

1                                   1 March 2001 - Certified  
2                                   Vancouver, B.C.

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

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

9 THE COURT: Yes, Mr. Cowper.

10 MR. COWPER: Thank you, My Lord.

11       If I may start with the -- just identifying  
12 what we have left to do, by my review of my notes,  
13 I have to take you to the last chapter. I have to  
14 take you to the proper interpretation of Article  
15 1110 in response to my friend. I also have to  
16 take you to the final section as it relates to my  
17 submissions respecting the logical order of the  
18 questions which arise.

19       And there are in the course of that a number  
20 of miscellaneous matters which have accumulated,  
21 particularly relating to some of the authorities  
22 my friend relies upon which fall within the  
23 remaining chapter, so I think I should be able to  
24 deal with those cases.

25       I do have -- on a review of my notes, failed  
26 to respond to one aspect of my friend's  
27 submissions with respect to the June '94  
28 incident. I'll give you a specific reference on  
29 that. And then I have to deal with the issue of  
30 the question of leave to appeal and the existence  
31 or absence of questions of law.

32       So -- and my friend has been kind enough to  
33 give me an authority, and the supplemental  
34 argument.

35       Now -- so that's what remains to be done.

36       What I'd like to do if I can is to start with  
37 the question Your Lordship left me last evening,  
38 which was, if I can paraphrase it, what was the  
39 federal government's responsibility for the lack  
40 of transparency on the basis of the findings of  
41 the tribunal?

42       Now, in my submission the award properly read

43 attributes liability to the federal government for  
44 a lack of transparency in two respects: It finds  
45 liability for lack of transparency with respect to  
46 the original acts or failure to act of the federal  
47 government, and those are two different things.

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1           And it also finds liability on the federal  
2 government as the national government because of  
3 the principle of attribution and the findings of  
4 the lack of transparency as it relates to State  
5 conduct and municipal conduct are attributed to  
6 Mexico in the finding of the tribunal.

7           Now, I think Your Lordship's question to me  
8 yesterday focused on the first part of that, and  
9 we then went as I read the transcript last night  
10 and covered a number of different areas. But just  
11 trying to proceed logically, if I may, let me  
12 start with the first proposition, which is: What  
13 did the tribunal find was the original liability  
14 of the federal government for its contribution to  
15 what the tribunal found was a lack of  
16 transparency?

17           If I may, I'd like to by way of preface say  
18 that I read the conclusion of the tribunal at 99  
19 and 100 on this topic at the very end of its  
20 section on 1105 to refer to the totality of the  
21 acts of the Mexican organs of government which  
22 have been dealt with in the previous sections as  
23 they pertain to transparency. So that paragraph  
24 99 which says:

25 [All quotations herein cited as read]

26  
27           "Mexico failed to ensure a transparent and  
28 predictable framework for Metalclad's  
29 business planning and investment. The  
30 totality of these circumstances  
31 demonstrates a lack of orderly process and  
32 timely disposition in relation to an  
33 investor of a Party acting in the  
34 expectation that it would be treated fairly  
35 and justly in accordance with the NAFTA."  
36

37           I say on a fair reading that's a reference to  
38 the acts and the failure to act of all three  
39 levels of government. That's a conclusion at the  
40 very end respecting the Mexican State, if you can  
41 put it -- the international State's liability for  
42 a breach of 1105 which is then found in paragraph

43 100. It says:  
44  
45 "Moreover, the acts of the State and the  
46 Municipality - and therefore the acts of  
47 Mexico..."

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And you'll find in the very beginning of this section the word -- Section A is the principle of attribution. And it says under Section A found earlier in the award, the acts of the State and municipality are properly attributable to Mexico under international law. So that's the reference back to that section of the award.

"...fail to comply with or adhere to...Article 1105...that each Party accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment. This is so particularly in light of the governing principle that internal law...does not justify failure to perform a treaty."

So just starting with the end of the story, what I say is fairly read -- and of course 101 is the conclusion of failure to treat under 1105. But 99 through 101 fairly read say -- the first part is that Mexico failed to ensure transparency collectively, that the failure to -- to perform -- to ensure transparency and predictability is a factor in paragraph 100 which resulted in unfair treatment, unfair and inequitable treatment, and that Mexico is responsible not only for its own federal officials' acts but the acts of the State municipality.

So starting with that, let me then go to what I say is the finding of liability in response to Your Lordship's direct question of the federal officials for a lack of transparency.

And Your Lordship said last evening that -- how can there be -- and excuse me for -- I'm not quoting you, but just so that we're on the same page, how can the federal government be responsible for a lack of transparency when it was Metalclad's position that the federal government

43 was correct in its assertion through its officials  
44 that the municipality had no authority with  
45 respect to municipal permits and could not refuse  
46 a permit?

47 Now, with respect to the tribunal's finding,

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1 the finding they make with respect to the federal  
2 government's original liability in my submission  
3 is found most clearly in paragraph 88 at page 29.  
4 And this is consequential to a number of other  
5 findings, but if I can focus on this for a  
6 moment.

7 The other findings are the representations,  
8 the reliance and otherwise that I referred  
9 Your Lordship to yesterday, and I won't -- I won't  
10 repeat that. But at 88 it says:

11  
12 "In addition, Metalclad asserted that  
13 federal officials told it that if it  
14 submitted an application for a municipal  
15 construction permit, the Municipality would  
16 have no legal basis for denying the permit  
17 and that it would be issued as a matter of  
18 course. The absence of a clear rule as to  
19 the requirement or not of a municipal  
20 construction permit, as well as the absence  
21 of any established practice or procedure as  
22 to the manner of handling applications for  
23 a municipal construction permit, amounts to  
24 a failure on the part of Mexico to ensure  
25 the transparency required by NAFTA."  
26

27 Now, with respect to the findings of the  
28 tribunal there are two aspects to that, but there  
29 is a clear liability in my respectful submission  
30 for the federal government's contribution to it on  
31 the findings of the tribunal.

32 And the central point that I think has to be  
33 made here in relation to Your Lordship's question  
34 is the tribunal's finding did not agree with  
35 Metalclad that the municipality had no authority.

36 And you'll recall as I went through the award  
37 that the position of the parties was Mexico  
38 submitted to the tribunal that the municipality  
39 was an autonomous constitutional entity that had  
40 the right to refuse the construction permit and  
41 could not be interfered with and had the authority  
42 to interfere with the construction -- to refuse

43 the construction permit, and that nothing wrong  
44 had happened.

45 Metalclad's position was not only on the  
46 facts; that is, we've been told they didn't have  
47 authority, we didn't have to apply to them. On

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1 the law, Metalclad's position was the municipality  
2 has no jurisdiction, no right to call for a  
3 permit, no right to receive a permit, no right to  
4 consider granting a permit.

5 What the tribunal said was on their view of  
6 the law in response to those two positions, the  
7 municipality's authority -- and I think they use  
8 the word "at its best," but for the purposes of  
9 the finding -- extended to physical and  
10 engineering considerations. And I'm -- I'm  
11 paraphrasing it, they use of "physical" and  
12 "physical design."

13 But clearly what they're talking about is the  
14 construction of the buildings, the pouring of the  
15 cement, and those physical engineering  
16 considerations as distinct from any considerations  
17 which would pertain to environmental matters, the  
18 design of the hazardous waste facility as it  
19 related to treatment of the waste, receipt of the  
20 waste, all of those construction and operation  
21 matters.

22 Now, on the facts found by the tribunal, what  
23 the tribunal has said is having regard to the  
24 permits issued, and they've -- they've placed  
25 great emphasis on that, the federal government in  
26 its permits nowhere said with clarity or in fact  
27 at all that you have to obtain a municipal  
28 construction permit because they have authority  
29 over physical and engineering considerations.

30 Now, you'll recall yesterday, I believe, I  
31 took you to the permits. And you'll recall that  
32 the permits include substantial reference to and  
33 authority to construct buildings, receiving  
34 facilities, process facilities, treatment  
35 facilities, everything that was built is  
36 encompassed within the construction elements of  
37 the federal permits.

38 What's not contained in the federal permits  
39 is any acknowledgment or reference to a municipal  
40 jurisdiction over the physical construction of the  
41 buildings or the fences or that suchlike.

42 And what the municip -- and what the tribunal

43 has said is you the federal government under the  
44 goal of transparency have an original obligation  
45 to tell an investor this is our responsibility,  
46 but you need to go to the municipal government  
47 because they have authority over the physical

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1 engineering component of your project; they can't  
2 interfere with our authority which is exclusive  
3 with respect to environmental matters, but they  
4 can go and you have to go to them to get a  
5 physical engineering -- and I'm just  
6 paraphrasing -- a permit as it relates to the  
7 physical engineering of your buildings and the  
8 like.

9 And on the findings of the tribunal, not only  
10 did the permits not state that, but the federal  
11 officials made representations which went even  
12 beyond silence to endorse and recommend and  
13 indeed, as is said in one of the documents,  
14 instruct the company to undertake and conduct its  
15 construction without seeking a permit, that the  
16 construction went on. And it was only after the  
17 Convenio -- I'm sorry, it was only after the stop  
18 work order is issued federal officials then say,  
19 oops, well, for the matter of respect you ought to  
20 apply. And then, as I said yesterday, the  
21 application lies like a dead letter until a  
22 Convenio is concluded, and then the municipality  
23 asserts itself.

24 So I say, just to sum up that point, that  
25 in -- the direct answer to Your Lordship is on the  
26 finding of the tribunal, they did not accept  
27 Metalclad's submission that there was no  
28 authority. And as a consequence of that there was  
29 a lack of transparency in their view as to the  
30 distinction between the federal government's  
31 exclusive environmental authority over the site,  
32 the project, the construction and everything else,  
33 and the municipal authority over physical  
34 engineering questions.

35 And so they attributed to the federal  
36 government a breach of transparency in relation to  
37 the federal government's treatment of the matter  
38 in their permits and in their documents and in  
39 their conduct of the matter.

40 So that's the first original finding, I say,  
41 of liability as it relates to the federal  
42 government for a lack of transparency.

43 Now, I use the word "liability" loosely  
44 because I've said, I think consistently, that the  
45 tribunal used it as a factor in finding a breach  
46 of 1105. They did not anywhere say this is a  
47 breach giving rise to a right to damages.

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1           With respect to the second ground of original  
2 liability in relation to, if you will, a  
3 transparency-related concern, in paragraph 104 of  
4 the award the tribunal found:

5  
6           "By permitting ..."

7  
8           I'm sorry if -- it's at page 33.

9 THE COURT: Got it.

10 MR. COWPER:

11           "By permitting or tolerating the conduct  
12 of Guadalcazar in relation to Metalclad  
13 which the Tribunal has already held amounts  
14 to unfair and inequitable treatment  
15 breaching Article 1105 and by thus  
16 participating or acquiescing in the denial  
17 to Metalclad of the right to operate the  
18 landfill, notwithstanding the fact that the  
19 project was fully approved and endorsed by  
20 the federal government, Mexico..."

21  
22           And in that connection of course they're  
23 talking about collective liability in  
24 international law.

25  
26           "...must be held to have taken a measure  
27 tantamount to expropriation in violation of  
28 NAFTA Article 1110..."

29  
30           So the second ground of original liability on  
31 the finding in relation to transparency concerns,  
32 I'm at -- or a breach of duties in relation to  
33 transparency concerns was the participation or  
34 acquiescence, using their phrase, in the  
35 misconduct, if I may say it that way, of  
36 Guadalcazar and inferentially the State of San  
37 Luis Potosi.

38           Now, as to that matter, the natural question  
39 arises and deserves a straight response as to what  
40 the tribunal had before it concerning the scope of  
41 steps available to the federal government other  
42 than acquiescence and participation.

43           And there are in my submission four matters  
44           that were before the tribunal, some of which I've  
45           already identified for you, but I'll summarize  
46           them this morning, which relate to the federal  
47           government's failure to fulfill the goals of

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1 transparency by failing to take steps in relation  
2 to the assertion of authority, the unlawful  
3 assertion of authority by the municipality and  
4 inferentially the State government.

5 The -- can I have tab -- I'll give you --  
6 I'll go to the next point and -- while my friend  
7 is finding my reference. The -- so maybe put a 1  
8 and then I'll come back to it, or you can number  
9 it.

10 The -- the -- the first point I'd like to  
11 make in this connection is that in contrast to  
12 what the municipality and the governor did, in the  
13 evidence before the tribunal, it's very clear that  
14 when the municipality and the State asserted  
15 themselves, that the political forces within the  
16 federal government had two reactions, first of  
17 all, was to convert it to a political problem.

18 And you'll see in my reference -- and one  
19 point in which my friend and I dissent is that my  
20 friend goes into discussions and negotiations  
21 which are self-evidently attempts to solve a  
22 political problem, not a legal problem, but  
23 attempts by Metalclad and the federal officials to  
24 say if we give you this, will you just change your  
25 position?

26 And if you go -- there's -- there's  
27 substantial evidence here of negotiations which  
28 are absolutely expressly on the basis that --  
29 let's put aside for the fact -- for the moment  
30 whether the municipality and the State have any  
31 lawful authority in this matter at all. If we  
32 offer you a citizens committee, if we offer you  
33 water, if we offer you medicine, if we offer you  
34 these things, will you abandon your position and  
35 allow us to proceed? And Metalclad conducted  
36 those negotiations extensively, and the federal  
37 officials from time to time turned up.

38 The point is though one of the federal  
39 responses was to blend the question of rights, the  
40 question of lawful process, with the question of  
41 political appeasement.

42 What the federal government did not do was to

43 assert itself in the municipality in any way  
44 comparable to the fashion which the governor did.  
45 And I -- I -- this isn't a big point, but if you  
46 look at what the governor did, he sends a lawyer  
47 to the municipality to provide them with, if I may

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1 put in quotes, advice respecting the -- the permit  
2 application.

3 The lawyer advises them as to how to refuse  
4 the application. The governor drives down to this  
5 tiny municipality, and it's -- it's more evocative  
6 of any other description, in which a mayor shares  
7 his telephone with the -- the phone booth, as my  
8 friend put it on the first day of this hearing.  
9 And he presides at the meeting concerning the  
10 application.

11 And I simply asked the question, and I think  
12 the tribunal fairly did too: Where were federal  
13 officials? Where were federal officials and  
14 federal political representatives in the  
15 municipality saying hold it a second, under the  
16 laws of this country you can't do this? You need  
17 to allow this facility to operate because we the  
18 federal government with the lawful authority have  
19 given them the authority to do it. More than  
20 that, we told them to build the facility without  
21 applying to you for a permit. We told them to  
22 apply for a permit to you because you would be  
23 required to give it. Where is the evidence of  
24 federal officials asserting their lawful authority  
25 in the same way that the governor and the State  
26 had?

27 So when the -- when the tribunal says that  
28 the federal government participated and acquiesced  
29 in that, that's one element of what they failed to  
30 do.

31 Now, if you go to -- if you go to the -- the  
32 next point, which is the assertion of police  
33 authority -- if you go to tab 21 -- I'm sorry, tab  
34 22. I'm trying to look for something. I'm not  
35 sure. And it's -- this is the -- one of the  
36 declarations of Mr. Miranda. And if you go to the  
37 page -- the fifth page, it's unfortunately not  
38 numbered.

39 And I'd ask -- I'm going to read you the  
40 second and third full paragraph. And this is --  
41 chronologically putting you in the history, this  
42 is following the demonstration. Okay.

43  
44 "For the following four weeks paid  
45 demonstrators stood by the landfill  
46 exercising psychological pressure,  
47 intimidating, threatening and challenging

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1 the workers of the landfill. State police  
2 were present during the whole time. And  
3 their attitude was also intimidating and  
4 threatening. The personnel began fearing  
5 for their families. I decided with the  
6 consequent economic implications to deviate  
7 the trucks and for them to enter the  
8 landfill through an alternate entrance.

9 "In January '96..."

10

11 Okay. So we're now in January '96.

12

13 "...once again the State police came back  
14 to the landfill for a three-month period.  
15 Many trucks entering and exiting the  
16 landfill were stopped and under strict  
17 surveillance when they had no attributions  
18 to do so. Because Metalclad and its  
19 subsidiaries never entered of one ounce of  
20 waste to the landfill the police were  
21 infuriated.

22 "Later a group of inhabitants of Los  
23 Almoles, backed by the municipality and  
24 with the State police protecting them,  
25 blocked the roads. And for some weeks no  
26 trucks could get into the landfill."

27

28 Now, there was a lot of fighting back and  
29 forth in the evidence as to the involvement of the  
30 State police and what they were doing, but I  
31 simply say this: In relation to the federal  
32 government's involvement, there's no evidence of  
33 the federal police showing up and saying this is a  
34 federal facility authorized by federal permits,  
35 it -- they have lawful authority of the federal  
36 government to operate it, and allowing and  
37 ensuring that other forces of the Mexican  
38 subsidiary governments did not interfere with the  
39 operation.

40 And I think yesterday you said -- said to me  
41 why didn't the company just go ahead and operate,  
42 or something to that effect. This is part of that

43 answer, which is that there were subsidiary  
44 government forces which Metalclad reasonably took  
45 the view would not let this facility operate. And  
46 more to the point for my present submissions, the  
47 federal government would not interfere with the

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1 actions of the State police or municipal people.

2 That's the second point, I think.

3 The third point relates to my -- my friend's  
4 reliance on the Amparo. And I simply say this,  
5 that the Amparo -- and -- and I don't want to give  
6 you the detail unless you need it. But the JURICI  
7 report stated that the Amparo obtained in relation  
8 to the Convenio was flawed because the process --  
9 well, firstly, there was no jurisdiction in the  
10 municipality to seek the relief, so the injunction  
11 ought not to have been granted.

12 Secondly, the order ought not to have  
13 extended to COTERIN which was not a party and did  
14 not have notice of the proceedings, had no  
15 opportunity to appear. In other words, it -- it  
16 shouldn't have been involved in any way.

17 And forgetting for the moment that -- the  
18 rightness or wrongness of the JURICI report, my  
19 point in relation to the federal inaction is that  
20 I believe it's undisputed that that Amparos  
21 dissolve several years later for lack of  
22 jurisdiction. And I say simply that the failure  
23 of the federal government to move with dispatch to  
24 remove that injunction also played an element and  
25 a role in the tribunal's finding of participation  
26 and acquiescence.

27 Now, finally, the fourth thing which the  
28 federal government could have done and did not do  
29 on the facts before the tribunal relates to this,  
30 and that is the transition, once the negotiations  
31 came acropper (sic), and have really infiltrated  
32 the negotiations, which is the negotiations, as  
33 I've already said, were political. And during the  
34 course of those, quite clearly the federal  
35 government was -- the federal government of Mexico  
36 was beginning to tell the company a message that  
37 was starkly in contrast to that which had -- it  
38 had told them during the construction and  
39 preparation of the site, which was we have to get  
40 the State municipality onside, that is politically  
41 necessary.

42 And in -- in that connection I'd ask you to

43 turn to tab 45, because one of the remedies that  
44 was lawfully available to the federal authorities  
45 that was considered by them and not acted on by  
46 them was the commencement of a legal process which  
47 I don't know the details of but which is

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1 effectively a -- a challenge to the  
2 constitutionality of the actions of another organ  
3 of government.

