistorical; a second point, which
15 is with respect to expropriation, my friend said
16 to you this morning this is just an interference
17 with property rights because there was always the
18 municipal offer to operate a non-hazardous waste
19 landfill.

20 Now, with respect, I can't think of anything
21 in international law concepts that is more
22 intensely factual than a conclusion of whether or
23 not the State measure has substantially deprived
24 the property owner of the use and benefit of the
25 property. My friend doesn't argue that title has
26 to be taken. I think he earlier in the week
27 talked about title, but I don't think any
28 international lawyer would say expropriation
29 requires a taking of title. It requires a
30 substantial taking and interference with the use
31 and benefit of the property. That's intensely
32 factual.

33 But let's take one small opportunity to look
34 at what was confronting the tribunal in this
35 case. And I'd like to take the opportunity
36 because it's fresh, it's maybe not even the best
37 example, of what my friend said to you this
38 morning, because I think you'll remember what he
39 said about the landfill.

40 First of all, on Monday morning my friend
41 starts with a submission that there's 30,000
42 tonnes or 50,000 barrels of hazardous waste. I
43 always forget which is which.

44 THE COURT: 20,000 tonnes.

45 MR. COWPER: 20,000 tonnes sitting in, I think, cell
46 number 1 or whatever today. It's sitting there
47 requiring remediation.

Charest Reporting Inc. (604) 669-6449

1 The municipality in the political
2 negotiations which occur after this comes crashing
3 to a halt says, well, we'd like you to think about
4 operating a dump. I mean, forget non-hazardous,
5 it's just a dump. We'd like to offer -- think
6 about operating a dump. But they also say you --
7 you as the owner have to remediate.

8 Now the tribunal's held, and I think on any
9 fair meaning of the statutes, clearly the
10 municipality has nothing to say about the
11 remediation of the hazardous waste. But the
12 municipality's saying you have to remediate before
13 you do anything further.

14 So if I understand my friend's submission
15 this morning, a practical suggestion -- it's not a
16 taking to say to the owner of this site you have
17 to truck the 20,000 tonnes of hazardous wastes off
18 to a hazardous waste facility somewhere else in
19 Mexico and pay for that to be done, and then just
20 operate a dump on this facility, even though you
21 have spent millions of dollars building a
22 hazardous waste landfill in a site that's 70
23 kilometres from the municipality. And you saw the
24 map on Monday -- I don't mean to -- mean to be --
25 be dismissive of it -- in the middle of nowhere.
26 Why would you have a dump there? It -- it makes,
27 frankly, no practical sense. It made no practical
28 sense to the tribunal.

29 Then let's go beyond the issue of fact and
30 just deal with the issue of law. It's in my
31 friend's submission characterized as an
32 agreement. But the -- the municipality is --
33 there's nowhere in the record that there's an
34 agreement to let it operate as a non-hazardous
35 landfill, nowhere. It was a proposal in political
36 negotiations which never concluded.

37 Now, finally, I do want to say that that
38 proposal this morning as my friend stated it, I
39 couldn't help but reflect on the fact in view of
40 the findings of the tribunal that my friend was
41 advancing this in light of this frankly what's
42 become a not-to-private, heated dispute, that the
43 municipality's suggestion is that the property
44 owner go from a facility which is under exclusive

45 federal control, exclusive federal permit,
46 exclusive federal oversight, and turn it into a
47 facility that the municipality has the right to

Charest Reporting Inc. (604) 669-6449

1 control, has the right to oversight, and has the
2 right to permit, because the division here -- and
3 I don't know if Your Lordship has got this --
4 under the law of Mexico, which was passed the
5 LGEEPA -- and I'm sure I've mangled that, but L-G
6 double E P-A, capitals -- it's hazardous waste
7 over which the federal government upon reason of
8 that law is given exclusive authority. And that
9 is what Secretary Carabias agreed. It's hazardous
10 waste.

11 So the municipality's suggestion is not only
12 do you have to remediate hazardous waste on this
13 site, but we'd also like you to convert this
14 facility into one over which we have lawful
15 jurisdiction.

16 Now, to conclude that point therefore, I say
17 that with respect to expropriation, that
18 expropriation, like 1105, is even more intensely
19 factual, that it depends upon an application of
20 the concept of expropriation to the question of
21 whether the State measures constituted a
22 substantial taking. And that's precisely what the
23 tribunal was appointed to decide. And under the
24 regime under which they operated, it was intended
25 to have finality.

