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2 Vancouver, B.C.

3
4 (PROCEEDINGS RESUMED AT 10:26 A.M.)

5
6 THE REGISTRAR: Recalling the matter of the United
7 Mexican States versus Metalclad Corporation,
8 My Lord.

9 THE COURT: Counsel, I apologize for the late start.
10 I had a case management conference on another
11 matter.

12 I'm quite prepared to make up the time by
13 sitting past 4 o'clock this afternoon, if -- if
14 that's what the parties wish.

15 MR. COWPER: Thank you, My Lord.

16 I -- I think we'll just assess how quickly
17 we're going, and we may or may not need to do
18 that.

19 If I may take you back to our memorandum of
20 argument, and last night I was -- I'd gone ahead
21 to the Southern Pacific Properties case. But if I
22 could take you back just to take you through the
23 passage at pages 37 and 38, we quote Dr. Herrmann
24 as it relates to the general intention of Article
25 5. And I'd just commend that to you as a good and
26 authoritative statement of the general intent of
27 Article 5 to restrict any residual discretion on
28 the part of the courts.

29 I should also draw your attention to 105 of
30 our argument. I prepared this when -- before my
31 friend's oral argument was had. As I understand
32 his submission to you last week, they are not
33 relying upon inherent jurisdiction of the Court.
34 I prepared that in response to the petition and
35 what I understood his position to be prior to the
36 hearing, that is that there was a residual or
37 inherent jurisdiction of the Court to intervene in
38 the interests of justice.

39 My interpretation of the statute is that
40 the -- the words such as "a Court must not
41 intervene" are part of -- actually expressly
42 intended to exclude inherent jurisdiction. But as

43 I understand it, my friend's not relying upon
44 that, so I'll just move on.
45 I deal with the Quintette case, and I've
46 already done that, in some of the following
47 pages. I'd ask you if you would turn to page 41

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1 though. And there are aspects of my friend's
2 argument, as I indicated on Friday, where in my
3 submission it's important to properly characterize
4 the errors alleged. On behalf of the respondent
5 we do submit that some of the errors are
6 inaccurately characterized as either questions of
7 law or questions of jurisdiction.

8 In this part of the submission I just
9 highlight the fact that this concern has evidenced
10 itself in a number of other proceedings and a
11 number of other decisions where, faced with the
12 same obstacles, parties have sought to persuade
13 Courts and other tribunals that what would appear
14 to be a question of fact is properly a question of
15 law or a question of jurisdiction.

16 And you'll see in the Schreter case, Item
17 114, quoting from that case, it says:
18 [All quotations herein cited as read]

19
20 "If this Court were to endorse the view
21 that it should reopen the merits of an
22 arbitral decision on legal issues decided
23 in accordance with a law of a foreign
24 jurisdiction and where there has been no
25 misconduct under the guise of ensuring
26 conformity with the public policy of this
27 province, the enforcement procedure of the
28 Model Law could be brought into disrepute."

29
30 There is another decision which talks about
31 dressing up fact as law or dressing up law as
32 jurisdiction, and that is a concern. And we say
33 with respect some of the errors alleged are really
34 attempts to convert what were factual disputes
35 before the tribunal into legal propositions and
36 then to put them into the commercial act for the
37 purpose of obtaining leave to appeal.

38 If you go on to paragraph 115, I'd ask you if
39 you could turn to the decision of the Court
40 itself, which is under tab 22 of my friend's
41 authorities. This is an UNCITRAL case from the
42 Ontario Superior Court. And I quote at the bottom

43 of 41 and over to 42. But the quote that I've
44 read (sic) there is, if you will, the summary,
45 because he says at 115:
46
47 "...whether or not the awards are legally

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1 wrong is not a basis for setting them
2 aside. On this point, I adopt without
3 reservation the comments of...Schreter..."

4
5 Which I've just given you.

6
7 "Second, whether or not the awards are
8 factually wrong is not a basis for setting
9 them aside."

10
11 There's two other references I'd ask to leave
12 you with while we're at that case, and they are at
13 197 and 203.

14 And there are some interesting features to
15 this case as it relates to this case. You should
16 know that this arose in a little bit of an odd
17 way. This was an application to set aside and a
18 counter-application to enforce, if I've read it
19 correctly. So the -- the moving party was seeking
20 to set it aside and the responding party was
21 seeking to enforce it, as I read it.

22 The -- so it was both occurring in the same
23 jurisdiction. As Mr. Alvarez pointed out to you,
24 that may or may not occur. And indeed in the case
25 we talked about yesterday, there were two or three
26 different tribunals concerning -- faced with an
27 award and enforcing jurisdiction, set aside
28 jurisdiction and an administrative tribunal.

29 But with respect to the point we have here,
30 that is the proper characterization of complaints,
31 if you will, about an award or the results of the
32 award, if you go to 197, and you -- you'd -- just
33 between D and E --

34 THE COURT: Um-hum.

35 MR. COWPER:

36 "The applicants rely on the decision
37 of...Stinchcombe as authority for the
38 proposition that full disclosure is a
39 fundamental principle of Canadian justice,
40 in both criminal and civil matters, and
41 that it is inconsistent with Ontario public
42 policy to deny it. There are, of course,

43 well-recognized limits on disclosure, which
44 include doctrines of privilege and
45 confidentiality. Be that as it may, the
46 point is not whether disclosure is a
47 fundamental requirement of our justice

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1 system, but rather, if the failure to
2 observe this requirement in another
3 jurisdiction is offensive to our essential
4 morality."

5

6 So that's an attempt to -- to respond to an
7 attempt to take a matter of procedure effectively,
8 that is a disclosure or an order relating to
9 disclosure or procedure relating to disclosure,
10 and say, well, we would not have allowed that to
11 occur in our domestic tribunals, and therefore
12 we -- we don't allow it to occur because of our
13 notions of justice and fairness, and therefore it
14 relates to public policy.

15 And all of the cases I've read are very leery
16 about allowing parties to convert matters which
17 are -- either matters of fact or law, and then
18 allowing them to sound in issues of public policy
19 through this fashion.

20 And of course on this point, as noted at
21 199:

22

23 "The inability to produce one's witnesses
24 before an arbitral tribunal is a risk
25 inherent in an agreement to submit to
26 arbitration and is not a basis for setting
27 aside an award..."

28

29 And we'll come back to that on the facts.
30 But in -- in this case one of the witnesses my
31 friend -- my friend asked you to note who did not
32 attend, Mr. Rodarte, was -- expressed himself as
33 unwilling and unable to attend because of an
34 investigation which had been commenced by the
35 State party in this proceeding in relation to
36 other conduct that he had that was coincidental
37 with or just prior to his attendance. So
38 Metalclad was unable to secure his attendance.

39 Similarly, as I indicated yesterday, the
40 procedures here overseen by the tribunal did not
41 include any adverse inferences to be drawn from
42 the failing to call a party as in the civilian

43 system and did not require a party to lead
44 evidence by viva voce procedures. Those are all
45 procedures commonly employed by arbitrators. They
46 might not be permitted, although our rules are in
47 the process of evolution, as readily in a Supreme

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1 Court trial.

2 If you go to the next argument they made in
3 this connection, if you go to 202 and 203, the
4 next argument was that the decision in relation to
5 rescission and damages constituted a violation of
6 public policy as I read it. And if you go to the
7 top of 203:

8

9 "I have already considered COTISA's
10 submissions on the procedural aspects of
11 Article 34(2)(b)(ii) and found them
12 unpersuasive. COTISA's argument on
13 substantive fundamental justice is that the
14 award of rescission and damages is wrong on
15 the facts and wrong in law and therefore
16 inconsistent with the public policy of
17 Ontario."

18

19 And if you skip down, he says:

20

21 "First, whether or not the Awards are
22 legally wrong is not a basis for setting
23 them aside."

24

25 And I've quoted that in the argument.

26

27 "Second, whether or not the Awards are
28 factually wrong is not a basis for setting
29 them aside."

30

31 And then he says:

32

33 "STET presented documentary and
34 testimonial evidence, including expert
35 opinion on Mexican law to establish their
36 claims. COTISA did not challenge this
37 evidence, nor present evidence of its own."

38

39 So he rejected as inappropriate the logical
40 progression from what is the correct answer as a
41 matter of law to the claim for -- I believe in
42 this case it was rescission.

43 And to say, well -- and of course it is
44 against the public policy of Canada to have
45 anybody make an error of law and -- and enforce a
46 legal obligation incorrectly on a party. That's
47 what the system of justice is aimed at

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1 preventing. But the question here is: With
2 respect to the enforcement of award and the -- the
3 safety valve, if you will, of the Court's
4 discretion to not enforce something contrary to
5 public policy, is every aspect of the principles
6 of justice an aspect of public policy? And I --
7 in my submission all of the tribunals or the
8 courts have indicated that questions of law are
9 within the jurisdiction and within the province of
10 the arbitrators to get wrong. They have the
11 privilege to get issues of law wrong.

12 Now, I -- if you could skip then to page 43,
13 and this is a small point, but it relates to my
14 friend's submission about the presumption of
15 sovereignty as it would relate to an
16 investor-State matter, and I need to deal with the
17 whole role of municipal law. But with respect to
18 one point my friend quoted from the Southern
19 Pacific case, and I do wish to draw your attention
20 to the following paragraph which is quoted at 120,
21 which in that very case it says:

22
23 "This is not to say, however...there is a
24 presumption against the confirmative
25 jurisdiction with respect to a sovereign
26 state or that instruments purporting to
27 confer jurisdiction should be interpreted
28 restrictively. Judicial and arbitral
29 bodies have repeatedly pronounced in favour
30 of their own competence with the force of
31 the arguments militating in favour of
32 jurisdiction as preponderant."
33

34 That point of course being in the context
35 where what -- and quite frankly, I find the
36 outcome surprising myself, in that the outcome
37 there was that the law referring to ICSID as a
38 possible means of dispute resolution passed by the
39 legislative assembly in Egypt was itself enough to
40 constitute a submission by the State to an
41 international investment arbitration.

42 Now, I find that an usual conclusion. But

43 the point being made here -- my friend relied upon
44 it to say sovereignty shouldn't be presumed. And
45 indeed, the final outcome as I read it was that
46 they ended up finding a submission to
47 jurisdiction. Neither of those points are

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1 particularly helpful or germane to the present
2 case when there's no dispute about whether Mexico
3 is bound by Chapter 11. Rather, we're dealing
4 with the subsidiary issues of the scope of
5 Chapter 11 and whether the claims fall within
6 Chapter 11 properly.

7 The next paragraph I deal with is -- it
8 refers to the Ethyl case and the west -- Waste
9 Management case, which are referred to. The --
10 the Waste Management case is a case which deals
11 with the validity of the waiver which
12 Your Lordship heard from me on Friday. And the
13 Ethyl case dealt with issues of precondition.

14 I don't, with respect, think that either case
15 is particularly helpful with respect to the issue
16 before Your Lordship. Let me say there are two
17 interesting observations that can be made though.

18 The -- the Waste Management case is actually
19 a living and -- and existing testament to the risk
20 that I outlined to you on Friday with respect to
21 the waiver, because what happened in Waste
22 Management was Waste Management delivered a waiver
23 and -- pursuant to a notice of claim under
24 Chapter 11. And it said in the waiver we're
25 bringing a claim under Chapter 11, but this waiver
26 does not apply to domestic Mexican proceedings
27 that we're bringing or continuing. And so they
28 purported to continue Mexican proceedings which
29 were, they said, outside the scope of the waiver
30 required by Chapter 11.

31 The majority in that case, and there was a
32 vigorous dissent, ended up holding that the waiver
33 was not unqualified and properly within the waiver
34 required by 1121, I think it is, or 1120, and for
35 that reason Waste Management was -- was prevented
36 from pursuing its Chapter 11 remedy; in other
37 words, that it had not properly waived the local
38 remedies which it was required to waive and
39 therefore it was prevented from going on to
40 Chapter 11.

41 With respect to the Ethyl case, and that's a
42 case against Canada, as I read it, the Ethyl case

43 essentially dealt with a number of fairly
44 technical questions. But the essential concern
45 that Canada had was that the legislation in that
46 case, as I understand it, wasn't pronounced until
47 nine days after the claim was filed. And the

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1 question was whether it was a measure under the
2 definition of the -- of Chapter 11 that was
3 existing as at the date of the claim. The
4 tribunal dealt with it at great length and ended
5 up concluding it had jurisdiction.

6 Moving on then to further points, you can
7 skip the next section which largely deals with
8 Quintette, which I dealt with yesterday.

9 And I say at -- at page 48 that there are a
10 number of cases and authors who have made the
11 obvious point, perhaps, that an error of law is
12 not jurisdictional in nature. Of course, an error
13 of jurisdiction is legal in nature, but an error
14 of law need not be jurisdictional in nature.

15 And I've referred you to a couple of cases
16 there. You may want to make a note under the
17 second case referred to. It's at page 190, I'd
18 also refer you to page 190. And under the Bank
19 Mellat case, the tab reference is in error, it
20 should be tab 3. And I'd refer you to page 52 in
21 that report.

22 Now, I -- I deal with Sonamar at -- at the
23 bottom of page 48 and 49 which my friend dealt
24 with. In my submission, on a fair reading of that
25 case, Mr. Justice Gonthier as he then was simply
26 dealt with the submissions made and dismissed them
27 all. He said it wouldn't even make the patently
28 unreasonable test. He doesn't in an analytical
29 sense deal with what should be the standard and
30 whether patently unreasonable is the correct
31 standard or otherwise. He doesn't deal with the
32 analytical commentary as it relates to that. And
33 as I read his judgment and the translation, he
34 essentially goes through the arguments which were
35 raised and says on those footings they should be
36 dismissed.

37 So he does deal with the issue, if I
38 understand it in French, reasons without cause as
39 opposed to patently unreasonable. But I say
40 that's not a reasoned judgment to found a
41 jurisdiction of patently unreasonable under the
42 act.

43 We quote Parsons and Whittemore at the
44 bottom, which has been quoted in other cases as I
45 indicated yesterday.
46 And over on page 50 there's a -- a -- a more
47 recent quote, and I'll give you the tab

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1 reference. And the reference at the bottom may be
2 somewhat confusing.

3 This is a quote from the NetSys Technology
4 case. Do you have the reference at the bottom,
5 because there's a number of cases rep -- referred
6 to by the judge?

7 THE COURT: Yes.

8 MR. COWPER: And that's found at tab 25 of our
9 authorities, and the quote's from page 317.

10 And so this is a -- a more recent and strong
11 acknowledgment of the points I'm making as to the
12 departure from historical judicial approaches to
13 the scope of arbitral disputes, as I indicated
14 yesterday.

15 So if I can then skip over, at page 52 we
16 deal with the scope of the ground for agreement on
17 procedure. And I'll -- when Mr. Greenberg comes
18 to deal with that chapter, he'll deal with that
19 aspect as well, but I've set that out, our view of
20 the -- of the scope of that potential error or
21 potential ground.

22 At 53 I deal with public policy, which I've
23 already dealt with as I dealt with the Corporacion
24 Transnacional case, the Schreter case. We've
25 given you another case dealing with Arcata
26 Graphics.

27 You may want to make a note that the
28 substantive area in the Schreter case dealt with
29 the issue of the acceleration of royalty payments;
30 in other words, what was argued to be a question
31 of law which rose to the concern of a public
32 policy was that under Ontario law you could not
33 enforce an award or a judgment which provided for
34 the acceleration of royalty payments, that that
35 would be inappropriate. They're due, I guess, as
36 and when they come due. And therefore, because
37 Ontario law didn't recognize the acceleration of
38 royalty payments, it was contrary to the public
39 policy of Ontario and ought not to be enforced,
40 even though it was embodied in the international
41 commercial award. And that was rejected. You may
42 want to make a note also to -- that the real meat

43 of that is at 379. I've given you two pages of
44 references.

45 The -- the point made in the Arcata Graphics
46 case was an attempt to convert the interest award;
47 that is, the award in the commercial context of an

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1 award which awarded essentially, as I read it,
2 commercial rates of interest to the successful
3 party as being contrary to public interest because
4 that was not permissible in Ontario law.

5 And so the reason I'm -- none of these are on
6 point precisely with the points that my friend has
7 raised. But what I'm trying to illustrate is that
8 there are a number of cases where the Courts and
9 other commentators have said that one must resist
10 the temptation and resist the efforts of parties
11 who have lost arbitration awards to take an issue
12 of law or an issue of fact and seek to transform
13 it into an issue of public policy so as to resist
14 the enforcement or to support the setting aside of
15 the award.

16 That concludes my discussion about the -- the
17 jurisdiction of the Court in review under the
18 international act. And that hopefully will inform
19 my submissions as I come to dealing with the award
20 later.

21 With respect to the Commercial Arbitration
22 Act, you of course have my point that we say it
23 doesn't apply. But of course in the event that
24 we're wrong on that, I want to deal briefly with
25 what I say the extent of the jurisdiction is. And
26 there is actually a very interesting intellectual
27 point here as it relates to a question of law
28 which, if Your Lordship feels compelled to go
29 there, you'll have to solve.

30 But I'll try to give you the best I can with
31 respect to the submission on it, and that is: How
32 do you relate the issue of the jurisdiction to the
33 question of law under our commercial act to what I
34 think is undoubted, which is that the questions of
35 law here are international law and treaty law?
36 How do you reconcile that statutory jurisdiction,
37 if it exists, with the character of law that we're
38 dealing with? I think that's the most interesting
39 point here.

40 But our position generally is of course that
41 the review under that act is also discretionary.
42 As I say on page 54, that questions of law are

43 strictly questions of law, that findings of
44 foreign law are findings of fact by the tribunal.
45 And I want to make a distinction, if I may,
46 between the findings of the tribunal as it relates
47 to Mexican law, and I've given you the reference

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1 in the argument, and I'll make sure it's there.

2 Both of the parties here proceeded through
3 the proceedings below or the proceedings before
4 the tribunal on the footing that the issues of
5 Mexican law were questions of fact for them to
6 determine. In other words, as I read the
7 submissions and the argument, nobody said to this
8 tribunal these are questions of law for you, these
9 are questions of fact for you. And that's why
10 they both called expert witnesses.

11 Now, in parts of my friend's argument, he --
12 he refers to juridical facts. And I wasn't quite
13 clear what he meant by juridical facts, because
14 the claim was premised on the basis that in
15 accordance with Mexican municipal law as founded,
16 there were excesses of authority which could
17 constitute elements of unfairness. That's, as I
18 read the award, effectively what they've held;
19 that is, excesses of authority under municipal law
20 properly found as a matter of fact are and may be
21 a context for the finding of unfairness or
22 inequity.

23 Now, the -- I can give you that reference
24 while you're making a note. It's at page 145,
25 line 17 over to page 146, line 9. And this is a
26 question from President Lauterpacht. I'm starting
27 in the middle of the question. And, I'm sorry,
28 the volume is -- sorry, it's under tab 32 of our
29 extracts. It says:

30
31 "Supposing we agree with you entirely that
32 Mexican law is a question of fact, the
33 tribunal still has to decide as a fact what
34 the content of the relevant Mexican law
35 is."

36
37 This is the question from the tribunal.

38
39 "You are quite right in saying it's a
40 matter of evidence, but when all the
41 evidence has been heard at the end of the
42 day, the tribunal has to decide as a fact

43 the content of Mexican law. Do you
44 disagree with that?
45 Mr. Thomas: May I consult?
46 Answer: Well, as a matter of principle we
47 think that the way in which you put the

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1 propositions are correct. We agree that
2 these are questions of fact."
3

4 Now, there's no doubt that there was a
5 jurisdictional component put to the tribunal as it
6 related to what they could do with the findings of
7 fact; that is, and I've said to you on Friday, as
8 I understand it, that my friends today are arguing
9 that the exhaustion of the local remedies is a
10 jurisdictional issue, and that's capable of being
11 jurisdictional.

12 The point I'm making here though is both
13 parties, when they led the evidence, were asking
14 the tribunal to make findings of fact with respect
15 to the questions of what Mexican law was. And the
16 tribunal, when it comes to that, deals with it as
17 a question of fact, not as a question of law for
18 them.

19 I separate that from the question of what
20 they did with 1105 and 1110. As I read the award
21 and as the parties dealt with it in their
22 submissions, that clearly was a question of law,
23 that being what was the proper test to be applied
24 under 1105 and 1110, and then applying that as a
25 matter of international law and treaty law to the
26 facts that they found, including Mexican law.

27 So just to restate this point, and I'll come
28 back to it, I see the tribunal as taking Mexican
29 law as a fact, it's an important fact in the facts
30 that were before them, relating to the test of
31 fairness and equity under 1105 and expropriation
32 under 1110.

33 Now, leave to appeal under page 54 is an
34 exercise of your discretion. And -- and I'm
35 troubled with the issue I raised to you earlier as
36 to what Your Lordship ought to do if you come to
37 the point of saying we're under the statute and
38 the questions of law relate to the interpretation
39 of 1105 and 1110.

40 And -- and I think fundamentally the proper
41 way to do it -- and I don't think I've said it
42 here, but thinking about it over the weekend -- is

43 that the -- the first important threshold is
44 whether the Court regards its discretion in
45 advancing leave to appeal as one which, in view of
46 the fact that they are questions of international
47 law and treaty law, is one which allows the Court

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1 to fairly give leave to appeal on those questions
2 and deal with them in a way that's responsive to
3 the process and that does justice between the
4 parties. In other words, the Court should be
5 satisfied that it can give leave to appeal and
6 fairly and properly determine those issues of law
7 at the leave stage as it relates to questions of
8 law other than British Columbia law.

9 The other potential argument would be that
10 properly understood questions of law in that
11 section as it relates to foreign law would not
12 embrace foreign law, they would only include
13 British Columbia law. I don't think that's the
14 better view, because I -- there may be situations
15 in other contexts and other circumstances where
16 the issue of law may not be an issue of fact. It
17 may be an issue of law, but it may not strictly be
18 an issue of law that's a British Columbia law.
19 I -- so -- so that's how I tried to responsively
20 deal with the act, if we're -- if we're there.

21 With respect to -- my friend said the
22 fundamental difference between the two acts is
23 that leave to appeal as a matter of law is allowed
24 in the other act, and I don't disagree with that.
25 There are other differences of some importance,
26 and Mr. Alvarez has dealt with some of those.

27 But I do wish to say this, and that is: The
28 jurisdiction to interfere with an award under the
29 commercial act as it relates to matters that are
30 not questions of law is not much more embracing
31 than it is under the international act. In other
32 words, the -- in -- in my view, if you read the
33 act properly, if the Court has a discretion to say
34 the arbitrators responsibly answered the question
35 between the parties, the arbitrators asked the
36 right questions, gave the answers, all of those
37 kind of considerations apply under the
38 international act, the question of whether to
39 grant leave to appeal on a question of law is a
40 jurisdiction given to the Court under the domestic
41 act, but clearly has to include considerations
42 such as is that the appropriate and correct thing

43 to do in the circumstances?
44 Now, the -- we've given you some quotes at 56
45 and following. I just state the obvious, I say
46 there is no jurisdiction to correct a mistake of
47 fact under the commercial act. I've quoted to you

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1 from the English Court of Appeal at page 56 which
2 I think is at least persuasive in characterizing
3 the jurisdiction.