4 And at the proceeding there was under tab 45  
5 this -- this memorandum of May 24th, 1996  
6 produced. It concerned other matters as well, and  
7 so only parts of the letter were filed. And it  
8 deals with other legal proceedings. But the  
9 passage I wish to emphasize today is at the second  
10 page of that memorandum. And this is a report by  
11 one of the counsel acting for COTERIN respecting  
12 his discussions with federal officials. And  
13 you'll see the second full paragraph:

14  
15 "We met with attorney Martin Diaz...Diaz,  
16 head of the legal department of  
17 SEMARNAP..."

18  
19 And you know that's the federal -- the new  
20 name for the federal agency.

21  
22 "...on May 21..."

23  
24 And just to put you in the chronology, that's  
25 May 21, '96.

26  
27 "...to discuss the advisability of SEMARNAP  
28 filing a lawsuit called 'Constitutional  
29 Controversy,' which is an action that the  
30 law grants to the authorities when another  
31 authority invades its jurisdiction. And in  
32 our case the Municipality of Guadacazar  
33 invades the area of authority of SEMARNAP.

34 "Prior to the meeting we delivered to  
35 Mr. Diaz a memorandum giving him our  
36 arguments to sustain the validity and the  
37 advisability of filing the constitutional  
38 controversy. At the meeting Mr. Martin  
39 Diaz mentioned that although in his opinion  
40 the constitutional controversy is an action  
41 in which SEMARNAP could succeed,  
42 Mrs. Carabias, the secretary of SEMARNAP,

43 mentioned to him that she considered it  
44 unadvisable to file a constitutional  
45 controversy because the president of the  
46 republic..."  
47

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1 And that's of course of Mexico.

2

3 "...has been mentioning in his speeches  
4 that there is a new federalism in Mexico.  
5 And a lawsuit filed by SEMARNAP against the  
6 municipality would be contrary to what the  
7 president has been stating."

8

9 Now, the point I'm making here is that the  
10 federal government had at its hand and -- and in  
11 its powers the ability to take the lawful question  
12 that -- the question of the lawful authority of  
13 the municipality to the courts of Mexico and to  
14 obtain a determination of the lawfulness of the  
15 conduct of the subsidiary government.

16 THE COURT: Is this proceeding, the con --  
17 constitutional controversy, the proceeding which  
18 the Mexican courts ultimately held that the  
19 municipality should have commenced rather than the  
20 Amparo proceedings?

21 Mr. Foy is shaking his head in the negative.

22 MR. COWPER: I don't know the answer to that. I'll  
23 try to look.

24 THE COURT: Okay.

25 MR. COWPER: As I understand it, it's another form of  
26 proceeding that's only open to governments in the  
27 courts to obtain declarations, so it would be --

28 THE COURT: Right. What I -- I understand of Amparo  
29 was that that's -- it's a private citizen --

30 MR. COWPER: Yes.

31 THE COURT: -- complaining of a --

32 MR. COWPER: Yes.

33 THE COURT: -- government action.

34 MR. COWPER: Yes. And this may have been the -- the  
35 way that it ought to have been commenced. I -- I  
36 don't know if the municipality has access to the  
37 same process. That's my question. It may have  
38 been. I'll come back to you. I'll try to find  
39 the answer to that question.

40 THE COURT: I think Mr. Foy and Mr. Thomas have  
41 consulted and may be able to give their view of  
42 it.

43 MR. FOY: My Lord, I think you're correct. As I  
44 mentioned when I described the -- the dismissal of  
45 the municipality's Amparo against the Convenio,  
46 one of the reasons, as I understood it, was that  
47 Amparo was only a remedy available to private

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1 interests, not to an organ of government, that the  
2 appropriate remedy for organs of government with  
3 respect to issues like this was the constitutional  
4 challenge.

5 THE COURT: Yes. I think you used --

6 MR. FOY: And I --

7 THE COURT: -- constitutional challenge or  
8 constitutional controversy.

9 MR. FOY: Controversy, yes. And I took you to this  
10 very memo during the course of our submissions.

11 THE COURT: Okay. That -- that satisfies my query,  
12 Mr. Cowper --

13 MR. COWPER: Thank you --

14 THE COURT: -- unless --

15 MR. COWPER: -- My Lord.

16 THE COURT: -- you feel the need to investigate it  
17 further.

18 MR. COWPER: No.

19 So finally on this topic, I just want to  
20 refer you to two aspects of the evidence that was  
21 in -- in -- in the form of evidence under oath as  
22 opposed to a letter, because I want to refer you  
23 back and just ask you to make a note that  
24 Ambassador Jones got the same message, and I read  
25 it to you yesterday in page 2 of his memorandum,  
26 where during the course of the negotiations when  
27 it appeared as if the municipality and the State  
28 would not agree to anything, and -- and you'll  
29 recall there's a number of declarations about how  
30 agreement appeared to be at hand, and then  
31 agreement failed, and then agreement appeared to  
32 be at had, the government appeared -- the governor  
33 appeared to be on-board and then changed his  
34 position repeatedly, that Ambassador Jones was  
35 told -- and it's page 2, and you don't have to  
36 come back to it, I read it yesterday. But he was  
37 told by high levels of the Mexican federal  
38 government that they were powerless to force State  
39 and local officials to support the Metalclad  
40 project. So that's evidence under oath that is to  
41 the same effect.

42 And I'd also refer you -- and I won't -- I

43 won't read it to you, but if you go to Secretary  
44 Carabias's evidence, and at tab 45 -- it's not tab  
45 45, sorry. Her evidence -- at page 70.  
46 She effectively in her evidence, and --  
47 and it's -- I've read the whole of her evidence,

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1 and it's -- it's a -- a bit of an internally  
2 difficult piece of evidence to read. But one of  
3 the themes of her evidence, and it's a very strong  
4 theme, is that the State and the municipalities  
5 are autonomous actors. We can't interfere with,  
6 we can't take steps to correct them because they  
7 are autonomous within our system of government.

8 And effectively that's, in a -- in a  
9 different way, reflecting the political judgment  
10 which she's reflecting to be one of the elements  
11 of the new federalism referred to in the letter,  
12 and that -- that tab reference is tab 12 at page  
13 70.

14 So just summing up that, what I say then in  
15 answer to your question, and I'm sure it's a  
16 longer answer than perhaps you wanted, is that  
17 there were on the terms of the award findings of  
18 liability for failure to obtain transparency which  
19 were proper factors to take into account in  
20 determining whether there's a breach of fair and  
21 equitable conduct under 1105, both as to original  
22 acts of the federal officials and inaction and  
23 failure to act which was characterized and found  
24 to be participation and acquiescence in unlawful  
25 conduct by the State and municipal governments.

26 As to the first, I've really given you two,  
27 which is that the finding of the tribunal was, at  
28 the end of the day, that there was in fact a  
29 jurisdiction in the municipality in relation to  
30 construction permits, that the federal officials  
31 had not identified for the investor in an  
32 appropriate way so that the investment was  
33 predictable and transparent, the necessity to  
34 obtain a permit that was restricted to physical  
35 and engineering purposes.

36 And it, by attribution, was held liable for  
37 the municipal government's breach of a whole host  
38 of transparency-related values which was the  
39 complete absence of a system at all, the complete  
40 absence of any kind of record of municipal conduct  
41 in accordance with their law, the failure to  
42 adhere to their jurisdiction, their excess of

43 jurisdiction and -- and, frankly, the chaos of the  
44 situation within the municipal office.

45 And you can, if you wish to -- it's -- the  
46 declaration of Carvajal who says not only is it a  
47 bad thing at the municipality, but I went to the

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1 State office that's supposed to have the registry  
2 of building permits within the State. There  
3 wasn't a single permit, not a single permit iss --  
4 on record that's supposed to be held by the State  
5 officials.

6 So -- and then I say for the four reasons  
7 that I've just given that the finding under 105 of  
8 participation and acquiescence was also the other  
9 basis of liability for saying the lot -- the  
10 federal officials failed to receive transparency.

11 Now, turning -- sorry.

12 THE COURT: Can I just ask you one --

13 MR. COWPER: Yes, of course.

14 THE COURT: -- question on the -- the latter part?

15 I took your submissions yesterday to say  
16 that -- that the municip -- or the tribunal's  
17 reliance on transparency only -- or was -- was  
18 only related or was restricted to 1105 and did not  
19 "infect," I think is the word used, the findings  
20 vis-a-vis expropriation under 1110. Now, Mr. Foy  
21 has been taking a contrary opinion.

22 MR. COWPER: Yes, of course. Yeah.

23 THE COURT: But in giving me the answer you've just  
24 given me, you've referred me to paragraph 104.

25 MR. COWPER: Yes.

26 THE COURT: And you've made reference to the  
27 acquiescence of the State. And you've -- you've  
28 talked to me about the lack of transparency in  
29 that regard.

30 But paragraph 104 comes under the section of  
31 the tribunal's decision dealing with  
32 expropriation, not a breach of 1105.

33 MR. COWPER: Yes. And if you -- if you go to 104 --  
34 and I don't disagree with that. I -- I -- if you  
35 turn to 104 which is in the expropriation section,  
36 I accept that. What -- and I -- I thought I had  
37 said this earlier, but I -- I say it here.

38 There's no doubt that the first finding under 1110  
39 carries with it a conclusion of unfair and  
40 inequitable treatment arising out of 1105.

41 What I've said is, though, that the -- at 104  
42 you'll see:

43  
44 "By permitting or tolerating the conduct  
45 of Guadalcazar..."  
46  
47 Do you see that?

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1  
2 "...in relation to Metalclad which the  
3 Tribunal has already held amounts to unfair  
4 and inequitable treatment breaching Article  
5 1105 and by thus participating or  
6 acquiescing in the denial to Metalclad of  
7 the right to operate the landfill..."

8  
9 What I was saying was in relation to the  
10 expropriation analysis, the tribunal does  
11 something additional to what it does under 1105,  
12 because it has additional findings in relation to  
13 what constituted an expropriation.

14 And in relation to that paragraph what  
15 they're focusing on is the federal government's  
16 attributed liability as it relates to  
17 expropriation for the -- what they held was  
18 essentially the permanent cessation of the  
19 operation of the facility by Guadalcazar.

20 Now, I say that's not infected. My friend  
21 says it's infected. Your Lordship will have to  
22 deal with whether under 1110 that finding, if  
23 there's any error in 1105, can remain. I say that  
24 it's quite a distinctive and additional finding  
25 than that under 1105.

26 If I led you to think that there was no  
27 connection, I certainly didn't mean to say that.  
28 There's clearly a connection as to the first  
29 finding between 1105 and the findings of -- in  
30 relation to that as it goes to 1110.

31 What I am -- putting it in another way, what  
32 I'm saying in particular is that if you look at my  
33 friend's argument, he says, well, the one infects  
34 the other. And I say that does not naturally flow  
35 at all, because expropriation is a separate  
36 conclusion flowing from particular findings which  
37 they make, including the finding in -- in 104.

38 And then of course I have the additional  
39 submission as it relates to the decree.

40 And let me say what I think the tribunal did  
41 with the same facts as it relates to  
42 expropriation, and they've done a number of

43 things. But as it relates to the federal acts  
44 that they found, what they've said is the  
45 representations which are made which the company  
46 relied upon in good faith, and those are the  
47 findings, that you didn't have to apply for a

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1 permit, and that the local authority had no  
2 jurisdiction to either consider one or -- or  
3 refuse one, coupled with, as they find in 104, the  
4 participation and acquiescence in the subsequent  
5 shutdown or, if you will, frustration of operation  
6 by the local governments, constituted a measure by  
7 the federal government taken collectively which  
8 constitute -- which amounted to expropriation,  
9 both I think originally and by attribution under  
10 the finding of sub (a) of attribution of liability  
11 for the State government.

12 Now -- and of course when you turn to -- and  
13 I'll get this to you in a moment. But the decree  
14 stands entirely separate from the transparency  
15 analysis, because the decree is a finding that's  
16 separate and apart from everything else that  
17 happened. The State governor pronounced a decree  
18 which had the effect of barring forever the  
19 operation of the landfill. That's not a -- that's  
20 not a -- and I don't even hear my friend saying  
21 that's related in any way to a transparency  
22 concern. His answer to that is it's not a finding  
23 or they didn't have jurisdiction to make it  
24 because it was an amendment.

25 So that's my answer anyway. If we go to the  
26 next chapter then, if I've dealt with your short  
27 question, that was my long answer to your short  
28 question from last evening.

29 Now, with respect to -- I dealt with the  
30 Myers case. If you could turn to 173. Now, I've  
31 already dealt, and I did particularly last Friday,  
32 with the argument my friend deals with here, which  
33 is this was merely an inter -- an impairment or  
34 a -- a slight interference with the value of the  
35 property because they could have operated a dump.  
36 I just remind you of what I said to you last  
37 Friday. I say that's an argument which does not  
38 succeed on the findings, that the tribunal  
39 properly within its jurisdiction, and indeed  
40 properly on the facts, found that the State and  
41 municipal government were absolutely prepared to  
42 ensure that this facility which was authorized and

43 built and -- and ready to be operated would never  
44 be operated.  
45 If I could go to -- and -- and when I get to  
46 Biloune, what I -- I was interested in my friend's  
47 comment about the before and after picture which

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1 was, well, Metalclad started with a partially  
2 permitted site and ended with a partially  
3 permitted site. And I said on Friday the  
4 difference was that they actually built a landfill  
5 in between those time periods, and there was a  
6 finding that they had a fully permitted site.

7 But aside from that, the central point to be  
8 made is when he goes to Biloune, Biloune is a case  
9 where there was a partially built -- or a project  
10 which started. They had a building on it. They  
11 started to build the -- the resort on the site.  
12 And then as a result of the absence of a building  
13 permit, it was partially demolished.

14 So you could say on those facts, well, at the  
15 beginning and the end Mr. Biloune, who was  
16 deported, had the same thing. He had a site in  
17 downtown Accra, or however that city is  
18 pronounced, in which he had a right to apply for a  
19 permit. He'd never obtained a permit. He had a  
20 legal right to try to build something, and he was  
21 deprived of nothing. And of course the very  
22 learned tribunal in that case found that there was  
23 an expropriation, and I'm going to come to that  
24 case before I complete my submissions.

25 The next point I make at page 173, the bottom  
26 and following, is the conception of  
27 expropriation. I -- I say that the tribunal in  
28 this case did not apply any extraordinary meaning  
29 given to expropriation. And the key issue is  
30 their findings of fact in relation to what  
31 occurred here, which is a -- a collective view of  
32 the totality of the circumstances as they viewed  
33 them.

34 It isn't the case that there was any  
35 compelling argument or indeed today any compelling  
36 argument that this was a minor interference with  
37 property rights. And indeed let me say this, and  
38 that is: The troubling issues which arises in  
39 international law, which is a legitimate one, is  
40 the -- is the threshold between the exercise of  
41 lawful authority which interferes with the value  
42 of property and the obligation to compensate when

43 you've determined not to allow someone to make use  
44 of their property.

45 Now, in this case I say we're very clearly  
46 far on this side of the line. And I do not say  
47 that the tribunal said that this is improper or

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1 gives rise to any compensation.

2 And on the facts of this case, it wasn't a  
3 difficult choice. There are lots of cases where  
4 it might be difficult, because if you take this as  
5 an example, assume that the hazardous waste  
6 facility was built, and that all the membranes are  
7 in place, and there's a regulatory change  
8 requiring a totally different membrane to be  
9 built -- to be put in place in such facilities and  
10 all the old membranes have to be taken out and put  
11 back in, and the company says that destroys our  
12 economics and we just can't operate profitably on  
13 that basis, that's the classic case where the  
14 regulatory initiative which affects an investor is  
15 an interference with the value of the property,  
16 but it's not a taking.

17 Now, in the situation in this case where the  
18 case had everything to do with whether or not this  
19 facility which was properly built and ready to go  
20 could ever be operated, you don't need to trouble  
21 yourself in my submission with whether or not  
22 there was a basis on which to find expropriation  
23 under the proper test in international law.

24 Now -- and -- and put another way, there is  
25 no basis to say that on a fair reading of the  
26 award they found an expropriation simply because  
27 an interference with the economic benefit of the  
28 project.

29 At page 174 I note that Amco and Indonesia, I  
30 am told, was an award which was quoted at 548 but  
31 it subsequently annulled. And if you read that  
32 quote, I -- I say it says nothing more in its  
33 context than referring to the fact that a taking  
34 has to be attributable to the State under rules of  
35 State responsibility. And if you make a note of  
36 that, even my friend's quote, I think, is really  
37 directed to that issue and not directed to the  
38 issue that it's cited for.

39 Now, secondly, with respect to, if you will,  
40 incidental effects, this isn't an incidental  
41 effect case. It's a case in which an organ of the  
42 Mexican government determined to stop the

43 operation of this facility. And there was lots of  
44 not only evidence of acts to that fact, but  
45 there's evidence of political determination.  
46 There's a whole -- a number (sic) of evidence  
47 which justify that conclusion.

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1           At the bottom, with respect to the reference  
2 to Myers, I say indeed that the Myers analysis,  
3 which my friend relies upon, is in -- is indeed  
4 fully consistent with the analysis of the tribunal  
5 here, because in Myers there was a more difficult  
6 issue with respect to expropriation which was the  
7 permanence of the measure.

8           And you'll recall that Myers was the export  
9 ban case. And if Your Lordship will recall, that  
10 export ban was temporary. So undertaking  
11 analysis, it has to essentially be a permanent or  
12 a severe taking. In other words, the -- the State  
13 has to say we're not going to let you do that.  
14 They can't say we're not going to let you do it  
15 for a month or for a year. It has to have an  
16 element of permanence to it.

17           In Myers the ban was fixed in time, and  
18 lifted. And so in terms of the expropriation  
19 analysis, that doesn't affect the 1105 analysis,  
20 which doesn't require permanence. It does affect  
21 the expropriation analysis. And I say there's  
22 nothing inconsistent with the tribunal's analysis  
23 of expropriation in this case and in the Myers  
24 case.

25           Now, with respect to the question of direct  
26 and indirect taking, there is in my submission no  
27 doubt in international law, even on the  
28 authorities my friend cites, that it need not be  
29 an express expropriation to constitute a taking  
30 under international law. And it need not be a  
31 transfer of title. In other words, the State  
32 doesn't have to affect a transfer of title from  
33 the investor to itself, and it doesn't have to say  
34 I'm expropriating your property in order to  
35 attract liability under Article 1110. And I make  
36 that point at 524, going over to page 176.

37 THE COURT: Do -- do you say that the phrase  
38 "tantamount to expropriation" is what brings in  
39 the tribunal's ability to deal with indirect  
40 expropriation?

41 MR. COWPER: I haven't read all of the authorities. I  
42 think on some of the authorities, even without

43 using "tantamount," the international lawyers have  
44 said expropriation includes acts which are in  
45 effect expropriations. But tantamount removes any  
46 doubt. Anything that is equivalent to  
47 expropriation --

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1 THE COURT: Um-hum.

2 MR. COWPER: -- allows expropriation.

3 But I think the word "expropriation" as  
4 properly understood includes with it acts which  
5 are in effect expropriations whether or not  
6 they're admitted expropriations.

7 Some of the authorities refer to them as  
8 constructive. I think it's quite clear on the  
9 authorities that there are many cases in which the  
10 word "tantamount" is not used, and this analysis  
11 is conducted; that is, just the word  
12 "expropriation" itself carries with it the  
13 concept that it's ought not -- it doesn't have to  
14 be an admitted expropriation.

15 And of course the -- the obvious virtue of  
16 that principle is that we're talking about  
17 States. And the State can effect an  
18 expropriation, intend to carry out an  
19 expropriation, without admitting it. It can do it  
20 in a variety of ways.