26 The next point I'd like to deal with because
27 it is, I think, potentially a point at least at
28 which -- which could in different circumstances
29 constitute a jurisdictional point, is the issue of
30 local remedies.

31 Now, my friend argued vigorously that the
32 tribunal misunderstood Mexico's position on the
33 exhaustion of local remedies. And you'll recall,
34 because I think my friend and I, when we outlined
35 this case the first time we had anything to say
36 about it, he and I took differing views on whether
37 the tribunal had addressed the issue of local
38 remedies. And I don't know if you recall that,
39 but I think that was our first or second
40 appearance before you.

41 But in -- in part my friend has on occasion
42 argued that the tribunal did not even address the
43 issue of local remedies. And I've referred to and
44 I rely upon your observation in paragraph 97 and

45 footnote 4, but there are two respects in which I
46 rely upon that.
47 The first is that they're correct in the

Charest Reporting Inc. (604) 669-6449

1 interpretation of Article 1121(2)(b). And the
2 second is they're correct that Mexico on the
3 record did not insist that local remedies had to
4 be exhausted and did not take this point before
5 the tribunal.

6 And I want to deal with those in reverse
7 order, because I'd rather deal with the substance
8 of it than the procedural point. And if I -- if
9 you could -- there are two central points. And if
10 you could turn to 1121 of NAFTA, and if you have
11 the book, that would be useful, because there's
12 something in the book that I need to show you that
13 I don't think has been given to you -- a copy.

14 Yes. Thank you very much. I appreciate my
15 friend donating a copy. I'm told they're
16 difficult to come by.

17 It's 1121(2)(b). And if you start at page
18 11-13 -- and it wasn't clear to me this morning
19 whether -- whether my friend likes titles or not,
20 but the title to this is "1121, Conditions
21 Precedent to Submission of a Claim." And that is
22 the intent of both sub (1) and sub (2). These are
23 the conditions precedent to the submission of a
24 claim. If you go to sub (2) it says:

25
26 "A disputing investor may submit a claim
27 under 1117 to arbitration only if both the
28 investor and the enterprise consent to
29 arbitration..."

30
31 Which is sub (a); and, (b):

32
33 "...waive their right to initiate or
34 continue before any administrative tribunal
35 or court under the law of any party or
36 other dispute settlement procedures any
37 proceedings with respect to the measure of
38 the disputing party that is alleged to be a
39 breach referred to in Article 1117, except
40 for proceedings for..." injunction
41 "...injunctive, declaratory or other
42 extraordinary relief not involving the
43 payment of damages before an administrative
44 tribunal or court under the law of the

45 disputing party."
46
47 Now, the difference between my friend and I

Charest Reporting Inc. (604) 669-6449

1 is that I say what is clear on any reasonable
2 construction of subparagraph (b) is that we're
3 dealing with the scope of a waiver. And what that
4 means for the dispute between my friend and I is
5 this; and that is, it's the investor's privilege
6 to do anything that is not covered by the waiver.
7 Are you with me? In other words, this is a
8 condition precedent to submission, and he must
9 waive certain things. And my friend relies upon
10 language which is an exception to the waiver. In
11 other words, those are matters on which the
12 investor is not taken to have waived his rights to
13 take other proceedings.

14 Now, my friend converts that into -- from a
15 condition precedent to going -- to a mandate or
16 requirement that the investor pursue local
17 remedies when in fact the purpose of Chapter 11 is
18 to allow an investor to go directly to Chapter 11
19 rather than trusting the courts of the State with
20 which he has a dispute.

21 Now, the burden that the investor takes is
22 that he has to prove a breach of the chapter. He
23 has to prove a breach in this case of 1105 and
24 1110. But if he does that, the fact that he
25 didn't go to the Supreme Court of the
26 United States, the Supreme Court of Canada or the
27 Supreme Court of Mexico, shall not, will not be
28 held against him. The fact that he never went to
29 court will not be held against him. What this
30 does is to say the investor has the remaining
31 right to pursue injunctive declaratory or other
32 extraordinary relief not involving the payment of
33 damages.

34 Now there's a second dimension to this which
35 is important, which is my friend in his
36 argument -- and I don't have the paragraph
37 numbers, and I'm sorry -- interprets that clause
38 as saying that the -- any proceedings is a --
39 qualified by the phrase "not involving the payment
40 of damages." In other words, that the waiver is
41 of any proceedings not involving the payment of
42 damages.