4 There are substantial differences, just to
5 warn you, between the Arbitration Act of 1979 in
6 England and the various arbitration acts in the
7 United States as they relate to review of both
8 domestic and international acts. The non-Model
9 Law jurisdictions have a number of different
10 considerations that they apply. So some of the
11 comments you receive in the cases, if you will,
12 are -- are self-restrained principles of restraint
13 rather than statutory principles of restraint.

14 There are Courts who have the jurisdiction
15 who say in respect of these types of matters we
16 ought not to intervene any further even though
17 we -- we may have the statutory jurisdiction to do
18 so.

19 If you go to page 56, that is a -- a recent
20 decision of your brother judge Mr. Justice Cohen
21 at 153, that's the Manufacturer's Life case. And
22 I've given you a quote here where he clearly saw
23 as persuasive the principles of Quintette as it
24 relates to the commercial -- the commercial act.
25 He quotes and relies upon it as a useful
26 admonition, if you will.

27 You may want to just make a note that in
28 relation to the substance of that case, that was a
29 case dealing with a lease. And I don't know if
30 Your Lordship wants to go to the authority, I can
31 take you there, but the nature of the dispute in
32 that case was a lease. What Mr. Justice Cohen had
33 a concern was (sic) whether or not there had been
34 an error of law in relation to the finding as to
35 the adjustment of the lease payments.

36 And there was a fairly full-throated effort
37 to persuade him that the outcome of the
38 arbitration incorrectly interpreted the lease as
39 it relates to the proper components of the rent.
40 And he went on after this observation to dismiss
41 that and to say that the -- that the arbitrators
42 were within their jurisdiction and within

43 reasonable bounds in reaching the conclusion that
44 they did.

45 Now, the -- the BCIT case is another lease
46 case, and I just give you that. It has a similar
47 sentiment.

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1 Over to the question of law arising out of
2 the award, we've given you the -- the Domtar
3 case. And there's the procedural concern
4 identified in Domtar of identifying specific
5 questions of law.

6 The next point is I've quote -- given you a
7 quote from the English Court of Appeal in the
8 Geogas case. That was a case -- and I've given
9 you a long quote at 40 -- 58 and 59. That was a
10 case dealing with the sale of propane through a
11 boat, a boat which is the Baleares.

12 And the Court goes out of its way to make it
13 clear that the thrust of the complaint was a
14 failure to take into account both sides of the
15 equation that was in stake (sic) with that case,
16 and they say essentially that's nothing but a
17 mistake of fact.

18 And you'll see over to page 59 an interesting
19 comment on the relationship between the review of
20 findings of fact of an arbitral tribunal and --
21 and domestic administrative law principles. If I
22 may read it, he says:

23
24 "The power to review a finding of fact of a
25 tribunal on the ground that there is no
26 evidence to support it, and that there is
27 therefore an error of law, is a useful one
28 in certain areas of the law, notably in the
29 administrative law field. But in the
30 limited appellate jurisdiction of the court
31 under Section 1 of the Arbitration Act,
32 1979 this concept has no useful role to
33 play. It is inconsistent with the
34 filtering system for the granting of leave
35 to appeal which was created by the
36 Arbitration Act 1979. In my judgment it
37 has not survived the changes introduced by
38 the reforming measure of 1979."

39
40 Now, what I then endeavour to do, I -- I
41 refer to Southam in stating what questions are
42 which, and it's a useful explication of the que --

43 question of law test because, as said there:
44
45 "...questions of law are questions about
46 what the correct legal test is..."
47

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1 And my friend -- and I think the central
2 difference between my friend and I in -- in this
3 connection is that my friend takes the award and
4 says, well, I think at least initially the error
5 was finding a breach of Chapter 18 when Chapter 18
6 wasn't available to the investor party. As I
7 understand his -- his further position, it is in
8 substance finding a breach of Chapter 18.

9 What I say is it -- its only a legal error if
10 you find that the arbitral tribunal did that as
11 opposed to doing what I urge upon you, which is
12 that they applied the test set forth for them
13 under 1105 and in informing the content of
14 equitable and unfairness they had regard to a
15 number of facts and a number of other factors,
16 including the other aspects of the tribunal --
17 sorry, the other aspects of the treaty and the
18 other guarantees of the treaty.

19 If we go over to page 60, there's a -- a
20 caution in -- there's a new English arbitration
21 act, as I understand it, I'm not expert on all
22 these various statutes, but in 1996. And if you
23 go to the bottom, in England, it -- it notes
24 that:

25
26 "In any event, the term question of law,
27 under... 82(1), refers to the domestic law,
28 so the English courts will not seek to deal
29 with issues of foreign law."

30
31 As I read the latest English statute, they
32 actually have a definition of question of law
33 which restricts it to domestic law, so you may
34 want to make a note of that. So when the English
35 cases talk about questions of law, there is a
36 statutory definition which excludes questions of
37 foreign law.

38 Now, the test for leave, if you skip over to
39 62, I -- I say with respect it's very clear that
40 leave to appeal ought not to be granted unless
41 there is a question of law or questions of law
42 which either alone or in the aggregate would

43 change the outcome. So not only has there to be a
44 question of law arising, but it has to be a
45 question of law which would change the outcome.
46 So with respect to this case, it's my
47 submission that my friend has to identify

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1 questions of law which would, if successful,
2 reverse the award as a whole. Otherwise, the
3 remaining parts of the award would remain
4 uninjured, if you will, or unindicted, and the
5 award should be enforced and not set aside.

6 That would be in my submission the right
7 outcome, unless Your Lordship was persuaded there
8 were questions of law which, if proven to be in
9 error, would reduce the entire effect of the
10 award. And so, as I said on Friday, that is the
11 finding of both 1105 as -- as held by the tribunal
12 and both findings of -- of breach of 1110, because
13 there's no difference of damages between 1105 and
14 1110.

15 So I say that the task my friend has under
16 this act is to identify effectively errors of law
17 as to all three findings which, if all successful,
18 would change the outcome. And I -- that's not
19 always the case, because there might be a change
20 in damages if there were multiple findings that
21 would then have to be remitted to the arbitral
22 tribunal. But I -- I don't think my friend
23 suggests there's any difference in compensation or
24 damages between either finding, 1105 or 1110. The
25 arbitrators clearly said it's the same test on my
26 reading of the award.

27 Now -- and -- and I'll come back to this, but
28 I do say, as I said earlier, that -- that in
29 trying to be responsive to the concerns of the act
30 and the identification of the Court's
31 jurisdiction, if we're in the commercial act, how
32 do you take account of the fact that we're dealing
33 with treaty law and international law?

34 And I think that is dealt with properly at
35 the leave stage, and I'll come back to this at the
36 end of my submission. But in my submission, if
37 Your Lordship is of the view that, reading the
38 tribunal, the questions of law raised by the
39 treaty and international law represent a reasoned
40 process and a reasoned conclusion, and that there
41 is no obvious and clear error that could be
42 determined by this Court applying international

43 law and the law of the treaty, then the proper --
44 if we're in that act, the proper measure would be
45 to refuse leave to appeal.
46 Now, the -- my friend argued, and I think
47 I -- my own view of it is that if leave to appeal

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1 is granted, there's no express standard applied.
2 And -- and you would then -- I think, properly
3 speaking, the standard of correctness under the
4 commercial act is probably the right standard in
5 issues in which the Court's granted leave to
6 appeal.

7 The other intellectual way you could deal
8 with the same concern would be to say we'll apply
9 in respect of international law a threshold which
10 will not take that into account at the leave
11 portion but will take into account at the -- at
12 the decision standard, in other words, whether we
13 intervene and say that there's an error of law.
14 But either one achieves the same goals, but I
15 think into -- being faithful to the statute, it
16 more properly belongs at the leave stage than at
17 the decision stage.

18 THE COURT: Sorry. I'm not clear on this issue.

19 MR. COWPER: Okay. My friend said to you that the
20 standard of review, if leave to appeal is granted,
21 should be correctness, as I understand it.

22 THE COURT: Right.

23 MR. COWPER: Okay. And what I'm saying is that the
24 fact that it's foreign law, and treaty law is a
25 factor in refusing leave --

26 THE COURT: Um-hum.

27 MR. COWPER: -- and that you should be satisfied at
28 that statement that the errors which have been
29 identified are not only questions of law, but they
30 are questions of law which, if leave to appeal is
31 granted, have a sufficient likelihood of success
32 that the Court could clearly and confidently find
33 error applying international and treaty
34 principles. And I'm trying to take into account
35 the -- the fact that we're a domestic court that
36 doesn't normally deal with those matters.

37 So I'm saying at the leave stage, I say the
38 Court should take into account and should be
39 satisfied that on the issue that's been
40 identified, if leave to appeal is granted, the
41 Court can confidently decide the question as a
42 matter of correctness. And if it can't, it should

43 refuse leave to appeal.
44 The other alternative would be to say that
45 leave to appeal can be granted on a question of
46 law, but that the standard for -- for
47 international law or law other than the law of

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1 British Columbia on the review after leave is
2 granted is not correctness. It's a -- a lower
3 standard. It would be reasonableness or patently
4 unreasonable, it could be a different standard.

5 I'm urging upon you the former rather than
6 the latter. But both of them are, I think,
7 available to you under -- under the statute.
8 There's no binding authority in my view either way
9 on this issue.

10 And I'll -- if I can, I think I'll -- if
11 that's -- did I answer your question or --

12 THE COURT: I think so. Yes.

13 MR. COWPER: Okay. If you could go to Chapter 3 --
14 and I think I'll deal with the award after I deal
15 with standard of review, because we've already
16 gone there. I -- I say that the standard of
17 review -- as I said on Friday, with respect, the
18 standard of review for a domestic administrative
19 tribunals is inapplicable. I say that it's also
20 inconsistent with the goal of uniform tests being
21 applied at the international level.

22 That is ultimately one of the goals of the
23 uniform -- I always get it wrong, the Model Law as
24 opposed to uniform law.

25 And you'll see -- if you go over to 65,
26 you'll see that the Court of Appeal recently in
27 BCIT held that the Court must extend:

28
29 "...respect for the forum of arbitration,
30 chosen by the parties as their means of
31 resolving disputes, and recognition that
32 arbitration is often intended to provide a
33 speedy and final dispute mechanism,
34 tailor-made for the issues which may face
35 the parties to the arbitration agreement."
36

37 And obviously, as I note at the bottom of
38 178, you need to consider and must consider the
39 issue of remission as well.

40 And over at 66, if -- and I say this is a
41 large "if," because I don't accept this, but if
42 the administrative standards of review have any

43 purchase in this case, then if you apply the tests
44 set out by Pezim or by Southam to this criteria,
45 then they would urge a more deferential or a very
46 deferential standard. And I -- I deal with those
47 at 66 and 67, but I think they're fairly

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1 straightforward.

2 Both acts have equivalence to privative
3 clauses. Both -- in this case the submission is
4 to a tribunal with undoubted expertise. My friend
5 conceded that in argument. And we have
6 acknowledged and internationally -- in a couple of
7 cases internationally -- famous international
8 lawyers who were appointed by the parties. Not
9 only that, but the tribunal in its constitution is
10 influenced by the parties. They are -- Mexican
11 international law expert was appointed by Mexico.
12 The -- Mr. Civiletti, who I think is the former
13 Attorney General of the United States was
14 appointed by my client. And then the president
15 was appointed by agreement, that's President
16 Lauterpacht.

17 So you have a tribunal which is constituted
18 with expertise, and the parties have an influence
19 over its constitution. In other words, it's not
20 purely a third-party appointment of people who
21 were expert. The parties can be ensured. In this
22 case Mexico had the right to ensure that there was
23 a Mexican lawyer with expertise in international
24 law on the tribunal making the decision with the
25 other parties.

26 With respect to the purpose of the act as a
27 whole, I say that unlike administrative bodies
28 under the treaty, there's another body which is
29 commissioned to police the interpretation or
30 application of the treaty on an ongoing basis.

31 And from a -- I said this yesterday, and it
32 may not have been clear: I don't regard -- and in
33 my submission the treaty does not contemplate a
34 jurisprudential role, if that's the right phrase,
35 for tribunals. There's no doubt they're
36 persuasive, but in our system the jurisprudential
37 role fulfilled by the Courts is that subject to
38 legislative change, the Courts' interpretations
39 will be binding on future parties, binding on the
40 population, and binding on future courts, whereas
41 in -- in this treaty, the -- it's expressly stated
42 by the treaty not to be binding, and there's a

43 parallel system for the provision of binding
44 interpretations. And that is a different --
45 that's -- that in some senses drains away the
46 jurisprudential context for arbitral tribunals.
47 The final one is the nature of the problem.

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1 As I said in our submission, the -- Mexico's case
2 in this case attacks principally findings of fact
3 or findings of mixed law and fact, and for that
4 reason deference would be an appropriate
5 standard.

6 Now, the final case --

7 THE COURT: Just -- just to interrupt you there.

8 MR. COWPER: Yes.

9 THE COURT: If in fact there are questions of fact and
10 questions of mixed law and fact, do I even get
11 there?

12 MR. COWPER: No, not in my submission.

13 I'm trying to really deal with my friend's --
14 my friend's points. I -- you don't get to this
15 analysis at all in my submission. And you don't
16 get to questions of fact and you don't get to
17 questions of mixed law and fact in my submission,
18 either under the international act or the -- or
19 the domestic act.

20 THE COURT: That's what I thought your position was,
21 so I was just a little surprised to see that
22 here.

23 MR. COWPER: Well, I -- what I was responding to here
24 or trying to respond to here was my friend's --
25 let me put -- and I'll state -- I -- I said a
26 large "if" at the beginning of this.

27 As I understand my friend's submission to
28 you, and I take it seriously, he -- he very
29 forcefully advocated applying a spectrum of
30 standard under either or both acts --

31 THE COURT: Um-hum.

32 MR. COWPER: -- applying the Southam and other cases.

33 Now, the first point of departure between us,
34 and I've tried to be clear, is that I -- I say
35 that's completely wrong. But if I'm wrong on
36 that, and -- and Your Lordship has found in
37 previous cases that I'm certainly capable of being
38 wrong, and I am capable of being wrong. But if
39 I'm wrong in that one, if my client's in error and
40 my submissions are in error in that, then my
41 alternative would be to say if you properly apply
42 the standards that my friend has reference to, it

43 would justify a very high degree of deference,
44 applying those standards. That's all I'm saying.
45 Have I been clear the second time around?
46 THE COURT: Yes, you have.
47 But I guess the -- the question that that

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1 leads me to is -- is assuming that your friend is
2 correct --
3 MR. COWPER: Um-hum.
4 THE COURT: -- and that they are questions of law --
5 MR. COWPER: Yes.
6 THE COURT: -- as opposed to questions of fact or
7 mixed fact and law, then in that case would that
8 not change the analysis for the appropriate
9 standard of review?
10 MR. COWPER: Okay. I'll deal with that in this --
11 this fashion: Questions of law as I read it under
12 the international act are immune from review,
13 period. So if you're under the international act
14 you -- you do not review --
15 THE COURT: I'm only --
16 MR. COWPER: -- errors of law either.
17 THE COURT: I'm only talking about the --
18 MR. COWPER: If we --
19 THE COURT: -- commercial arbitration.
20 MR. COWPER: If we go to the domestic -- domestic act,
21 I concede that there is a jurisdiction in the
22 Court to grant leave to appeal on questions of
23 law.
24 So if my friend identifies questions of law
25 and if we're under that statute, then with respect
26 to the question of standard of review, there are
27 two ways you can deal with it. You can deal with
28 it on the basis of the analogy to the Pezim,
29 Southam case, or you can deal with it as I've
30 proposed to you, which is that the central
31 filtering mechanism is likely leave to appeal and
32 the factors under leave to appeal.
33 And I think my friend's first position on --
34 on the standard if leave is granted is
35 correctness, and I think that is generally
36 correct. That is generally correct.
37 If Your Lordship says, no, even though I
38 grant leave to appeal, I still have it open to me
39 to decide a standard of review by analogy to
40 Southam. So that's where I am now. Then applying
41 those factors, that standard of review would be
42 highly deferential in my view, if you applied

43 those standards.
44 THE COURT: On questions of law?
45 MR. COWPER: Yes, on the questions of law.
46 THE COURT: When you say "highly deferential," you
47 mean reasonableness simpliciter as opposed to --

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1 MR. COWPER: Reasonableness simpliciter or patently
2 unreasonable, one or the other. I don't think --
3 I've never quite figured out how you tag the --
4 the spectrum, and I know Your Lordship struggled
5 with it in Beazer. But either -- on either
6 standard this award is not readily capable of
7 indictment, either reasonable simpliciter standard
8 or patently unreasonable.

9 I think the -- I think the reason that it can
10 be confusing is that my friend, I think, and I'll
11 go away and look at my notes, applies the -- the
12 analogy to -- pretty broadly to the potential
13 jurisdiction of the Court under the international
14 act or under the domestic act, whereas I see it
15 having only a narrow potential purchase at the
16 very end of the -- of the -- of the position. In
17 other words, it's only -- if you go all the way
18 down to leave to appeal being granted and the
19 leave -- and the question of law being identified,
20 that you then have to concern yourself with the
21 potential application of either the Pezim standard
22 or the other standard.

23 Now, I deal at page 67 with a -- a real-life
24 example in the Hayes appeals of a case of first
25 impression, a question of law being heard by the
26 Court of Appeal recently in which the Court of
27 Appeal, I think, clearly set out the division
28 between what it will do with questions of law and
29 when it will intervene or not. And this is really
30 not arising in an identical context, but it does
31 arise under this act.

32 And just -- I was the counsel for the
33 appellant in both these appeals, unsuccessful
34 counsel, but the questions were simply these, and
35 that was: Two arbitrators had had to interpret
36 for the first time the regulation under the forest
37 act which supervised and provided for the setting
38 of rates for contractors under the forest act.
39 One arbitrator had found that the tests set by the
40 regulation was an objective test, having regard to
41 various factors. The other arbitrator found that
42 it was both subjective and objective and that he

43 was entitled to take into account subjective
44 factors.
45 I appealed both to Madam Justice Baker and
46 then to the Court of Appeal. The Court of Appeal
47 dismissed both appeals, so it upheld the award of

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1 both arbitrators. And in determining whether or
2 not the fact that one arbitrator took a contrary
3 view of the regulation than the other, the Court
4 of Appeal took a very, I think, cautious approach
5 to leaping to the conclusion that the arbitrator's
6 observation of the regulation led to a legal error
7 justifying a reverse.

8 It was indeed my submission to them that they
9 could not hold -- uphold both outcomes because you
10 had an irreconcilable view of the jurisdiction
11 under the regulation which was a clear question of
12 law, and that they ought to decide either
13 objective or subjective, and whichever arbitrator
14 got it wrong ought to be reversed. They upheld
15 both.

16 And at page 68 in dealing with the appeal
17 from the arbitrator who applied subjective
18 elements, at the top of page 68 Mr. Justice Finch
19 writing for the unanimous court said:

20
21 "It appears to me...the arbitrator
22 correctly instructed himself that the task
23 of an arbitrator under s. 25(1) is to
24 determine what 'a licensee' and 'a
25 contractor' - not the particular parties to
26 the dispute - 'acting reasonably in similar
27 circumstances' would agree to. Despite
28 some confusing or perhaps even inopportune
29 language used later in the award, I am
30 satisfied, as was the learned chambers
31 judge, that the arbitrator stayed..." too
32 "...true to his overall task of
33 objectively determining the appropriate
34 award.

35 "The impugned passages reproduced
36 above, that this is, 'replicating the
37 parties' past bargaining behaviour' and
38 acting as a 'surrogate negotiator' would be
39 inappropriate descriptions of the proper
40 manner to resolve the dispute if the
41 passages were unqualified. However, in
42 both instances, and particularly in the

43 concluding passage...the arbitrator
44 referred to the overall requirement of
45 s. 25 which he understood to be objective."
46
47 And the reason I've referred to this is

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1 because there is an analogy to my friend's attack
2 on this award. My friend says, in response to
3 Your Lordship's comment as I understand it -- was,
4 well, they did refer to 1105 at the beginning.
5 They did refer to 1105 at the end. They pro --
6 they -- they said that they were making a finding
7 of a breach of 1105. But in the course of doing
8 so, they referred to Chapter 18.

9 In this case that's -- that's really by
10 analogy precisely what this arbitrator did. The
11 arbitrator started with a -- the reference to the
12 objective language of the regulation, concluded
13 with an objective language, but in between he
14 referred on numerous occasions, as you can tell,
15 to subjective factors.

16 And the Court of Appeal said no. As they
17 say:

18
19 "...the arbitrator...arbitrator stayed
20 true to his overall task..."

21
22 And that's what I say, by way of analogy,
23 beyond any question in my submission, these
24 arbitrators did.

25 Now, I say there's no jurisdiction for review
26 of fact or mixed fact and law. And I finish that
27 chapter.

28 Now, I know that we went late. I was going
29 to go now and deal with the award, so it's an
30 appropriate time if you want to take the morning
31 break now.

32 THE COURT: Very well. We'll take the break.

33 THE REGISTRAR: Order in chambers. Chambers is
34 adjourned for the morning recess.

35
36 (MORNING RECESS)

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

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

39

40 MR. COWPER: Thank you, My Lord.

41 I should say as well, just before closing
42 Chapter 3, the point I didn't make in oral

43 argument is that our position in relation to an
44 error of fact that becomes an error of law is that
45 it has to be a finding without evidence, not a
46 finding that is unreasonable or patently
47 unreasonable, or against the weight of the

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1 evidence; it has to be a finding without evidence.

2 When we come to the facts of this case, what
3 we will concentrate on is simply giving you the
4 contrary case on the issues of fact that my friend
5 dealt with. And in my submission if we can
6 establish the existence of contrary evidence, that
7 that disposes of any question of fact becoming a
8 question of law for this Court.

9 Now, before I go to the allegations of excess
10 of jurisdiction and otherwise, I thought it would
11 be important for me to go through the -- the award
12 as my friend did and to indicate what differences
13 he and I have, at least in -- in overview, in our
14 interpretation of the award.

15 So if Your Lordship could have the award in
16 whatever version you've been using -- and let me
17 try to summarize, if you have the -- the -- the
18 table of contents of the award in front of you,
19 some of my friend's and my differences.

20 As I understood my friend's submission and --
21 and interpretation of Part 5, he said to Your
22 Lordship his view of part of the award is that it
23 is and should be regarded as a section dealing
24 with allegations rather than any findings of
25 fact.

26 I've gone through that part of the award. In
27 my submission there were many, many findings of
28 fact which are clearly findings of fact in that
29 part, and the title, which is facts and
30 allegations, is accurate. There are allegations,
31 and my friend highlighted for you and referred you
32 to the paragraphs which refer to "Metalclad
33 asserted" or "Mexico asserted." But in the same
34 part it's quite clear that the tribunal was making
35 findings of fact as they said they would do in
36 that part, so that it is not accurate, with
37 respect, to say that you can pass over Part 5 as
38 simply being a recitation of allegations.