21 THE COURT: The reason I ask that question is --

22 MR. COWPER: Um-hum.

23 THE COURT: -- because quite apart from the  
24 explanation you just gave --

25 MR. COWPER: Yes.

26 THE COURT: -- if you look at 1110, it actually uses  
27 the word "indirectly." It says may directly --  
28 any party may directly --

29 MR. COWPER: Yes.

30 THE COURT: -- or indirectly --

31 MR. COWPER: Right.

32 THE COURT: -- actually. Okay. So I've -- the  
33 question that enters my mind then is: What is the  
34 phrase "tantamount to nationalization,  
35 expropriation" attempting to accomplish?

36 MR. COWPER: Well, I -- I don't know if it's belts and  
37 suspenders here.

38 The -- the argument below was that people  
39 said equivalence was the -- "tantamount" meant  
40 equivalence. And that may be another way of -- of  
41 dealing with something which is in effect an  
42 expropriation but not an admitted expropriation.

43 Directly or indirectly is another way of getting  
44 at the potential risk that a State effects an  
45 expropriation which it doesn't admit and it  
46 doesn't do so directly.  
47 So I think that they -- they may come at

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1 both -- at the same situation from different  
2 normative directions, if you will.

3 THE COURT: Um-hum.

4 MR. COWPER: What -- what I say in relation to that is  
5 that my friend cannot sustain the proposition that  
6 there has to be a transfer of title, that there  
7 has to be a direct and admitted expropriation.  
8 And that's what I say, with respect, on these  
9 facts you would have to find in order to erect any  
10 error in relation to the tribunal's treatment of  
11 the concept of expropriation.

12 If you're at 176 at 527, I've quoted an ICSID  
13 award at the bottom, and it says:

14  
15 "A deprivation or taking...may occur under  
16 international law through interference by a  
17 State in the use of that property or with  
18 the enjoyment of its benefits, even where  
19 title to the property is not affected...  
20 [Compensation is] warranted whenever events  
21 demonstrate that the owner was deprived of  
22 fundamental rights of ownership and it  
23 appears that this deprivation is not merely  
24 ephemeral."  
25

26 And in relation to investing, I -- I just  
27 make a narrow point which is of course that any  
28 project will involve starting with a purchase in  
29 the host country of a right in relation to a  
30 site. So if we take ourselves completely out of  
31 this and say that you would like to operate a -- a  
32 rain forest resort in the middle of a rain forest  
33 somewhere in Suriname as an example, and you go to  
34 the country, and you purchase even just a lease or  
35 some right to occupy a portion of the rain forest  
36 and to build a resort, if you apply my friend's  
37 analysis, if the -- if the local State said you  
38 can't operate the resort anymore, but you can  
39 still keep the -- the licence, you can still be  
40 there, you just can't operate the resort, has  
41 there been a taking?

42 Well, for the purpose of investors, what

43 they're interested in and what the guarantee is,  
44 is it's the guarantee that your investment will be  
45 protected. And that's why in all of these cases  
46 they're looking at it as a project analysis.  
47 And in this case, coming back to our case,

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1 that's precisely what the tribunal said. The sole  
2 basis for the investment was the construction and  
3 operation of a hazardous waste facility, not a  
4 place for rare cactus, not a dump, not a municipal  
5 dump, but a hazardous waste facility.

6 I go to 177 and I quote Professor Higgins,  
7 where she talks in similar terms. And she makes  
8 it clear that it's -- it's intensely a factual  
9 determination.

10

11 "...interferences which significantly  
12 deprive the owner of the use of his  
13 property amount to a taking of that  
14 property."

15

16 And then I go in the middle of page 177 to my  
17 next point, which is that the cumulative effect  
18 principle, which is can you take into account as a  
19 tribunal not only an isolated act, but can you  
20 take into account the totality of circumstances?  
21 And I say that's clearly permissible. It's --  
22 it's permitted by Chapter 11. And it's a  
23 well-acknowledged principle of international law  
24 that constructive takings are very often the  
25 product of combinations of acts by government, and  
26 sometimes combinations of acts by different levels  
27 of government within the same State, but they end  
28 up with the net effect of a taking.

29 And on that point, Your Lordship's reference  
30 to directly or indirectly might be opposite, that  
31 there might be a -- a useful application of that  
32 language to a circumstance where there is by way  
33 of cumulative effect an indirect taking. And I've  
34 given you a number of references at the bottom of  
35 177.

36 If you go to 178, I'd like to quote from our  
37 own Yves Fortier who, in an unanimous award,  
38 pronounced on this issue in the following terms:

39

40 "It's clear, however, that a measure or  
41 series of measures can still eventually  
42 amount to a taking, though the individual

43 steps in the process do not formally  
44 purport to amount to a taking or to a  
45 transfer of title. What has to be  
46 identified is the extent to which the  
47 measures taken have deprived the owner of

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1 the normal control of his property... There  
2 is ample authority for the proposition that  
3 a property has been expropriated when the  
4 effect of measures taken by the state has  
5 been to deprive the owner of title,  
6 possession or access to the benefit and  
7 economic use of his property."  
8

9 And -- and I'm going to go to tantamount in a  
10 moment, but I do say this, and that is in relation  
11 to the general consideration Your Lordship has;  
12 I'm dealing with error here. But I do remind you  
13 that I stand on the proposition that the  
14 tribunal's clearly within its jurisdiction in  
15 relation to this type of consideration, because  
16 it's an intensely factual question.

17 Even in international law, these standards  
18 aren't pure standards of law. It's not a pure  
19 question of law. It's a question of mixed fact  
20 and law within the international law standard,  
21 because one has to determine -- if you've just  
22 read this, you have to identify the extent to  
23 which the measures taken have deprived the owner  
24 of the right to property. It involves both legal  
25 and factual elements.

26 Now, turning to the next point with respect  
27 to tantamount, I say at 532 that it was common  
28 ground below that "tantamount to" denoted  
29 equivalence. And the tribunal I say properly  
30 referred to and saw as appropriately relevant the  
31 Biloune case.

32 And I'd like to go to Biloune. And I can do  
33 that before or after the break.

34 THE COURT: You may as well do it now.

35 MR. COWPER: Okay. If you go to the Biloune case,  
36 which is in our -- I'm sorry, the petitioner's  
37 authorities, tab 12.

38 And my friend I think quite fairly noted that  
39 Biloune was an authority relied upon by the  
40 tribunal. It's an authority in relation to  
41 expropriation. And he quite fairly tried -- or  
42 sought to distinguish it, and in my submission the

43 petitioner cannot successfully do so.  
44 For the -- for my purposes I simply say the  
45 tribunal used it as persuasive, and it is  
46 persuasive. The tribunal referred to it as having  
47 a number of common features. And I say beyond

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1 doubt it has a large number of common features.

2 The only, if I will say, signal call of my  
3 friends is that this case involves a deportation.  
4 If you take that into account, and you look at all  
5 the other facts, virtually every other fact in  
6 this case sounds in Biloune.

7 You have assurances that a municipal permit  
8 is not required, reliance on those assurances.  
9 You have construction. You have arbitrary acts by  
10 a municipal authority. You have a -- a stop work  
11 order which is enforced by a partial demolition.  
12 You have a denial by the government that it knew  
13 it was going on.

14 In this case, as I say, in not dissimilar  
15 terms in a situation where the building was in the  
16 city right next to a facility of the government,  
17 as in adjoining the facility of the government,  
18 the government maintained it didn't know  
19 construction was going on in -- before the  
20 tribunal. And the tribunal found that to be  
21 unsustainable. I say similarly the tribunal in  
22 this case made a similar finding. So you had that  
23 position.

24 You had, similarly with respect to the issue  
25 of customary international law, the liability in  
26 this case, although it arose from an agreement,  
27 was determined in accordance with customary  
28 international law. Judge Schwebel clearly applied  
29 customary international law and the concept of  
30 expropriation to the facts of an investment which  
31 was made which was frustrated by the circumstances  
32 arising from a dispute between the investor and  
33 the permitting authority and a change in  
34 politics.

35 There was clearly a change in the country  
36 which altered the political will to allow the  
37 investment to go forward and was backed up by the  
38 denial of the -- of the -- of the permit, which  
39 was never granted in this case, the stop worker --  
40 order and partial demolition and then the  
41 deportation.

42 So with respect to common features within the

43 facts of the award itself, those are a large  
44 number of common features.  
45 And I -- I commend you to deal with the issue  
46 and the authority at 207. And I'd just ask you to  
47 flag, if you would, that -- Part 6 under

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1 "applicable law" makes it clear at the bottom  
2 that although it was an agreement, neither of the  
3 parties led evidence with respect to the law of  
4 Ghana, and they applied customary principles of  
5 international law to the -- to the consideration.

6 And then Part 7, which is the tribunal's  
7 decisions, you'll see that they find that there  
8 was a -- a de facto partnership, that there was  
9 substantial work on the premises when work was  
10 interrupted.

11 If you go to 208, at the top of that  
12 paragraph, the -- the -- the investor's company  
13 began work before a building permit was applied  
14 for. And you'll see in the second sentence on the  
15 top paragraph it appears that:

16  
17 "GDTC considered the granting of a  
18 building permit to be a formality which  
19 would eventually be discharged but which  
20 was not necessary prior to starting work.  
21 Indeed, the fact that the original pond  
22 court structure was constructed without a  
23 permit ever having been applied for or  
24 issued tends to indicate that a permit was  
25 not indispensable."

26  
27 Of course, in our case we have a municipality  
28 that had never granted a building permit in its  
29 history.

30 And you'll see, following down, the stop work  
31 order in the next paragraph is issued one day  
32 before the deadline. The local -- the authority  
33 of ACC ordered demolition to begin and part of the  
34 new structure was destroyed.

35 Then in the middle you'll see Mr. Biloune  
36 brought all these events to GIC's attention, was  
37 told, he maintains, that his problems did not  
38 arise out of a lack of a building permit, but  
39 rather were political.

40 And let me say at the end of the story that  
41 the tribunal had before it that was precisely the  
42 case here, and there's evidence of that. There is

43 evidence that in the negotiations with the State  
44 and the municipality, they made it clear the  
45 building permit was not the problem. The building  
46 permit was not the problem. The political  
47 question of benefits to the State and the

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1 municipality being provided Metalclad was the  
2 issue. That was the problem.

3 And I think it's Mr. Carvajal's dec --  
4 declaration that says that's per -- that's what we  
5 were told in the negotiations. There was no doubt  
6 about it, if we can solve these other problems,  
7 the building permit will be issued without any  
8 difficulty.

9 At the bottom, the permit was never granted.

10 Going over to 209 at the top, you'll see at  
11 209 the change in government. It appears that by  
12 mid-November 1987 --

13 Do you have 209?

14 THE COURT: Um-hum.

15 MR. COWPER: Thank you.

16

17 "...Mr. Biloune concluded that the  
18 government was not willing to permit the  
19 project to proceed. He accordingly placed  
20 the project in the hands of administrators  
21 and the workforce was discharged."

22

23 Well, you know, Mr. Biloune is in the same  
24 position. He's in a -- a politically difficult  
25 position. He has to decide am I going to try to  
26 press things, try to get the permit, try to move  
27 forward, or are my political problems  
28 insuperable.

29 He's deported. He still owns the property.  
30 But the international lawyers on this tribunal  
31 found that the aggregate combination of acts by  
32 the governments constituted a taking of the  
33 property giving rise to a -- a right to  
34 compensation.

35 If you go to the next paragraph, it's  
36 interesting that this tribunal as well did not  
37 make findings about the motivations for the  
38 actions. The -- the facts gave rise, as I say in  
39 this case, to numerous speculations about the  
40 underlying political motivations of the political  
41 actors. The tribunal says in the second sentence:

42

43 "The motivations for the actions and  
44 omissions..."  
45  
46 And you may want to circle "omissions."  
47

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1            "...of Ghanaian governmental authorities  
2            are not clear. But the tribunal need not  
3            establish those motivations to come to a  
4            conclusion in this case."  
5

6            So they, just as in the present case, were  
7            able to conclude international liability in  
8            relation to expropriation without a finding of  
9            motivation or intent on the part of the  
10           governmental authorities.

11           Now -- and I don't want to trouble you much  
12           longer with this, but with respect to the defences  
13           in the case, the defences in this case were quite  
14           similar. The respondent, that is the governmental  
15           authority, said we didn't know the building was  
16           going on and -- otherwise we would have acted to  
17           require a building permit, that his problems in  
18           relation to the deportation had nothing at all to  
19           do with the project. They're completely  
20           unrelated.

21           The fact that the building permit was  
22           refused, the partial demolition happened. And  
23           then shortly thereafter he's asked to turn up and  
24           file his statement. And then shortly thereafter  
25           he's arrested. And shortly thereafter he's shown  
26           the way out of the country. Those are totally  
27           unrelated. They're coincidental. We ask you to  
28           find that the -- the latter are not related to the  
29           former. And the tribunal said that strains  
30           credibility, as the tribunal in this case held in  
31           relation to the decree, in my submission.

32           And they do so over at 210 in the finding  
33           with respect to the ignorance in this case. The  
34           authorities in Accra alleged to be -- and if  
35           you're -- the second paragraph up from the --  
36           Part 8, it says:

37  
38           "In particular, the tribunal does not find  
39           credible that the authorities in Accra were  
40           ignorant of the existence for well over a  
41           year of construction activity in one of the  
42           most prominent sites in the city and one

43        which adjoins the seat of the government of  
44        Ghana."

45

46        And I say a similar finding was made in this  
47        case.

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1           So I say purely and simply in a case which  
2           was pronounced by a highly distinguished arbitral  
3           tribunal, including Judge Schwebel from the  
4           International Court of Justice, they had no  
5           trouble finding an expropriation on similar  
6           circumstances, an expropriation applying to the  
7           principles of customary international law on facts  
8           which I think the tribunal properly characterized  
9           as remarkably alike.

10          There's two other points before I leave it  
11          though, which are of some interest. The same  
12          questions procedurally arose in relation to  
13          damages and the quantification of damages that my  
14          friend Mr. Thomas put before you in this case,  
15          because the respondents argued that the  
16          quantification of damages were impaired by what  
17          they characterized as inaccurate and improper  
18          accounting and the relationship of some of the  
19          expenses claimed to the project. And you may wish  
20          just to make a note of 214, the second full  
21          paragraph.

22 THE COURT: I don't have a 214.

23 MR. COWPER: I'm sorry?

24 THE COURT: I don't have a 214. Mine ends at 211.

25 MR. COWPER: I -- did my friend not put the full  
26          judgment in? There's -- there's two awards in the  
27          report. One is on liability and the other is on  
28          damages.

29 THE COURT: Yes. Mine stops just after the award on  
30          damages begins.

31 MR. COWPER: Oh, my friend says he only put liability  
32          in. I'm sorry, I didn't know that. We'll get you  
33          a full copy, but maybe for that reason, if you  
34          could just make a note to -- to read 214.

35          The only point I'm making is that remarkably  
36          the similarity in this case not only extends to  
37          what happened and the facts which were confronted  
38          by the tribunal, but also some of the procedural  
39          elements of the case, because when the investor  
40          in -- in this case came forward, part of the  
41          response was hold it a sec, a whole bunch of those  
42          expenses weren't attributable to the project. You

43 took money out. You took inventory out. They're  
44 inaccurate or false. And that issue was faced and  
45 confronted by the tribunal. And they concluded an  
46 award of damages based on value, based on  
47 investment, just as this tribunal did, the -- the

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1 monies invested in the project on the whole of the  
2 evidence. And they found some -- some support in  
3 auditors' and accountants' work in this case, as  
4 in the present appeal.

5 And finally, there was also in this case, and  
6 it's not totally clear the basis of it, an  
7 application to the tribunal to set aside its own  
8 award on the basis of false representations by the  
9 claimant made to the tribunal in the first  
10 occasion, which was dismissed by the tribunal  
11 itself.

12 So the parallels between this case and  
13 Biloune far from being that obvious go in my  
14 respectful submission from the beginning to the  
15 end of the alphabet.

16 If that's an appropriate time to take the  
17 morning break.

18 THE COURT: Yes. We'll take the morning break.

19 THE REGISTRAR: Order in chambers. Chambers is  
20 adjourned for the morning recess.

21

22 (MORNING RECESS)

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

24 (PROCEEDINGS RESUMED AT 11:29 A.M.)

25

26 THE COURT: You're in the home stretch of your  
27 submission, Mr. Cowper.

28 MR. COWPER: Thank you, My Lord. The -- I'll -- I'll  
29 endeavour not to stumble and fall before the end.

30 I'd like to return, if I may, because  
31 Mr. Greenberg pointed out that I didn't read my  
32 note carefully enough when I responded to your  
33 question on infection, and there is a point that I  
34 failed to make, and that is -- if you -- or if I  
35 made it, I made it, in his words, "ineptly."

36 THE COURT: That was brave of him.

37 MR. COWPER: The section which starts at 104 as it  
38 relates to the tribunal's determination of whether  
39 there was an expropriation in relation to those  
40 facts needs to be and must be read in coordination  
41 with the following paragraphs which are 105, 106  
42 and 107.

43           And what I was endeavouring to say was that  
44           the fundamental foundation for the finding of  
45           expropriation in relation to municipal conduct as  
46           it relates to expropriation was the absence of  
47           lawful authority, not a confusion about who had

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1 what authority.

2 What they found was the denial of the permit  
3 was without authority. And you'll see in those  
4 sections they place emphasis that it's founded on  
5 the absence that is the unlawful conduct, not the  
6 confusing conduct, but the unlawful conduct of the  
7 municipality.

8 And so in relation to my friend's assertion  
9 that the observations respecting transparency  
10 infected 1110, what I say is that those  
11 observations which he criticizes relate to  
12 confusion, lack of clarity, et cetera. And as I  
13 endeavoured to say earlier in the week, when you  
14 come to their finding in respect of the  
15 municipality, clarity's not an issue, because they  
16 have, as held by the tribunal, exceeded their  
17 lawful authority.

18 With respect to the references in those  
19 paragraphs respecting process, because there are  
20 references of process, those sound in the due  
21 process required by 1110. In other words,  
22 you'll -- there are references to the finding that  
23 the municipality did not carry out due process in  
24 relation to its conduct. And you'll recall that  
25 in 1110 it's not only liability for -- for  
26 expropriation. The way 1110 is framed indeed is  
27 that a State must follow due process in relation  
28 to any State conduct which will amount to and  
29 result in the taking.

30 So turning back to what's left of my  
31 remaining Chapter, I have dealt with the concept  
32 of measure from 179 and following.

33 THE COURT: Would you mind just giving me the -- the  
34 tab reference in paragraph 533?

35 MR. COWPER: I'm sorry. I didn't -- I was --

36 THE COURT: Paragraph 533, there's a tab reference  
37 that's left blank. Do you know what that is in  
38 reference to?

39 MR. COWPER: Oh, I don't. I noticed that last night.

40 Tab 74.

41 THE COURT: 74.

42 MR. COWPER: I apologize.

43           The -- coming back to Part 7, which is at  
44           paragraph 534, there are really two different  
45           questions here. And let me just say this, and  
46           that is: It's important to recognize that in  
47           relation to this case and other similar cases that

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1 the question of what's a measure in respect of a  
2 federal State requires a very careful  
3 understanding of the principle of attribution in  
4 international law.