43 Do you have the two clauses in hand?

44 THE COURT: Um-hum.

45 MR. COWPER: Okay. I read it differently, because I
46 read this as being any proceedings with respect to
47 the measure of the disputing party that is alleged

Charest Reporting Inc. (604) 669-6449

1 to be a breach. And then it's except for
2 proceedings for injunctive, declaratory or other
3 extraordinary relief not involving the payment of
4 damages. In other words, you can pursue local,
5 injunctive, declaratory or other relief, but not
6 if those involve the payment of damages. But the
7 waiver includes any proceedings with respect to
8 the measure of the disputing party that is alleged
9 to be a breach.

10 Now, with respect to Mexico, Mexico wasn't
11 happy with that language. And I understand -- I
12 stand to be corrected is the only party that
13 signed -- that pronounced an annex that my friend
14 hasn't taken you to. And the annex is very
15 interesting when you turn to it. If you go turn
16 to annex 1120.1, which is at page 11-26, just a
17 few pages further on --

18 THE COURT: Um-hum.

19 MR. COWPER: I don't know if Your Lordship has -- has
20 seen this, but it's -- I don't think my friend has
21 referred to it. It says "Submission of a Claim to
22 Arbitration." And this is -- I -- I don't want to
23 take the time today, but I think you understand
24 that annex is -- there's a -- there's a power to
25 do an annex which is each individual State may do
26 an annex, and as long as they pronounce an annex
27 within their authority, it's binding on the
28 parties as it relates to that State. And I
29 don't -- Mexico is the only one that has done
30 this, as I understand it.

31 If you go to 110.1, and the relevant
32 subparagraph is (b), it says:

33
34 "With respect...with respect to the
35 submission of a claim to arbitration..."

36
37 Do you have that?

38 THE COURT: Um-hum.

39 MR. COWPER: That's the opening clause, (b):

40
41 "...where an enterprise of Mexico that is a
42 juridical person that an investor of
43 another party owns or controls..."

44

45 Okay. Pausing there, that's Metalclad,
46 because Metalclad owns COTERIN, COTERIN is a
47 juridical person. Are you with me so far?

Charest Reporting Inc. (604) 669-6449

1 THE COURT: Um-hum.

2 MR. COWPER: So an investor in the treaty doesn't have
3 to own -- doesn't have to be directly owned; it
4 can claim in respect of its investment which is a
5 juridical person. But of course the juridical
6 person's within the normal customary sovereignty
7 of the State. And so what Mexico says is if it's
8 a juridical person that you have the investment
9 in, and then continuing on:

10

11 "...directly or indirectly alleges in
12 proceedings before a Mexican court or
13 administrative tribunal that Mexico has
14 breached an obligation under (i) Section
15 A..."

16

17 Do you have that?

18 THE COURT: Um-hum.

19 MR. COWPER: And Section A includes 1105 and 1110, so
20 that -- that's the investment dispute section.
21 Then the closing operative words are:

22

23 "...the investor may not allege the breach
24 in an arbitration under this section."

25

26 So what Mexico has said essentially is if you
27 pursue local remedies and you directly or
28 indirectly allege in proceedings that Mexico has
29 breached an obligation under Section A -- and
30 listen to the words, "directly or indirectly
31 allege a breach" -- then the investor may not
32 allege the breach in an arbitration under this
33 section.

34 So I think Mexico has made it very clear that
35 in respect of any dispute with it that an investor
36 had better be very careful in respect of -- if it
37 is operating through a juridical person in Mexico
38 before it takes any judicial proceedings in Mexico
39 respecting something it plans on claiming to be a
40 breach under Chapter 11.

41 The second point that relates to this though
42 is this, and that is that the point taken below by
43 my friend before the tribunal that the tribunal
44 refers to in footnote 4, as I've -- read the

45 transcript, is that my friend argued before the
46 tribunal that it had no jurisdiction to consider
47 the complaints about the municipal government's

Charest Reporting Inc. (604) 669-6449

1 misdeeds respecting the permit and its general
2 frustration with the project, because the State
3 measures didn't include the municipal governments
4 under the -- under NAFTA. And so that in order
5 for it to be elevated into a NAFTA complaint, it
6 had to get up to the level of a State or federal
7 government involvement.