39 The next point, which I think is an important
40 point, is that I find on the award in respect of
41 what the tribunal found was a breach of 1105, I
42 say on a proper reading they relied upon the

43 totality of circumstances. They did not -- and I
44 think my friend's interpretation is that the
45 unfairness under 1105 exclusively related to the
46 municipality's excess of jurisdiction. That is
47 not my reading of the award, and I'll give you a

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1 thumbnail sketch of what I say the circumstances
2 were that they had regard to.

3 But it's on my respectful submission clear
4 that the tribunal had regard to acts and -- and
5 failures to act on the part of the federal, State
6 and municipal governments as factors in
7 determining whether Mexico had acted unfairly and
8 inequitably and thus breached its obligation under
9 1105.

10 I've already dealt with the -- on Friday the
11 difference between my friend and I in relation to
12 the two findings of expropriation, but that's
13 another important difference between us in
14 relation to the interpretation of the award.

15 And as I said this morning, we have a very
16 different view of the -- of the role that Chapter
17 18 played in the ultimate finding of the Court --
18 of the tribunal in relation to breach of 1105.

19 Now, that being said by way of introduction,
20 I think I can go quite quickly.

21 In relation to background facts, if you go to
22 paragraph 28 to 32, in my submission in this
23 section the tribunal is making a number of
24 findings, most of which are unexceptional and many
25 of which are not disputed, which are in the nature
26 of background facts, that is where the site was.
27 But some of these are important facts, the fact
28 that, for example, the site is actually 70
29 kilometres from the city, the fact that only 800
30 people live within 10 kilometres of the site.

31 And there are other sections which then go on
32 to deal with important findings in relation to
33 permits and authorizations in the same section.
34 If you go to paragraph 28 and 29 there is a
35 reference to the permit. In 28 it starts with the
36 authorization to COTERIN to construct and operate
37 a transfer station.

38 In 29 it deals with the granting of a federal
39 permit in January 23, 1993. In paragraph 30, it
40 deals with the finding that after the issuance of
41 a federal construction permit on April 23, 1993
42 there was an option agreement entered into to

43 purchase COTERIN.
44 And -- and I may say, just to flag here, as I
45 understood my friend, he argued that the State
46 permit did not authorize construction, and that I
47 believe he said that the permits did not deal with

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1 construction.

2 Now, in my submission, and I'll give you the
3 permit, I think beyond doubt the federal permits
4 included the authorization to construct the
5 facility. There is no doubt in my submission, and
6 I'll give you the permits to read, that they
7 contemplated and authorized the construction of
8 the facility.

9 One important difference between my friend
10 and I is in the construction of the reference to
11 the facts of the federal closure order. And
12 just -- I don't think you've heard this. It was
13 Metalclad's position at the hearing, and I say
14 it's -- it's clearly made out from the facts, that
15 the federal closure order had nothing to do
16 directly with the construction and operation of
17 the hazardous waste facility but, rather, the
18 federal closure order related to the closure of
19 the transfer station and the requirement to
20 confine the improperly stored materials.

21 And I can say this: I think the short point
22 which makes it obvious is that on the tribunal's
23 findings, on my friend's view of the facts,
24 there's a series of federal authorizations,
25 federal permits and a series of acts relating to
26 construction of the hazardous waste facility at
27 the same time as the federal closure order that my
28 friend relies upon was in existence.

29 So my friend has created an issue by
30 characterizing the federal closure order as having
31 to do with the waste facility and then says, well,
32 they didn't have regard to it. Metalclad's
33 position, which is endorsed by the tribunal,
34 it's -- it's no relevance to the hazardous waste
35 facility at all.

36 What the tribunal did was to refer to the
37 authorizations granted by the federal government
38 in relation to the hazardous waste facility. The
39 only intersection, which is why the federal
40 closure order was eventually lifted, was that the
41 Convenio contemplated the remediation of those --
42 those improperly stored facilities which required

43 the closure order to be lifted so that they could
44 be included in the operation of the other -- of
45 the facility.
46 But just continuing, paragraph 31 deals with
47 the issuance of stand -- of State land use

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1 permit. It refers to the conditions of the permit
2 at paragraph 31.

3 If you go to paragraph 32 there's a reference
4 to meeting the governor. And you'll see in
5 relation to governor's conduct and -- that in that
6 paragraph it says:

7
8 "One month later, on June 11th, '93,
9 Metalclad met with the Governor of SLP to
10 discuss the project."

11
12 That I think is a finding. Then it says:

13
14 "Metalclad asserts that at this meeting it
15 obtained the Governor's support for the
16 project."

17
18 That's an assertion.

19
20 "In fact..."

21
22 Which I think is a finding of fact:

23
24 "...the Governor acknowledged at the
25 hearing that a reasonable person might
26 expect that the Governor would support the
27 project if studies confirmed the site as
28 suitable or feasible and if the
29 environmental impact was consistent with
30 Mexican standards."

31
32 And I say that's a finding in relation to
33 what, as they say, a reasonable person would
34 conclude from the governor's representations.

35 Now, just so Your Lordship has -- because my
36 friend dealt with the municipality. A central
37 theory of the case that Metalclad had was that the
38 federal government up until the very end of the
39 piece was uniformly supportive and gave a series
40 of authorizations which authorized the
41 construction of the facility on various conditions
42 which were met by Metalclad; that the governor, on

43 the other hand, who was a significant political
44 figure -- that the State had issued a State land
45 use permit, but that the governor effectively was
46 seeking to obtain political concessions from
47 Metalclad, and that he episodically either was in

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1 favour or against depending upon the -- the stated
2 time you're dealing with, and that when the
3 Convenio was concluded, the governor came out
4 firmly against the project, the Convenio being
5 the -- the conclusion of, if you will, both a
6 legal and a social contract between the federal
7 authorities and Metalclad, and that the terms of
8 that Convenio were -- were opposed by the
9 governor, and that he dominated the municipal
10 process, that he in fact sent lawyers to -- to --
11 to instruct the municipality as to how to deal
12 with the permit application, which had been
13 outstanding for a long period of time and nothing
14 had been done about it, and that he in fact
15 attended and was at the meeting which my friend
16 relies upon for the denial of the permit, and that
17 he indeed -- he indeed overwhelmed, if you will,
18 the local process to ensure that the municipality,
19 I'm talking about Metalclad's case, was -- took a
20 position adverse to the project. So this finding
21 and this reference to the governor's initial
22 support is -- is an important factual context for
23 what he later does.

24 There's a finding at 35 that in August 10,
25 '93 federal authority granted a permit for
26 operation. September '93 Metalclad exercised its
27 option.

28 I should say, and we'll come back to this,
29 but in relation to the option agreement that my
30 friend put some emphasis on, the contrary position
31 was very simply this, and that was: Mr. Kesler
32 was cross-examined on that, was cross-examined on
33 the option agreement. And when he was re-examined
34 he said, in either the cross-examination or
35 re-examination, that we removed the condition
36 relating to municipal permits when we were
37 satisfied by the federal officials that we didn't
38 need one and that if we applied for one it would
39 be issued as a matter of course.

40 At 43, and this is an important fact in
41 relation to permits, and I'm going to skip around
42 a little bit, but I want to stay with permits. At

43 43, in relation to the finding I've just referred
44 to in 35, you'll see that in January 31, '95 the
45 federal authority:
46
47 "...granted Metalclad an additional

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1 federal construction permit to construct
2 the final disposition cell for hazardous
3 waste and other complementary structures."
4

5 And if we can stay with sort of the
6 administrative process, if you skip to 44 on the
7 same subject matter, you'll see that:
8

9 "In February '95, the Autonomous
10 University of SLP...issued a study
11 confirming earlier findings that, although
12 the landfill site raised some concerns,
13 with proper engineering it was
14 geographically suitable for a..." hase
15 "...a hazardous waste landfill."
16

17 So that's at 44. And then just continuing
18 with the permitting history, if you go to -- on
19 same paragraph, if you have it with me, over on
20 the next page:
21

22 "In March '95, the Mexican Federal
23 Attorney's Office for the Protection of the
24 Environment..."
25

26 Which is PROFEPA.
27

28 "...conducted an audit of the site and
29 also concluded that, with proper
30 engineering and operation, the landfill
31 site was geographically suitable for a
32 hazardous waste landfill."
33

34 And I'll take you -- let me finish this. The
35 final reference on permitting, if you go to 57,
36 you'll see that they -- they find in this
37 section:
38

39 "On February 8th, 1996, the INE..."
40

41 Which is the federal authority, one of the
42 federal authorities.

43
44 "...granted Metalclad an additional permit
45 authorizing the expansion of the landfill
46 capacity from 36,000 tons per year to
47 360,000 tons per year."

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1
2 So in the -- and by that point in the
3 history, we're dealing with -- the controversy has
4 blown -- full-blown by February of '96. I don't
5 think there's any doubt about that. And the
6 federal authority grants an additional permit
7 authorizing the expansion of the capacity by a
8 factor of tenfold.

9 Now, let me just say this, and that is we'll
10 get you back to the evidence.

11 But Metalclad's case here was that if you
12 look at the history of what's going on here, that
13 Metalclad answered all of the legitimate
14 environmental concerns, it conducted and
15 participated in the audit, it participated in the
16 reaudit, and it satisfied all legitimate
17 environmental concerns to the authority that had
18 the right responsibility to oversee environmental
19 concerns, and that once it had satisfied all of
20 those, it was then ready to go and ready to
21 operate, but that the municipality and the
22 governor for improper reasons interfered with the
23 operation of the facility in a way which
24 frustrated its operation.

25 And ultimately what happened was political
26 factors made it impossible for the federal
27 government to continue with support, that they
28 basically felt unable to deal with the political
29 factors within Mexico and so that they in effect
30 abandoned Metalclad.

31 And I'll come back to you.

32 I -- I should say on a very narrow permitting
33 point, and I can come back to this and give you
34 the specific references, but my friend took you to
35 two really -- earlier points. And I said
36 yesterday -- on Friday that -- that our submission
37 is that Metal -- Mexico is being very ahistorical
38 in its relationship to the facts.

39 Let me give you just an example or two. The
40 refusal of the first permit on its face refers to
41 the absence of federal and State permits. In
42 other words, the -- the -- the first refusal my

43 friend -- my friend put such great reliance on,
44 which I think is '90 or '91, and I'll get the
45 right date later, on its face says we're not
46 giving it to you because you don't have a federal
47 permit and you don't have a State permit.

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1 Now, my friend doesn't deal with the
2 difficulty that his -- that Mexico had in this
3 case, which was by the date that this -- that the
4 permit was applied for, which was refused in '94,
5 the federal permits have been obtained and the
6 State permits have been obtained.

7 So it's one thing for a municipality to say,
8 well, you don't have the proper permit, so why are
9 we issuing a construction permit? But everything
10 had changed in the interval.

11 So my friend says the tribunal failed to have
12 regard to that when indeed a -- in my submission
13 they had regard to precisely what they ought to
14 have, which is as at the date when the
15 municipality was acting did they have the right
16 federal permits, did they have the legal and
17 lawful authorization to operate the facility?

18 The next topic I -- I'd like to deal with
19 which is just three paragraphs is the conclusions
20 in relation to the municipal process. If you
21 could go back to paragraph 50, this is, I say, a
22 finding in relation to municipal permitting. It
23 says:

24
25 "On December 5th, 1995, thirteen months
26 after Metalclad's application for the
27 municipal construction permit was filed,
28 the application was denied. In doing this,
29 the Municipality recalled its decision to
30 deny a construction permit to COTERIN in
31 October '91 and...'92 and noted the
32 'impropriety' of Metalclad's construction
33 of the landfill prior to receiving a
34 municipal construction permit."
35

36 Now, I believe my friend at one point said
37 that the tribunal paid no regard or had no effort
38 or no attention to the prior refusal. Well,
39 that -- that's the same beast. We're talking
40 about the same beast. The difference between my
41 friend and the tribunal was the tribunal did not
42 give it any weight. And that's a question of

43 fact. That's a -- there's no doubt they were
44 aware of it. And -- and if you read the -- the
45 submissions, there is a -- a spirited interchange
46 as to whether it made any difference at all.
47 But just continuing on this issue to the next

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1 two paragraphs, it says:

2

3 "There is no indication the Municipality
4 gave any consideration to the construction
5 of the landfill and the efforts at
6 operation during the thirteen months during
7 which the application was pending."

8

9 Now, the next paragraph is the only one on
10 which there's frankly any ambiguity as to what
11 they've done, because in my submission they don't
12 use the word "asserted," but quite clearly, if you
13 read the whole of 52 and the subsequent findings,
14 I think they -- they agreed with Metalclad on the
15 matters contained within 52.

16 But I agree that since they say:

17

18 "Metalclad has pointed out..."

19

20 There's some ambiguity.

21

22 "...that there was no evidence of
23 inadequacy of performance...of any legal
24 obligation, nor any showing that Metalclad
25 violated the terms of any federal or state
26 permit; that there was no evidence the
27 Municipality gave any consideration to the
28 recently completed environmental reports
29 indicating...the site was in fact
30 suitable...that there was no evidence that
31 the site...failed to meet any specific
32 construction requirements; that there was
33 no evidence...the Municipality ever
34 required or issued a...permit for any other
35 construction project in Guadalcazar; and
36 that there was no evidence that there was
37 an established administrative process with
38 respect to municipal construction permits
39 in the Municipality..."

40

41 Let me say that on -- and I've tried to
42 review all of my friend's arguments. I believe my

43 friend in the course of his submission more or
44 less conceded each of those points. I don't see
45 anywhere in my friend's submission where he says
46 this was a violation of the federal permit or this
47 was a violation of the State permit. He's

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1 asserting instead a coordinate existing municipal
2 authority to have regard to the matters they had
3 regard to, which in our submission clearly fall
4 within the view of environmental oversight,
5 directly or indirectly. And that is -- falls
6 squarely in the face of a finding of fact that
7 they had no authority.

8 Now -- and I should say in relation to two
9 other matters, my friend said, and on occasion he
10 used the phrase turning a new vice into a virtue
11 as he related to the tribunal. But he said that
12 the municipality had no commercial activity, and
13 you could go in and you wouldn't see any municipal
14 permit issued for anything. But that's not
15 surprising because it's a poor place with no
16 commercial activity.

17 Well, there was contrary evidence. The --
18 the -- Metalclad led the evidence of a notary who
19 went around the municipality, went around to
20 places that were being built and said do you have
21 a permit. No. And, you know, there's a bunch of
22 evidence about that, as to whether anybody for any
23 commercial activity or any construction activity
24 for any purpose had ever been asked for a permit.
25 And the answer was no permit had ever been sought
26 or answered.

27 Now, I -- at this point I'm only talking to
28 you about the contrary case. But it's important
29 in my respectful submission for my friend to deal
30 with the contrary case as well as Mexico's case in
31 the court below.

32 So there was contrary evidence about whether
33 the municipality had indeed followed any
34 permitting history, even in circumstances where it
35 was -- it would have otherwise have been required
36 to do so. This was the first hazardous waste
37 landfill, but the authority asserted was for
38 construction. Forgetting about what can be taken
39 into account, I don't think my friend could say
40 that there was no evidence of other construction
41 in the municipality. He used the phrase
42 "commercial activity."

43 And I think there was evidence and -- and
44 substantial suggestion that there was construction
45 you would have thought required a permit and no
46 evidence of permits whatsoever.
47 Turning to -- continuing, if you go to 54,

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1 you'll see at 53, just before I go, that the
2 tribunal notes Mexico's assertion of the awareness
3 through due diligence. Then it goes on to 54 and
4 says:

5
6 "Metalclad was not notified of the Town
7 Council meeting where the permit
8 application was discussed and rejected, nor
9 was Metalclad given any opportunity to
10 participate in that process. Metalclad's
11 request for reconsideration of the denial
12 of the permit was rejected."
13

14 Now, if I heard my friend properly, he said
15 that the -- the ability to request a
16 reconsideration was an answer to the fact that the
17 original process was flawed. Well, Metalclad's
18 case was, by the time that decision had been made
19 in the presence of the governor, the -- you know,
20 the -- the -- the dye was cast by the governor and
21 by the municipality and -- that nothing would move
22 it, and that the request for reconsideration was a
23 dead letter, and that any administrative process
24 would be equally a dead letter in view of the
25 changed political circumstances.

26 Now, turning to the issue of construction, if
27 you could turn back to paragraph 38 -- and I hope
28 this is helpful in dealing with it in the subject
29 matter rather than just order. 38 there is a
30 finding. After reciting Metalclad's assertion,
31 you'll see it says Metalclad asserts that in April
32 after months of reporting had secured SLP's
33 agreement. It says:

34
35 "...in May 1994, after receiving an
36 eighteen-month extension of the previously
37 issued federal construction permit from the
38 INE, Metalclad began construction of the
39 landfill. Mexico denies that SLP's
40 agreement or support had ever been
41 obtained."
42

43 But there can be no doubt, and I think my
44 friend conceded, that there was construction
45 ongoing.
46 What Mexico did at the hearing was to say,
47 well, yes, there was construction ongoing, but

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1 it's explained by Metalclad's explanation that it
2 was either remediation or maintenance. That was
3 the explanation.

4 Now, we -- I think my friend conceded that
5 the whole facility was built over this time
6 frame. And what the question of fact before the
7 tribunal was: Was it notorious and open to
8 everybody, as Metalclad said, and everybody knew
9 what was going on, or was it being conducted under
10 the cover of darkness or the cover of some other
11 explanation?

12 I don't know, with respect, how you could
13 characterize what was built, if people know it was
14 going on, as maintenance when they're building
15 buildings, they're -- they're digging, digging
16 pits. They're putting down membranes. They're --
17 they're putting in places for the treatment of
18 the -- of the waste. That doesn't, with respect,
19 sound in common sense.

20 But let's turn, if I can, to the findings of
21 fact. If you go to 39, the second sentence:

22
23 "Federal officials and state
24 representatives inspected the construction
25 site during this period, and Metalclad
26 provided federal and state officials with
27 written status reports of its progress."
28

29 We've given you the reference in our
30 argument, but I believe there were 65 progress
31 reports on construction which were filed before
32 the tribunal made by Metalclad to the federal
33 officials. So to the extent that the explanation
34 was that Metalclad was doing things secretly, that
35 was a fact to be taken into account by the
36 tribunal to the contrary.

37 It's not 65. How many is it? My -- it's not
38 65, I'm told. I'll give you the right number.
39 64? Okay. I'll get the right number. I think
40 there's a substantial number of them.

41 If you go then to 40, it's the finding of
42 termination as a result of the stop work order on

43 October 26th. And you'll see at 42, and dealing
44 with this sequentially, it then goes to resuming
45 construction and submission of an application for
46 a municipal construction permit.
47 And then the completion of the -- of the

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1 landfill was in March of '95, and that finding is
2 at paragraph 45.

3 Now, in relation to paragraph 45 of the --
4 and following, my friend at -- when he came to 46,
5 which is the reference to the demonstration, said
6 that the last sentence, if it's interpreted as a
7 finding, was, I think he said perverse because the
8 demonstration by itself was not sufficient to
9 cause anybody to stop operation.

10 Now, with respect, on two footings, firstly,
11 nothing could be clearer than a finding of fact as
12 to why Metalclad stopped working. But the more
13 direct answer is, I think on a reading of the
14 award as a whole, it's quite clear that the
15 tribunal did not find that the demonstration in
16 and of itself had stopped the construction.

17 And I say that because, if you see what --
18 first of all, the word they used is "Metalclad was
19 thenceforth" as opposed to as a consequence of the
20 demonstration prevented from operating.

21 The demonstration, both in terms of
22 chronology and relationship, was related to the
23 municipal and governor's opposition to the
24 project. And if you read the tribunal as a whole,
25 they then go on to talk about in the very next
26 paragraph the creation of the Convenio, which at
27 47 says:

28
29 "After months of negotiation, on November
30 25, '95, Metalclad and Mexico, through two
31 of SEMARNAP's independent
32 sub-agencies...entered into an agreement
33 that provided for and allowed the operation
34 of the landfill (hereinafter 'the
35 Convenio')."
36

37 So with respect, I think my friend has
38 erected a finding that is not obvious and then
39 attacks it on the basis that it's perverse.

40 I say that, read fairly, what they've said is
41 that, from March of '95 on, there were political
42 difficulties arising because of the opposition of

43 the Mexican State government and municipal
44 government. And that how that was dealt with as
45 noted in 47 was the negotiation and conclusion of
46 a Convenio.
47 And if you read their extensive references to

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1 the Convenio, which is the very next section, that
2 makes sense, because you'll see that the Convenio
3 contained a number of items which were the subject
4 matter of the political opposition. If we go to
5 page 16 you'll see -- we can take you there, but
6 it deals with audit and reaudit of the -- of the
7 site, addressing certain deficiencies.

8 If you go down to about line 6 there's an
9 action plan, including a site remediation plan,
10 that there is an agreement to carry out the work
11 in the action plan, including the corresponding
12 plan of remediation. They required remediation
13 and commercial operation to be -- to occur
14 together in the first three years.

15 There was a five-year term of operation,
16 renewable by the two agencies. In addition to
17 requiring remediation, there's a buffer zone for
18 cons -- conservation of endemic species, that is
19 dealing with the rare cactus, I take it. There's
20 a technical scientific committee to monitor
21 remediation, required that representatives of the
22 federal authority, the University of Mexico and
23 UASLP be invited to participate. And then a
24 citizen's supervision committee was to be created.

25 So in relation to the Convenio, there's no
26 doubt, if you read the award fairly, with respect,
27 that what happened between the spring of '95 and
28 the creation of the Convenio was that the federal
29 authorities took the lead in trying to solve the
30 problem which had given rise to the
31 demonstrations, which would then allow the --
32 the -- the plant to open and to be operative.

33 What happened though was the Convenio was
34 concluded between Metalclad and the federal
35 authorities, and very shortly thereafter the
36 municipality asserted itself, and the State came
37 out against the Convenio.

38 And as Your -- as Your Lordship may be aware,
39 I'm sure you -- you'll recall the injunction that
40 was obtained by the municipality was not based on
41 the absence of a construction permit, it was based
42 on the alleged inadequacy at law of the Convenio;

43 that is, that they -- the municipality said you,
44 the federal government, do not have the authority
45 to reach the agreement that you've reached. And
46 that was the -- the -- the continuing force of the
47 court enjoining the operation of the -- of the

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1 facility. And, as you know, that was then
2 dissolved later, so --

3 Okay. My -- my -- Mr. Parrish tells me
4 there's not 65 reports. There's 60 pieces of
5 correspondence between Metalclad and -- and the
6 federal government which were put into evidence,
7 and there were monthly construction reports, so
8 however many months, I take it, that construction
9 took place, and I'll give you the precise number
10 later.

11 Now, just so you have the finding,
12 paragraph 49 is the finding, and an observation of
13 the governor came out against the Convenio.
14 You'll see that at the second paragraph. You'll
15 see, 49:

16
17 "Metalclad asserts that SLP was invited to
18 participate in the process of negotiating
19 the Convenio but that SLP declined."

20
21 That's the State, reference to the State.

22
23 "The Governor of SLP denounced the
24 Convenio shortly after it was publicly
25 announced."