5 And so any fair determination of what's a  
6 measure has to take into account that measures may  
7 be taken by any or a combination of the organs of  
8 government in the federal State which may be taken  
9 either alone or together to constitute an act by  
10 the sovereign country for which the sovereign  
11 country is responsible in international law.

12 And I give you the -- the quote in Loewen at  
13 the bottom and the top of page 180. Loewen was on  
14 any account, I think, an extreme case in the sense  
15 that, as I indicated earlier in the week, the --  
16 the threshold question there was to what extent  
17 can judicial conduct be reviewed under Chapter 11,  
18 if at all? And so they have to go not to deal  
19 with the normal things we would think about, which  
20 is a municipality's authority to shut down a  
21 State, or a State's authority to issue an official  
22 decree preserving rare cactus, or the federal  
23 government's authority to permit a hazardous waste  
24 site. Those things are frankly within the very  
25 narrowest concept of State measures, either the  
26 action in relation to such matters or the denial  
27 in relation of those measures, are at the heart of  
28 what we think of as State measures within the  
29 concept of international law.

30 The second point my friend raises is really  
31 in relation to how it is that inaction can be a  
32 basis for liability, and he makes that point at  
33 586.

34 And I simply say that international  
35 responsibility, as I say at 538, is frequently, if  
36 not very frequently, found on the acts of omission  
37 by a State rather than the acts of commission.  
38 And there's no principle of international law that  
39 a State must take positive action before it can  
40 have attracted to it international liability. And  
41 I quote from Smith at 538 to that effect. And in  
42 fact, as you'll see at the bottom:

43  
44        "...it has been noted that 'the cases in  
45        which the international responsibility...  
46        has been invoked on the basis of an  
47        omission are perhaps more numerous than

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1           those based on an action taken by a  
2           State."

3  
4           Now, I -- I simply say that on any fair  
5 reading of Chapter 11 measures intended by NAFTA  
6 to embrace a broad variety of State conduct or --  
7 or measures, and that what was at stake in this  
8 case falls within the narrowest possible meaning  
9 of "State measures."

10          The point I make in paragraph 8 is -- is  
11 really related to my reply I made concerning the  
12 submission my friend made concerning interference  
13 with economic benefit, and I won't repeat that  
14 here, although I give you another international  
15 authority at 543.

16          And I then turn to the ninth point which  
17 deals with the municipal conduct. And if you go  
18 over to page 183, I deal with the ELSI case.

19          And the -- there are really two observations  
20 to be made on ELSI. The governmental act in that  
21 case complained of was in fact an order of  
22 requisition. The outcome, and you'll recall that  
23 this was a case involving an act which was held to  
24 be unlawful by the local authorities but held not  
25 to be a breach of international law.

26          And there are two or three observations about  
27 that. The first one, as I said on Tuesday, there  
28 is no precise equation between the lawfulness of  
29 domestic action and unlawfulness under  
30 international standards. Something can be  
31 unlawful in domestic law and lawful  
32 internationally, or lawful by domestic law and  
33 unlawful by international standards, and the other  
34 two mathematical possibilities also exist.

35          And the reason for that is because -- not  
36 only because they're different measures, but  
37 because by the very nature of international law it  
38 imposes on States liabilities which are  
39 differently expressed and differently stated but  
40 which are relevant to the lawfulness of the  
41 State's conduct by domestic law.

42          So taking it in its logical order, if the

43 domestic law constitutes a violation of  
44 international law when the State takes measures  
45 pursuant to it, the most obvious one being  
46 expropriation without compensation in this  
47 context, the fact that it's a lawful expropriation

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1 by the law of British Columbia or the law of  
2 Mexico or otherwise is totally beside the point in  
3 determining whether it constitutes a compensable  
4 expropriation under international law.

5 Equally, however, in determining, I say,  
6 expropriation, if for example there was an  
7 unlawful act of an -- of a -- of an organ of  
8 government which constitutes essentially the  
9 denial of the uses of property by an investor,  
10 that is a factor, and it is a proper foundation  
11 for a finding that supports a finding of ex --  
12 expropriation at international law. It's not a  
13 necessary finding, but it's a supportive.

14 In ELSI they found, if I read the case  
15 properly, that on the facts of that case the cause  
16 of the requisition, and you can go -- just make a  
17 note at page 71, was not the improper motives of  
18 the State in issuing the requisition, but the  
19 fault of the company in being, as I think they  
20 said, inevitably bankrupt or hurdling into  
21 inevitable bankruptcy. So although the authority  
22 said there's no breach of international law, a  
23 very important point was that the company was on  
24 the facts found to be hurdling into bankruptcy in  
25 any event, and not as a result of the fault of the  
26 State or any State measure.

27 Now, that's my first ground of distinction,  
28 and I think it's a fairly solid one.

29 I should also say that, if you will, the  
30 theology expressed in ELSI that the fact that it  
31 was unlawful in international law ought not to be  
32 taken heavily into account has been seriously  
33 criticized notwithstanding the unusual facts of  
34 the bankruptcy at the door, and at 547 I quote the  
35 late F.A. Mann saying:

36  
37 "[T]here is no doubt as a matter of Italian  
38 law, the requisition was unlawful. As a  
39 matter of pure logic, it is plain that  
40 illegality under a municipal system of law  
41 does not necessarily entail illegality in  
42 international law. Yet, as a matter of

43 practical justice, it does cause discomfort  
44 to realize that...treaties designed...to  
45 protect foreign investment should fail to  
46 condemn acts which...the legal systems of  
47 civilized nations consider illegal... [T]he

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1 standards of international law and in,  
2 particular [sic], of treaties designed to  
3 protect foreign investors are not usually  
4 lower than those of municipal legal  
5 systems."  
6

7 And then Thirlway commented on that case as  
8 unusual. And in the quote at 548, he says:

9  
10 "The unusual aspect of this finding is  
11 that it operates in favour of the State  
12 whose national law is in question. The  
13 principle of the supremacy of international  
14 law has developed in the form of findings  
15 that a State cannot rely on its own  
16 national law as a defence on the  
17 international level. In the ELSI case, on  
18 the other hand, the fact that the domestic  
19 courts censured an action affecting foreign  
20 nationals was not regarded as sufficient to  
21 support a claim of breach of treaty."  
22

23 And I think logically both of those  
24 commentators might have arrived at precisely the  
25 same outcome for the investor in the ELSI case but  
26 by a different route. They would have found there  
27 was a breach of international law but no damages,  
28 because the company had no value to be compensated  
29 for on the international level, and the tribunal  
30 did not go there. They said there isn't even a  
31 breach of international law.

32 So I say it's an unusual case. It's not a  
33 case that had any clear or obvious application to  
34 the present case, and most clearly does not  
35 support a finding that the tribunal erred in law  
36 in finding an expropriation on the facts before  
37 them.

38 Now, that's -- those are my submissions in  
39 relation to the -- where are my notes -- in  
40 relation to Chapter 8.

41 I have to deal with a number of other matters  
42 though.

43        Could you make a note in relation to the --  
44        my friend in -- in oral argument, I don't think  
45        we've dealt with this at all in our -- in our  
46        written submissions, at least I couldn't find them  
47        last night -- suggested in oral argument to you --

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1 and it may be in his -- in his materials -- that  
2 there was a June 1994 stop work order. And I  
3 don't know precisely how he characterized it, but  
4 that's how I understood his submission to be.

5 In my submission there was no such beast, and  
6 the evidence made that clear. And I'll just give  
7 you two references. There are more, but the --  
8 the document which I don't think my friend took  
9 you to is Exhibit 16-1. And we've put it in the  
10 back of tab 21 of our extracts. The two  
11 references I give you, the witnesses are  
12 Mr. Tuckett at tab 25 of our extracts pages 3 to  
13 5, and again Mr. Miranda at pages 2 to 3.

14 And if I may say all that -- what -- what  
15 happens is that in June of '94 there's some people  
16 on the highway. They go out and talk to them.  
17 The people on the highway threaten them. They go  
18 back into the facility. And then subsequently  
19 these people create this handwritten document  
20 which is nicely typed and -- and translated, but  
21 effectively purports to be minutes of a meeting  
22 including a resolution by the people on the  
23 highway that they were going to stop the  
24 operations of the facility. And the officials of  
25 Metalclad did not understand, interpret or  
26 otherwise consider that to be a stop work order in  
27 any fashion. It was part of the general political  
28 controversy relating to the facility.

29 Now, with respect to the next -- if I can go  
30 to the next point, which is my friend's -- well,  
31 perhaps I could deal with it this way: Let me --  
32 let me go to tab 9. And then I can deal with it  
33 another way. I have to deal with the issue of  
34 questions of law, and I -- would Your Lordship  
35 like me to deal with that before I come to the --  
36 my Part 9 or --

37 THE COURT: Makes no difference to me.

38 MR. COWPER: Makes no difference to you? Okay. With  
39 res -- let me deal with the questions of law that  
40 my friend handed up.

41 And do you have that? It was a supplemental  
42 submissions.

43 THE COURT: Yes.  
44 MR. COWPER: That makes one of us. Sorry. Thank  
45 you.  
46 The -- in my friend's supplemental argument,  
47 and you do need to have it in front of you, my

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1 friend identifies, in response to my concerns on  
2 page 1, questions of law under Section 31 of the  
3 Commercial Arbitration Act under paragraph 2.  
4 Under sub (a) he characterizes it as:

5  
6 "The tribunal erred in law by failing to  
7 deal with all questions addressed to it, in  
8 particular questions relating to  
9 Metalclad's bona fides and improper acts  
10 contrary to Article 53 of the ICSID  
11 Arbitration (Additional Facility) Rules  
12 which the tribunal was bound to apply."  
13

14 And sub (b) under the heading "Unreasonable  
15 Findings" --

16 MR. FOY: What page are you on? Sorry.

17 MR. COWPER: The first page.

18 MR. FOY: Thank you.

19 MR. COWPER:

20 "The tribunal erred in law by making  
21 findings upon a view of the facts that  
22 could not reasonably be entertained in  
23 particular by failing to have regard to  
24 relevant evidence."  
25

26 Now, that embraces in the two propositions a  
27 substantial number of subsidiary arguments which  
28 were made and purported to be in relation to  
29 either issues of fact or issues of jurisdiction or  
30 issues of law. And I simply say this, and that  
31 is: In relation to -- and I'm going to take them  
32 in reverse order -- unreasonable findings, that  
33 that is not a statement of an error in law, that a  
34 statement of an error in law would have to say, as  
35 I've submitted earlier, that the tribunal made  
36 findings in the absence of evidence, and I'll deal  
37 with why I say that in a moment.

38 My friend has asserted -- in support of that  
39 he's handed to me the decision of Your Lordship in  
40 Marathon Realty which refers to a decision by  
41 Madam Justice Southin in Crown Forest Products,  
42 and I'll deal with that in a moment.

43 But as I indicated in my argument and as I  
44 submitted to you, in this context it's my  
45 submission that the question of law as it arises  
46 out of a finding of fact must be -- and fall  
47 within the conventional test which is a finding of

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1 fact in the absence of evidence as opposed to a  
2 weighing of evidence.

3 And there are different statutory contexts in  
4 which judges have found that it may be capable of  
5 being intervened in a judicial administrative  
6 context where no reasonable person could find such  
7 facts or could not reasonably enter -- be  
8 entertained. I say that's not the right  
9 formulation for this context.

10 Secondly, I say that with respect to what  
11 represents a -- a constellation of attacks on the  
12 findings of fact of the tribunal, that when we're  
13 dealing with an application, on the assumption  
14 that there's no jurisdiction except as it relates  
15 to questions of law, that the petitioner has to go  
16 to the level of detail of saying these elements of  
17 evidence or these findings were made without  
18 evidence and constituted material errors which  
19 justify setting aside the award.

20 And the -- the -- I -- I frankly am not that  
21 much further ahead than I was on the delivery of  
22 my friend's argument in that he has  
23 comprehensively identified all of his attacks on  
24 unreasonable findings as justifying this  
25 collective error of law. And I say properly  
26 speaking my friend ought to have identified, and  
27 I -- I -- I thought I had said this, clear  
28 questions of law, and that when it relates to a  
29 question of fact, he ought to state it in clear  
30 terms so that the Court can, in assessing whether  
31 it's a question of law, firstly know what the  
32 petitioner proposes the question of law to be and  
33 what it relates to, so that it can not only assess  
34 whether it's a question of law, but its  
35 materiality and relevance to the other issues in  
36 the case.

37 Mr. Greenberg's addressed Article 53, and I  
38 won't supplement his submissions with respect to  
39 that.

40 Now, with respect to -- I've already  
41 conceded, without having my friend's point, that  
42 in relation to some of the threshold questions

43 under the commercial act, these are clearly  
44 matters of moment, if you will. They're matters  
45 of substance, that there are questions of law  
46 which I've conceded exist on which you could say  
47 that the threshold test that is of importance to

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1 the parties, questions of law that are of  
2 importance to the parties and of significance.

3 In my submission none of the questions which  
4 relate to the findings of fact fit within that  
5 rubric. None of them properly can be elevated  
6 into questions of law which justify the Court  
7 entertaining leave to appeal on them. None of the  
8 questions relating to the reasons can be so  
9 elevated.

10 With respect to the issues of law which I've  
11 accepted could arise, in my submission they are  
12 questions of law relating to the interpretation of  
13 the treaty and international law, and that it's  
14 important how my friend characterizes them  
15 because, depending on that characterization, the  
16 Court has to consider the questions of discretion  
17 and propriety, if you will -- not propriety in any  
18 proper sense, but the -- the suitability -- that's  
19 the word I'm reaching for -- the suitability of  
20 granting leave to appeal to a domestic court for  
21 their consideration. And so, for example, if the  
22 question of law is did the tribunal properly  
23 interpret the principles of customary  
24 international law as they relate to expropriation,  
25 I say the Court has to consider as a threshold  
26 whether that's an appropriate question of law,  
27 assuming, as I've said, it's clearly a question of  
28 law on which a domestic court should grant leave  
29 to appeal.

30 And that's a factor not only in granting  
31 leave to appeal, but in considering whether to  
32 remit in the event that that is a measure which  
33 the Court wishes to consider, because remission is  
34 a remedy available in the event that intervention  
35 is warranted under either act.

36 If on the other hand the question of law is  
37 stated as is the decree, capable of being and  
38 constituting a taking in international law, that's  
39 a different question of law with a different  
40 character and one which in my submission deserves  
41 far less attention and far less of a case for  
42 granting leave to appeal, because it's a far

43 narrower and fact-dependent question which only  
44 arises between these parties to this dispute.  
45 It's not of relevance to the parties  
46 generally in Chapter 11. It's not of interest to  
47 the international law community. And so to

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1 consider granting leave to that question of law  
2 constitutes -- considering of granting of a -- a  
3 leave to a very narrow issue of international law  
4 which is not only fact-dependent, but only arises  
5 between these parties.

6 There's no quest -- nobody else is  
7 complaining about the decree. And indeed, on my  
8 reading of the review, there's only one -- only  
9 one person who is intended to be affected by the  
10 decree.

11 But what I say is my friend hasn't, with  
12 respect -- and I -- and I have tried to say it's  
13 important to identify the questions of law on  
14 which the Court needs to identify leave, not only  
15 for the purposes of fairness to Metalclad which is  
16 responding to a proceeding which has been  
17 conflated for the benefit of both parties, but for  
18 the -- in fairness to Metalclad. As I indicated  
19 at the very beginning, I was concerned about the  
20 definition of questions of law. And I say with  
21 respect to my friend, I am not further along on  
22 that process substantially than I was at the  
23 beginning.

24 Being that as it may, and I appreciate the  
25 Court -- and my client, I can tell, you  
26 appreciates the Court making itself available in  
27 the conflated hearing and making all of this time  
28 available, I simply leave this point to say this,  
29 and that is: When Your Lordship comes to this  
30 point, if Your Lordship does, and that is if you  
31 find that the commercial act has application and  
32 you come to consider whether or not there are  
33 questions of law, then I would ask you to go  
34 through the process I've just identified and to  
35 say -- and ask yourself the question: What is the  
36 question of law which arises? And does that  
37 question of law deserve being granted leave to  
38 appeal having regard to the nature of the question  
39 and the Court's ability to comfortably address and  
40 answer the question and the significance to the  
41 public generally? Because not all these questions  
42 concern everybody. And my friend's submission was

43 everybody's waiting for this, but that's not true  
44 of all of these questions.  
45 And then finally you have to consider whether  
46 the questions of law which are identified are  
47 taken collectively, because there's a -- there's a

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1 significant number of them at least, would, if  
2 leave to appeal has been granted and if found to  
3 be in error, justify setting aside the award.

4 With respect to -- that's my submission with  
5 respect to the questions of law except as it  
6 relates to the test. And on that I will simply  
7 rely to my -- to my friend's cases, so I don't  
8 need to seek leave to serve reply.

9 Did -- did you give His Lordship the Marathon  
10 case?

11 MR. FOY: It's in the materials.

12 MR. COWPER: Oh, I'm sorry.

13 If you could turn -- I -- I understand my  
14 friend's relying for his statement of the test as  
15 it relates to evidence on Your Lordship's judgment  
16 in Marathon, which is at tab --

17 MR. ALVAREZ: 36.

18 MR. COWPER: -- 36 --

19 MR. ALVAREZ: In the petitioner's authorities.

20 MR. COWPER: -- of the petitioner's authorities.

21 And do we have --

22 And -- and effectively it's -- it's

23 Your Lordship's statement at page 5, paragraph  
24 14. And I've had occasion to read not only  
25 Your Lordship's judgment but also the referred  
26 judgment in Crown Forest Industries.

27 THE COURT: Um-hum.

28 MR. COWPER: And this is a judgment Your Lordship  
29 composed some time ago, I think it was six or  
30 seven years ago. But you'll see that in paragraph  
31 14 you say:

32

33 "The appeal of an arbitration award is  
34 limited to questions of law. Counsel for  
35 the tenant relied upon the following scope  
36 of questions of law established for  
37 assessment appeal cases. See Crown Forest  
38 Industries v. Assessor of Area 6, Courtenay  
39 Southin..."

40

41 As she then -- Southin J. as she then was:

42

- 43 "1. The arbitrator misinterpreted or  
44 misapplied legislation.  
45 2. The arbitrator misapplied principles of  
46 general law.  
47 4. The arbitrator acted without any

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1 evidence or upon a view of the facts which  
2 could not reasonably be entertained."

3

4 And Your Lordship then said:

5

6 "Counsel for the landlord did not take  
7 exception with this characterization of a  
8 question of law."

9

10 And I don't know Your Lordship's purpose for  
11 saying that, but I do say counsel for Metalclad in  
12 this case does take exception to that  
13 characterization of a question of law for the  
14 purposes of this proceeding.

15 In my submission if you go to the Crown  
16 Forest Case -- and I've just been told we haven't  
17 copied it.

18 THE COURT: Um-hum.

19 MR. COWPER: So I've --

20 THE COURT: I just viewed -- I just viewed para 14.

21 I'm just repeating what counsel for one of the  
22 parties told me.

23 MR. COWPER: That's -- that's what I thought. And --

24 and if you go to the Crown Forest Case -- and I'll  
25 have to get a copy for you, and I apologize  
26 because I thought we had pretty much everything  
27 here -- but Madam Justice Southin, as she then  
28 was -- and it's a very colourful judgment and --  
29 and great fun to read, but she -- she, I think,  
30 very clearly for her purposes of the case is  
31 dealing with it not on the basis that that is the  
32 conventional test, but is a test that she's just  
33 stating for the purposes of the case. And it's --  
34 it is so for a number of reasons.