8 And I -- I'll have to take you back to the
9 actual transcript, and I'll give you the
10 references. But Mr. Thomas argued that -- and
11 this was the subject of 15 or 20 pages of
12 discussion between them, that as a result of the
13 various definitions in the text, read properly,
14 municipalities were not contemplated. And he
15 asked -- he's asked by President Lauterpacht:

16
17 "What is the bottom line of your argument?"
18

19 And he says:

20
21 "The bottom line, I'm afraid, is that the
22 vast bulk of the allegations which have
23 been made by the claimant here concerning
24 denial of municipal permits concerning
25 litigation engaged in by the municipality
26 does not fall within the jurisdiction of
27 the tribunal."
28

29 And he then later goes and says:

30
31 "The State is clearly bound by Article
32 105..."
33

34 And that's the section early on which deals
35 with the scope, but:

36
37 "...but, Mr. President, this falls into the
38 area of legal epiphany. I've read the
39 agreement hundreds of times. I went back
40 and read it and reread it in light of the
41 question posed by the tribunal."
42

43 And following down, he says:

44

45 "The confirmatory language, local
46 governments are not included."
47

Charest Reporting Inc. (604) 669-6449

1 And I'll give you the -- the transcript
2 references. But Mr. -- President Lauterpacht
3 says:

4
5 "Your argument is this: When federal
6 government or a State conducts itself in a
7 manner inconsistent with NAFTA, that can
8 properly be a matter immediately referable
9 to arbitration by the injured individual,
10 injured foreigner.
11 A. Yes."

12
13 And then I'll -- but not as it relates to
14 municipal government.

15 So the position taken before the tribunal at
16 the hearing that this is reflected was that
17 municipalities were enti -- if there was municipal
18 conduct, local remedies had to be exhausted as a
19 matter of jurisdiction, but not State or federal
20 governments as an aspect of the interpretation of
21 NAFTA.

22 Now, at the end of this discussion, President
23 Lauterpacht says this seems to me to be a matter
24 of great significance with respect to the reach of
25 NAFTA. At one point he refers to it driving a
26 horse and coaches through the promises and NAFTA.
27 And he says to the parties, including the
28 United States and Canada:

29
30 "I would expect and hope that somebody
31 would give us very detailed submission on
32 this, because if this is so, it's a matter
33 of great importance."
34

35 Subsequent to this, Mexico concedes that it
36 is responsible for the actions of the municipal
37 government. And so that is explaining footnote
38 4 -- 4 when the tribunal says Mexico has conceded
39 this, and then they go on to say it's correct.
40 The reference is at transcript Volume 9, pages 95
41 to 117.

42 Now, I come to the last point, if I may, with
43 res -- which I was going to deal with today, and
44 that is the submissions which were made yesterday

45 afternoon as to deception on the tribunal in
46 support of an argument that the tribunal's
47 assessment of costs in some fashion eventually

Charest Reporting Inc. (604) 669-6449

1 ends up not only losing jurisdiction but resulting
2 in a public policy defence to the award.

3 Now -- and I'll deal with this in greater
4 detail tomorrow (sic), but let me just give you
5 the outlines in two or three minutes.

6 The Paris judgment that my friend referred
7 you to is a case where an arbitral tribunal made
8 an award based upon evidence as to certain
9 expenses, including other matters. Subsequent to
10 the award, one of the parties, assuming the losing
11 party, came upon evidence which established that
12 that list of expenses was fraudulent.

13 In other words, that a deception had been
14 committed on the tribunal because they'd been
15 given -- given evidence and as a result of
16 afterdiscovered evidence it was found to be
17 false. And nullification proceedings were
18 brought. And the Court was satisfied on the basis
19 of the null -- of the evidence on the
20 nullification proceedings that that part of the
21 award should be set aside. And that's paragraph
22 17 at page 204, just reading it:

23
24 "The documents submitted in the present
25 annulment proceedings reveal that Westman
26 did not sustain any of the expense it
27 certified it made, and therefore did not
28 perform under the contract."

29
30 So it's -- it's clear, with respect, that
31 what happened was in the nullification proceedings
32 there was fresh evidence. And as in our system,
33 you can set aside something that's been obtained
34 by fraud if you meet the discoverability test, the
35 reasonable availability test and otherwise.