26
27 And then with respect to the timing, the very
28 next paragraph is:

29
30 "On December 5th, '95, thirteen months
31 after Metalclad's application for the
32 municipal construction permit was filed,
33 the application was denied."

34
35 And the timing of coincidences in both the
36 award and time is not -- it can't be overlooked
37 because, as you'll see, the Convenio's announced
38 on November 25th. The permit's been hanging
39 around, accumulating moss on the application, and
40 nobody has been doing anything. And the -- the
41 tribunal finds nothing's done until the Convenio's
42 concluded. Then the municipal -- municipality

43 denies the application and gets an injunction
44 against it based on the Convenio.
45 With respect to the Ecological Decree, that's
46 referred to in paragraph 59. And there's a
47 finding of the governor's issuance of the decree,

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1 and that the natural area encompasses the area of
2 the landfill under the decree at paragraph 59.

3 Now, with respect to two other matters, and
4 that is Metalclad's purposes in good faith,
5 firstly, you should have regard of the fact that
6 the tribunal found at paragraph 77 that
7 Metalclad's sole purpose of acquiring COTERIN was
8 for the development and operation of a hazardous
9 waste landfill.

10 And you'll see at 78 the tribunal observes
11 that:

12
13 "The Government of Mexico issued federal
14 construction and operating permits for the
15 landfill prior to Metalclad's purchase of
16 COTERIN, and the Government of SLP likewise
17 issued a state operating permit which
18 implied its political support for the
19 landfill project."
20

21 And that's an important finding of context in
22 relation to Metalclad's good faith in going
23 forward. And I don't think my -- my friend
24 suggests anything other than the tribunal found
25 that Metalclad believed there were assurances and
26 acted in good faith, and those are two critical
27 findings of facts. I'll come back to those.

28 With respect to the federal government's
29 representations, I say at paragraph 80, which is
30 the paragraph on the same page says -- it is a
31 finding, which is:

32
33 "When Metalclad inquired, prior to its
34 purchase of COTERIN, as to the necessity
35 for municipal permits, federal officials
36 assured it that it had all that was needed
37 to undertake the landfill project. Indeed,
38 following Metalclad's acquisition of
39 COTERIN, the federal government extended
40 the federal construction permit for
41 eighteen months."
42

43 Now, with respect to my -- my friend's
44 assertion in the chapter on the facts, my friend
45 makes the submissions to this Court, which are
46 almost word for word the submissions that were
47 made to the tribunal; that is, it -- it -- Mexico

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1 sought to explain why Metalclad's submission that
2 it had applied in good faith and thought it would
3 get it should be rejected, and it was a historical
4 argument.

5 The argument was they knew about it when they
6 came down, they knew the permit had been refused,
7 that they were wrong when they said they had no
8 idea of municipal permits, all of the arguments
9 you've heard.

10 What my friend didn't with fairness deal with
11 is the contrary case. And there was a substantial
12 contrary case. The contrary case was -- consisted
13 of a number of elements. But fundamentally it was
14 that while there was an awareness of the
15 possibility of a municipal permit, there were
16 assurances by federal officials on a number of
17 occasions that the municipality had no authority
18 over the environmental aspects of the project,
19 that it would have no choice but to issue the
20 permit, and that if you applied for it, they would
21 have to give it to you. And that was the basis on
22 which the permit was eventually submitted.

23 Now, let's just step back half a mo -- point
24 and say are those questions of fact? And I say
25 with respect they clearly are. And my friend's
26 submissions in that are simply Mexico's
27 submissions on questions of fact and -- without
28 taking into account or even crediting the contrary
29 case.

30 And, you know, one test of this is if you
31 actually dip into the arguments here, and if you
32 take, for example, Metalclad's reply and read
33 Chapters 12 through 16 in terms of the evidence
34 they rely upon to indict the process, and to
35 indict the federal government, the State
36 government and the municipal government as to how
37 they handled the project, there are very
38 compelling facts.

39 Now, those were the facts the tribunal
40 found. The facts my friend says are the -- are
41 the facts which were rejected are the reasons
42 paragraph by paragraph, taking Mexico's position

43 and finding out why they're not accepted, no,
44 they're not. But that's not, with respect, a
45 requirement even in this court for reasons, much
46 less in this arbitral regime.

47 Now, in relation to the findings, if you go

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1 to paragraph 85, the tribunal finds in the opening
2 that:

3
4 "Metalclad was led to believe, and did
5 believe, that the federal and state permits
6 allowed for the construction and operation
7 of the landfill."
8

9 And I say that's a finding and a reasonable
10 finding that was well supported on the facts. If
11 you look at the matter historically, that is
12 when -- when it's dealing forward with this
13 matter, for example, during the negotiation of the
14 Convenio, is that what they believed in '94 as
15 distinct from my friend saying, well, when they
16 had the option agreement, they were uncertain?
17 You have to look at their belief and their state
18 of mind as the history un -- unfolded.

19 The next one is 87, it says:

20
21 "Relying on the representations of the
22 federal government, Metalclad...
23 constructing the landfill, and did this
24 openly and continuously, and with the full
25 knowledge of the federal, state, and
26 municipal governments, until the municipal
27 'Stop Work Order' on October 26, 1994.
28 The basis of this order was said to have
29 been Metalclad's failure to obtain a
30 municipal construction permit."
31

32 Now, the -- the first sentence of that
33 paragraph I say is a finding. And with respect to
34 my friend's argument on representations, we'll
35 come back to it, my friend in answer to
36 Your Lordship said he would persuade you that the
37 finding of representations was patently
38 unreasonable.

39 Let me just -- on my review of the record,
40 which is by necessity incomplete, as far as I can
41 tell essentially what happened was fairly -- with
42 fair uniformity a number of Mexican officials,

43 either through writing or otherwise, said we
44 didn't make that representation, we wouldn't have
45 made that representation.
46 Metalclad's position was it was made on a
47 number of occasions and that there wasn't just one

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1 witness who said it, there were a number of
2 witnesses who said it.

3 When my friend says that it's patently
4 unreasonable, he's dealing with, by and large in
5 his factual references, Mexico's witnesses. But
6 he doesn't credit the existence of Metalclad's
7 evidence from a number of people saying you bet
8 those representations were received, and not only
9 that, but we relied upon it, we made decisions
10 based upon it, we invested money based upon it.
11 And, yes, they were oral representations, they
12 weren't written representations. They were oral
13 representations.

14 Now, that is, with respect, a classic
15 question of fact for a trier of fact. Does this
16 party who says rely on the paper, we didn't say
17 anything else otherwise, or these people who say
18 forget it, you know, forget what the paper says,
19 they told us we didn't have to worry about this,
20 we didn't have to worry about this, we would get
21 it. They had the only authority. With respect,
22 that's squarely in my submission a finding of fact
23 for the tribunal on any standard.

24 With respect to the findings of Mexican law,
25 I -- I -- I think there's two points that I'd like
26 to refer you to. And if you go earlier in the
27 award, it's really found in 81 and following, it
28 says:

29
30 "As presented and confirmed by Metalclad's
31 expert on Mexican law, the authority of the
32 municipality extends only to the
33 administration of the construction
34 permit..."

35
36 And then they quote the Mexican
37 constitution:

38
39 "...to grant licenses and permits for
40 constructions and to participate in the
41 creation and administration of
42 ecological...zones..."

43

44

45

46

47

Now, if I'm not mistaken, that is a reference to the Mexican constitution. I think my friend said towards the end that they had not referred to the American -- Mexican constitution. I may be

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1 wrong, I thought that was a reference to the
2 constitution.

3 They then say Mexico's experts on
4 constitutional law expressed a different view.
5 But then they say, starting at page 28:

6
7 "Mexico's...Law...expressly grants to the
8 Federation the power to authorize
9 construction and operation of hazardous
10 waste landfills."

11
12 And they go:

13
14 "Article 5 of LGEEPA provides that the
15 powers of the Federation..."

16
17 This is the federal government:

18
19 "...extend to: [t]he regulation and
20 control of activities considered to be
21 highly hazardous, and of the generation,
22 handling and final disposal of hazardous
23 materials and wastes for the environments
24 of ecosystems, as well as for the
25 preservation of natural resources, in
26 accordance with [the] Law, other applicable
27 ordinances and their regulatory
28 provisions."

29
30 And then 83 says:

31
32 "LGEEPA..."

33
34 Which is the -- the law:

35
36 "...also limits the environmental powers
37 of the municipality to issues relating to
38 non-hazardous waste. Specifically, Article
39 8 of the LGEEPA grants municipalities the
40 power in accordance with the provisions of
41 law and local laws to apply: [l]egal
42 provisions in matters of prevention and

43 control of the effects on the environment
44 caused by generation, transportation,
45 storage, handling, treatment and final
46 disposal of solid industrial wastes which
47 are not considered to be hazardous in

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1 accordance with the provisions of Article
2 137..."

3
4 Then he says, 84:

5
6 "The same law also limits state
7 environmental powers to those not expressly
8 attributed to the federal government."

9
10 Then he -- then he goes on to make the
11 finding with respect to Metalclad's stated
12 belief.

13 In very short order, what the tribunal found
14 was the constitution allowed the federal
15 government to have the power, the federal
16 government in LGEEPA assumed the power and
17 excluded the authorize -- excluded any authority
18 on the State and municipality. That's what
19 Metalclad's expert witnesses said. Effectively
20 that's what the expert evidence as -- as -- as to
21 Mexican law said. They accepted Metalclad's
22 expert view of Mexican law, and they rejected
23 Mexico's view of both constitutional and statutory
24 law.

25 Now, with respect to findings concerning the
26 Mexican municipal construction area, you will need
27 to look at and continue reading -- and I think you
28 had it read to you, but at 86, if you go over
29 there, after referring to Mexico's argument, it
30 says at 86:

31
32 "Even if Mexico is correct that municipal
33 construction permit was required, the
34 evidence also showed that, as to hazardous
35 waste valuations and assessments..."

36
37 And that's referring back to LGEEPA which
38 talks about hazardous is federal, non-hazardous is
39 the -- is the greatest extent of municipal.

40
41 "...the federal authority's jurisdiction
42 was controlling and the authority of the

43 municipality only extended to appropriate
44 construction considerations. Consequently,
45 the denial of the permit by the
46 Municipality by reference to environmental
47 impact considerations in the case of what

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1 was basically a hazardous waste disposal
2 landfill, was improper, as was the
3 municipality's denial of the permit for any
4 reason other than those related to the
5 physical construction or defects in the
6 site."

7
8 Now, let me say this, and that is -- because
9 partly this decision has had comment made on it as
10 to restrictions on local authority, and my friend
11 said that one aspect of the municipal's (sic) role
12 in the system was as representative democracy,
13 or -- or I've forgotten the phrase other than
14 "representative democracy."

15 But in my submission, what the tribunal
16 properly did was not to say what should Mexico's
17 allocation of legislative and statutory authority
18 be. They -- they didn't say it should be
19 different than it is. They went to it properly
20 and said on the expert evidence what is the
21 allocation of authority? Metalclad said this
22 permit wasn't refused for proper reasons; it was
23 refused for improper reasons.

24 And the absence of lawful authority by an
25 organ of government in my submission has to be a
26 factor in any determination of something that is
27 said to be inequitable and unfair. It certainly
28 may not be conclusive. It may not be sufficient.
29 It depends on the circumstances.

30 But I don't think with respect that my friend
31 could sustain the proposition in any forum that
32 under international law the excess of authority,
33 the unlawful acts of a State organ, is not a
34 factor to take into account in assessing whether
35 or not that State has afforded fair and equitable
36 treatment to an investor.

37 Now -- and I'll -- we'll give you these
38 later, but you should note the findings at 90, 91
39 and 92 as it deals with the town council. They go
40 at some length to deal with the issues and whether
41 or not the basis for the refusal was either
42 appropriate or even in -- in a general sense fair

43 or equitable.
44 The final finding's at 93, and it says that:
45
46 "...the construction permit was denied
47 without any consideration of...construction

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1 aspects or flaws of the physical facility."

2

3 And it's telling with respect, both under the
4 treaty and under international law, that the
5 tribunal was faced with this fact, which was the
6 facility was built. There was a facility for the
7 remediation, the processing and safe storage of
8 hazardous wastes produced by Mexican industry. It
9 was there to be used. The net effect of the
10 political and governmental action which was
11 complained of was that it wasn't going to be able
12 to be used by Metalclad.

13 But with respect to what's fair and
14 equitable, and this was relied upon by Metalclad
15 below, the very notion of fairness and equity
16 includes a question as to whether that enrichment,
17 that is that -- the -- the building of that
18 facility is an aspect of equity in whether or not
19 there's an unjust enrichment underlying the
20 expropriation that effectively resulted from the
21 steps taken by the State organs.

22 Now, with respect to the prevention of
23 operating the landfill, you'll see that there are
24 findings that -- finding in relation to the
25 municipality's roles at paragraph 106, and then
26 the references to the decree I gave you which are
27 at 96 and 109.

28 So if I can just close on -- dealing with the
29 award on -- on this basis: The -- what I say with
30 respect to the findings in fact are that the
31 tribunal focused upon properly what the state of
32 federal permits and authorizations was through the
33 historical period. And it properly, and on the
34 basis of substantial evidence, found that the
35 State authorities, operating within their
36 constitutional and statutory authority, had
37 approved the project and had indeed overseen the
38 construction and development of the facility; that
39 they, within their rights, evaluated the Mexican
40 law properly, and concluded that the municipality
41 had no authority to take the steps it did; and
42 that the municipal actions, coupled with the

43 change in political climate and the failure of the
44 Mexican federal government to take any steps,
45 resulted in the landfill being unable to be
46 operated by Metalclad.
47 Now, with respect to my friend's focus on the

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1 permit, it is very important for -- for my
2 submission that the refusal of the permit be
3 placed in its historical context, as I've just
4 said, and the tribunal clearly did so. You don't
5 ignore the timing, which is they didn't do
6 anything for 13 months. They had never issued in
7 their lifetime municipal -- lifetime a permit for
8 anything, and when did they refuse it? They
9 refused it days after the Convenio is concluded
10 with federal authorities which authorized the
11 operation of a landfill, and sought to reconcile
12 the political winds which had blown since the
13 spring.

14 Now, all I say it -- when we come to the next
15 point with res -- with respect to jurisdiction, if
16 we go to Chapter 4, is that all that I've said so
17 far are facts which are properly within the
18 jurisdiction of the tribunal, in -- and -- and
19 properly taken into account in their determination
20 of whether or not Mexico treated Metalclad fairly
21 and equitably. And -- and I say with respect
22 that's all I need to establish, that the tribunal
23 took proper facts into account in reaching a
24 conclusion that there was unfair and inequitable
25 conduct.

26 And -- and if I can, before going to this,
27 deal with the issue of the relationship of
28 municipal law to international law, which is sort
29 of flitting around the courtroom a little bit, and
30 give you my submission on it and what I think the
31 tribunal did, there's nowhere that the tribunal
32 said that an excess of authority by itself
33 constitutes a breach of international law.
34 There's not a word or a -- with respect, a
35 syllable of a suggestion that they were saying
36 that every denial of a construction permit by any
37 municipal authority will constitute a breach of
38 1105.

39 That's why, with respect, they go into the
40 whole history. That's why they make the findings
41 about federal authority and federal permissions.
42 That's why they make the findings about the

43 federal authorizations and assurances, because
44 it's the -- it's the concurrent involvement of the
45 federal officials which see the investment being
46 made, the construction occurring, the construction
47 being completed, with the subsequent denial of the

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1 oper -- of the authority to operate by the
2 municipality, which creates the unfairness. The
3 unfairness is not created solely by a municipality
4 saying no, but by the bringing together of the
5 effects of the three governments through the
6 historical period.

7 Now, with respect, the tribunal, when they
8 came to consider the application of 1105, used the
9 phrase "totality of the circumstances," and that's
10 precisely what they had in mind. When they deal
11 with the history, they're dealing with the
12 totality of those circumstances, and -- and I'll
13 take you to the law as we do it.

14 But in international law, as in other areas
15 of law, it's very hazardous to say, well, here is
16 one piece of a fact and that by itself doesn't
17 constitute a breach of the law. But what the
18 tribunal had to do was to consider all of the
19 facts and say on the totality of the
20 circumstances, does this constitute a breach of
21 the duty to be fair? And let me just pluck out
22 at -- one example, which I indicated.

23 There's an entire chapter in Metalclad's
24 submission which says essentially this constitutes
25 unjust enrichment, effectively, one organ of
26 government caused us to make an investment, caused
27 us to believe we would be able to make use of the
28 investment. As a result of the arrangements
29 between governments and the political situation of
30 Mexico, we're not able to make use of it.

31 That constitutes a basis in international law
32 for claiming compensation based upon either
33 unfairness or expropriation. And the concept of
34 unjust enrichment sounds in equity. The concept
35 of equity is incorporated in the treaty. And we
36 say based on international authority that's a
37 foundation for the finding that you ought to
38 make.

39 That's a sensible, reasonable argument in my
40 submission based on the tribunal's findings of
41 fact. It's clearly one which international
42 lawyers could differ and disagree on, and they

43 did, if you -- if you read the submissions, they
44 did so vigorously.
45 Mexico had international lawyers saying, no,
46 no, you ought not to do that. That's putting the
47 minimum standard, which -- they characterized fair

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1 and equitable as being minimum standard, whether
2 that's right or wrong aside -- that's putting it
3 way too high. You shouldn't put it that high.
4 But that's the application of a legal test, fair
5 and equitable, to a collection of facts. And,
6 with respect, that is something clearly within the
7 province of the arbitral tribunal.

8 Now, I was -- I'm going to turn to Chapter 4,
9 and I can do that for -- I guess I have 10
10 minutes, so I'll take a start at it, if I may.

11 THE COURT: Please.

12 MR. COWPER: In Section A I deal with the tribunal's
13 mandate and associated rules of treaty
14 interpretation. And one of the points that I
15 first want to make is under 191, which is the
16 international law to which Article 1131 refers to
17 can be determined by reference not only to
18 treaties and custom, but also to general
19 principles of law common to developed legal
20 systems.

21 And the point I'm making here is really in
22 reply to my friend Mr. Thomas's suggestion that --
23 that the -- the gross error that occurred here was
24 that these three international lawyers had left
25 the traces, skipped the traces, and they had
26 purported to apply international law without
27 leaving the treaty behind. And I think he said
28 the reference to customary international law means
29 you go to the customary international law and you
30 leave the treaty behind.

31 Two or three things: First of all, I say
32 that it takes very little effort to find
33 authorities that the concepts of fair and
34 equitable in international law, which is the
35 standard set by the treaty, is not a standard that
36 has clear delimitation, such as my friend
37 suggested, but it's one which is intensely
38 fact-specific and deals with, not surprisingly,
39 the fairness and the equitable considerations
40 arising from a collection of State conduct as it
41 relates to an investor or the citizen of another
42 State.

43 And so that when my friend urges upon you an
44 orthodox principle that you go to customary
45 international law, that is flawed in that you go
46 to international law to determine the content of
47 fairness and equity. That's the first flaw.

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1 The second one is that among the sources of
2 customary international law is the conduct of
3 States, which includes not only their conduct
4 which is evidenced by what they do, but also by
5 the agreements they make. And one of the sources
6 of international standards is a prevailing
7 consensus among signing States with respect to the
8 contents of treaties. It's an unusual feature of
9 international law. But one thing that
10 international jurists do is to look around the
11 world and look at the evolving and emerging
12 consensus of States respecting the contents of
13 international law standards.

14 And they often refer to the emerging
15 consensus and prevalence of treaty standards in
16 determining -- that is other treaty standards and
17 general treaty standards -- in determining what's
18 thought to be fair and equitable.

19 So when my friend says you go to customary
20 international law, there is no fixed body of law
21 out there which deprives fair and equitable in
22 some ways of any sort of general application. It
23 remains for the international lawyers to have a
24 sense -- when they go to general international
25 law, to have a sense currently of what the
26 standards of international conduct are. And those
27 standards of conduct can include what people do as
28 well as what States agree ought to happen.

29 And indeed, as Your Lordship may know, one of
30 the unusual features of international law is that
31 you can have a conclusion that international law
32 has changed even when you don't have a treaty in
33 relation to it concluded where, for example -- and
34 there was a substantial debate about the law of
35 the sea when -- when the convention on the law of
36 the sea hadn't been ratified, but had been
37 around -- and I'm not an expert in this area, but
38 it had been around for decades. And -- and it
39 hadn't been ratified by sufficient numbers of
40 States. There was article after article after
41 article saying that notwithstanding that it hadn't
42 been ratified by the sufficient number, that there

43 was a consensus of conduct that aspects of its
44 standards represented the international norm.
45 So the point I'm making is that there is no
46 clear safe harbour for finding limited and
47 delimited concepts of fair and equitable out in

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1 customary international law.

2 Finally, I say with respect international
3 lawyers don't agree with my friend that the terms
4 of treaties, which are the source of the
5 obligation, are somehow irrelevant to the content
6 of fair and equitable. I say that both on the
7 terms of this treaty itself, and in international
8 law, the interpretation of the treaty clearly
9 contemplates having regard to the principles that
10 the parties have agreed to in re -- in governing
11 their relationship elsewhere in the treaty. It
12 doesn't change the obligation being enforced,
13 which is fair and equitable. But it is -- it is a
14 fair and appropriate matter to have regard to in
15 determining whether something is fair and
16 equitable, and I'll give you more detail.

17 So for those three reasons I say that what
18 the tribunal in this case did was both reasonable
19 and within the consensus of international lawyers
20 rather than existing in some -- some faraway
21 world, as -- as I think my friend submitted to
22 you.

23 Now, with one of the comments, for example,
24 at the bottom, just to try to anchor this in some
25 detail, if you go to 192, Mexico in its
26 submissions -- and I've plucked this out of a
27 whole bunch of submissions, but Mexico, for
28 example, cited to the tribunal one of the books
29 authored by Mr. -- Professor Sir Lauterpacht, I
30 guess is his name -- his title, which talks about
31 equity, and talks about when international States
32 agree to a -- abide by equitable treatment, is
33 there -- is there a role for the domestic law
34 respecting equity, either in the civil code or the
35 common law, to inform that with some kind of
36 content? And he wrote in this that there was, and
37 that you had to, and that it was useful to look to
38 domestic standards of equitable conduct and to --
39 and to apply them with -- with appropriate changes
40 to State conduct to ensure that ideals of fairness
41 are achieved on the international level as well as
42 otherwise.

43 And of course the -- the one that's most
44 obvious here, because of the construction of the
45 facility, was the concept of unjust enrichment;
46 that is, that the State had received, through no
47 wrongdoing of Metalclad, a facility at -- at

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1 considerable cost and had -- had it. No matter
2 what happens, it's still there.

3 Seventy-one, we go on to treaty
4 construction. And I say that -- that beyond doubt
5 under the Vienna Convention the tribunal in fact
6 has to have reference to standard rules of treaty,
7 applying 1105. And if you look at the Vienna
8 Convention, it's clear that a tribunal is required
9 to give treaty terms an ordinary meaning in their
10 textual context and to consult the treaty's object
11 and purpose, and that in particular, if there's
12 ambiguities, that is of use, of utility.