35 In the assessment area, you have what I  
36 think -- and Your Lordship knows more than I do.  
37 In the assessment area you have this incredibly  
38 complex and difficult appeal process or -- or  
39 jurisprudence relating to what do you do with  
40 hypotheses of valuation which are used or not used  
41 in the absence of evidence having regard to a  
42 statute which has various terms relating to the

43 hypotheses and standards of valuation?  
44 In the very cases Madam -- Madam Justice  
45 (sic) in her judgment disagrees with a judgment by  
46 Mr. Justice MacDonald in the assessment context  
47 and refuses to follow him on the basis that he is

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1 interfering with findings of fact and not  
2 questions of law.

3 And in the course of her judgment, she  
4 effectively says that in the unusual -- and I  
5 think she actually uses the word "bizarre" at some  
6 point -- the bizarre context of assessment  
7 appeals, that the -- you have to deal with  
8 questions which relate to matters which are  
9 decided in the complete absence of evidence but  
10 nevertheless have to be reviewed as to whether  
11 they were available to the assessors because they  
12 represent valuation methods which may or may not  
13 be properly before them.

14 And so I say that that test ought not to be  
15 extended generally either from Your Lordship's  
16 judgment or her judgment into this case, and  
17 indeed in the -- some of the other cases cited by  
18 Madam Justice Southin in her own cases. The two  
19 at page 15 of her judgment are both cases which  
20 say they are findings of fact unless there is an  
21 absence of evidence or no evidence.

22 And if you want to know, that's the  
23 Provincial Assessors of Comox case which says:

24  
25 "Absence...we must accept those findings as  
26 the case does not raise any question of  
27 absence of evidence."  
28

29 And in the Swan Valley Foods case, which is  
30 another assessment case, it says:

31  
32 "In the present case there...I have  
33 reached the conclusion they've reached that  
34 in the present case there was no evidence  
35 that the owner would be willing to pay the  
36 replacement cost."  
37

38 So even within the assessment field, I think  
39 there's some state of confusion. And some judges  
40 have applied the no-evidence test. And other  
41 judges have said that because of the unusual  
42 features of the statute and the statutory tests

43 which have to be applied, there may be, if you  
44 will, reviewable errors which would in another  
45 context not be errors of law.  
46 Now, that deals with the -- those two cases.  
47 And if I could then turn to Chapter 9, what

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1 I've tried to do here -- and I don't know if -- if  
2 Your Lordship's read it, but I thought it was  
3 perhaps useful at the end of my submissions to  
4 deal with what I submit to you is -- is an attempt  
5 at least to -- to deal with the logical complexity  
6 of the case before you.

7 And I -- I say firstly of course that the  
8 first question is which statute applies to the  
9 proceeding. And we've submitted to you that the  
10 international act applies. And if the  
11 international act applies and the commercial act  
12 does not apply, then a number of the issues which  
13 have been raised and which we've spent a great  
14 deal of time on in the last few days do not arise  
15 for decision.

16 THE COURT: I actually --

17 MR. COWPER: If --

18 THE COURT: -- see it as being that threshold question  
19 and then it branching --

20 MR. COWPER: Yes.

21 THE COURT: -- into two sections.

22 MR. COWPER: The --

23 THE COURT: Which -- you haven't quite put it that  
24 way.

25 MR. COWPER: No. I mean, Your Lordship could consider  
26 the grounds under both statutes in the event that  
27 Your Lordship was in error as to the first issue  
28 or, in other words, if Your Lordship was to -- to  
29 approach the matter and say I accept that it's  
30 only international act, then it's clearly within  
31 your jurisdiction to proceed to consider what you  
32 would do under the second ground. I mean, I  
33 accept that. Is that -- that's the two branches  
34 Your Lordship is referring.

35 THE COURT: Yes.

36 MR. COWPER: Yeah, okay.

37 The -- the second logical step, and I think  
38 this would apply to either of Your Lordship's  
39 potential avenues of inquiry and decision, is  
40 what's the proper legal characterization of the  
41 errors alleged? And -- and I do say that that's a  
42 necessary and important question, because my

43 friend and I have disagreed as to the proper  
44 characterization of the errors which have been  
45 asserted by the petitioner. And just two of those  
46 questions are whether there are any questions of  
47 jurisdiction; that is, whether any of the errors

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1     alleged in the jurisdictional part of my friend's  
2     submissions are truly questions of jurisdiction.  
3     And secondly, whether there are within those any  
4     questions of law and, if so, are they reviewable?

5         Under (c) do the questions of fact raise  
6     grounds of reviewable error under the relevant  
7     statute? That's logically available to you on the  
8     basis of my friend's submission.

9         Second, the next stage I say to submit --  
10    would be to assess any of those errors, either  
11    jurisdictional, legal or factual against the  
12    proper standard of review having regard to the  
13    proper characterization of the error.

14         Assessing whether any of the errors  
15    identified would have made any difference to the  
16    outcome of the arbitration. And of course, my  
17    client is not engaged in this for academic  
18    purposes. It's engaged in it because it's  
19    received what it hoped to be a final adjudication  
20    of its rights. So unless there are errors  
21    identified that justify setting aside the award, I  
22    say that the inquiry by the Court does not justify  
23    inter -- any intervention, because it has to  
24    justify setting it aside in the aggregate in order  
25    for there to be a justified conclusion of setting  
26    aside the award.

27         The next one is -- and I've put it the wrong  
28    way having regard to Mr. Greenberg's submissions,  
29    but assessing whether the tribunal failed to  
30    answer the questions before it or in the terms of  
31    the act whether it dealt with the disputes before  
32    it. And you have Mr. Greenberg's submission as to  
33    the proper characterization of that jurisdiction.

34         Then the next one would be to consider your  
35    discretion after you've identified and dealt with  
36    those preliminary matters, your discretion under  
37    the statute whether to intervene at all. And I --  
38    I remind you that in our submission there is an  
39    overriding jurisdiction that is mandated to you  
40    under the act not to intervene, that you have the  
41    right not to intervene even in the face of error,  
42    in the face of material and -- and proven error.

43           And then, secondly, whether the errors are  
44 severable from the remainder of the award.  
45           And over the top, if any intervention is  
46 merited, whether there should be remission to the  
47 arbitrators required in the circumstances either

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1 to address claims or other matters not addressed  
2 or, you may wish to -- to note, not addressed  
3 adequately in the award. In other words, if you  
4 conclude that they're addressed, but not  
5 adequately.

6 And then alternatively whether to remit any  
7 matters to be determined in accordance with your  
8 directions as to either jurisdiction or law.

9 Now, with respect to the -- the overall  
10 exercise of your discretion at the last stage of  
11 this analysis, in my submission in terms of the  
12 relationship between this Court and the tribunal  
13 that none of my friend's submissions justify any  
14 conclusion other than that the tribunal honestly  
15 came to grips with the problem, and I've supported  
16 them throughout and I continue to do so.

17 If Your Lordship finds that there are  
18 mistakes or, if you will, Your Lordship's not  
19 satisfied that they've reached the right  
20 conclusion in a way that's reviewable under either  
21 statute, I say that with respect to issues of  
22 international and treaty law, because of the  
23 structure which -- that NAFTA has set, the proper  
24 body to have another go at those issues is the  
25 tribunal and not the Court. And that's because  
26 in -- as I submitted earlier, the jurisprudential  
27 context here in my submission is that these  
28 disputes are determined by the tribunals which  
29 determine the rights between the parties subject  
30 to obviously Your Lordship's oversight and review  
31 and correction for error.

32 And that role continues and ought to continue  
33 and is intended by the act to continue having  
34 regard to Your Lordship's authority to remit. And  
35 that's particularly so given the role of the  
36 commission and the governmental actors which are  
37 after all ultimately in control of the content and  
38 interpretation of NAFTA.

39 Now, that concludes my submission with  
40 respect to that.

41 I -- I want -- there's one issue of dispute  
42 between my friend and I which we can deal with

43 before we close for -- for noon hour, which is  
44 that my friend has given me the submissions of the  
45 American government in another proceeding under  
46 Chapter 11 which has not yet been determined by  
47 anybody. And I object to those being given to

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1 Your Lordship. And we need -- perhaps need to  
2 deal with that. He fairly gave them to me  
3 yesterday or the -- earlier in the week. And in  
4 my submission Your Lordship ought not to have  
5 reference to the submissions of other parties,  
6 either claimants or respondents, in ongoing  
7 Chapter 11 disputes. I -- I think in principle  
8 those ought not to be entertained by the Court.

9 I do wish to say that overall, with respect  
10 to the submissions of Quebec and Canada, that I  
11 have I think with sufficient force addressed the  
12 issues which are spoken to by Canada and Quebec,  
13 so I have no supplemental submissions. I think  
14 we've essentially embraced in our submissions and  
15 answered the concerns raised by both of those  
16 parties.

17 I do wish to say though that in relation to  
18 the matters that occur here, it's -- I do  
19 recognize that the States which are parties to the  
20 treaty are excited and concerned about the  
21 interpretation given to the treaty.

22 And I've submitted to you that the process  
23 they've put in place to which we all ought to be  
24 servants rather than masters puts the tribunals in  
25 fundamental control of the interpretation of the  
26 NAFTA unless and until they've erred within a  
27 material sense under the international act and  
28 subject to binding determinations as to future  
29 tribunals coming from the commission.

30 But I do say this as well in closing, because  
31 this is a case where a company, a -- an  
32 enterprise, took advantage of the offer that is  
33 guaranteed in Chapter 11 to have its investment --  
34 investment in one of the party States protected by  
35 the protections of Chapter 11. And it is the  
36 first or one of the very first cases in which an  
37 investor has called a State party to account for  
38 the promises under Chapter 11 and has undertaken  
39 as a private party the not inconsiderable burden  
40 of establishing to an international tribunal that  
41 a State party has violated international law and  
42 has violated its treaty obligations in relation to

43 its -- its conduct respecting a private party.  
44 And my friend made a fairly stirring  
45 submission to you that this was a privilege which  
46 we have to watch jealously, that we ought not to  
47 allow, if you will, the people on the street to --

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1 to lightly interfere with sovereign relations  
2 between party States.

3 And in relation to the facts of this case, I  
4 just -- I'm just going to close with this  
5 observation, and that is: What we're seeing occur  
6 is precisely what happens when you give private  
7 parties rights, and you give them a process which  
8 allows them to call to account a government that  
9 was previously unaccountable to private parties.

10 And the process of international law, which  
11 has undergone evolution for centuries, is one  
12 which had one significant and overwhelming filter  
13 for the adjudication of private rights, and that  
14 was no matter what was done to you by another  
15 State party, you had to persuade what Harry Truman  
16 called the men in pinstripes in the State  
17 Department, or our equivalent of pinstripes in our  
18 departments, that your problem deserved not only  
19 the attention of your country, but the  
20 determination by your country to take your claim  
21 to another State and to prosecute it with all the  
22 diplomatic risks which are attendant on calling  
23 another State to account for a potential breach of  
24 its international obligations.

25 And in my respectful submission what's  
26 outrageous conduct when you own a business like  
27 this and you invest in a country like this for a  
28 businessman is outrageous having regard to what's  
29 occurred to that businessman, and that's always  
30 been the case. But what's happened in the past  
31 was the assessment at the very beginning of what  
32 was outrageous was made by the men in pinstripes;  
33 that is, the diplomats, the trade officials and  
34 otherwise, to decide whether what was conducted,  
35 whether it was outrageous or not, truly deserved  
36 the attention and, if you will, the championing by  
37 a sovereign State against another sovereign  
38 State. And you can imagine the governmental  
39 process involved in assessing whether to allow  
40 private claims to go through that filter.

41 And so what we've seen happen here, not only  
42 in this case but in the other awards we've

43 reviewed, is that private parties have said hold  
44 it a second, we take those promises seriously.  
45 And now that you've given us the right to bring  
46 them directly, we're going to. And of course, not  
47 surprisingly, Canada and Mexico and the

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1 United States are saying, well, you know, actually  
2 there are a lot more people taking advantage of  
3 us, a lot more people calling us to account for  
4 the rights we've given them than we anticipated.

5 And I say with respect that is absolutely  
6 precisely what the governments announced they were  
7 doing, what they intended to do, and the  
8 consequences flow naturally from investing people  
9 with rights that allow them to have access  
10 directly to tribunals to acquit their rights.

11 In respect of this case I have no doubt that  
12 in the previous era in which a small company that  
13 tries to establish a facility in a rural part of  
14 Mexico would have had no luck whatsoever in  
15 getting something like the sovereign United States  
16 of America to bring a claim internationally to  
17 call Mexico to account, given the complexity of  
18 that international relationship.

19 What I say with respect to the overall case  
20 here is that this tribunal did precisely what the  
21 drafters of NAFTA asked them to do. They've  
22 discharged their duty as international lawyers in  
23 assessing the facts, in making the facts, and in  
24 finding that what happened to Metalclad was unfair  
25 and inequitable and was an expropriation of its  
26 facility.

27 Those are my submissions, My Lord.

28 THE COURT: Thank you, Mr. Cowper.

29 Just to address the point you raised earlier,  
30 I see nothing inappropriate for Mr. Foy to rely on  
31 the arguments of the United States in another  
32 arbitration. They have no precedential effect on  
33 me. He's simply going to be adopting as his own,  
34 as is usually the case. So I -- I don't see  
35 anything inappropriate, so he may refer to those  
36 when he replies tomorrow.

37 MR. COWPER: Okay. I have Your Lordship's ruling.

38 Then I'd like to, if I may, have the  
39 privilege of putting into the evidence the reply  
40 to that argument by Methanex. I only was given  
41 that this morning.

42 I should tell you I didn't have either of

43 these arguments until this morn -- I -- my friend  
44 gave me the United States's yesterday. I asked  
45 him for the reply, and he gave that to me this  
46 morning.  
47 I would like to --

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1 MR. FOY: I'll put both in.

2 MR. COWPER: -- look at the latter.

3 No, I understand that.

4 MR. FOY: Okay.

5 MR. COWPER: We'll put both in, I appreciate that.

6 But I -- I would like to make submissions  
7 with respect to them now they're to be the record  
8 so that I'm not interrupting my friend or seeking  
9 to have a sur-reply. I'll only be five or ten  
10 minutes at the most.

11 THE COURT: Mr. Foy, do you have anything to --

12 MR. FOY: Two things, My Lord. I'd like to start my  
13 reply this afternoon, if that's convenient for  
14 Your Lordship. The -- we've -- there's a lot of  
15 ground that we have to cover, and I think it would  
16 be a -- a useful use of the time, if -- if that's  
17 convenient to the Court.

18 And I have no difficulty with my friend  
19 making some submissions with respect to the  
20 materials to -- which I've provided to him.

21 THE COURT: Um-hum.

22 MR. COWPER: When am I going to do that? Will I do  
23 that at 2? When do you want me to do it? Sorry,  
24 I'm just --

25 MR. FOY: You can -- when would it be convenient?

26 He can do it tomorrow morning if he'd like to  
27 do it. Maybe he wants to hear what I have to say  
28 about the -- the --

29 MR. COWPER: I don't like -- I don't like interrupting  
30 my -- my opponents, so what I'll try to do is --  
31 is read them at lunch hour and give you my  
32 observations on them before my friend starts his  
33 reply. I -- I don't know how long my friend is  
34 planning on being in reply obviously. If he wants  
35 to start at 2, I'm in Your Lordship's hands. I  
36 know that we indicated we'd take this afternoon  
37 off. I --

38 THE COURT: Yes. And I communicated that to Trial  
39 Division. Ms. Smolen was quite happy to hear that  
40 actually, because she had other matters for me to  
41 do.

42 Madam -- or, Mr. Registrar, do you know from

43 your conversations with Ms. Smolen today whether  
44 there's another judge who has become available to  
45 hear the other matters?  
46 THE REGISTRAR: I'm -- from my sense of the  
47 conversation, I don't believe there is, but I can

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1 check again, My Lord. I checked at 11 o'clock.  
2 THE COURT: Um-hum. Would you mind checking and phone  
3 down now?  
4 MR. COWPER: I should say just while we're on this, I  
5 have to appear before the benchers tomorrow  
6 morning on a matter which might take me a little  
7 bit later in the morning, so I -- I may not be  
8 here at the bell of 8 -- of 10, but other counsel  
9 will be, and I'll just join when I can, if that's  
10 okay. I apologize. I'm not intending any  
11 discourtesy to my friend. It's not a disciplinary  
12 matter, My Lord, I may say.  
13 THE REGISTRAR: The registry has indicated that would  
14 be fine.  
15 THE COURT: So there is another judge available to  
16 deal with it?  
17 THE REGISTRAR: I believe so.  
18 THE COURT: Then we will continue at 2 o'clock.  
19 THE REGISTRAR: Order in chambers. Chambers is  
20 adjourned until 2 p.m.  
21  
22 (NOON RECESS)  
23 (PROCEEDINGS ADJOURNED AT 12:18 P.M.)  
24 (PROCEEDINGS RESUMED AT 2:00 P.M.)  
25  
26 MR. FOY: Thank you, My Lord.  
27 Today I want to start our reply. I will  
28 focus this afternoon on replying to the arguments  
29 made orally. I will tomorrow reply to the written  
30 materials.  
31 I want to note at the outset that many of the  
32 arguments we have heard orally were made to refute  
33 points that Mexico did not make, and that many of  
34 the points that we did make were not addressed.  
35 And in the course of the reply, we hope to  
36 identify where the parties are now in agreement,  
37 and we are in -- given changes in Metalclad's  
38 position throughout the course of the oral  
39 argument, we are in more agreement today than we  
40 were when we -- when Metalclad started last week,  
41 to identify where there are issues that remain  
42 between us and to identify what those issues

43 properly are from our perspective, and to answer  
44 some of the questions that -- that have arisen.

45 But before I do that, I'd like to go to the  
46 decision that I have handed up. This is the  
47 decision -- sorry, not decision. These are the

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1 submissions that Mr. Cowper referred to earlier  
2 this morning in the Methanex matter.

3 You have before you the submissions of the  
4 United States on jurisdiction and the submissions  
5 of Methanex on jurisdiction -- on -- on the  
6 United States's challenge to jurisdiction.

7 The -- we contacted the United States and  
8 asked them if they had a position on Metalclad,  
9 and we were directed to this document. We do not  
10 speak for the United States, and I make that  
11 perfectly clear. And I am adopting these  
12 submissions as Mexico's.

13 As I understand how these proceedings came  
14 about, and how Metalclad came to be an issue in  
15 these proceedings, in the Methanex proceedings, is  
16 that in the course of -- or subsequent to an  
17 initial challenge that was filed by the  
18 United States with respect to whether or not the  
19 pleadings disclosed a cause of action that was  
20 known to the NAFTA, amendments were sought after  
21 the Metalclad and Myers decision had been handed  
22 down. And that's why you'll see in these  
23 submissions reference to the Metalclad decision  
24 and the position taken by both the -- the  
25 United States and Methanex in that regard.

26 I'd note at the outset that these positions  
27 are being taken in the jurisdictional context. So  
28 they are considered to be -- to bear upon  
29 jurisdiction. And so you have before you, with  
30 respect to these points, you have Canada, you have  
31 the United States and you have Mexico  
32 characterizing the issues that we'll get to as  
33 jurisdictional issues.