36 With respect to my friend's hand -- you know,
37 table that he did yesterday, this is what happened
38 before the tribunal. This is the kind of your
39 claim is inflated, your claim is misstated; when
40 you refer to plants and property, it doesn't --
41 plants and property also includes capital costs
42 elsewhere, you've rolled in this cost, you've
43 debundled that cost. That's the kind of factual
44 issue, including allegations of falsity, which was

45 had out before this tribunal.
46 The evidence my friend referred to was relied
47 upon him extensively before the tribunal. And in

Charest Reporting Inc. (604) 669-6449

1 fact the tribunal addresses the factual issues
2 respecting damages. It gives effect to -- to
3 several of Mexico's criticisms of the petitioner's
4 claims.

5 What it does not do is establish, even start
6 to establish, a deception on the tribunal. That's
7 what the tribunal's job is, is to assess other
8 matters, including credibility. Is this
9 accounting statement right? Is it -- should it be
10 accepted? What weight should be given to it?
11 What is the -- what is the proper way to approach
12 this investment?

13 Now, being a little bit more technical, if I
14 may, and then I'll close, what's quite clear is
15 that there's a -- and I was trying to figure it
16 out exactly, but it's a -- between
17 \$3-and-a-quarter million and \$4 million depending
18 on how you view the '91/'92 costs of adjustments
19 for remediation and for the debundling of certain
20 expenses.

21 The tribunal does not make the adjustments
22 that my friend put before you. The tribunal in
23 fact on its own terms does not do that, because it
24 says in respect of remediation that an allowance
25 has been made and, in respect of debundling, that
26 there's a debundling of certain of the expenses.
27 It is squarely within its task to decide what the
28 value of this investment was and the value of the
29 property taken.

30 Now, if I may, and then I'll close for the
31 day, I also don't want to lose sight of what they
32 were supposed to be doing and what they did, which
33 is Metalclad's claim was for the fair market value
34 of the property taken. And there's provisions in
35 NAFTA which allow it to make that claim. Its
36 principal claim was that value determined by
37 discounted present-day future profits, which is --
38 which is orthodox valuation principles. \$90
39 million was the claim for the present-day value of
40 future income and profits. The alternative was
41 some measure of value having regard to the capital
42 investment.

43 Mexico said, well, it's not worth anything.
44 It's worth a negative amount. As you heard

45 Mr. Civiletti said, applying that principle it
46 would be a negative amount. So that was the
47 extreme between the parties.

Charest Reporting Inc. (604) 669-6449

1 But what the tribunal was commended to do,
2 and which Courts here do all the time, it had to
3 arrive at a fair market value assessment having
4 regard to hotly disputed evidence about what had
5 been spent, what was properly attributed to and
6 whether the property would have made money had it
7 been approved. That's the type of intensely
8 factual evidence which you had expert witnesses on
9 testifying back and forth, which any trier of fact
10 has to come to grips with.

11 And they did precisely what they ought to
12 have done, which is they said we have to award
13 fair market value. We're not going to award based
14 on future cash flow, because we consider that to
15 be speculative. We're going to take as a measure
16 of fair market value capital costs. We're
17 accepting some of the capital costs but not
18 others. We're making two allowances, and this is
19 our award including interest.

20 That's precisely, frankly, what you would
21 expect any adjudicator to do. You would expect a
22 trial judge to do that. I don't have to resort to
23 fancy international law principles to say with
24 respect -- attacking that as a deception on the
25 tribunal and as a ground of public policy. To
26 interfere with the enforcement of the award is,
27 with respect, disconnected from Your Lordship's
28 jurisdiction under the international act.

29 Now, I thank you for your patience, because
30 it's been a long week, but those are my comments
31 for today.

32 THE COURT: Thank you, Mr. Cowper.

33 We'll continue at 10 o'clock on Monday
34 morning.

35 THE REGISTRAR: Order in chambers.

36 Chambers is adjourned until the 26th of
37 February at 10:00 a.m.

38 THE COURT: Apologies, Mr. Cowper. You were going to
39 provide me with --

40 MR. COWPER: We've got it here.

41 I'm sorry, I had people whispering behind
42 me.

43 THE COURT: I'm going to be coming back in the
44 courtroom to get what I want.

45 MR. COWPER: Okay.
46 THE COURT: So as long as it's put on the bench,
47 that's fine.

Charest Reporting Inc. (604) 669-6449

1 MR. COWPER: Thank you, My Lord.

2

3 (PROCEEDINGS ADJOURNED AT 4:01 P.M.)

4

5 Charest Reporting Inc.

6 Certified Realtime Court Reporters

7 Vancouver, British Columbia

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

45
46
47

Charest Reporting Inc. (604) 669-6449