13 Now -- and this is a -- really a response to
14 my -- my friend's submission, but I -- I believe
15 it was argued to you that limitations on the State
16 sovereignty are not to be presumed. And I've
17 quoted from Lord McNair there, saying that that's
18 not a prevailing rule of treaty interpretation,
19 that because both parties are restricting their
20 sovereignty when they enter into international
21 arrangements, one's not to presume that the State
22 sovereignty is not -- is not restricted.

23 That is indeed one of the objects of
24 international treaties. Taking the most obvious
25 example, Canadian law does not acknowledge a
26 constitutional right to property. We have by
27 signing NAFTA agreed that as it relates to foreign
28 investors, we have an international obligation to
29 compensate for expropriation. Now, by so doing we
30 have chosen to give investors from abroad greater
31 rights than investors have here pursuant to the
32 international -- international standard applicable
33 in NAFTA.

34 I think I've taken up the time.

35 THE COURT: We'll take the luncheon recess and
36 reconvene at 2 o'clock.

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

39

40 (NOON RECESS)

41 (PROCEEDINGS ADJOURNED AT 12:31 P.M.)

42 (PROCEEDINGS RESUMED AT 2:02 P.M.)

43

44 THE COURT: Mr. Cowper.

45 MR. COWPER: Thank you, My Lord. I was, I believe, at
46 the bottom of page 71 going over to 72.

47 And at the bottom of 71, I -- in relation to

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1 the principles of treaty construction, I refer to
2 the Ethyl case. And I quote that in relation to
3 the proposition or the issue of whether there is a
4 doctrine of strict construction respecting
5 sovereignty.

6 And you'll see from the report of that case,
7 which was quite long, that Canada apparently
8 argued before that tribunal that any interference
9 with its sovereignty should be strictly
10 interpreted, and this is part of the answer:

11
12 "The Tribunal considers it appropriate
13 first to dispense with any notion that
14 Section B of Chapter 11 is to be construed
15 'strictly.' The erstwhile notion that 'in
16 cases of doubt a limitation of sovereignty
17 must be construed restrictively' has long
18 since been displaced by Articles 31 and 32
19 of the Vienna Convention."
20

21 Which in my submission is a similar sentiment
22 to that expressed by McNair that I've quoted in
23 paragraph 195.

24 While I'm at that, if you could turn to the
25 Ethyl case, because it's one of the few awards
26 which has been rendered under Chapter 11. And as
27 you know, some of the awards have concerned only
28 the issue of -- as in the Waste Management case,
29 the only decision was a decision declining
30 jurisdiction on the issue of the waiver. So not
31 all of the awards actually get to the substance of
32 the treaty's terms and guarantees.

33 But with respect to this, there were a couple
34 of points in addition to the section that I've
35 quoted at 71 I wanted to refer you to. If you go
36 to page 28 and 29 immediately after the passage
37 which I've just quoted, which refers to another
38 tribunal, if you go over to page 29, you'll see
39 that what they do in relation to the issue before
40 them is to say:

41
42 "Given the relevance under Article 31 of

43 the Vienna Convention of NAFTA's object and
44 purpose, it is necessary to take note of
45 NAFTA Article 102..."
46
47 Particularly 1(c), and as -- they then quote

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1 Article 102, which is the objectives section.

2

3 "The Tribunal..."

4

5 At the bottom:

6

7 "...reads Article 102 as specifying that
8 the object and purpose of NAFTA within the
9 meaning of those terms in Article 31(1) of
10 the Vienna Convention are to be found by
11 the Tribunal in Article 102(1) in
12 confirming the applicability of Articles 31
13 and 32 of the Vienna Convention."

14

15 So for the purposes of determining the proper
16 interpretation of NAFTA having regard to the issue
17 before them, that tribunal had no difficulty in
18 saying that among the references it could make
19 were to the objects of NAFTA generally. And so I
20 say that that is, given the sparsity of tribunals
21 which have come to consider it, of support for
22 this tribunal's ref -- reference to the same
23 section.

24 I should also say that I believe on Friday
25 afternoon I reversed myself as I made my
26 submissions in relation to 102 in that I think I
27 was arguing in favour of the proposition, as I
28 read my -- my transcript anyway, that the
29 principles and rules were A through F, rather than
30 the principles and rules being national treatment,
31 MFN and transparency. As I read my comments, I
32 think that's what I said to you. I don't think
33 that's right. That's the opposite, what the
34 tribunal found. The tribunal found that the
35 principles and rules include national treatment,
36 MFN and transparency, and the objectives are A
37 through F. So I apologize for that. I --

38 THE COURT: If you said that on Friday, I didn't
39 interpret you to -- to say that.

40 MR. COWPER: Okay. Thank you.

41 The -- the other section I thought would
42 be -- just while we have that report in front of

43 you -- is of some interest is -- and I don't think
44 it should startle you, but it is of -- of note,
45 that if you go to page 33, and it starts at
46 paragraph 65, one of the issues that raised here,
47 and I indicated this this morning, was whether the

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1 fact that there had been a -- a statute which had
2 been, I think, passed but not promulgated as of
3 the date of the claim being made, whether or not
4 there was a measure which is, of course, a --
5 arguably a jurisdictional question for the
6 exercise of jurisdiction under Chapter 11, it's
7 only measures that States have to be accountable
8 for. Canada's argument here was we haven't -- we
9 hadn't, as of the date of the filing, passed a
10 law. I -- I believe, as the tribunal points out a
11 few days later, it was promulgated and became law.

12 But the issue was does the claimant have to
13 refile? In other words, do they have to abandon
14 their initial filing and refile? And in
15 determining what a measure was, Canada had regard
16 to the references to measure elsewhere in the
17 treaty, including the fact that elsewhere in the
18 treaty, and specifically as I read it Chapter 18,
19 there were references to measures and proposed
20 measures.

21 And so in -- Canada, in support of its
22 argument here in interpreting the use of the term
23 "measure" under Chapter 11, had no hesitation in
24 going to other parts of the treaty and saying when
25 you're interpreting "measure," you should exclude
26 "proposed measures" because proposed measures are
27 used elsewhere and are -- and that concept is
28 employed elsewhere in the treaty.

29 And that is apparent, I believe, from 65,
30 which talks about measure. And you'll see -- and
31 I may be making the point too many times, but you
32 see in the middle of 65 it says:

33
34 "Succinctly, Canada has argued that no
35 legislative action short of a statute that
36 has passed both the House the Commons and
37 Senate and has received royal assent
38 constitutes a measure subject to
39 arbitration under Chapter 11. Since at the
40 time Ethyl's claim was submitted to
41 arbitration by delivery of its notice, the
42 MMT Act..."

43

44 And this was the act which prohibited the
45 export of PCBs.

46

47 "...had not yet received royal assent

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1 which was forthcoming 11 days later, Canada
2 argues that jurisdiction fails."

3

4 And I think elsewhere it's noted that the
5 only consequence of that would be an obligation to
6 refile. But going on:

7

8 "In addressing what constitutes a measure,
9 the Tribunal notes that Canada's statement
10 says the term 'measure' is a non-exhaustive
11 definition of the ways in which governments
12 impose discipline in their respective
13 jurisdictions. This is borne out by
14 Article 201 which provides that..."

15

16 And then that's the definition of measure.
17 And that's within the treaty itself. The first,
18 of course, is the statement on implementation.
19 And then it says:

20

21 "...clearly something other than a law
22 even in the nature of a practice, which may
23 not even amount to a legal structure, may
24 qualify. Nonetheless, Canada argues not
25 without effect that an unenacted
26 legislative proposal which is unlikely to
27 have resulted even in the practice cannot
28 constitute a measure. It is reinforced in
29 this connection by the fact that Articles
30 1803(1) and (2) employ the term 'proposed
31 or actual measure.'"

32

33 And it says in relation to 10 -- sub (1),
34 quoting:

35

36 "To the maximum extent possible, each
37 party shall notify any other party with an
38 interest in the matter of any proposed or
39 actual measure that the party considers
40 might materially effect it."

41

42 And then going over to the top of the next

43 page:
44
45 "Canada draws further strength from the
46 reference to an actual or proposed measure
47 in Article 2004 which provides recourse to

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1 dispute settlement procedures..."

2

3 Et cetera. So those are different
4 operations, but Canada had no difficulty and saw
5 nothing wrong in arguing in relation to the
6 interpretation of the term "measure" in Chapter 11
7 that the tribunal should have regard to the
8 objects, purposes of the treaty, which are
9 referred to, and to the uses of similar terms
10 elsewhere in the treaty.

11 What this tribunal did was to say in
12 assessing what's fair or equitable, it is not
13 unfair or inappropriate to have regard to the
14 objects of the treaty, which include the object
15 of -- and the principle of transparency, and that
16 we ought to give "fair and equitable" a meaning
17 that furthers those objectives rather than hinders
18 those objectives.

19 And I say that's a principle of construction
20 which was within the jurisdiction of the tribunal
21 to -- to engage upon, and that there is no
22 boundary line beyond which the tribunal crossed in
23 its construction of the treaty and application of
24 the principles of international law.

25 Now, I'm going now to C. And let me say in
26 introducing this, and I deal in the remaining
27 parts of this chapter with how the transparency
28 argument was presented and how it was argued
29 before the tribunal.

30 But there's a preliminary point which I think
31 is of perhaps the greatest moment, which is, as I
32 read the submissions below, neither party -- no
33 international lawyer turned up and said to this
34 tribunal here is the authoritative, clear
35 definition of fair and equitable that you have to
36 apply to the facts of this case.

37 No one suggested to them in any passage that
38 I've read, and there's an awful lot of material,
39 but in neither the argument or the oral
40 submissions that the tribunal had available to it
41 some clear definition which excluded concepts like
42 unlawful exercise of authority by a municipality,

43 et cetera.
44 It was argued that the facts didn't
45 constitute unfairness or inequity, but there was,
46 as far as I can tell, no recognized definition
47 which would either exclude those or give them any

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1 particular weight. It was up to the tribunal to
2 decide how you translated those general concepts
3 in international law to the facts that were laid
4 before it.

5 The second point is with respect to my -- my
6 friend who -- who argued vigorously below, there
7 is no doubt in my submission that the concept of
8 fair and equitable treatment is in the process of
9 evolution in international law.

10 My friend referred, I think, to a 1926 case
11 talking about the minimum treatment. And that was
12 the phrase often used at the turn of the century
13 to -- to delimit State authority over -- over
14 people under these treaties. However, the phrase
15 fair and equitable has come to be used more and
16 more often. And the existence of State conduct
17 which has increased the expectation of fair
18 regulatory conduct and of fair government in the
19 general sense has been evolving, and this treaty
20 is part of that.

21 I mean, NAFTA is a very substantial and
22 significant international treaty, not only for the
23 purpose of the parties as a whole, but for States
24 generally, because you have Canada and the
25 United States, including in Mexico, a process
26 whereby they have assured to citizens of each
27 other's country fair and equitable treatment with
28 access to the investors who are affected by
29 that -- that -- the alleged conduct, the right to
30 bring claims immediately before arbitral
31 tribunals.

32 So I think with -- with respect to those two
33 preliminary points, that ought to in my submission
34 satisfy any concern the Court has with respect to
35 whether the tribunal was exercising its office in
36 a good-faith manner.

37 The absence -- my friend said, well, they
38 refer to no authority here, no authority there.
39 With respect, I think the tribunal on a fair
40 reading of the award thought this was an unusual
41 case. They total up the totality of
42 circumstances.

43 I -- I think the tribunal went out of their
44 way not to pronounce an authoritative,
45 comprehensive definition for future conduct. They
46 were solving the claim. And I think that the
47 award read as a whole reads fairly that way, and

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1 they applied the test. But, with respect, there
2 was no formula advanced before them by either
3 party which was shackling them to one conclusion
4 or the other.

5 So let me turn, if I will (sic), to
6 transparency and the role it played in the
7 argument and the role which we say it properly
8 plays in the application of the standard rules of
9 treaty interpretation and the sources of
10 international law.

11 Now, I'm at 197 and following. Could you
12 make a note that the references to the Vienna
13 Convention and the statute in the International
14 Court of Justice are both to my friend's
15 materials? I think we have "respondent's." Those
16 should be petitioner's authorities.

17 Now, I'm sorry, it's pointed out that I
18 forgot to mention one thing.

19 If you could -- I'll come back to it, but if
20 you would just after Ethyl -- could you put the
21 note -- and I'll come back and give you to -- to
22 the Loewen Group case, because that's another
23 example of a tribunal constituted here having
24 regard to terms of the treaty outside Chapter 11.
25 But I -- I didn't fully brief that, and I'd like
26 to come back to that, if I can. But I'll -- I'll
27 ask you to make a note of it there. It's under
28 tab 20 of our authorities.

29 So in general, Metalclad's submission below
30 was that weight had to be given to the ordinary
31 meaning of the concept of fairness and the concept
32 of equitable. It -- it also, as I said this
33 morning, placed weight on the fact that equitable
34 was a legal concept which had its counterparts in
35 both the procedural and substantive traditions of
36 common law and civil law traditions.

37 And you may have recalled one of the
38 arguments about public policy was whether public
39 policy was seen as having only a sounding in
40 common law or civil law. Mr. Justice Gonthier for
41 example said, well, it includes both.

42 And as I understand the -- the watershed

43 between those two traditions, it is that public
44 policy in the common law tradition has had regard
45 to the substantive provisions of law or
46 substantive application of rules, whereas in the
47 French tradition of -- of -- public policy has

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1 also had a procedural aspect, that it has been
2 seen as fundamental that certain procedural
3 standards be adhered to.

4 But in relation to this matter, Metalclad
5 said in the absence of any clearly developed, if
6 you will, and clearly comprehensive definition of
7 these terms in international law, then the
8 tribunal was to have regard to the ordinary
9 meanings of fair and equitable and to apply them
10 to the principles of the State's conduct seen as a
11 whole in this case.

12 As I go on to paragraph 199, Metalclad argued
13 that the transparency objectives were available to
14 the tribunal to construe what was fair and
15 equitable treatment, and that that exercise was
16 consistent with the -- Article 102's express
17 mention of transparency and with the ordinary
18 meanings of fair and equitable as modifiers of
19 treatment.

20 At no time in the submissions below did
21 Metalclad suggest that the meaning of transparency
22 was either coextensive with the GATT
23 jurisprudence, which Mr. Thomas referred to, or
24 its specific meaning in other NAFTA chapters. On
25 numerous occasions in the material and in the
26 submissions, Metalclad referred to the problem of
27 legal confusion by terms other than
28 "transparency."

29 And if I can pause here and just say this:
30 There's one actual surprising part of this case
31 when we come to the issue of transparency. And I
32 don't know quite how to say this exactly, but one
33 of the core acts which the tribunal clearly
34 thought was unfair and inequitable was not an
35 instance of a lack of transparency at all. The
36 lack of authority in the municipality to prohibit
37 the -- the operation of the landfill was not an
38 instance where there was a lack of transparency,
39 rather there was an excess of authority.

40 And as I said this morning, clearly an excess
41 of authority; that is, unlawful conduct
42 according -- according to the domestic law of the

43 State by a State organ must be at least a factor
44 that the tribunal's entitled to take into account
45 when it considers fairness and equity.
46 The tribunal's construction here of
47 transparency was not directed primarily to what

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1 the municipality did, because its conclusions very
2 clearly were the municipality had no authority.

3 Rather, what it was saying was look what has
4 happened in the course of the historical story to
5 the federal government's involvement. The federal
6 government comes in and says you have authority
7 from us. We are controlling. Don't worry about
8 anybody else. We're okay. And on the findings,
9 that's what happened.

10 Now, that's where the lack of transparency
11 arises, because the federal government is at one
12 in the same time saying that, and then later in
13 the piece says effectively there's nothing we can
14 do about what the municipality has done and, as
15 they submitted below, that's just -- that's just
16 bad -- bad luck that they ended up frustrating
17 your project.

18 So it's quite clear in my submission that the
19 tribunal placed the weight of its transparency
20 observations on the actions of the federal
21 government with respect to the municipal
22 government, which was, if -- if you will, the
23 casus belli here of the cause that -- that caused
24 Metalclad to complain. It isn't a
25 question of transparency at all; it's a question
26 of excess or want of authority or abuse of
27 authority.

28 If you go over to page 73, as I say at the
29 top of that page, Metalclad submitted below that
30 since there was no adjudicative precedent
31 precisely construing fair and equitable treatment,
32 one of the comments that was an excellent starting
33 point was that no commentators known to it
34 propounded a narrow meaning for the clause, and at
35 least two learned commentaries ascribed a broad
36 meaning to it.

37 Now, my friend in his submission urged upon
38 you some narrow definitions of the minimum
39 standard. And you -- you'll recall that the title
40 says "Minimum Standard," but 1105 talks about fair
41 and equitable.

42 One of the questions for international

43 lawyers to debate is what does it mean when the
44 treaty goes beyond the minimum standard, which was
45 a phrase used much more frequently earlier in the
46 century, and now guarantees fair and equitable
47 treatment, which is an emerging and more common

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1 treaty description with respect to the -- the --
2 the protection afforded to an investor?

3 And of course if we just think about it as
4 people using the English language, you would
5 expect a minimum standard to be more conservative
6 than a fair and equitable standard. And that is
7 not a -- past the notice of international
8 lawyers. And I'd like to give you at least one
9 reference to the authorities we've referred to at
10 paragraph 200. If you could go to our tab 52, to
11 F. Mann -- I don't know if F.A. Mann is the
12 equivalent at Oxford or London to Lauterpacht and
13 Cambridge, but he's another very distinguished
14 international lawyer from England and a
15 distinguished authority, I believe.

16 If you could go to 237 to 238, I've given you
17 a couple of the references there, but I'd like to
18 read 237, 238 as well. You'll see at 237, under
19 substantive law --

20 THE COURT: Um-hum.

21 MR. COWPER:

22 "The overriding obligation is that
23 investment shall at all times be accorded
24 fair and equitable treatment and shall
25 enjoy full protection and security."
26

27 And there's a lot of debate about what "full
28 protection and security" means when used in
29 coordination with full -- fair and equitable when
30 used alone.

31
32 "This is underlined by the further
33 provision that investors shall not be
34 subject to unreasonable measures."
35

36 That's another language. It's not used in
37 this treaty, but it's another commonly encountered
38 language.

39
40 "Although these are very familiar terms,
41 they have hardly ever been judicially
42 considered. Thus, while it may be

43 suggested that arbitrary, discriminatory or
44 abusive treatment is contrary to customary
45 international law, unfair and inequitable
46 treatment is a much wider conception which
47 may readily include such administrative

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1 measures in the field of taxation, licences
2 and so forth as are not plainly illegal in
3 the accepted sense of international law.
4 In particular, it is submitted that the
5 right to fair and equitable treatment goes
6 much further than the right to
7 most-favoured-nation and to national
8 treatment, even if in the latter case the
9 foreigner's rights are greatly extended and
10 underlined by the duty not to subject the
11 foreigner to unreasonable measures."

12

13 And if you go over to the top of 238:

14

15 "It has been suggested that the term 'fair
16 and equitable' is expressive of or adopts
17 what has for many years been known as the
18 minimum standard. Thus, in 1979 the Swiss
19 foreign office stated..."

20

21 And I won't inflict my French on you there,
22 but I think in three or four textual references
23 I've seen, this is referred to as being sort of
24 the conservative statement of fair and equitable
25 being related to the minimum standard. But this
26 author goes on and says:

27

28 "It is submitted that nothing is gained by
29 introducing the conception of a minimum
30 standard, and more than this, that it is
31 positively misleading to introduce it.
32 The terms 'fair and equitable treatment'
33 envisage conduct which goes far beyond the
34 minimum standard and afford protection to a
35 greater extent and according to a much more
36 objective standard than any previously
37 employed form of words. A tribunal would
38 not be concerned with a minimum, maximum or
39 average standard. It will have to decide
40 whether, in all the circumstances, the
41 conduct in issue is fair and equitable or
42 unfair and inequitable. No standard

43 defined by other words is likely to be
44 material. The terms are to be understood
45 and applied independently and
46 autonomously."
47

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1 And I think that will suffice for that
2 purpose.

3 While I -- you may want to make a note, just
4 if you're interested, that he makes an observation
5 or a series of observations about expropriation
6 and its understanding at 241 and 242, and his --
7 with respect to the debate about what tantamount
8 in NAFTA means, and both of the parties -- it
9 means equivalent. But part of what it means is
10 not necessarily properly taken. In other words,
11 its conduct which is equivalent to expropriation
12 without necessarily being an admitted
13 expropriation.

14 Do you have my point? In other words, the --

15 THE COURT: Um-hum.

16 MR. COWPER: -- my understanding of the use of the
17 word "tantamount" is that States who are
18 expropriating without compensation might say we've
19 entered into a treaty in which we agree to
20 compensate for expropriation, but only when we
21 admit we're expropriating. If we -- if we're
22 taking measures which effectively create an
23 expropriation, unless we admit it, there's no
24 obligation. And that's my understanding of one of
25 the purposes of that language of "tantamount," is
26 that the tribunal can consider whether the
27 totality of conduct is equivalent to an
28 expropriation.

29 I think both parties below -- as I read their
30 submissions, both agreed on that. And Mexico
31 agreed that a taking of the title was not
32 necessary, as I -- as I read it. I may have been
33 wrong. But certainly from our point of view,
34 there's a clear understanding in international law
35 that in order for there to be an expropriation
36 that gives rise to compensation under this
37 language, you don't have to take the title.

38 Now, going on to fair and equitable though at
39 201 at 73, if I can go back to my argument, as
40 I -- I think I observed this morning, Mexico
41 indeed relied upon President Lauterpacht's -- one
42 of President Lauterpacht's books and its argument,

43 the fact that no fixed meaning can be attributed
44 to the clause because of its fact-dependent
45 nature. And -- and so far as I can tell, that was
46 common ground between the parties.
47 Now, going over to paragraph 202, in support

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1 of its submission as to the direction in which the
2 international standards were going, as is often
3 the case in international law, the international
4 lawyers pluck out of a variety of areas analogous
5 examples or historical examples in support of the
6 proposition that the new standard sounds well in
7 respect of the past standards of compensation. In
8 other words, it may be a new phrase, but there are
9 analogous circumstances in which compensation was
10 found or analogous governmental action that was
11 censured or otherwise a basis for supporting the
12 interpretation of fair and equitable that was
13 being urged upon it.

14 And at 202 we refer to two cases. And these
15 are older cases, and I'll just tell you about each
16 of them quickly.

17 The Tattler case was actually a case
18 involving Canada. And if you want to look at it,
19 it's at tab 27. And this was a decision from 1920
20 in which a fishing vessel was seized in
21 Nova Scotia, and a claim was made, as I read it,
22 by the United States against Great Britain
23 pursuant to the terms of an international treaty.
24 And -- and I hope that whets your appetite a
25 little bit.

26 But if you look at the -- at page 49,
27 essentially they reject, as I understand it, the
28 first claim, which is -- and, I'm sorry, let me
29 step back.