34 So I'd ask you to turn to the United States  
35 submission. And I'll take you just to the passage  
36 that deals with the Metal -- or the -- take you to  
37 the passages that deal with the Metalclad  
38 decision, and it starts at page 37 of the U.S.'s  
39 memorial.

40 Under the heading "B, Methanex's Article  
41 1105(1) claim is inadmissible on its face," and  
42 I'd like to take you through this in some detail,

43 it notes:  
44  
45 "Methanex...Methanex's Article 1105(1)  
46 claim similarly fails to identify any right  
47 on which that claim could be based. There

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1 is no international law standard  
2 incorporated into that article that is  
3 implicated by the measures in question.  
4 In the discussion that follows, the  
5 United States first demonstrates that the  
6 standards of treatment contemplated by  
7 Article 1105 are those established by  
8 customary international law."  
9

10 And you will recall that both Mexico and  
11 Canada have submitted in these proceedings that  
12 the standards contemplated by Article 1105 are  
13 those established by customary international law.  
14

15 "Second, the United States shows that no  
16 standard of customary international law  
17 incorporated into Article 1105, whether  
18 substantive or procedural, is implicated by  
19 the acts alleged to be wrongful here."  
20

21 And I won't -- I won't detain you with the --  
22 the particulars. And I'm referring to these  
23 submissions for their principles.

24 Turning the page to page 38 under the heading  
25 "Article 1105 standards are those of customary  
26 international law," first reference is made to the  
27 text of the article, and it is noted that:  
28

29 "By its plain terms, treatment is to be  
30 accorded in accordance with international  
31 law. Fair and equitable treatment and full  
32 protection and security are provided as  
33 examples of the customary international law  
34 standards. The plain language and  
35 structure of Article 1105 requires these  
36 concepts to be applied as and to the extent  
37 that they are recognized in customary  
38 international law and not as obligations to  
39 be applied without reference to  
40 international custom."  
41

42 And I'll come back to that. I'll just note

43 that, because Methanex as well agrees that the  
44 Metalclad tribunal in our case made its findings  
45 without reference to international custom, its  
46 1105 findings.  
47

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1 "Methanex's suggestion that Article 1105  
2 and, in particular, its reference to fair  
3 and equitable treatment can be applied  
4 without reference to customary  
5 international law is rebutted not only by  
6 the plain language of the article, but also  
7 by the historical context of the words  
8 'fair and equitable' in the article. The  
9 most direct antecedent to the usage of fair  
10 and equitable treatment in international  
11 investment agreements is the OECD draft  
12 convention on the protection of foreign  
13 property first proposed in 1963 and revised  
14 in 1967."

15  
16 And I would just pause there, My Lord, to  
17 recall that Metalclad argued before Your Lordship  
18 that one should simply read the language as if  
19 you're reading the English language. And with  
20 respect, one should read the language of Article  
21 1105 as treaty language in the context in -- and  
22 the history in which it has arisen, not simply  
23 as -- without context, not simply without  
24 reference to that context.

25 And it goes on:

26  
27 "The commentary to Article 1 of the OECD  
28 draft convention which incorporated the  
29 standard of fair and equitable treatment  
30 noted that the standard reflected the  
31 well-established general principle of  
32 international law that a State is bound to  
33 respect and protect the property of  
34 nationals of other States."

35  
36 And then it quotes from that draft  
37 convention.

38 It goes on:

39  
40 "In addition in 1984, the OECD's committee  
41 on international investment and  
42 multinational enterprises surveyed the OECD

43 member States on the meaning of the phrase  
44 'fair and equitable treatment.' The  
45 committee confirmed that the OECD members,  
46 the world's principal developed countries,  
47 continued to view phrase as referring to

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1 principles of customary international law."

2

3 Now, this would be well-known to the  
4 negotiators of the NAFTA.

5

6 "Thus, from its first use in investment  
7 agreements, fair and equitable treatment  
8 was no more than a shorthand reference to  
9 elements of the developed body of customary  
10 international law governing the  
11 responsibility of a State for its treatment  
12 of the nationals of another State. It is  
13 in this sense, moreover, that the  
14 United States incorporated fair and  
15 equitable treatment into its various  
16 bilateral investment treaties."

17

18 Now, this is the United States speaking with  
19 respect to its own BITs.

20

21 "In the ensuing years as international  
22 investment treaties incorporating variance  
23 of the OECD draft became more common, an  
24 academic debate emerged concerning the  
25 meaning of the phrase as it appears in  
26 those agreements without reference to  
27 customary international law."

28

29 And you'll recall, Your Lordship, in -- in  
30 our argument we took you to the text writer who  
31 noted that in the NAFTA it did not appear without  
32 express reference to customary international law,  
33 but appeared subsumed under international law.

34

35 And so these other agreements that didn't  
36 make any express reference to international law  
37 are different than 1105. But this -- but we also  
38 referred to the debate that had arisen. And we  
39 referred to that reference in -- where it was said  
40 that in the NAFTA of course it's clear fair and  
41 equitable treatment is subsumed under  
42 international law, and you'll recall those  
43 extracts.

43 Even in the -- in this debate though, the  
44 United States notes:  
45  
46 "The prevalent view was that in such  
47 circumstances the phrase should be viewed

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1 as having its traditional meaning as a  
2 reference to the international minimum  
3 standard of treatment. A few scholars  
4 contended that the requirement of fair and  
5 equitable treatment standing alone  
6 announced a new and undefined conventional  
7 standard distinct from customary  
8 international standards, a..." subje "...a  
9 subjective standard that left it to the  
10 arbitrators to determine in each case  
11 whether in all the circumstances the  
12 conduct in issue is fair and equitable or  
13 unfair and inequitable."

14  
15 And there's the reference to the footnote to  
16 F.A. Mann upon which Metalclad has placed  
17 significant reliance.

18 So in this context of these other treaties  
19 that -- where fair and equitable treatment was  
20 disjointed from the language or not subsumed under  
21 international law, the debate arose, and it was  
22 argued a sub -- subjective standard should apply.

23  
24 "Against this backdrop..."

25  
26 The U.S. says:

27  
28 "...the drafters of Chapter 11 excluded any  
29 possible conclusion that the parties were  
30 diverging from the customary international  
31 law concept of fair and equitable  
32 treatment. Accordingly, they chose a  
33 formulation that expressly tied fair and  
34 equitable treatment to the customary  
35 international minimum standard rather than  
36 some subjective, undefined standard.

37 "Article 1105's provision for  
38 treatment in accordance with international  
39 law, including fair and equitable  
40 treatment, states the primacy of customary  
41 international law. If this were not  
42 enough, the heading of the article 'Minimum

43 Standard of Treatment' confirms the  
44 applicability of the customary  
45 international minimum standard.  
46 "Finally, Canada's statement on  
47 implementation of the NAFTA clearly notes

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1 that the article provides for a minimum  
2 absolute standard of treatment based..."

3

4 And this was read to you earlier:

5

6 "...based on long-standing principles of  
7 customary international law. For these  
8 reasons the United States disagrees with  
9 the discussion of fair and equitable  
10 treatment in the award by the Chapter 11  
11 arbitral tribunal in Metalclad. Although  
12 the award's sparse statement of reasons  
13 leaves...leaves some doubt..."

14

15 And you'll recall there was no reference  
16 other than the -- to any authorities, principles  
17 or otherwise in the 1105 discussion in the award,  
18 there was simply the reference and -- and we say  
19 misreference to the -- a combination of the  
20 preamble and Article 102. And so we agree the --  
21 with the characterization of the reasons as  
22 sparse, and leaving the reader in some doubt.

23 It goes on:

24

25 "It appears to apply a fair and equitable  
26 standard without an evaluation of customary  
27 international law on the subject. To the  
28 extent that Metalclad can be read to  
29 suggest that fair and equitable in Article  
30 1105 articulates a standard other than the  
31 international minimum standard, it is  
32 wrongly reasoned and should not be followed  
33 here."

34

35 Now, the -- not -- not surprisingly Methanex  
36 on this jurisdictional challenge differs with that  
37 as to whether or not their pleadings should  
38 survive, and whether or not the United States is  
39 right with respect to this issue.

40 But interestingly, they -- the Methanex  
41 submission, and I'll take you to it next at page  
42 10, at page 10, when they rely upon the Metalclad

43 decision, at the bottom of that page they -- they  
44 note Metalclad at the top, and they say that the  
45 tribunal emphasized a -- a broad protection and  
46 found a breach, and quoted some of the portions of  
47 the award. But then they say this at the -- at

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1 the bottom, they -- they agree with the  
2 United States in this regard, and with -- with --  
3 saying:

4  
5 "The Metalclad tribunal thus made no  
6 reference to customary international law in  
7 finding a violation of Article 1105.  
8 Rather, following Dr. Mann's approach, it  
9 simply considered whether the measures at  
10 issue were fair and equitable or unfair and  
11 inequitable."

12  
13 So I think that confirms our reading of the  
14 award in -- and we -- I'll come back to that. But  
15 it confirms that insofar as both Methanex and the  
16 United States are concerned, the Metalclad  
17 tribunal did not apply customary international  
18 law. It did something else. And an issue for  
19 this Court will be whether or not it had the  
20 jurisdiction to do that something else.

21 THE COURT: Mr. Foy, I'm not sure if you discussed  
22 with Mr. Cowper -- this is the first point you're  
23 making.

24 Mr. Cowper, would -- would you --

25 MR. COWPER: I haven't -- I'm afraid that I had booked  
26 the afternoon, so I spent my lunch hour actually  
27 getting rid of my afternoon, and I haven't had a  
28 chance to read either document. I'll do that  
29 overnight, because my friend said I can deal with  
30 it in the morning, and I will.

31 THE COURT: Very well. We can leave it on that  
32 basis. I anticipate after the length that  
33 Mr. Foy's indicated during his reply that you  
34 probably will be asking for an opportunity to  
35 provide some sur-reply, whether I give you that  
36 privilege or not, it remains to be seen. So you  
37 can govern yourself as to whether you wish to wait  
38 until Mr. Foy's finished or not or do it in the  
39 morning. It is totally up to you.

40 MR. COWPER: Well, I think it's best to interrupt him  
41 as few times as possible, so I'll leave it to the  
42 end. Thank you, My Lord.

43 MR. FOY: Now, I hope to be saying more about  
44 F.A. Mann tomorrow, but just -- it -- it noted  
45 there that -- by the United States that his theory  
46 is a theory that starts from a premise that does  
47 not exist here, the premise that your treaty

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1 language only includes the language "fair and  
2 equitable treatment," and does not subsume that  
3 standard under customary international law and the  
4 minimum standard of treatment afforded by  
5 customary international law. So I say Mann's  
6 theory is -- is inapplicable in the circumstances  
7 of this case, even on his own formulation of it.

8 But I also note that Metalclad took you to a  
9 portion of the Myers award in which arbitrator  
10 Schwartz referred to Mann's theory. And I just  
11 note that at paragraph 258, I won't turn it up,  
12 Schwartz also recogni -- himself recognized that  
13 Mann's theory is not part of customary  
14 international law.

15 So the other -- the other thing I take from  
16 the submissions of the United States in the  
17 Methanex case is that you have before you the  
18 submissions of the three parties to the NAFTA, you  
19 have Mexico's submissions, you have Canada's  
20 submissions and to -- and you have these  
21 submissions, all agreeing that the Metalclad  
22 decision was wrongly decided. And I'll talk --  
23 and I'll come back to that when I talk about the  
24 assistance that -- that this Court either needs or  
25 has been provided in dealing with issues of  
26 international law and the interpretation of the  
27 NAFTA.

28 Another point I take from the Methanex  
29 decision is it's -- it's clear rebuttal of -- of  
30 any proposition that these tribunal's decisions  
31 don't have some precedential impact. What you  
32 have here is the Metalclad decision coming down.  
33 You have immediately amendments being made to  
34 pleadings in reliance upon the reasoning advanced  
35 by the Metalclad tribunal, and then you have  
36 another dispute as to the correctness of Metalclad  
37 not simply occurring in this -- in these  
38 proceedings, but occurring in the Methanex  
39 proceedings as well.

40 So notwithstanding the technical, non-binding  
41 effect as provided for in Chapter 11, the  
42 practical impact of these decisions, which is to

43 be well-expected given the breadth of the -- of  
44 the offer to arbitration that is contained there,  
45 have been cited, immediately cited, and are the  
46 subject of discussion in -- in front of other  
47 tribunals. So any reliance upon any proposition,

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1 as Metalclad did, that these -- that these  
2 decisions have no precedential effect I think  
3 is -- is also rebutted by the -- the events in  
4 Methanex.

5 Now, having said that you have before you the  
6 submissions of three of the parties to the NAFTA  
7 that the decision of Metalclad is not correct, I  
8 note that most of the time spent in oral argument  
9 by Metalclad was not spent attempting to defend  
10 the correctness of the decision. Most of the time  
11 in oral argument was instead spent in attempting  
12 to argue that the tribunal did its job by  
13 resolving the dispute before it, and whether the  
14 tribunal did so or -- correctly or not, this Court  
15 cannot interfere because a jurisdictional error  
16 has not been demonstrated. Most of the time was  
17 spent not defending the correctness but in an  
18 attempt to demonstrate that the tribunal had done  
19 its job.

20 Now, of course, if we're under the Commercial  
21 Arbitration Act, Your Lordship can correct the  
22 tribunal on the questions of law. And the very --  
23 that -- that is a question of law, for example,  
24 that has just been discussed in Methanex. It's a  
25 clear question of law as to whether or not the --  
26 whether or not Article 1105 expresses the  
27 customary international law standard or something  
28 different.

29 Now -- but I want to in this part of my  
30 submissions emphasize and respond to -- reply to  
31 the jurisdictional arguments.

32 In my submission this tribunal did not do the  
33 job that the parties conferred upon it by their  
34 consent to arbitration in this case. I'm going to  
35 emphasize that in this part of my submissions I  
36 will not go into the record to disputed facts. I  
37 will take what the tribunal says at face value,  
38 and I will go from that -- and not just some of  
39 what they say, and I won't -- and I will ask you  
40 not to ignore what they say, and I will examine  
41 the questions that they asked themselves.

42 Now, in my reply the tribunal's job was

43 limited, as it -- as any arbitrator's is, by the  
44 terms of the consent to arbitration contained in  
45 the particular arbitration. As Your Lordship is  
46 aware, the terms of that consent to arbitration  
47 are contained in Section B of Chapter 11.

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1           And one part of Section B is to -- is to  
2     require the tribunal to apply the -- to focus upon  
3     the -- sorry. One part of the consent to  
4     arbitration concerns the question of what is the  
5     applicable law. That is a jurisdictional issue.  
6     In our submission this tribunal identified and  
7     relied upon the wrong applicable law. This is not  
8     a question of misapplication of the correct law,  
9     but rather identification and reliance upon the  
10    wrong applicable law.

11          And I take you back in the award to -- to  
12    emphasize Part Roman numeral 6 termed "The  
13    Applicable Law." And you'll recall just this  
14    morning Metalclad's counsel took you to the  
15    arbitration in the Biloune case where it too -- in  
16    the course of the arbitration, the arbitrator set  
17    out the, quote, applicable law. It is a necessary  
18    part of the identification of their jurisdiction.

19          And it's paragraph 70 and 71. And I take you  
20    to 71, and emphasize the reference to Chapter 18  
21    in the second sentence of that paragraph. And I  
22    say this tribunal, taking them at face value and  
23    not ignoring what they've said, not putting behind  
24    what they said, they have identified Chapter 18 as  
25    part of the applicable law governing this  
26    dispute.

27          Now, I think -- and -- and you have been  
28    taken to -- and as you recall, Chapter 18  
29    prescribes transparency requirements for the  
30    publication of laws and for the provision of  
31    administrative and judicial remedies.

32          You have been taken to paragraphs 76 and 88  
33    and 104 of the award just today in which  
34    Metalclad's counsel showed how transparency formed  
35    not just part of the award under 1105, but also  
36    the award under 1110. As my friend said in --  
37    fairly, he agreed this morning that there is  
38    clearly a connection between the tribunal's  
39    finding and 1105 and 1110. That connection is  
40    transparency.

41          And I'll just -- again, I -- I know you've  
42    been taken many times to these, but just so that I

43 have the point, at paragraph 76 again, there's  
44 the:  
45  
46 "Prominent in the statement of principles  
47 and rules..."

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1  
2           And -- and I'll come back to the confusion  
3 between objectives and principles and rules, but  
4 the tribunal has it correct, I think.

5  
6           "Prominent in the statement of principles  
7 and rules that introduces the Agreement is  
8 the reference to 'transparency.'"

9  
10          They see transparency as a rule. It is part  
11 of the applicable law. They are applying that  
12 rule in determining the dispute before them.

13          They then set out their understanding of that  
14 rule.

15          And we have -- and I'll just pause there to  
16 note that one of the things you haven't heard is  
17 an argument that -- from -- from Metalclad, is  
18 that the members of this tribunal, as arbitrators,  
19 are entitled to legislate new rules not otherwise  
20 agreed to by the parties. That was one of the  
21 jurisdictional defects in this tribunal --  
22 tribunal's reasoning, and I submit it has not been  
23 addressed. But that's what they do in the  
24 remainder of paragraph 76.

25          In paragraph 88 they make it clear that it is  
26 their -- it is the violation of this rule of  
27 transparency, they -- they say -- they talk about  
28 the absence of a clear rule with respect to  
29 municipal construction -- and then they say it is  
30 this that:

31  
32          "...amounts to a failure on the part of  
33 Mexico to ensure the transparency required  
34 by NAFTA."

35  
36          Again, in my submission making it clear that  
37 the applicable law that they are applying is a  
38 transparency rule.

39          Now, I think I heard counsel for Metalclad  
40 agree in oral argument that this formed part of  
41 the content, that was the language used, part  
42 of -- that this transparency formed part of the

43 content of their ruling on Article 1105. And I  
44 agree with that. It did. Both Chapter 18 and  
45 clearly transparency formed part of the content of  
46 the applicable rules applied by this tribunal to  
47 resolve this dispute.

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1           Now, counsel for Metalclad agreed that the  
2 tribunal did that and then defended the tribunal  
3 by arguing that this tribunal has jurisdiction to  
4 apply the, quote, agreement as a whole. As I  
5 understand the response of Metalclad, it -- it's  
6 not disputing what -- what they did, but -- but  
7 arguing that they are entitled to do that, to  
8 consider the agreement as a whole.

9           Mexico's reply is that only Chapter 20  
10 tribunals can apply the rules that are contained  
11 throughout NAFTA.

12           Articles 1116 and 1117 of Chapter 11 restrict  
13 Chapter 11 tribunals to the rules contained in  
14 Section A of Chapter 11. Transparency is not a  
15 rule contained in Section A of Chapter 11.

16           I did not hear Metalclad respond to Articles  
17 1116 and 1117 and the restrictive effect that they  
18 have on this tribunal's jurisdiction in respect of  
19 the applicable law.

20           You have been advised that transparency is a  
21 qualitatively different rule than customary  
22 international law, that it is a treaty rule that  
23 only exists by virtue of treaty and is only  
24 expressed in the specific terms of the specific  
25 treaty in which it's found.

26           You have also been advised that as a treaty  
27 rule it does not exist in Chapter 11, Section A.  
28 And this comes back to the debate that was ongoing  
29 in -- in Methanex. The -- in Methanex it was  
30 pointed out that what 1105 covers are not treaty  
31 rules, but customary international rules, a  
32 different set of rules.

33           And those treaty rules in my submission are  
34 not implicit somehow in Chapter 11. Section B is  
35 clear, they have to be expressed there. The  
36 architecture is clear. When other rules like  
37 those contained in Chapter 15 are set out, they  
38 are set out expressly.

39           Now, the next point I'd like to reply to  
40 relates to Article 102 and the preamble.

41           Now, we heard a lot of argument that Mexico  
42 is submitting you cannot -- the tribunal was wrong

43 to look at Article 102. That is not Mexico's  
44 submission. Mexico submitted that this tribunal  
45 misstated Article 102. And I'd like to turn it  
46 up, and -- and to recall the misstatement and  
47 bring it back to the applicable law, because it

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1 arises from this tribunal's conflation of a  
2 statement in the preamble, one of the words of the  
3 preamble, and words that don't exist in 102.

4 Now, as I said, Mexico does not take the  
5 position that it was jurisdictional error for this  
6 tribunal to refer to 102, but when you go there,  
7 you have to read it.

8 102, as Your Lordship is familiar, contains  
9 both a reference to objectives and a reference to  
10 rules. My -- counsel for Metalclad, now we appear  
11 to be in agreement that the objectives are set out  
12 in A through F. Any principles or rules that are  
13 referred to are national treatment,  
14 most-favoured-nation treatment and transparency.

15 Now --

16 THE COURT: You say you're in agreement.

17 MR. FOY: Well, we almost got there, but then my  
18 friend said -- and I'm going to elaborate on  
19 this. And then my friend said but transparency is  
20 also an objective.

21 So he -- grammatically he appeared to -- he  
22 started with one position, he then resiled from  
23 that position, and then I thought we were close to  
24 an agreement, and then said but transparency is  
25 also an objective. So I -- with that caveat I  
26 think we're in -- we're in agreement.

27 Our position is clear, if I can state it.  
28 Our position is the objectives are those set out  
29 in A through F. The rules and principles are  
30 those elaborated throughout the agreement, as  
31 Mr. Thomas advised, including national treatment,  
32 most-favoured-nation treatment and transparency.

33 Now, one of the things that we pointed out  
34 was that you do not see in Article 102 the  
35 objective identified by this tribunal in paragraph  
36 75 of its award. Paragraph 75 of the award, the  
37 tribunal says:

38  
39 "An underlying objective of NAFTA is to  
40 promote and increase cross-border  
41 investment opportunities and..."  
42

43 And I emphasize this language:  
44  
45 "...and ensure the successful  
46 implementation of investment initiatives."  
47

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1 Reference Article 102.

2 The language "ensure the successful  
3 implementation of investment initiatives" appears  
4 nowhere in Article 102. The word "ensure" does  
5 appear in the preamble that -- one page back. The  
6 word "ensure a predictable commercial framework  
7 for business planning and investment" is one of  
8 the preambular statements. But nowhere -- and it  
9 appears the tribunal appears to have conflated or  
10 taken that word out of the preamble, and then  
11 attach it to words that don't appear in the  
12 objectives by transforming "increase substantially  
13 investment opportunities" into "ensure the  
14 successful implementation of investment  
15 initiatives."

16 Now, Your Lordship would be familiar with the  
17 rest of the award, that what the tribunal takes --  
18 later takes this -- how they -- having mis --  
19 misidentified an objective, they then take this  
20 obligation of result and apply a duty of insurance  
21 on the federal government in this case to ensure  
22 the successful implementation of Metalclad's  
23 business plan.

24 In fact, my friend earlier this morning went  
25 so far as to suggest that this tribunal has  
26 imposed a duty on the federal government to go to  
27 court to obtain permits for this business plan to  
28 ensure its successful implementation, and I'll  
29 come back to that.

30 Now, again, this is one of those arguments  
31 that -- jurisdictional arguments that I didn't  
32 hear responded to directly. What we heard instead  
33 was -- with respect to Article 102, we heard  
34 instead some -- a number of different positions as  
35 to whether or not transparency is a rule or an  
36 objective.

37 And Your Lordship has -- recollection is  
38 probably more accurate than mine in that we are  
39 not in agreement, but I heard originally Metalclad  
40 saying transparency is an objective of the -- of  
41 102, but then I thought I heard him come back and  
42 say, no, transparency is a rule as -- as

43 grammatically is suggested. But then in the  
44 course of answers to questions, it was also said  
45 that, well, it's also rule and an objective. And  
46 so to that extent we remain apart.  
47 I would like to make our position clear.

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1 Objectives and rules are different.  
2 Objectives are hortatory. They, like preambular  
3 statements, can be looked at, but they are not  
4 rules, and they do not override the textual  
5 rules.

6 And tomorrow I will bring to your attention a  
7 passage from another Chapter 20 tribunal in  
8 which -- in -- in a dispute between the States  
9 with respect to transportation issues in which a  
10 tribunal said:

11  
12 "There is no suggestion in NAFTA that the  
13 preambular language was intended to  
14 override the textual obligations. Rather,  
15 the language used in the preamble, resolve  
16 rather than agree to, shall or must,  
17 indicate the preamble is aspirational and  
18 hortatory. The panel also notes..."  
19

20 Sorry -- so the -- both the preamble -- and  
21 that deals with the preambular statement where  
22 they have taken the word "ensure," it appears,  
23 from the preamble, made it into an objective.  
24 They have then taken in my submission in this --  
25 this tribunal has taken a misstated objective and  
26 had regard to that misstated objective in the  
27 application of what are already the wrong rules,  
28 the Chapter 18 transparency rules. And with  
29 respect to that, and -- and the difference between  
30 objectives and rules, our position is that the  
31 tribunal may have regard to objectives, but must  
32 have regard to them properly stated.

33 What a tribunal may not do without exceeding  
34 its jurisdiction is have regard to a different --  
35 have regard to different treaty rules, like  
36 transparency, to provide content for the customary  
37 international law rule of minimum standard of  
38 treatment contained in Chapter 1105 -- Article  
39 1105. In our submission the tribunal in doing so  
40 identifies the wrong applicable law and goes  
41 beyond the parties' consent to this arbitration.

42 Now, I mentioned this briefly, but the -- the

43 next point I reply to is the alternative point  
44 that this tribunal, if it was -- and I say it was  
45 not -- if it was entitled to go to treaty notions  
46 of transparency to inform Chapter 18 -- Chapter  
47 11, then this tribunal legislated a treaty

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1 standard not found anywhere else in the NAFTA in  
2 its paragraph 76.

3 Now, as I mentioned a few minutes ago, I did  
4 not hear a response to -- to this allegation of  
5 jurisdictional error. It appears to Mexico that  
6 the tribunal applied a wholly new notion, as the  
7 Methanex investor agrees was a wholly new notion  
8 not grounded in customary international law.

9 Now, Your Lordship has pointed out in  
10 questions to Metalclad that even on this standard  
11 as legislated, and accepting the findings of the  
12 tribunal with respect to Mexican domestic law, and  
13 I'll be getting to those, the federal government  
14 met the standard, recent -- rendering in my  
15 submission the result on its face to be  
16 unreasonable and contradictory.

17 Now, in response to Your Lordship's  
18 questions, the counsel for Metalclad constructed a  
19 new set of reasons for the tribunal that don't  
20 appear on the face of the award, referring to a  
21 number of findings not made by the tribunal in an  
22 attempt to defend the result, ultimately getting  
23 to the -- to state the proposition that the  
24 federal authorities were obliged to seek legal  
25 remedies on Metalclad's behalf.

26 Now, that doesn't appear anywhere in the  
27 tribunal's award. And in this portion of the  
28 submissions, I'm restricting my submissions to the  
29 face of the award and not going -- and not writing  
30 in findings that were -- that do not appear on the  
31 face of them.

32 But I want to note this point, because it's  
33 ironic that the first we hear of legal remedies  
34 available in the Mexican domestic courts from  
35 Metalclad, the first we hear was an argument that  
36 the federal authorities, not Metalclad, but the  
37 federal authorities have a NAFTA obligation to go  
38 to court on behalf of investors to ensure the  
39 successful implementation of their business  
40 plans. And if they don't, they will violate  
41 Article 1105.

42 This submission is made in response to one of

43 our primary submissions which is that Metalclad  
44 itself had domestic remedies available to it,  
45 exercised by it, and later abandoned with respect  
46 to the domestic legal issue that it faced.  
47 Nothing was said by Metalclad's counsel about

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1 Metalclad's exercise of those legal remedies.  
2 Nothing was said by the tribunal about Metalclad's  
3 exercise of those remedies. Instead, for the  
4 first time we hear -- nothing was said in  
5 response. Instead, for the first time we hear  
6 that the NAFTA obliges the federal government to  
7 take the municipality to court to resolve the  
8 constitutional difference between the two levels  
9 of government, all of which in response to -- to a  
10 question, well, isn't this -- on its face, this  
11 award, self-contradictory?

12 Now, that brings me to the tribunal's  
13 application of the wrong law in another respect,  
14 and that is in the respect of its approach to the  
15 Mexican domestic legal issue. And as we  
16 mentioned, and as I've just reiterated, when the  
17 tribunal in its award -- you will not find any  
18 reference to the Mexican domestic remedies, the --  
19 the specific facts now I'm talking about, about  
20 the exercise -- the existence of the remedies, the  
21 exercise of the remedies, and the abandonment by  
22 Metalclad of those remedies in favour of  
23 negotiations with the municipality.

24 And I will -- I want to reply to my friend's  
25 response to -- to that.

26 My -- my friends don't disagree with me.  
27 They agree there is no reference, and they defend  
28 that. They defend that failure to refer by a  
29 reference to a portion of the award in paragraph  
30 97 and footnote 4, but -- and I'll get to that.

31 But at this stage I'd like to just go back to  
32 the reasons, take them at face value, and ask the  
33 question whether or not this tribunal's doing its  
34 job, doing the job assigned to it, or doing  
35 something else. And I'd like you to turn to  
36 paragraph 79 of the award. At paragraph 79 of the  
37 award, the tribunal says:

38  
39 "A central point in this case..."  
40

41 And I emphasize for this tribunal a central  
42 point was an issue of Mexican domestic law.

43           Now, the tribunal's award goes on to identify  
44 two aspects of this issue, whether or not a  
45 municipal permit was required at all or whether or  
46 not a municipal permit was required, but this  
47 tribunal could -- this -- this municipality in

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1 these circumstances could not refuse this permit  
2 application.

3 The -- the reasons are difficult to follow  
4 with respect to those two aspects of the  
5 question. At one stage in the reasons, paragraph  
6 105, the tribunal appears to hold -- says, taking  
7 them at face value, that the:

8  
9 "...exclusive authority for siting and  
10 permitting a hazardous waste landfill  
11 resides with the Mexican federal  
12 government."  
13

14 And that, if you took it as what was -- that  
15 there would be no requirement for any municipal  
16 permit if -- if that was a -- a correct finding.  
17 I'm going to come back to the question of  
18 correctness or incorrectness.

19 But at another stage in the award the  
20 tribunal, in paragraph 86, says:

21  
22 "Even if Mexico is correct that a  
23 municipal construction permit was  
24 required..."  
25

26 So I'm not clear where they land on the -- on  
27 the question, but I'm -- I just want to emphasize  
28 at this point it's central to their -- it's a  
29 central point as far as they're concerned.

30 At no stage in these -- in this award does  
31 the tribunal ask itself the question, are there  
32 domestic remedies available to Metalclad, to  
33 foreign investors, to address this issue of  
34 domestic law?

35 The correctness or incorrectness of the  
36 municipality's view of its jurisdiction was not an  
37 issue before this tribunal. And I say that it  
38 wasn't necessarily an issue either as a matter of  
39 Mexican domestic law or as a matter of fact. It  
40 was not a central point that needed to be resolved  
41 as if by a Mexican domestic court, which is the  
42 way the tribunal approached it.

43           And I'm going to develop the point that in my  
44 submission the tribunal's asked itself the wrong  
45 question. The question should have been, in my --  
46 or the questions could have been in my submission  
47 more along the lines of -- of the following: Was

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1 the uncertainty arising from an unresolved  
2 constitutional issue agreed by Metalclad's counsel  
3 to be -- to involve a federal-municipal  
4 confrontation, was the existence of that  
5 uncertainty over a new law involve -- involving  
6 environmental issues a violation of the mini --  
7 minimum standard of treatment in Article 1105?

8 Investors face uncertainty in the application  
9 of new laws, especially in federations, every  
10 day. This investor when it acquired this  
11 investment was aware of that uncertainty, and I'll  
12 be coming back to the option agreement to identify  
13 how this investor arranged its affairs, planned  
14 its affairs on account of that uncertainty. And  
15 if the existence of uncertainty arising from  
16 unresolved constitutional issues and environmental  
17 law is a violation of the NAFTA, then in the  
18 Beazer case, in the Hudson case, in the Rascal  
19 case, Canada is frequently violating Article 1105  
20 of the NAFTA.

21 And I submit that that demonstrates both  
22 the -- the unreasonableness of -- of -- of that,  
23 if the proper question were asked, but also I -- I  
24 want to emphasize that what I -- the submission  
25 I'm making at this stage is that for an  
26 international tribunal charged with the  
27 responsibility to determine whether there's a  
28 violation of international law, that the fine  
29 points of -- of interpretation of domestic law are  
30 not matters that have been afforded to it.

31 It should look at the question, not with  
32 resolving correctness or incorrectness, but  
33 dealing with both. If the municipality's right or  
34 if they're wrong, does the existence of that  
35 uncertainty itself violate the NAFTA?

36 Now, another way to frame the question in  
37 this case, again being true to the findings of  
38 the -- of the tribunal, would be to say, well, in  
39 the face of a representation from a federal  
40 official with respect to the extent of municipal  
41 authority, and in the face of conflicting  
42 representations from municipal authorities with

43 respect to their understanding of their  
44 jurisdiction, does that amount to a violation of  
45 the NAFTA?  
46 Now, international law is clear, and -- and  
47 I -- I -- I -- I will come back to -- to the way

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1 my friend characterized international law as being  
2 somehow vague on this point. It's not.

3 At international law, rather than attempting  
4 to resolve fine disputes of domestic law, international --  
5 international law, especially under Article 1105,  
6 requires the tribunal to have regard to the entire  
7 legal system.

8 The ELSI case makes it clear that in testing  
9 questions like this, the question requires regard  
10 to the entire legal system, both to determine  
11 whether foreign investors are permitted access to  
12 that legal system to resolve these questions of  
13 Mexican domestic law, to ask the question whether  
14 there are remedies open to an investor to curb  
15 ultra vires acts. Without that examination,  
16 without the examination of the legal system as a  
17 whole, and as ELSI points out, where the legal  
18 system has been engaged without an examination of  
19 the specific findings of -- of the -- of the  
20 domestic courts, the international tribunal has  
21 not done its job.

22 Now, in this respect this tribunal made no  
23 mention of the legal system as a whole generally.  
24 They didn't examine the question of whether it was  
25 open to foreign investors generally. But more  
26 specifically, they did not examine the facts  
27 involving the specific exercise by Metalclad of  
28 the remedies open to it against this permit  
29 denial.

30 There is no reference in the award to the  
31 initiation by Metalclad of a writ of Amparo  
32 against the municipal permit denial of the finding  
33 of the Mexican domestic courts that that  
34 initiation had been done without exhaustion of the  
35 domestic remedy at the administrative level, and  
36 without reference to the abandonment of those  
37 domestic legal proceedings by Metalclad  
38 voluntarily as they stated before the tribunal --  
39 and I'll come back to their change in position  
40 here, as they stated to the tribunal as a  
41 demonstration of good faith for -- in -- in  
42 respect of the negotiations with the State and the

43 municipality.  
44 Examination of those facts rather than the  
45 substitution of the tribunal's view for domestic  
46 law, examination of those facts would demonstrate  
47 there was a legal system available to Metalclad to

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1 resolve these issues. It would reveal that it was  
2 Metalclad's voluntary abandonment of those  
3 remedies that took place in this case. It would  
4 allow -- it would permit -- recourse to those  
5 remedies would permit the domestic courts to  
6 resolve the central point. And who better suited  
7 to resolve an issue of Mexican domestic law than  
8 the Mexican courts? Certainly who better suited  
9 than a tribunal charged with applying  
10 international law?

11 Now, on this point, and there's another point  
12 of agreement, Metalclad's counsel agreed that a  
13 violation of domestic law and a violation of  
14 international law are not co-equivalent. They  
15 exist at different levels. They are two separate  
16 issues.

17 And I'm about to turn to replying to  
18 Metalclad's defence of the tribunal's failure to  
19 consider these facts, and it may be an appropriate  
20 point to take a break.

21 THE COURT: Yes. We'll take the afternoon break.

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

24

25 (AFTERNOON RECESS)

26 (PROCEEDINGS ADJOURNED AT 3:02 P.M.)

27 (PROCEEDINGS RESUMED AT 3:16 P.M.)

28

29 THE COURT: Yes. Continue, Mr. Foy.

30 MR. FOY: Thank you, My Lord.

31 When I was going through the Chapter 18 point  
32 I had a note to -- that I would give you tomorrow  
33 the references that Mexico gave to the tribunal  
34 that it -- it saw this as a juridical issue, so  
35 I'll give you those tomorrow. But I forgot to  
36 tell you that when I was going through that --  
37 that portion.

38 Where I was was making the point that on  
39 the -- again, identifying the point of agreement  
40 between us, that Metalclad agreed that the  
41 tribunal did not consider the existence or  
42 exercise of the local domestic remedies but

43 defends that by reference to paragraph 97 and  
44 footnote 4 of the award.  
45 And in paragraph 97 the tribunal is  
46 concluding its view of Mexican domestic law and  
47 in -- and -- and stating its conclusion that the

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1 municipality's insistence upon the deny -- and  
2 denial of the construction permit in this instance  
3 was improper in its view of Mexican domestic law.

4 And then it footnotes this, it says:

5  
6 "The question of turning to NAFTA before  
7 exhausting local remedies was examined by  
8 the parties. However, Mexico does not  
9 insist that local remedies must be  
10 exhausted. Mexico's position is correct in  
11 light of NAFTA Article 1121 which provides  
12 that a disputing investor may submit a  
13 claim under NAFTA Article 1117 if both the  
14 investor and the enterprise waive their  
15 rights to initiate or continue before any  
16 administrative tribunal or court under the  
17 law of any party any proceedings with  
18 respect to the measure of the disputing  
19 party that is alleged to be a breach  
20 referred to in NAFTA Article 1117."

21  
22 And my friend took you to an exchange between  
23 President Lauterpacht and Mr. Thomas in the -- in  
24 the -- in the award and argued that it had been  
25 agreed by Mexico that local remedies did not need  
26 to be exhausted.

27 And -- and I'll point out that there may be a  
28 difference between the question of exhaustion and  
29 the question of whether or not those -- the  
30 remedies are completely irrelevant, the exercise  
31 of those remedies and the facts arising by reason  
32 of those exercising -- but -- but I'll come back  
33 to that.

34 First, dealing with the exchange between --  
35 sorry. So -- so he took you to that exchange  
36 between President Lauterpacht and Mr. Thomas. And  
37 then he argued that nothing in Article 1121  
38 requires Metalclad to exhaust local remedies. So  
39 those were his defence of the agreed-upon  
40 proposition that this tribunal ignored those  
41 facts.

42 Now, dealing first with the exchange between

43 Mr. Thomas and -- and President Lauterpacht, this  
44 exchange related not to this point at all. This  
45 exchange related to the meaning of Article 105 of  
46 the NAFTA. Article 105 is the -- was the subject  
47 of extensive debate and relates to the issue of

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1 State responsibility for the acts of some  
2 nationals.