30 What essentially happened here was there's a
31 vessel coming from the United States, coming into
32 Canada, and it's seized. And the argument with
33 respect to the essential ground we're talking
34 about is that the Canadian authorities seized it
35 and then apologized for it and said the seizure
36 was wrong because they had misapplied their own
37 standards.

38 And so what Metalclad did below was to say,
39 well, here's an example in the history of
40 international law where Canada in good faith
41 applies one standard and then realizes it's wrong
42 and -- and says, sorry, here's your boat back.

43 But in the meantime, the tribunal found that
44 there was a responsibility to compensate because
45 of the confusion, if you will, the lack of
46 transparency with respect to Canadian law and its
47 application to the fissing -- fishing vessel.

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1 And so this was an argument that says the
2 idea that laws should be predictable and that they
3 should be evenly applied is not new to
4 international law. And you'll see that that is
5 explained at 49 and 50. And the bottom is the
6 Canadian statute of 55, 56 Victoria, talking about
7 fishing vessels of the United States. It talks
8 about sailing from Gloucester, Massachusetts to
9 Newfoundland on a salt herring voyage. And if you
10 go to the second full paragraph, you'll see that:

11
12 "It's shown by the documents and is not
13 denied that the master of the tackler after
14 entering that port went onshore and applied
15 to the Canadian authorities for the said
16 licence."

17
18 And that was a licence under Canadian law for
19 American fishing vessels fishing in Canadian
20 waters, as I understand the reasons.

21
22 "That notwithstanding three separate
23 requests, the licence was refused him on
24 the ground that the schooner was on the
25 American register and did not hold an
26 American fishing licence, and that on this
27 refusal, the men were shipped without a
28 licence."

29
30 And as I understand it, that decision was
31 later established to have been wrong. And it
32 says:

33
34 "It's established by a report of the
35 Canadian authorities that up to that
36 seizing, the United States vessels
37 registered as trading vessels visited
38 Newfoundland for the purposes of obtaining
39 cargoes of frozen herring were afforded all
40 of the ordinary ports. Newfoundland,
41 however, in that year passed an act
42 preventing such vessels from procuring bait

43
44
45
46
47

fishes..."

Et cetera. And if you go down to about
two-thirds of the way down, it says:

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1 "In the early part of the season, the
2 Canadian local custom officials were not
3 very clear as to the status of these
4 vessels under the changed conditions."
5

6 And that's in relation to the inter --
7 interpretation and application of these current
8 regulations.

9 And if you go down to the paragraph -- the
10 second paragraph after that one:

11
12 "By that time...by that time, the Tattler
13 had returned to Gloucester and sailed again
14 for Newfoundland. And on December 15th,
15 owing to bad weather, she entered North
16 Sydney for shelter. She was immediately
17 seized on the charge of having on a
18 previous..." ship "...trip ship men without
19 a licence."
20

21 That's a Canadian licence.

22
23 "Telegraphic correspondence took place
24 between the owners and the Canadian
25 authorities to ascertain the facts, but it
26 was not until three days later that her
27 release was obtained.

28 "This tribunal is of the opinion that
29 the British government is responsible for
30 that detention."
31

32 It says:

33
34 "It's difficult to admit that a foreign
35 ship may be seized for not having a certain
36 document when the document has been refused
37 to it by the very authorities who required
38 that it should be obtained."
39

40 And the indemnity was ordered.

41 And this was not argued to be directly
42 applicable but rather, as I said, argued to be a

43 historical parallel or a historical analogy that
44 could be applied in determining what was fair in
45 relation to the municipal processes involved.
46 And it was a historical example where an
47 international tribunal said it's -- it's wrong

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1 to have essentially refused a licence when it was
2 requested earlier, and to have then seized the
3 vessel and you have to compensate for it.

4 The -- I won't take you to the De Sabla case
5 which is under tab 9. That case dealt with Panama
6 land law. And effectively the state of confusion
7 of Panama land law was found in -- in that case to
8 be at least a potential basis for a --
9 compensation in another international law context.

10 So parallels were sought with respect to that
11 case. There were other parallels in other
12 international cases which were urged upon the
13 tribunal.

14 At the top of 74 you'll see the reference to
15 the Buckingham Claim case. That was a case where
16 a British subject, I believe, was killed by
17 bandits in the mountains of Mexico. And the
18 argument was made successfully that the Mexican
19 authorities had not taken full steps to protect
20 the lives of foreign visitors under the relevant
21 international obligation, in that they ought to
22 have warned people there that there was a risk of
23 banditry and that as a result they had to
24 compensate the widow. And that's another older
25 authority from earlier in this century arising out
26 of Mexico.

27 So what essentially happened below was both
28 parties were struggling to persuade the tribunal
29 as to what content should be provided for the
30 terms "fair and equitable."

31 My friend has given you their position, which
32 is that fair and equitable requires you to refer
33 out of the treaty, forget the treaty, and to go to
34 standards of international law and to apply only
35 the minimum standard. That was essentially, as I
36 read his argument and his submissions, their
37 principle. So that you go from forgetting
38 transparency as an objective of the parties to the
39 treaty. You go to international law. And you not
40 only go to international law, you go to a
41 conservative view of international law, which is
42 the minimum standard of protection.

43 Metalclad said hold it a second, you don't
44 leave the treaty behind. We're trying to
45 interpret what these parties meant by fair and
46 equitable. The objects and purposes of the treaty
47 are legitimate baggage when you go to

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1 international law, if you will. They're
2 legitimate companions to the inquiry. You inform
3 at fair and equitable having regard to not only
4 what these parties have voluntarily assumed as
5 obligations between themselves, but also when you
6 go to see what constitutes a reasonable standard
7 for equitable conduct on the part of States. And
8 when you go to review the concepts of fair and
9 equitable in international law, you should give
10 those a full and robust meaning.

11 And I say with respect that is a debate that
12 properly took place before the tribunal, and they
13 concluded that the claim was made out in their
14 case.

15 And I say with respect that the final meaning
16 to be given to fair and equitable in 1105 will
17 only become clear when a number of tribunals have
18 an opportunity to have regard to that meaning of
19 that clause in a number of different contexts.
20 And -- and ultimately there may become a consensus
21 around the contents of those very general terms.

22 At page 74 I make the point which I -- I made
23 this morning, which is that one of the central
24 elements of equity relied upon by Metalclad was
25 the concept of infrastructure enrichment. And if
26 you read -- I -- I haven't incorporated them here,
27 but there's an entire chapter in Metalclad's reply
28 which essentially says that the underlying concept
29 of fairness and equity and compensation for
30 expropriation is that in relation to bilateral, or
31 in this case trilateral investment arrangements,
32 the very purpose is to attract capital into both
33 countries from investors of the other country, and
34 that that purpose results in capital coming in and
35 achieving the goal of enriching the infrastructure
36 of the recipient host State, and that if that
37 infrastructure's received, it can fairly be
38 given -- give rise to inequity that needs to be
39 fairly dealt with as it relates to this -- the
40 actions of the State organs in the host country.

41 And if -- if they act unfairly and
42 inequitably by international standards, liability

43 for compensation will arise whether or not it's
44 lawful by the standards of the domestic country.
45 It may be perfectly lawful but unfair, or it may
46 be, in this case, unlawful and unfair.
47 Now, finally, at the bottom of 74 I do make

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1 the point that my friends are seeking to submit,
2 and they do submit forcefully, that the tribunal
3 elevated transparency into a substantive goal.
4 And I do say that, read fairly, the submissions
5 before them and the tribunal award does not deal
6 with transparency as a singular foundation of
7 liability, but rather a principle or a rule which
8 informs the notions of fairness and equity and
9 which was available for them to have regard to in
10 determining whether the conduct before them was
11 fair and equitable.

12 And -- and I say with respect it's a fairly
13 telling point that the central act that was seen
14 as being unlawful was not an instance of a lack of
15 transparency at all. It was a lack of excess or
16 want of authority depending on how you view it, an
17 unlawful exercise of authority, rather than a
18 confusion about who was or wasn't responsible for
19 the area.

20 So I'm turning to page 75.

21 Now, I made this point yes -- on Friday
22 afternoon, but I -- I -- and I won't remake it
23 here, but as a matter of simply language and
24 lawyering, forget international lawyering, I say
25 that the tribunal was absolutely correct in
26 concluding that the objects and purposes of the
27 agreement, that is the whole of the treaty, were
28 available to them, that I think if -- if you read
29 that, in my submission any lawyer, forget an
30 international lawyer, would say that when it
31 refers to "agreement" it means all of the
32 agreement, which includes the purposes and objects
33 section. What you do with that can be a matter
34 for debate. But I say with respect to my friends
35 that there can be no rational suggestion that
36 there's a boundary between Chapter 11 and the rest
37 of the treaty.

38 And -- and the purpose of that is I say with
39 respect my friends have to erect a wall between
40 Chapter 11 and the rest of the treaty, because
41 once you penetrate Chapter 11, once you say, well,
42 they're entitled to have regard to the objects and

43 purposes of the treaty which include the principle
44 of transparency, then it's just a question of
45 lawyers arguing what you do with that. In other
46 words, you -- you know, in order to even elevate
47 it to a question of law, you have to say you can't

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1 go beyond Chapter 11.

2 My friends vigorously argued that. But the
3 very definition of "agreement" in the text
4 contradicts any suggestion that there's some
5 hermetic seal between Chapter 11 and the rest of
6 the agreement. It's part of the agreement, and
7 the objects and purposes are just as applicable to
8 the proper interpretation of Chapter 11 as they
9 are to the other parts of the treaty.

10 Now, one of the reasons why I think there may
11 be a state of confusion on the part of -- if you
12 go to page 76 with respect to this issue is that
13 it's difficult to, I think, conceptually separate
14 my friend's submissions as it relates to local
15 remedies from the issue of whether the tribunal
16 was entitled to have regard to the objects and
17 purposes of the treaty, because the -- they tend
18 to become for some reason engaged with each
19 other.

20 And at the hearing they did because, as I
21 indicated on Friday, there was a position taken,
22 which was that the treaty as a whole was not
23 binding upon municipal conduct. In other words,
24 that the -- the boundary, as I read the
25 submissions -- and I read you part of the exchange
26 between President Lauterpacht and my friend
27 Mr. Thomas before the tribunal. But the boundary
28 that was -- one of the boundaries that was drawn
29 before the tribunal was that you can't find a
30 violation of 1105 based upon municipal misconduct
31 of any sort, because on a proper interpretation of
32 NAFTA as a whole, it doesn't apply to municipal
33 action. And that applied to local remedies.

34 But it also applied to simply whether or not
35 Mexico was liable for the misdeeds, if you will,
36 or the potential allegations of unfairness against
37 a municipal level of government.

38 And so a lot of the argument about this
39 matter became intertwined with each other in the
40 interplay between counsel. And as I indicated
41 on -- on Friday, Mexico, subsequent to the
42 hearing, accepted that it -- that NAFTA bound not

43 only the State and the federal governments but
44 also the municipal government, and that it was
45 responsible for the actions of the municipal
46 government.

47 Now, as I also said on Friday, Metalclad

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1 accepted the burden that it had to establish that
2 the misdeeds of the collective organs of
3 government in Mexico, the three levels taken in
4 totality, constituted a breach of 1105. And they
5 sought to do so, and the tribunal found that was
6 so.

7 Metalclad didn't say breach of fairness at
8 the municipal level by itself constitutes a breach
9 of the treaty. They agreed they had to discharge
10 the -- the burden of proving that it was unfair
11 and inequitable within a reasonable meaning of
12 1105.

13 Now, at page 77, the final -- well, nothing
14 here is final, but the last comment I make with
15 respect to the principles of interpretation is the
16 doctrine of effectiveness. And I don't know if
17 you can actually call anything in international
18 law a doctrine because a -- theology is very
19 loose, in my reading anyway, and the concepts seem
20 to flow between each other without very clear
21 lines between them.

22 But as I understand the authorities and the
23 opinio juris, I think is what it's called, in
24 relation to effectiveness is that in interpreting
25 a treaty and in applying it to the facts at hand,
26 a tribunal should seek to make effective the
27 guarantees which are thought to be contained
28 within the treaty, which is either unexceptional
29 or inspirational, depending on your view of it.

30 And in this case Metalclad relied very
31 heavily on the proposition that the tribunal had
32 to look at the totality of the circumstances and
33 say, if you don't regard this as unfair and
34 inequitable, will it not frustrate the very
35 objects of the treaty as a whole? Will it not
36 frustrate Mexico's justifiable effort to attract
37 foreign capital? If this company in relation to
38 this story ends up being not compensated for the
39 actions of the Mexican government at the end of
40 the day, will that not scare away other capital?
41 Will it not deter other people from making similar
42 investments?

43 And that in terms of effectiveness I say is a
44 legitimate and permissible argument under
45 international law. And in the circumstances of
46 this case, it was a very persuasive, in my
47 submission, basis for saying that however you

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1 regard fairness and equity generally, if you were
2 to give regard to the objects of NAFTA, that the
3 total story of how the company had come and made
4 its investment and then ended up losing its
5 investment was a compelling case where
6 compensation was justified on the basis of the
7 unfairness in the total treatment of the company's
8 investment by all three levels of government.

9 Now, I'm at page 78. And if you're at the
10 top of page 78, you'll see that one of the
11 accompanying statements of Mexico's goal was in
12 President Salinas's official transmittal to
13 Congress which I quote at the top of page 78.

14
15 "The purpose of this bill..."

16
17 And just to be clear, you understand there's
18 a -- and I think my friend referred to you,
19 there's implementing legislation in Mexico in
20 relation to NAFTA, and some States have and
21 haven't passed different implementing laws.

22
23 "The purpose of this bill..." is -- is
24 "...for a foreign investment Act is to
25 establish, a new legal framework which, in
26 full compliance with the Constitution,
27 promotes competitiveness in the country,
28 provides legal certainty to foreign
29 investment in Mexico and establishes clear
30 rules to channel international capital to
31 productive activities."

32
33 So before the tribunal were not only the
34 goals set out in the treaty, but there was also
35 evidence of Mexico's president having a very
36 similar goal in relation to what was, in this
37 case, the Foreign Investment Act of 1993.

38 The second source cited in relation to
39 Mexico's need for transparency was the World Bank
40 study which was marked, and I've just given you a
41 quick quote here at paragraph 219.

42 But the report confirmed that at the time

43 NAFTA came into effect in Mexico there remained:
44
45 "...wide and unclear discretionary powers
46 in administrative law matters need to be
47 curbed at all levels of government.

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1 Regulations need to be more clearly drafted
2 and in strict compliance with governing
3 law. They also must be less frequently
4 changed. Finally, adequate resources must
5 be...available so as to permit the
6 publication and dissemination of laws,
7 regulations and administrative directions
8 at both federal and state level[s]."
9

10 And with respect to my friends pain -- if you
11 will, painting a picture of the municipal
12 government in this case, part of what was the
13 basis of complaint here was -- and we can paint
14 the facts as they relate to municipality with
15 different colours. But one of the necessities of
16 fairness to an investor is that the country as a
17 whole has to ensure that a municipality that
18 shares -- the mayor shares his telephone, I think
19 as my friend said, with the public pay phone, that
20 there's the resources available to, if they are
21 going to have permitting authority over anything,
22 that they actually exercise it, that it's
23 predictable, that it's known, that people within
24 the municipality know that it exists and it has
25 some kind of history to it. That's one of the
26 goals in transparency in any legal system.

27 In this case my friend says, well, there were
28 no permits ever issued because he submitted there
29 was never any reason for them in the past. But,
30 with respect, it's quite clear that on any
31 portrait of this municipality, they had never
32 historically, but for the one refusal which I'm
33 going to take you to, in relation to this landfill
34 ever received, requested, considered or issued a
35 permit.

36 And that has to be taken into account in
37 respect -- in considering the fairness of what
38 happened when, on the facts of this case, the
39 facility is being built throughout -- and I'll
40 take you to the evidence that the municipality is
41 well aware of the construction, or at least the
42 evidence Metalclad relied upon that people in the

43 municipality were looking at it and getting
44 progress reports as to how it was being built and
45 how it was being built (sic), but that they only
46 acted when the Convenio was concluded, when the
47 federal government asserted its authority and said

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1 we've solved the whole problem here. We've
2 concluded a Convenio with Metalclad which includes
3 measures for the local citizens, environmental
4 measures, not only the approval of the site from
5 an environmental point of view, but also from a
6 social -- socio-political point of view.

7 Then the State and municipality reacted by
8 way of obtaining an injunction based on the
9 Convenio and purported to refuse the permit which
10 had been lying idle for some 13 months.

11 Now, the final element of the Mexican context
12 which was relied upon below was Metal -- Mexico's
13 traditional reluctance to acknowledge the
14 obligation of compensation for a nationalization.
15 And you'll see at the bottom I've quoted
16 Professor -- Professor Lillich's account which is
17 in -- quoted by others that:

18
19 "...Mexico like the Soviet Union before
20 it, categorically denied the existence of
21 any international law rule requiring a
22 State to pay compensation when it engages
23 in a general nationalization program that
24 affects foreign property [and] in so doing
25 invoked again the national treatment
26 doctrine."
27

28 Now, as I understand the struggle for much of
29 this century in international law, States like
30 Russia and similar States which had nationalized
31 economies or State-controlled economies in the
32 international law front said there should be and
33 ought to be no international law obligation to
34 compensate foreign capital so long as everybody's
35 nationalized together. In other words, that's the
36 national treatment doctrine at the bottom. In
37 other words, if we treat foreign companies and we
38 expropriate their assets, along with all of our
39 own nationals assets, then there ought to be no
40 international consequences for those measures.

41 The other view, which was the view championed
42 by the United States and other western countries,

43 was that that was an inadequate protection, a
44 woefully inadequate protection for investors, and
45 that its consequence would be a sterilization of
46 international flow of capital.

47 And in the postwar period, that has bit --

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1 bit by bit, if I may say that, bilateral
2 investment treaty by bilateral investment treaty,
3 has been addressed and answered by -- by States
4 entering into what I believe on some accounts are
5 now something like 2,000 bilateral investment
6 treaties in existence. And I -- I'll double-check
7 that number, but there's -- there are hundreds and
8 hundreds of bilateral investment treaties, one of
9 the principle purposes of which is to say if you
10 bring your capital to our country, what we promise
11 is to compensate you for -- for any -- any
12 expropriation, even if we com -- we expropriate
13 everybody else as well.

14 If you go to page 79, I've been dealing with
15 the general principles of treaty interpretation.
16 And the point I wish to stress here is that all of
17 what I've said so far does not raise a
18 jurisdictional issue.

19 And my friend in this chapter, and I'm
20 replying to this first point that he makes, says
21 that the issues he raises are jurisdictional in
22 their character. I agree they're legal in their
23 character but, with respect, they're not
24 jurisdictional, and I have a number of submissions
25 in relation to that. But they're not
26 jurisdictional even in the way in which we would
27 be regarding an administrative tribunal as being
28 jurisdictional or a trial judge as being within
29 the -- the realm of his -- his authority over the
30 law.

31 They're -- they're simply active and vigorous
32 debates about the application of an accepted
33 international law formulation without a formula --
34 I mean the accepted international law standard to
35 particular facts and the question of what content
36 goes into the terms "fair and equitable" properly
37 applied.

38 So the first point I make at 222 is that --
39 and this is an obvious point, but it's an
40 important point, is that all of the applicable
41 rules that might apply to Chapter 11, whether it's
42 the additional facility rules or -- or the

43 Inter-American, whatever -- I've forgotten the
44 other two -- ICSID additional facility rules and
45 the other conventions that the parties might refer
46 to, they all expressly confer on the tribunal
47 competence to determine their own jurisdiction.

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1 And that is a threshold point that is very
2 fundamental, because my friend raises it to the
3 point of jurisdiction in a context in which the
4 rules which are referred to by the treaty confer
5 on the tribunal the authority to confer their
6 jurisdiction.

7 The commission does not have that authority.
8 There is no judicial body which is conferred with
9 the power to determine jurisdiction. And there
10 are rule consequences for that, which I'll come to
11 later in the submission, where clearly under the
12 rules it's important that issues of jurisdiction
13 be determined early by the tribunal; that is, the
14 tribunal have fair warning that an issue is
15 thought by one or more of the parties to be
16 jurisdictional in its character.

17 And you'll see, for example, in the Waste
18 Management case the party which raised the issue
19 of jurisdiction relating to the waiver raised the
20 point it was determined as a preliminary point,
21 and the claim was brought to an end.

22 Now, some of the points my friend makes here
23 I have read the submission and have been unable to
24 find or -- or see any clear lines where it was
25 portrayed to the tribunal as jurisdictional in its
26 character. And to take an example in this
27 particular context, the application or the -- the
28 potential import of transparency objectives on the
29 meaning of fair and equitable was vigorously
30 fought over.

31 My friend said don't do it. There's no
32 authority to interpret fair and equitable having
33 regard to transparency. I don't see a place in
34 which Mexico said, hold a second, if you do that,
35 you're stepping outside the bounds of the
36 jurisdiction, and you should consider this as a
37 jurisdictional issue.

38 And I say that for two reasons: Firstly, the
39 tribunal doesn't deal with it as a jurisdictional
40 issue. And I don't think they interpreted any of
41 the submissions before them on this point as being
42 jurisdictional.

43 You'll note that in relation to the
44 Ecological Decree Mexico quite clearly said this
45 is jurisdictional. You can't include this claim.
46 And the tribunal determined it on a jurisdictional
47 point before it proceeded to deal with it on the

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1 merits.

2 You'll see at the top of page 79 that in
3 another ICC arbitration a fairly practical view is
4 taken of the relationship between, if you will,
5 disputes and complaints about jurisdiction. It
6 says here:

7
8 "[T]he parties did not restrict the
9 jurisdiction of the Arbitral Tribunal to
10 certain limited questions of law, but
11 rather submitted for decision their
12 respective positions as to certain facts
13 underlying their dispute, as listed in the
14 arbitration clause. Thus as regards a
15 factual situation alleged by Claimant which
16 presents itself as a dispute arising
17 directly or indirectly from the contract,
18 the intent of the parties is that such a
19 case be considered in its entirety by the
20 Arbitral Tribunal. The question of
21 determining the precise legal grounds on
22 which claims arising from such a situation
23 can be based does not affect the
24 jurisdiction of the Arbitral Tribunal."
25

26 And if I may take a parallel to the present
27 case, there were a number, in addition to the
28 findings made -- for example, there was a national
29 treatment argument made by Metalclad which the
30 tribunal didn't find that it had to determine
31 because it had found grounds of liability otherwise
32 (sic).

33 But the point I'm making is that the dispute
34 that's referred under Chapter 11 is the complaint
35 by the investor. Within the dispute there may be
36 a number of allegations respecting the legal
37 foundations for liability against the State, the
38 jurisdiction of the tribunals over the dispute.

39 And when you turn to the international act
40 and you ask yourself did they determine the
41 dispute, I say the dispute is that which is
42 related to all of the facts giving rise to all of

43 the claims which are put before the tribunal.
44 Now, with respect to the next section at page
45 80, I deal with the -- the issue of the
46 effectiveness principle and what the tribunal did
47 with respect to transparency. And I won't say

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1 that again, because I think I've indicated to you
2 our position with respect to how they employ
3 transparency on a couple of occasions. But I did
4 state it more -- more clearly in a narrative in
5 this section.

6 If you could go and -- and have regard to an
7 authority, there's the Myers case which I quote at
8 page 81, paragraph 230, that a particular investor
9 might be entitled to greater State efforts to
10 ensure fairness in the disposition of its
11 individual case than would apply when the
12 regulation is of general application has been
13 recognized by other Chapter 11 arbitrators.
14 Drawing on domestic law analogues, Dr. Schwartz
15 wrote in Myers:

16
17 "When a discretionary decision is made
18 with respect to the fate of a particular
19 applicant, Canadian administrative law
20 often requires proper notice and a fair
21 hearing of the individual's views.
22 When a broader change is contemplated,
23 there may be few or no rights for an
24 individual to make direct
25 representations. ... The minimum standard
26 under the international law [embodied in
27 Article 1105] would, I think, take in to
28 account this distinction between the
29 exercise of an administrative discretion
30 with respect to particular individual and
31 the exercises of a broad law-making
32 character."

33
34 And I'll just take the afternoon break in a
35 second. But let me just simply say this, and that
36 is: What I'm referring to that for is for the
37 purpose of saying that in applying the fair and
38 equitable standard conferred on the tribunal by
39 Section 1105, the history and the story is an
40 important element in deciding what the -- what
41 life, if you will, or even what meaning should be
42 given to the excess of authority by the

43 municipality.
44 And it is of telling importance that it
45 happens at the end of the story rather than at the
46 beginning of the story. My friend commended to
47 you the conclusion that if the municipality turned

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1 it down, the short answer is to seek an Amparo.
2 Now, separate and apart from whether that's a
3 practical remedy, and separate and apart from
4 whether Metalclad would be entitled to, under its
5 waiver, to do that and then pursue an arbitration,
6 the point I want to make by way of just common
7 legal sense is that if Metalclad arrived before
8 making an investment and went and made three
9 applications, and -- and -- and two of them were
10 allowed and one of them was reversed, and it
11 hadn't done anything, it hadn't built a facility,
12 it hadn't done anything, and the municipality at
13 that stage exceeded its authority, I think a party
14 would have a great deal of difficulty persuading a
15 tribunal that the totality of those facts
16 constituted a breach of the international standard
17 of fairness and equity.

18 But this story is a situation where the
19 federal government located the site, encouraged
20 the investment, authorized the construction,
21 issued not one, not two, but I think three or four
22 permits; expanded the -- in the face of the
23 opposition, expanded the capacity by tenfold; made
24 oral representations that the municipality had no
25 authority, which were later found on the facts to
26 be true; and then at the end of all of that,
27 negotiated a Convenio to negotiate the social
28 ramifications which were generating the political
29 opposition, and it was only then that you have the
30 excess of authority come into the story.

31 That's a very different equitable situation,
32 both from the point of view of the investor and
33 from the point of view of any common sense
34 application of a fair and equitable standard to
35 facts.

36 I think I'm -- the reporter tells that my --
37 my given hour is about up to his capacity, so I
38 think he would like a break.

39 THE COURT: Yes. We'll take the break.

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

42

43 (AFTERNOON RECESS)
44 (PROCEEDINGS ADJOURNED AT 3:02 P.M.)
45 (PROCEEDINGS RESUMED AT 3:15 P.M.)
46
47 THE COURT: Yes, Mr. Cowper.

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1 MR. COWPER: Thank you, My Lord.

2 I'm at the top of page 81. And while I'm
3 there, if I may, I'd like to deal with the Loewen
4 case and Myers. I promised you I'd come back to
5 Loewen or threatened you, one of the other
6 adjectives.

7 If you could go to Loewen, which is under tab
8 20 of our authorities, which is at Volume 1, and
9 the awards with respect to jurisdiction are
10 multiplying more quickly than they are with
11 respect to the merits. This is another case in
12 which the -- the award concerns a hearing, as
13 you'll see at the -- at the description, of
14 objection to competence and jurisdiction.

15 Just to give you a -- a short introduction
16 into the nature of the claim, this is a claim
17 against the United States arising out of
18 litigation which Loewen was engaged in in
19 Mississippi, which was the subject of considerable
20 national and international pub -- publicity.

21 THE COURT: A crazy jury award.

22 MR. COWPER: Yes. That's -- yes. And the issue --
23 the issue in this case is whether craziness in the
24 judicial system can sound in damages in
25 international law.

26 Effectively what Loewen said was that the
27 conduct of the trial by the trial judge -- and the
28 essential allegations in the case is that -- the
29 conduct of the trial judge. The trial judge
30 permitted an appeal to -- prejudice against
31 Canadians to be evidenced and put before the jury
32 and that the jury was motivated by -- and we think
33 of ourselves as nice, but apparently we're not
34 regarded as nice in Mississippi -- motivated by
35 malice against Canadians, and thus the judicial
36 system effected a breach of the national treatment
37 and fairness and equitable standards.

38 Now, this doesn't deal with the -- the
39 merits. And obviously there's a long way to go in
40 converting the jury award which then later
41 resulted in a settlement into an international
42 arbitral tribunal's ruling. But the United States

43 took a number of preliminary objections to
44 competence and jurisdiction on, among other
45 grounds, the proposition that the -- the term
46 "measure" in Article 201 could not have been
47 intended to include the types of matters cited by

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1 Loewen as occurring in the courtroom and being
2 meted out by the jury.

3 And you may recall there -- and I don't want
4 to oversimplify it or make it more complicated
5 than necessary -- in the -- in the judicial
6 history there was the jury award. And then part
7 of the issue was the judge's refusal to set aside
8 the jury award. And then the ultimate denouement
9 was the Mississippi Supreme Court's decision that
10 115 percent of the total award had to be secured
11 in a letter of credit in order to pursue an
12 appeal.

13 So all of those are part of the underlying
14 facts giving rise to this claim. And of course
15 the United States is very much opposed to this use
16 of Chapter 11. And it vigorously argues that this
17 kind of claim ought not to be entertained.

18 The tribunal here held and dismissed
19 essentially the total -- I won't get into the
20 individual ones, but essentially said there was
21 jurisdiction and sent it on to a hearing on the
22 merits. There are some grounds of jurisdiction
23 which are referred to the tribunal for finding, so
24 that they're still not determined.

25 The reason that I refer it to you is if you
26 go to paragraph 50, you'll see that it says -- and
27 this is another tribunal award very recently, it
28 says under paragraph 50 --

29 Do you have that?

30 THE COURT: Um-hum.

31 MR. COWPER:

32 "A tribunal established pursuant to NAFTA
33 Chapter 11, Section B must decide the
34 issues in accordance with the provisions of
35 NAFTA and the applicable rules of
36 international law. Further, as already
37 noted, Article 102 provides that the
38 agreement..."

39

40 And again, that's of course -- they're
41 referring to it in its defined sense.

42

43 "...must be interpreted in light of its
44 stated objectives and in accordance with
45 applicable rules of international law.
46 These objectives include the promotion of
47 conditions of fair competition in the free

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1 trade area, the increase of investment
2 opportunities, and the creation of
3 effective procedures for the resolution of
4 disputes. Guided by these objectives and
5 principles, we do not accept the
6 respondent's submission that NAFTA is to be
7 understood in accordance with the principle
8 that treaties are to be interpreted in
9 deference to the sovereignty of States."

10

11 Then they refer to the Amco case.

12

13 "Whatever the status of the suggested
14 principle may have been in earlier times,
15 the Vienna Convention is the primary guide
16 of the interpretation of the provisions of
17 NAFTA."

18

19 And it then refers to the Ethyl Corporation
20 award where a NAFTA tribunal expressly rejected
21 the argument that Section B of Chapter 11 is to be
22 construed strictly, and also refers to the Pope &
23 Talbot award.

24

Then go I to 52:

25

26 "We agree with the respondent not every
27 judicial act on the part of a courts of a
28 party constitutes a measure adopted or
29 maintained by a party. Mexico submits..."

30

31 And of course this is as an intervenor in the
32 Loewen case, as I understand it.

33

34 "...that in order to constitute a measure,
35 the judicial action under consideration
36 must have a general application.
37 Thus, a judicial affirmation of a general
38 principle might well constitute a measure,
39 whereas a specific order requiring a
40 defendant to pay a sum of money would not.
41 The definition of measure in Article 201
42 which includes retirement is by no means

43 consistent with this argument."

44

45 And then I won't go on, because you don't
46 need to concern yourself in this case with measure
47 but the reason I refer to it is simply this, and

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1 that is to say: Here is another tribunal composed
2 of expert international lawyers who, when faced
3 with the issue of interpreting NAFTA and -- and
4 interpreting what the measure is to an unusual set
5 of circumstances, start with the proposition that
6 they turn to the treaty and objects.

7 Now, they have referred to different
8 objectives on 201 and were referred to by this
9 tribunal, but in my respectful submission there's
10 nothing in either tribunal's discipline or logic
11 that does not commend itself to -- to the court.
12 It's -- it's a rational and proper attention to
13 the overall goals of the parties.

14 Now, if I can go to Myers, that's at my
15 friend's tab 58. And Myers is -- is a more useful
16 case for the purposes of this dispute in my
17 submission, because Myers actually dealt with and
18 found a breach of the fair and equitable standard
19 under Chapter 11.

20 Now, Myers was not available to the
21 tribunal -- and I'll double-check this, but Myers
22 was not a decision available to the tribunal in
23 our case. It was -- it was decided subsequently
24 to them, so they didn't have it to review or to
25 agree or disagree with. So it represents in -- in
26 some senses a -- an independent conclusion as it
27 relates to the parameters and the application of
28 1105.

29 Now, it's a long decision, and I don't know
30 if Your Lordship's had any chance to look at it.
31 Let me just give you the short background of what
32 I understand the case to be, and it's a complex
33 case. But this is a claim against Canada.

34 So by way of some kind of economy of effort
35 in the last little while, we've dealt with a claim
36 against Mexico, a claim against Canada, a claim
37 against the United States. And not surprisingly,
38 all three States are vigorously defending the
39 investor's attempt to apply the principles of
40 fairness and equity to their -- to the State's
41 conduct in relation to the investment.

42 In relation to this matter, what happened, as

43 I understand it, is that Canada passed a ban which
44 temporarily banned the export of PCBs. What --
45 the situation and the facts as found by the
46 tribunal was that Canada had -- and forgive me,
47 I'm -- I haven't memorized the decision. But in

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1 general terms, as I understand it, there were two
2 motivating factors in Canada's mind, if you take
3 Canada as constituting the intent of the whole
4 constellation of people. And there's legislation,
5 of course, involved here, one being the desire to
6 preserve within Canada the capacity to recycle or
7 to deal with PCB waste.

8 So in other words, under the Basel
9 Convention, as I understand it, States are
10 encouraged to maintain within their boundaries
11 hazardous wastes processing facilities so that
12 they can process their own waste. And that's a --
13 a function of international -- well, it's an
14 international standard, it's a convention which is
15 aimed at increasing that.

16 By not pure coincidence it's -- it's a --
17 it's a goal that I think Mexico has as well. And
18 that was one of the underlying reasons why people
19 like Metalclad were invited into Mexico, because
20 it's sadly short of the capacity of reusing and
21 properly storing the hazardous waste that its
22 industry generates.

23 With respect to the case against Canada, what
24 the American firm said was hold it a second, you
25 didn't in fact put the export ban down to preserve
26 your own capacity or for the reasons of health or
27 safety or anything else; you did so to preserve
28 the market for your Canadian processing
29 facilities. That was the true intent of the
30 statutory ban on export. And of course I've said
31 earlier it was a temporary ban.

32 So the tribunal had to decide firstly the
33 whole issue of national intent and motivation in
34 regard to whether or not there was a breach of the
35 national treatment provision; that is, was the
36 ultimate aim of the statutory goal to discriminate
37 against an American by prohibiting the export of
38 PCBs, or was it unfair and inequitable treatment?

39 So I'm not suggesting that the statutory
40 context is helpful to -- or would have been
41 helpful to the tribunal. But when they come to
42 determine the -- the -- the proper interpretation

43 of 1105, I say that their approach is not
44 dissimilar to the tribunal that is being
45 challenged in the present proceeding.
46 You may want to make a note, and I won't read
47 it to you, but the chapter on the export ban's at

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1 35 and following. They deal with the -- the
2 issue, if you want to see some of the evidence,
3 that was allied against Canada. At page 39 you'll
4 see that -- and this is -- I'm just plucking out
5 little pieces of evidence, but at the bottom it
6 says:

7
8 "Mr. Cornwall cited as the only pro factor
9 in favour of the decision that the Canadian
10 environmental industry, i.e. Chem Security,
11 is protected by a secure supply of PCBs for
12 their facility in Swan Hills."
13

14 Do you have that? I'm sorry, page 39.

15 THE COURT: Um-hum.

16 MR. COWPER: Paragraph 178.

17 THE COURT: Um-hum.

18 MR. COWPER: And then they deal with the -- the pros
19 and cons and various speeches throughout the
20 chapter. And then the -- at 193 the tribunal
21 says:

22
23 "Having reviewed all the documentary and
24 testimonial evidence before it, the
25 tribunal is satisfied that the interim
26 order and the final order favoured Canadian
27 nationals over non-nationals. The tribunal
28 is satisfied further that the practical
29 effect of the orders was that SDMI and its
30 investment were prevented from carrying out
31 the business they planned to undertake
32 which was a clear disadvantage in
33 comparison to its Canadian competitors.
34 Insofar as intent is concerned, the
35 documentary record as a whole indicates
36 that the interim order and final order were
37 intended primarily to protect the Canadian
38 PCB disposal industry from U.S.
39 competition. Canada produced no convincing
40 witness testimony to rebut the thrust of
41 the documentary evidence.

42 "The tribunal finds that there was no

43 legitimate environmental reason for
44 introducing the ban insofar as there was an
45 indirect environmental objective to keep
46 the Canadian industry strong in order to
47 assure a continued disposal capability. It

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1 could have been achieved by other
2 measures."

3
4 Now, the reason I raise that is it indicates
5 the complexity of the exercise that has to be
6 carried out by a tribunal when its assessing State
7 action, and that is a difficult and complex
8 exercise, because in this case, for example, they
9 had to ascertain from a body of evidence, both
10 testimonial and documentary, what was Canada truly
11 attempting to achieve.

12 The parallel exercise, carried out by the
13 tribunal in our case was: What was Mexico doing
14 through its federal, State and municipal
15 authorities through the story that Metalclad told
16 the tribunal in relation to the various approvals
17 and disapprovals by the different organs? What
18 was Mexico achieving and -- and seeking to achieve
19 by that?

20 Now, one thing that is perhaps obvious, but I
21 do want to say this, is that it -- in my reading
22 of the award, the tribunal actually was quite
23 careful to not make findings of animus, if you
24 will, although that was a very strong part in
25 Metalclad's case. Metalclad put evidence before
26 the tribunal that the -- the governor was -- was
27 motivated by mani -- animus, that the State's
28 municipality was motivated by animus, an improper
29 motivation.

30 If you read the -- the award, I think they've
31 been very careful to say we can deal with this
32 case without having to make findings in relation
33 to those issues. And we can find liability
34 without having to find that there was an improper
35 motive or intent.

36 When I come to the end of our submissions,
37 one of the factors Your Lordship will have to
38 consider is that quite clearly Metalclad's case
39 went far further than the tribunal found it
40 necessary to go, and said, among other things, for
41 example, the governor should be disbelieved when
42 he said the Ecological Decree was not, as he was

43 said to have announced it, passed for the clear
44 specific intent of shutting down Metalclad.
45 In other words, the tribunal said reading the
46 decree is sufficient, but Metalclad's case was we
47 cross-examined them. Here are the reports in the

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1 press. You should find on a finding of
2 credibility that he's not to be believed.

3 And of course in international law, or any
4 other setting, if the tribunal had found it
5 necessary, they would have had to assess his
6 credibility and make a finding of credibility as
7 to whether indeed in relation to the Ecological
8 Decree, forgetting what it said, that it
9 represented a governmental measure that would
10 never allow this landfill to open again, which was
11 part of Metalclad's case.

12 So going back to page 45 in the Myers case,
13 starting at 196, you'll see that the opening
14 sentence is:

15
16 "The NAFTA provides internal guidance for
17 its interpretation in a number of
18 provisions. In the context of a Chapter 11
19 dispute, it is appropriate to begin with
20 the preamble to the treaty which asserts
21 that the parties are resolved inter alia to
22 create an expanded and secure market for
23 the goods and services produced in their
24 countries, to ensure a predictable,
25 commercial framework for..." planning
26 "...business planning and investment, and
27 to do so in a manner consistent with
28 environmental protection and conservation."
29

30 The very next paragraph quotes Article 102 in
31 the same way that the tribunal here and the other
32 tribunals I referred to quote it.

33 And then 198 refers to the objectives as were
34 referred to in other awards. If you go over to
35 page 46, you'll see there's a reference to 1131
36 as -- as was the case in the present case.

37 And 200 they deal with the international law
38 rules of interpretation. They say the first part
39 of call is the Vienna Convention, trans-boundary
40 agreement, and they go on. If you could then --
41 that's the general discussion.

42 If you then go to the section with Article

43 1105, you'll see at page 63 and 64 that they
44 conclude that the facts as found justify the
45 conclusion that there was a breach of Article
46 1102, and that was that the -- that there was a
47 breach of the national standard first and

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1 foremost.

2 But if you go to 1105 at page 64, they quote
3 1105. And this is -- this is an alternative
4 finding for the tribunal. At 259 they say:

5
6 "The minimum standard of the treatment
7 provision is similar to clauses contained
8 in BITs."

9
10 Those are bilateral investment treaties.
11 And you'll -- you'll recall that my friend's
12 submission was once you leave the treaty, you head
13 into international law, which is customary
14 international law. You leave the treaty behind.
15 You leave the notion of treaty behind. Well, the
16 very first observation this tribunal makes,
17 another group of experienced and capable
18 international lawyers, is that this type of treaty
19 provision is similar to those contained in many
20 bilateral investment treaties.

21
22 "The inclusion of a minimum standard
23 provision is necessary to avoid what might
24 otherwise be a gap. A government might
25 treat an investor in a harsh, injurious and
26 unjust manner, but do so in a way that is
27 no different than the treatment inflicted
28 on its own nationals. The minimum standard
29 is a floor below which treatment of foreign
30 investors must not fall, even if a
31 government were not acting in
32 discriminatory manner."

33
34 And over at page 65 they quote the
35 U.S.-Mexican Claims Commission. And they talk
36 about the -- the -- the consequence of
37 international law and the existence of
38 international obligations.

39 And go to 261:

40
41 "When interpreting and applying the,
42 quote, minimum standard, the Chapter 11

43 tribunal does not have an open-ended
44 mandate to second-guess government
45 decision-making. Governments have to make
46 many potentially controversial choices. In
47 doing so, they may appear to have made

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1 mistakes, to have misjudged the facts,
2 proceeded on the basis of a misguided
3 economic or sociological theory, placed too
4 much emphasis on some social values over
5 others and adopted solutions that are
6 ultimately ineffective or
7 counterproductive. The ordinary remedy, if
8 there were one, for errors in modern
9 governments is through internal
10 political..." proce "...political and legal
11 processes, including elections."

12
13 Then they go to 1105.

14
15 "Article 1105 expresses an overall
16 concept. The words of the article must be
17 read as a whole. Phrases 'fair and
18 equitable treatment' and 'full protection
19 and security' cannot not be read in
20 isolation; they must be read in conjunction
21 with the..." inductivey "...introductory
22 phrase 'treatment in accordance with
23 international law.'"

24
25 I can just pause here to say these people
26 don't -- don't find any definitive meaning to fair
27 and equitable either. They're trying to breathe
28 life into the words and apply them to the
29 situation that's before them, just as the tribunal
30 at hand did.

31 And it's notable as we go on that they don't
32 draw the distinction my friend would have between
33 minimum standard and fair and equitable
34 treatment. They -- they clearly provide and
35 interpret 1105 as having an equitable and unfair
36 element to it starting at 263.

37
38 "The tribunal considers that..." an
39 article "...a breach of Article 1105 occurs
40 only when it is shown that an investor has
41 been treated in such an unjust or arbitrary
42 manner that the treatment rises to the

43 level that is unacceptable from the
44 international perspective. That
45 determination must be made in light of the
46 high measure of deference that the
47 international law generally extends to the

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1 right of domestic authorities to regulate
2 matters within their own borders.
3 The determination must also take into
4 account any specific rules of international
5 law that are applicable to the case."
6

7 And then you go over to page 66, this
8 tribunal quotes with approval the very notion that
9 Dr. Mann, in the earlier textbook reference I had,
10 gives to fair and equitable; that fair and
11 equitable award is not the narrow and I may say
12 sterile concept urged upon this Court in the
13 tribunal below, but is one which provides
14 substantive protection in favour of investors.

15 They then say at 266:

16
17 "Although modern commentators might
18 consider Dr. Mann's statement to be an
19 overgeneralization, and the tribunal does
20 not rule out the possibility that there
21 could be circumstances in which a denial of
22 the national treatment provisions of the
23 NAFTA would not necessarily offend the
24 minimum standard provisions, a majority of
25 the tribunal determines that on the facts
26 of this particular case the breach of
27 Article 1102 essentially establishes a
28 breach of Article 1105 as well."
29

30 And you should make a note that that's a
31 majority decision. If you want to make a note
32 next to 266, that's by a majority. And that's
33 made clear in 267 and 268. The reason I say that
34 is there's not a separate minority opinion on it.
35 It's just noted in these two paragraphs.

36 Mr. Chiasson, and that's our Mr. Chiasson --
37 not ours in the sense of the firm, but Vancouver's
38 Mr. Chiasson -- considers that -- it is my
39 friend's Mr. Chiasson -- considers that a
40 finding -- a finding of a violation of Article
41 1105 must be based on a demonstrated failure to
42 meet the fair and equitable requirements.

43 It's interesting, fair and equitable
44 requirements of international law.
45 His dissent is:
46
47 "Breach of another provision of the NAFTA

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1 is not a foundation for such a conclusion."

2

3 So his dissent is based on the application of
4 the consequences of another breach to 1105.

5

6 "The language of the NAFTA does not
7 support the notion espoused by Dr. Mann
8 insofar as it is considered to support a
9 breach of 1105. That is based on a
10 violation of another provision of Chapter
11 11."

12

13 And then it's interesting, on the facts of
14 this case, Canada's actions come close to the
15 line, but they -- on the evidence no breach of
16 Article 1105 is established. So the Canadian
17 member says, well, at best what you can say is
18 Canada's actions come close to the line.

19 And -- and if you read that discussion in the
20 context of the facts, what you had was Canada
21 balancing, in both its executive and legislative
22 capacities, the goal to ensure local processing of
23 hazardous waste, environmental concerns, and
24 otherwise, things that within a domestic context
25 we could not even conceivably challenge the
26 government on.

27 And yet what's happened here is the
28 international tribunal says, by a majority, hold
29 it a second, the fact that the dominant purpose of
30 doing so was to prefer Canadian industry over U.S.
31 industry is inconsistent with the objectives of
32 the treaty, it violates the national treatment
33 clause, but it also constitutes unfair and
34 inequitable treatment under 1105.

35 They're very different circumstances because
36 in our case what's the story that Mexico has to
37 say? Mexico has to say the municipality acted as
38 a popular democracy. That's the best that can be
39 said for what occurred in this case. But, with
40 respect, that's what the tribunal said was not the
41 case in Mexican law. As a matter of fact, they
42 found that isn't the case. The municipality under

43 Mexican law does not operate as a popular
44 democracy as it relates to hazardous waste. It
45 doesn't have that authority.
46 So they're very different contexts. But I
47 say with respect to my friend's submissions

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1 concerning the reach of 1105 that to date there
2 has been very little, if any, success in
3 persuading the tribunal's charge with interpreting
4 the treaty either that they should confine
5 themselves to a hermetically sealed Chapter 11 or
6 that the terms "fair and equitable" should be
7 given a -- a narrow and conservative application.

8 Now, the --

9 THE COURT: Um-hum.

10 MR. COWPER: And I'm -- I'm going to page 82. And the
11 final case before I leave this section, which I've
12 cited is the Shufeldt claim case. And I have a
13 note that I wanted to read you a passage from
14 that, and that's respondent's tab 31.

15 Now, the reason I refer to this case is
16 because this is actually a -- an old chestnut from
17 1930 in respect of a claim between the
18 United States and Guatemala. And this hearkens
19 back to the days when an investor who's been
20 affected has to get the -- the State to take it
21 seriously enough to sponsor the claim and to
22 appoint counsel and move forward.

23 But if you go to the first page of the
24 report, you'll see that there was in this case a
25 protocol of arbitration of 1929 in which the
26 United States and Guatemala submitted two
27 questions for determination, and the first one is
28 whether a citizen of the United States, and that's
29 Mr. Shufeldt, I take it.

30

31 "...as a sessionary..."

32

33 Do you see that?

34

35 "...as a sessionary of the rights of
36 Victor Morales and Francesco Naharo
37 Androdia..."

38

39 And I probably mangled that name, but:

40

41 "...the right to claim a pecuniary
42 indemnification for damages and injuries

43 which have been caused to him by the
44 promulgation of the legislative decree of
45 the assembly of Guatemala by which it
46 disapproved the contract of 1922 for the
47 extraction of a minimum of 75,000 quetzals

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1 of cically in a defined area of the
2 country."

3

4 Now -- and the second one is if -- if they
5 find it, how much?

6 Now, what happened here was there was a
7 concession, and the government of Guatemala
8 contended that the concession was not granted in
9 accordance with the laws of Guatemala, and
10 therefore was not binding upon it. And it
11 contended that:

12

13 "Although Shufeldt may have acquired
14 rights under the contract in the first
15 instance, that he divested any rights he
16 had that he could invoke as a citizen of
17 the United States."

18

19 And finally they contended:

20

21 "The decree abrogating the contract was a
22 sovereign act which was not subject to
23 judicial review."

24

25 So in some senses in this case you have a
26 concession which has been interfered with by an
27 act of the Guatemalan government or several acts
28 of the Guatemalan government. And the defence in
29 this case many years ago is not dissimilar in its
30 character to the defence that's asserted before
31 you in this case.

32 It was held in this case that the government
33 of Guatemala was -- was liable. And you'll see
34 that in relation to the validity of the concession
35 that the concept of estoppel is referred to. And
36 just reading from that:

37

38 "The arbitrator on examining the
39 proceedings of the national assembly of
40 Guatemala found that the concession was in
41 fact approved in a constitutional manner."

42

43 Okay. Now, pausing for a moment, there you
44 have Guatemala saying, no, this wasn't valid. You
45 have a tribunal, which I think in this case was a
46 sole arbitrator, saying I've looked at the matter,
47 and as a matter of fact I found that the

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1 concession was in fact constitutionally approved.

2 So he disagreed.

3 My friend might have characterized
4 Guatemala's position there as -- as similar to his
5 or not. But in any event, I say that many moons
6 ago an arbitrator had no qualm, as in the present
7 case, in examining to their own satisfaction
8 whether or not the State's position about
9 constitutionality was correct.

10 He then said, and of course this is a quote
11 from the arbitrator:

12
13 "In view of my finding that the contract
14 was laid before the legislature and
15 approved by them, it is not necessary for
16 me to deal with the second point raised by
17 the United State's case, that the
18 Guatemalan government, having recognized
19 the validity of the contract for six years
20 and received all the benefits to which they
21 were entitled under the contract, and
22 allowed Shufeldt to go on spending money on
23 the concession, is precluded from denying
24 its validity even if the approval of the
25 legislature had not been given to it.

26 "I may, however, state on this point
27 that in all the circumstances I have
28 related and the whole case submitted to me,
29 I have no doubt that this contention of the
30 United States is sound and in keeping with
31 the principles of international law, and I
32 so find."

33
34 Which is curiously quite similar to the
35 grammar used 70 years later by the arbitrators in
36 this case. They don't have to do it, but I so
37 find. Now, whether or not that's how arbitrators
38 should decide their awards, there appears to be
39 some -- some genealogy to it.

40 The point that I'm making here is this: Look
41 at what's happened here in two paragraphs.
42 Firstly, the arbitrator found, contrary to the

43 position of the State, that the concession was
44 constitutionally approved. Secondly, in the
45 alternative finding, he says for the purposes of
46 international liability, even if I'm wrong, the
47 fact that the investor has gone on spending money

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1 when the government knew that it was spending
2 money and was receiving the benefit, that is the
3 country receiving the benefit, is something which
4 would excite and attract liability on the
5 international scale, even if a -- in accordance
6 with municipal law, the law would say that the
7 contract and the concession was invalid.

8 So I say by way of a parallel those kind of
9 principles have long been appropriate as they
10 relate to the relationship between municipal acts
11 and international law.

12 Now, if you look at page 181, there's another
13 paragraph on that topic. And you'll see under the
14 title "Municipal Acts and International Law,"

15 Title 3 there --

16 THE COURT: Um-hum.

17 MR. COWPER:

18 "It was not possible to accept the
19 contention that, as the decree abrogating
20 the concession was the constitutional act
21 of the sovereign State exercised by the
22 national assembly, such decree had the
23 force of law and could not be questioned
24 before a Court. This may be quite true
25 from a national point of view, but not from
26 an international point of view, for it is a
27 settled principle of international law that
28 a sovereign cannot be permitted to set up
29 one of his own municipal laws as a bar to a
30 claim by a foreign sovereign for a wrong
31 done to the latter subject."
32

33 And that flows in my submission logically
34 from the relationship which municipal law has to
35 international standards. Sovereignty exists
36 within the boundary of the country. It dictates
37 and is -- and -- and compels obedience and --
38 and -- and adherence to the laws of the country.

39 However, internationally other parties are
40 not so bound as it relates to adherence to
41 international standards. That's -- that's the
42 very notion of international law, that violations

43 of the local law may constitute violations of
44 international law. But equally, totally lawful
45 acts of a sovereign State may nevertheless attract
46 international liability if they represent breaches
47 of international or treaty obligations.

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1 Now, I say it at 82 to 83, that the
2 tribunal's reference to other parts of the treaty
3 are -- are as they were in the other cases, in the
4 cases I've read you, the Loewen case and the --
5 the other two awards, and they're quite
6 appropriate and proper. And I've given you
7 references at 83 and 84, and I won't read those to
8 you again.

9 Now, the -- I'm over at page 84. And I'm
10 starting at -- at page H. And I've -- I mentioned
11 this below. And I -- and I say this as best I
12 can: I have not seen in my review of the record a
13 clear identification as this issue as being
14 jurisdictional (sic). And I say that's a factor
15 in Your Lordship's consideration of both whether
16 it's jurisdictional and also its appropriateness
17 as a jurisdictional point in this Court. And I
18 say that for a number of reasons.

19 If you look at page 84 and 85, I've given you
20 the references to the transcript, as best we can
21 interpret it, 43 to 72, in my friend's argument in
22 the -- before the tribunal; and over at 85 again
23 it -- a discussion between the tribunal and -- and
24 counsel; and then a reference to the written
25 arbitral submissions, which -- which I do not --
26 which in my submission do not un -- unambiguously
27 state that the question of transparency is
28 anything other than an issue of construction.

29 And I quote the proposition found in the
30 counter-memorial at paragraph 243.

31
32 "...there is no authority for interpreting
33 fair and equitable treatment to extend to
34 transparency and predictability
35 requirements."
36

37 Quite clearly they were saying it's the wrong
38 conclusion. But I say with respect that the
39 operative word there is "interpreting." And it
40 says:

41
42 "Those matters are addressed in Chapter 18

43 of the NAFTA."

44

45 Now, the reason that I say that's to be taken
46 into account is that under modern arbitral
47 procedure all of the rules encourage promptness,

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1 as I set out in Section 2 of this argument, in
2 identifying and objecting to perceived
3 jurisdictional excess on the part of a tribunal.
4 And you won't be surprised to find that there is a
5 similar provision under our act because, as I
6 quote in Section 16 (2) and (3), it says:

7
8 "A plea that the arbitral tribunal does
9 not have jurisdiction shall be raised not
10 later than the submission of the statement
11 of defence...
12 "A plea..."

13
14 And it -- we're talking about the Model Law
15 now.

16
17 "A plea that the arbitral tribunal is
18 exceeding the scope of its authority shall
19 be raised as soon as the matter alleged to
20 be beyond the scope of its authority is
21 raised during the arbitral proceedings."

22
23 Going over to page 86, there's a reference to
24 the -- the commentary on the Model Law as it
25 relates to this. And there is a formal procedure
26 within the additional facility rules through which
27 those objections as to jurisdiction may be made.
28 You'll see article 46 at paragraph 247.

29 THE COURT: Um-hum.

30 MR. COWPER: It says:

31
32 "Any objection that the dispute is not
33 within the competence of the Tribunal shall
34 be filed with the Secretary-General..."

35
36 That's the Secretary-General of ICSID.

37
38 "...as soon as possible after the
39 constitution of the Tribunal and in any
40 event no later than the expiration of the
41 time limit fixed for the filing of the..."
42 counterclaim "...or, if the objection

43 relates to an ancillary claim, for the
44 filing of the rejoinder - unless the facts
45 on which the objection is based are unknown
46 to the party at that time."
47

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1 Now, quite clearly jurisdictional issues may
2 arise during the course of the proceeding that may
3 not have been anticipated. All I'm saying is that
4 there's a constellation of provisions which make
5 it clear that tribunals are entitled to expect
6 from the parties a clear identification of matters
7 which are regarded by the parties as being
8 jurisdiction and clearly stated and clearly
9 pursued. And I say with respect that Mexico
10 failed to do so in this case.

11 Now -- and you'll recall that a number of the
12 awards have actually turned only on jurisdictional
13 issues and on competence issues determined before
14 and sometimes finally for the purposes of the
15 claim that was advanced and in a number of
16 these -- these awards.

17 Finally, I've made the point at 87, and I'm
18 coming to the end of this chapter, that I say
19 beyond question that the tribunal had competence
20 to decide its own competence. And I've given you
21 some authority as to the significance of that.

22 And I then go to -- on page 88, and this is
23 really a different point, so let me just step back
24 and summarize where I am up to this point in the
25 chapter.

26 As I understand my friend's submission on
27 this point of his written submission, he argues
28 that in one form or the other the utilization or
29 the reference to the transparency objectives of
30 the treaty is a jurisdictional error on the part
31 of the tribunal.

32 And what I have submitted to you is that it's
33 not jurisdictional in its character. It's not
34 jurisdictional in its character, because it's a
35 question of interpretation. I say that my friend
36 in seeking to draw a seal or a wall between
37 Chapter 11 and the rest of the treaty is not
38 accurately stating the provisions of the treaty
39 itself.

40 It's clear that the objective section of the
41 treaty is related to the agreement, and that the
42 agreement as defined in Chapter 11 refers to the

43 whole of the treaty and not only Chapter 11, so
44 that there's a natural and textual connection
45 between Chapter 11 and the objectives of the
46 treaty, and that this tribunal and all of the
47 other tribunals are doing the natural thing that

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1 would occur to one if you were exploring this area
2 of law for the first time, effectively,
3 pioneering, if you will, on the international
4 field, and that is to start with the proposition
5 of asking the question: What did the parties as a
6 whole seek to achieve by entering into the treaty
7 of which Chapter 11 is a part? And that that's a
8 natural -- not only natural rationale, but it's
9 also the correct thing to do.

10 That the tribunal in this case said that one
11 of those goals which is relevant to our
12 determination of what's fair and equitable is the
13 transparency goals of the treaty. And so that
14 when we turn to consider the actions of the
15 federal, State, municipal governments here, we can
16 have regard to the fact that transparency is a
17 virtue which the parties agree upon, and that in
18 determining whether the conduct of the State
19 organs was unfair and inequitable under the terms
20 of international law, we're entitled to take that
21 into account, and they did so.

22 And I say with respect that's a question of
23 interpretation. It's a question of international
24 law. It's not a question of jurisdiction.

25 If we're in the international act, that's the
26 end with respect to the entire case. I say that
27 nothing else raised by my friend is one which
28 ought to excite the attention of the Court to the
29 award at all.

30 Now, if I go to page 88, I deal with local
31 remedies. And if you could -- I read portions of
32 the transcript on Friday, and I won't read any
33 other portions. But just -- I know when I went
34 through and I noted the portions I read to you,
35 could you make a note, if you would, please, that
36 under that section of the transcript that the
37 clearest admission of the nature of the debate
38 between President Lauterpacht and my learned
39 friend is at 108, line 10, to 109, line 4.

40 I read you four or five passages, but that's
41 a very clear passage in support of the proposition
42 we make there, that in the argument it was argued

43 that -- it's in the same volume -- sorry,
44 volume -- it's right there.
45 So it's within the references that I've given
46 you. I'm sorry, if I -- my friend's confused.
47 And I hope you're not confused. Under 251 --

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1 THE COURT: Um-hum.

2 MR. COWPER: -- the references to the transcript.

3 Within those references that particular passage
4 is -- is the clearest passage in my view. Read as
5 a whole I think it's a fair statement of what
6 my -- my friend was saying to the tribunal.

7 And the point, just to remind you, was that,
8 as I understand my friend, it is that some
9 recourse to local remedies was necessary. And
10 indeed, I think Mr. Giles said it was required,
11 that there had to be a recourse to local remedies;
12 that was part of his submission to you, and
13 separate and apart from the issue of the
14 interpretation of the waiver which I took you to
15 on Friday, in part.

16 What I'm saying here is that my understanding
17 of my friend's submission was that that
18 particularly arose because of a -- an argument
19 about the interpretation of the scope of the
20 States covered, and whether all of the subsidiary
21 forms of government were covered by the reach of
22 the treaty or whether it only extended to the
23 federal and State levels of government. And that
24 is clear from this.

25 And -- and -- and President Lauterpacht, I
26 think -- well, quite clearly was skeptical. And
27 in fairness, I think he tested it. He says a
28 couple of times I -- I -- we need to think
29 carefully about this, and I'm just seeking to
30 probe what you're saying to me because I'm
31 concerned. As I said on Friday, it drives a horse
32 and carriage through the protections to investors
33 as it relates to municipal conduct.

34 That position was subsequently withdrawn. I
35 don't hear my friend raising it. But that's the
36 contextual explanation for why you see the
37 tribunal doing what they do with the local
38 remedies question. They say Mexico doesn't
39 maintain that local remedies have to be pursued.

40 So the position taken before this Court on my
41 respectful submission is not the position that was
42 taken before the tribunal at the end of the day

43 after the post-hearing and other briefs were
44 filed.
45 Now, I have said, and I -- and I maintain
46 that the tribunal's finding of the interpretation
47 of 1121 is absolutely correct, and that it's made

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1 clear by the annex that Mexico has filed, and that
2 if you read those together, there can be in my
3 submission no doubt about the relevance of local
4 remedies.

5 And I've submitted to you earlier that in the
6 Waste Management case there's a living embodiment
7 of the risk to an investor of continuing any
8 proceedings under 1121, because of the risk that
9 Mexico would take the position that they directly
10 or indirectly raised measures which ought to be
11 raised within the NAFTA context or they can be
12 raised in either/or, but not both.

13 The central point that I make here is simply
14 that what was conceded before the tribunal was
15 that 1121 contemplates direct reference of a
16 dispute to a Chapter 11 tribunal without
17 exhaustion of local remedies, that that's the
18 privilege of the investor.

19 The burden the investor has established,
20 unlike in domestic remedies, is a breach of
21 international law and a breach of the trea -- of
22 the treaty provisions.

23 In domestic law, all they have to do is
24 establish the domestic and pursue the domestic
25 remedies. They'd have to pursue and -- and prove
26 the international violations should they choose to
27 go under NAFTA. And I say that that's a correct
28 interpretation of 1121, particularly in the
29 context of the annex, and I quote that at page 88
30 and 89.

31 You may want to make a note in this section
32 that's not only the -- in relation to waivers of
33 course, you have not only the Waste Management
34 case, you also have the Ethyl case which I read to
35 you earlier. And that's the case dealing with
36 the -- the passage of the act nine days after the
37 filing of the notice and -- and that
38 interpretation of 1121.

39 So with respect to what I think my friend
40 characterizes as a jurisdictional issue, I say
41 this, and that is: Firstly, the point was
42 conceded below. But, secondly, it's a question of

43 the interpretation of 1121. It's not a -- it's
44 not a jurisdictional question for this Court, it's
45 an interpretation of 1121. All these other
46 tribunals are interpreting 1121. 1121's a
47 provision in Chapter 11.

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1 The interpretation of the local remedies rule
2 as it is properly interpreted from 1121 is a
3 matter for the tribunal. It is a question of
4 law. I concede it's a question of law. It's not
5 a question of jurisdiction in the sense that
6 they're not answering a dispute that's before
7 them, which is, I think, where my friend needs to
8 elevate the matter. He needs to elevate it to an
9 excess of jurisdiction on their part by answering
10 the question in which the -- in the way in which
11 they did.

12 Now, two practical things which I wanted to
13 say in relation to local remedies, and then I'll
14 finish for the day, if I may, and that is the
15 practical con -- consequences of domestic
16 remedies. And I need to get the reference to
17 you. And, I'm sorry, I think the one Amparo which
18 lived a life in this case started in '96 and
19 finished in '99, and I've -- I've forgotten, but
20 those dates strike in my head, and they're about
21 the three-year period.

22 I don't know that anybody's identified for
23 you the fact that complaints about a State measure
24 have to be commenced within three years. So from
25 a practical point of view, an investor has to say
26 if I'm going to pursue local remedies -- forget
27 the waiver and all those other matters, if I'm
28 going to pursue local remedies before -- because
29 if you read 1121, before I commence my -- my
30 complaint, depending on your interpretation of
31 1121, then three years may be up before -- if --
32 if the local remedies take longer than three
33 years, and then I may be out of time with respect
34 to my complaint.

35 Now, the obvious reconciliation of that is
36 that they're two different regimes, that you have
37 to bring it within three years if you say it's a
38 measure sounding in Chapter 11. And you can do
39 your domestic remedies if you want if you say it's
40 something else or if you're satisfied with
41 domestic remedies.

42 But that leads to my ultimate point, which is

43 the privilege of going directly to the arbitral
44 tribunal. And my friend Mr. Thomas said
45 essentially people like my client should not be
46 allowed to trifle with the privilege but, with
47 respect, Metalclad said we have been unfairly

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1 treated by the Mexican governments in this case,
2 and our asset has been taken away from us.

3 That privilege nobody can doubt exists on the
4 part of investors. And the privilege carries with
5 it this important consequence, which is:
6 Investors who go into a host country do not have
7 to depend upon the local State courts for their
8 remedies.

9 That's -- that's the -- one of the central
10 guarantees here is that if you're treated unfairly
11 and harshly within the meaning that that term
12 applies to an international law, if you're -- if
13 there's a violation of the national treatment
14 protection or any other Chapter 11 protections,
15 you don't have to go to the local courts to have
16 that acquitted.

17 You have the privilege of going immediately
18 to an international tribunal and saying my rights
19 within NAFTA have been violated; and the host
20 country, not the municipality, not the State, the
21 United States of Mexico have the obligation to
22 compensate me for the wrong which has been done to
23 me under the treaty.

24 And I say with respect that privilege has not
25 been trifled with by my client, but also cannot be
26 gainsaid in these proceedings.

27 Now, that finishes Chapter 4 in my
28 submission. And I'll check my notes to see if
29 I've leapt over references that I needed to --
30 needed to give you that I've forgotten, but I
31 think I'm well ahead of schedule.

32 I'm going to go to Chapter 5. I think we're
33 on -- if I'm correct, it's Tuesday night. I -- my
34 own prediction is that we'll certainly be finished
35 I think by tomorrow, but certainly we're even
36 running ahead of the schedule I thought of
37 yesterday. I -- I think we'll be --

38 I have to slow down. During the break the
39 reporter is asking me to slow down.

40 I'm going to go to some -- a number of the
41 factual references, and that will take us, I
42 think, a substantial time of the morning, but then

43 I then go to errors of law reluctantly, but I'll
44 deal with that.
45 I have, I think, foreshadowed our position on
46 international law as it relates to the application
47 of international law in the circumstances. And

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1 the only other parts of the case we need to deal
2 with are the failure to provide reasons asserted
3 by my friend.

4 So you'll hear from two or three of us
5 tomorrow, but I think we should be able to finish
6 at least within tomorrow, but certainly sometime
7 on Thursday, I suspect Thursday morning at the
8 latest.

9 THE COURT: Um-hum.

10 And, Mr. Foy, have you had an opportunity to
11 consider your position with respect to your reply
12 if we achieve the timing that Mr. Cowper believes
13 is reasonable?

14 MR. FOY: If Mr. Cowper finishes on -- by Thursday
15 at -- at the break, at the noon break, then we
16 will be able to reply -- reply orally on Friday.
17 I cannot at this stage commit to the delivery of
18 the written -- the full, final finished written
19 reply by that time, but I could certainly commence
20 the oral reply.

21 THE COURT: Um-hum.

22 MR. FOY: And I have Your Lordship's admonition that
23 if there was anything in the written reply going
24 beyond the points covered orally, that there would
25 be an opportunity to respond.

26 THE COURT: Um-hum. I -- I do wish to complete this
27 week, and -- and I know Mr. Cowper has certainly
28 expressed his desire to.

29 Having said that, I don't want to have you
30 feel that you're pressured to give me a reply when
31 you -- if you don't feel you're ready to do so.

32 MR. FOY: Well, I'll -- I -- I appreciate Your
33 Lordship's -- the extension of that, and we'll
34 take it under consideration.

35 THE COURT: Very well.

36 On that basis, we don't need the additional
37 time this afternoon then, so we'll adjourn
38 notwithstanding my late start this morning and
39 reconvene at 10 tomorrow morning.

40 THE REGISTRAR: Order in chambers. Chambers is
41 adjourned to the 28th of February at 10 a.m.

42

43 (PROCEEDINGS ADJOURNED AT 4:05 P.M.)
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