3 The debate, and I won't go into the details  
4 of it, but the debate centred on the fact that  
5 under the Free Trade Agreement, the U.S.-Canada  
6 Free Trade Agreement, there was express reference  
7 in the agreement when imposing obligations on  
8 local governments to the phrase -- to the use of  
9 the phrase local governments.

10 And the debate noted that in Article 105 that  
11 reference does not appear. The reference in  
12 Article 105 is to State and provincial  
13 governments.

14 That debate was dealt with by the tribunal in  
15 paragraph 73 of its award. And I took you to that  
16 in the opening and noted that, although Mexico's  
17 position was not set out fully in -- in paragraph  
18 73, that Mexico did not base this application  
19 before Your Lordship upon any issue arising out of  
20 paragraph 73.

21 I'm merely pointing to the -- to the -- I'm  
22 at this point in the argument to point out that  
23 the -- this exchange that took place between the  
24 tribunal and counsel that my friend referred to  
25 had to do with Article 105, not with the point  
26 that I'm dealing with.

27 Now, the next defence by Metalclad of the  
28 ignoring by this tribunal of local remedies is the  
29 proposition that nothing in Article 1121 requires  
30 Metalclad to exhaust local remedies. Now again,  
31 this is a point that was not made by Mexico.

32 Mexico's point was that at international law,  
33 before a State will be found to have violated the  
34 minimum standard of treatment, of fair and  
35 equitable treatment, the entire legal system as a  
36 whole has to be considered.

37 A claim of this -- of this type, denial of  
38 fair and equitable treatment, is not ripe until  
39 those local remedies are exhausted, unless there  
40 is in these -- the system of laws of that country  
41 a denial of access to the laws, or denial of  
42 access to the courts to foreign investors, or some

43 other denial of justice is made out in the -- in  
44 the court proceedings themselves.  
45 Article 1121 doesn't require the investor  
46 to seek local remedies for local problems;  
47 international law requires that before a violation

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1 of this standard can be made out.

2 And again, counsel for Metalclad agreed with  
3 the proposition that when an investor comes to a  
4 Chapter 11 arbitration they carry the burden. The  
5 language that was used was that they carry the  
6 burden of demonstrating a violation of in this  
7 case Article 1105.

8 That burden cannot be discharged without an  
9 examination of the local remedies and a finding  
10 that they are wanting or in some way have  
11 specifically denied justice to this investor.

12 You'll recall that in the ELSI case the  
13 tribunal, after having examined in detail the  
14 remedies actually exercised, the tribunal then  
15 asked the question, well -- and having examined  
16 the -- the Court's treatment of those -- of those  
17 issues, then asked the question: Has the legal  
18 system as a whole failed the investor in this  
19 case?

20 And I point to this as an -- as an example,  
21 as a reply to my friend's submission that this  
22 tribunal did its job, did the job before it.  
23 In -- in my submission it did not.

24 Now, I want to treat separately the question  
25 of the relevance of local remedies and questions  
26 of expropriation in -- in dealing with Article  
27 1121. But before I get to that, what Article 1121  
28 does in the face of this principle of  
29 international law so far as 1105 is concerned is  
30 to say that if you're going to come to the NAFTA,  
31 you must file a waiver. That waiver relates to  
32 actions involving the measure but then says but  
33 not including injunctive, declaratory or other  
34 extraordinary relief not involving a claim for  
35 damages.

36 That last phrase, and I -- I should get the  
37 precise phrase, and it's Article 11 -- in this  
38 particular case Article 1121(2)(b) that we're  
39 talking about, which the tribunal has noted in  
40 footnote 4, contains some of the language that the  
41 tribunal ascribes to it.

42 But the tribunal does not note the

43 exception. If you go back to the award and  
44 footnote 4, you'll see they set out the  
45 introductory language with respect to that  
46 waiver. And they stop at:  
47

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1            "...alleged to be a breach referred to in  
2            NAFTA Article 1117..."

3  
4            Without noting the language,

5  
6            "...except for proceedings for injunctive,  
7            declaratory or other extraordinary relief  
8            not involving the payment of damages before  
9            an administrative tribunal or a Court under  
10           the law of the disputing party..."

11  
12           No waiver is required with respect to those  
13           type of proceedings. International law requires  
14           those type of proceedings, or at least the  
15           examination of those type of proceedings before  
16           identifying any substantive breach of Article  
17           1105.

18           You don't have a denial of the minimum  
19           standard of treatment where there exists domestic  
20           remedies available to the -- and -- to the foreign  
21           investor without an examination of the legal  
22           system as a whole.

23           If you -- if you -- and I -- if you take this  
24           again at the face of the award, this tribunal's  
25           view of Mexican domestic law, which as I've  
26           already indicated was an inquiry beyond its  
27           jurisdiction and unnecessary for its -- its  
28           jurisdiction, if you take their finding, then  
29           had -- and -- and credit it, then had Metalclad  
30           proceeded with -- and -- its domestic remedies and  
31           chosen the appropriate forum, it would have  
32           succeeded. It would have succeeded in obtaining a  
33           declaration, as the municipality -- or as this  
34           tribunal said, that the municipality's insistence  
35           upon and denial of this -- of this permit was  
36           improper.

37           Absent a finding that there's no legal remedy  
38           available to you, or you've been denied access to  
39           this remedy, again on -- on this tribunal's  
40           finding, if they had noted the existence of those  
41           remedies and the significance of that fact, they  
42           would have said you've got a domestic problem

43 here; you have a domestic legal problem. The  
44 gravamen of your complaint is an ultra vires act,  
45 not a violation of the NAFTA. Have you gone and  
46 exercised your remedies? We need to know that  
47 before we can pass upon whether there's any

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1 international responsibility for Mexico.

2 Now, this tribunal did not engage in that  
3 inquiry. And they didn't because they say --  
4 they -- they referred to -- my friend has taken  
5 you to a passage where he says Mexico didn't  
6 insist, and they've taken you to a passage that  
7 dealt with an entirely separate issue, Article  
8 105.

9 And then they take you to Article 1121 and  
10 say -- and -- and they say it doesn't require me  
11 to exhaust the remedies. Mexico didn't argue  
12 that. Mexico argued that international law  
13 requires that, that Article 1121 has a partial  
14 modification of that international rule, a partial  
15 modification which does not have any impact on  
16 proceedings for injunctive, declaratory or other  
17 extraordinary relief not involving the payment of  
18 damages.

19 The very proceedings that -- that Metalclad  
20 engaged in in this case, the writ of Amparo, is a  
21 constitutional remedy available to a private  
22 citizen to challenge the vires of the  
23 municipality's insistence upon and denial of the  
24 construction permit; that was the very case  
25 brought by Metalclad too as it turned -- initially  
26 they brought it without exhausting a -- a remedy  
27 that was available to correct that.

28 The -- and -- and as I noted, they later --  
29 they later abandoned that proceedings (sic). And  
30 they said when they abandoned the -- that  
31 proceeding that they did so as a show of good  
32 faith towards the municipality in support of their  
33 negotiations. Now, what do they -- that's what  
34 they said to the tribunal.

35 What do they say now? They say now what they  
36 say in paragraph 375. They make here an  
37 allegation which is quite contrary to the -- what  
38 they admitted, and I took you to the admission,  
39 and it was paragraph 630 of the -- of the -- of --  
40 of the record, but it was at -- I put it in my  
41 extracts at tab 69, where the fact that on October  
42 31, 1996 COTERIN filed a motion before the Supreme

43 Court withdrawing from the appeal regarding the  
44 district judge decision to reject the Amparo that  
45 it filed challenging the municipality's denial of  
46 a construction permit.  
47 And Metalclad's position on that allegation

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1 of fact was it was admitted. Metalclad notes that  
2 it withdrew its Amparo actions as a demonstration  
3 of good faith in the negotiations undertaken with  
4 the State and municipality, 6 -- 69 of the  
5 extract.

6 Now, they say it must be considered that the  
7 judge likely to hear any proceedings brought by  
8 Metalclad would be directly appointed by the  
9 governor. Well, first of all, that's a  
10 misstatement of fact. The proceedings would get  
11 to the federal level, to justices appointed at --  
12 at the federal level.

13 Then they say Metalclad understandably had no  
14 confidence whatsoever in the integrity of the  
15 legal process, in its ability to provide a fair  
16 and impartial hearing of those issues affecting  
17 Metalclad. That -- that's quite a different  
18 statement than the one they made to the tribunal.

19 Then they say consequently Metalclad  
20 determined that it -- it had been treated unfairly  
21 and inequitably and properly sought relief  
22 pursuant to the NAFTA instead of proceeding under  
23 Mexican law.

24 That's their excuse now, a new excuse. And  
25 I'd -- if this had been the gravamen of their  
26 complaint, and if the tribunal had made such a  
27 finding, one thing is for sure: They would have  
28 to examine the existence, exercise and abandonment  
29 of the legal remedies; it would have to be part of  
30 their job to look at it. And if they found that  
31 there was no integrity in the legal process in  
32 Mexico, we'd have a different award. We don't  
33 have that award.

34 And the -- what we have instead is a complete  
35 failure by the tribunal to address the  
36 significance of these facts. And in my submission  
37 a -- an admitted omission, it's common ground that  
38 they didn't deal with it, and no defence to that  
39 in my submission to -- to that omission.

40 Now, I'd like to deal with -- excuse me.  
41 The -- my friend reminds me that I should  
42 emphasize, and I should, that -- that when the

43 tribunal states article -- the content of Article  
44 1121 in this footnote they -- this is the second  
45 misstatement or failure to record the accurate  
46 content of an article of -- of the NAFTA by this  
47 tribunal. It was done in respect of Article 102.

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1           And here's another example of, in this case,  
2 an incomplete -- the other case it's -- it's not  
3 of whole cloth, here is an incomplete statement of  
4 what Article 1121 in fact states.

5           Now, I'd like to stay with this issue and --  
6 and deal with it -- deal slightly separately with  
7 the question of local remedies and expropriation,  
8 because the -- there are slightly different but  
9 ultimately no -- no difference in result.

10          If there were no Article 1121 and you were  
11 simply dealing with international law, then in my  
12 submission, if there was an act of expropriation  
13 by a State, the -- and -- and if there was a  
14 treaty like the NAFTA but without Article 1121,  
15 the investor would have to look around initially  
16 and see is there a local compensation board to  
17 whom I can seek compensation for this  
18 expropriation, and have to go there, or at least  
19 attempt to go there to determine whether or not  
20 there had been a taking without compensation.

21          Now, again the investor would have to do that  
22 because they bear the burden when they go to NAFTA  
23 of demonstrating under this -- under Article 1110  
24 of a taking without compensation. And if there's  
25 a mechanism freely available to them at the  
26 domestic level to go to the local compensation  
27 board, they would not -- and they went there and  
28 obtained compensation, they would not be able to  
29 establish that there had been a taking without  
30 compensation.

31          So if they were successful, they would have  
32 no -- no claim at the international level. Now,  
33 Article 1121 appears to modify that in respect of  
34 claims for damages. Or, sorry, I'll put it  
35 another way. I'll put it in the language of  
36 the -- I'm -- I'm making a -- okay. In respect of  
37 claims other than claims for -- claims for  
38 proceedings for injunctive, declaratory or other  
39 extraordinary relief not involving the payment of  
40 damages.

41          Now, the claim I've just described, if you'd  
42 go to the lo -- the local compensation board,

43 there's been an expropriation and you're -- you're  
44 going there for compensation, it would not fall  
45 within that -- within that language. It would be  
46 a claim for compensation. And Article 1121  
47 appears to allow an investor an option to go to

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1 arbitration before or instead of -- or going to  
2 make the claim before the local compensation  
3 board. Now -- so long as that claim is waived.  
4 That -- come back to our case. That's not  
5 our case. In our case what we have is a claim.  
6 The gravamen of the complaint was an ultra vires  
7 act by the municipality. The claim at the  
8 domestic level, the claim that this tribunal  
9 elevated to the international level was not a  
10 claim at the local compensation board for  
11 compensation for an expropriation.  
12 The Amparo that was initiated was for, as I  
13 understand it, a -- a -- a declaration the  
14 municipality had either the obligation to -- to  
15 extend the permit or was wrong in denying the  
16 permit. That type of claim is completely  
17 unaffected by Article 1121.  
18 And again, in respect of this -- in -- in  
19 respect of this case we have no ripened  
20 expropriation. If they go off to the domestic  
21 court, if they convince the domestic court that,  
22 yes, we're right, that this tribunal's view of  
23 domestic law is correct, then of course the  
24 municipal denial would be dealt with and nothing  
25 would stand in the way of -- you know, that would  
26 be resolved. The -- this -- the domestic legal  
27 issue would have been resolved.  
28 Now, Article 1121 does not on whatever  
29 reading its given make irrelevant these facts  
30 of -- that Metalclad both contracted to do this  
31 when they bought this investment and did it in  
32 respect of these very -- this -- these very  
33 events.  
34 And as I -- as I mentioned, not -- not  
35 hearing -- other than this defence about the  
36 tribunal was entitled to ignore that, the first  
37 you heard of the legal remedies available in  
38 Mexico from Metalclad's counsel was this -- this  
39 morning when you heard that it was the federal  
40 authorities that ought to have initiated a  
41 constitutional challenge.  
42 And it -- and again, in dealing with this

43 overall question has this tribunal done its job,  
44 in my submission its failure to examine those  
45 facts, to consider them as totally irrelevant and  
46 to -- failure to deal with the significance in  
47 international law of the existence, exercise and

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1 abandonment of remedies has not done its job.

2 Now, another point was made by my friends  
3 with respect to this issue of local remedies.

4 And -- and it was -- annex 1120.1 was pointed to.

5 And annex 1120.1, on the basis of this it was  
6 suggested -- it was suggested that an investor  
7 should be very careful before they exercise local  
8 remedies in Mexico because of the terms of -- of  
9 this provision.

10 My friends in making those submissions failed  
11 to understand a fundamental principle of Mexican  
12 law that is entirely different from Canadian and  
13 United States law, and it's as follows: Under  
14 Mexican law a treaty like the NAFTA becomes  
15 domestic law. It does not need legislation to be  
16 implemented. And I'll come back to the situation  
17 in Canada and the United States. It becomes  
18 Mexican domestic law.

19 So in Mexico, and in Mexico alone of the  
20 three countries, it is open to anyone, because  
21 it's domestic law, to seek to allege a violation  
22 of the NAFTA itself in the domestic courts in  
23 Mexico. It's part -- this is part of Mexican  
24 domestic law.

25 And what annex 1120 deals with is a situation  
26 where an investor attempts to do that, rely upon  
27 the NAFTA in a Mexican domestic court, or an  
28 alleged violation of the NAFTA, and also go to a  
29 Chapter 11 arbitration panel and rely on the  
30 violation of the NAFTA, and it speaks to that  
31 situation.

32 Now, of course, again it has no application  
33 to the facts of this case. This investor did not  
34 allege a violation of the NAFTA in the Mexican  
35 domestic courts. This investor alleged a  
36 violation of the Mexican constitution in a writ of  
37 Amparo, a different law than this.

38 This annex is only necessary in the case of  
39 Mexico because under Canadian law treaties are not  
40 self-executing. They are not implemented as  
41 domestic law unless Parliament passes legislation,  
42 in some cases the legislative assembly passes

43 legislation making them part of domestic law.  
44 And you'll recall, Mr. Thomas took you  
45 through it, that that happened with respect to  
46 those changes required to Canadian law to  
47 implement Chapter 19 of this agreement.

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1           There were consequential amendments that are  
2 now part of domestic law to implement those  
3 changes. But Article 1105, Article 1110 are not  
4 Canadian domestic law.

5           In the United States it's slightly more  
6 complicated. The NAFTA is what's called a  
7 congressionally approved executive agreement under  
8 U.S. law and, with that status, is not  
9 self-executing in the United States. It -- it  
10 too, as in Canada, has to be implemented by  
11 legislation.

12           Things that are treaties which are ratified  
13 by a two-thirds vote of the Senate, treaties under  
14 U.S. law are self-executing. This is not one of  
15 them. And -- and for that reason in both Canada  
16 and the United States the NAFTA's not part of  
17 Mexican (sic) domestic law, but in Mexico it is  
18 and that's the reason for annex 1120.1.

19           And again, it's -- although my -- counsel for  
20 Metalclad relied upon it as a defence for the  
21 proposition that it was appropriate to ignore  
22 Mexican legal remedies, it -- it has no  
23 application. There were no Mexican legal remedies  
24 attempted to be initiated in the domestic courts  
25 of Mexico alleging a -- a direct violation of the  
26 provisions of the -- of the NAFTA.

27           Now, in its response to one of your  
28 questions, My Lord, the -- well, I'll come back to  
29 that.

30           I'll deal with the point that was made that  
31 these are not jurisdictional errors as they only  
32 involve the interpretation of Article 1121, that  
33 the tribunal -- that my friend's saying -- okay.  
34 Well, all right. Let's assume that the tribunal's  
35 got it wrong, again with respect to Article 1121;  
36 this is not jurisdictional. And in my submission  
37 it is jurisdictional for this reason:

38           Article 1121 is part of Section B of  
39 Chapter 11 and is one of the -- what I would call  
40 the constating provisions of the jurisdiction of  
41 Chapter 11 tribunals. It is one of the provisions  
42 like Article 1116 and 1117 that gives these

43 tribunals their jurisdiction.  
44 And Your Lordship knows that in the analogous  
45 context of the powers -- and -- and I say  
46 analogous. I don't say it's exactly the same.  
47 But in the analogous context of a -- for example,

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1 another subordinate body that has a limited  
2 jurisdiction which is constrained by its  
3 constating provisions, like a municipality in  
4 Canadian law, Your Lordship is aware, and I took  
5 you to the Rascal case in which the Supreme Court  
6 of Canada has recently confirmed that the  
7 correctness standard is applied to review of a  
8 tribunal's interpretation of a provision that  
9 gives it jurisdiction.

10 Once it has jurisdiction, and it's within the  
11 scope of its powers, then the exercise of those  
12 powers may be subject to a different standard of  
13 review. But on the question of its jurisdiction,  
14 a correctness standard is applied to review.

15 And in my submission the misinterpretation of  
16 Article 1121 and its effect somehow to make  
17 irrelevant all of these -- the existence, exercise  
18 and abandonment of local remedies was a  
19 jurisdictional error.

20 Excuse me.

21 This -- this particular jurisdictional error  
22 was compounded in this case by not only ignoring  
23 the local remedies, the domestic remedies, but by  
24 this tribunal seeing itself as a Mexican domestic  
25 court and seeing itself as required, a central  
26 issue, to resolve fine issues of Mexican domestic  
27 law.

28 So the -- the two errors of jurisdiction are  
29 interrelated. And as interrelated, they both --  
30 both involve what I started out with, which is the  
31 proposition that the tribunal has identified the  
32 incorrect applicable law and basically has done a  
33 job not assigned to it by the consent of the  
34 party -- of the parties to the -- to this  
35 arbitration.

36 Now, My Lord, I'm about to move on to a new  
37 topic and I think it would be, from my  
38 perspective, if it's convenient for Your Lordship,  
39 to take a slightly early break and -- and resume  
40 tomorrow morning.

41 THE COURT: Particularly in view of the fact that we  
42 weren't even planning on sitting this afternoon

43 I --  
44 MR. FOY: Thank you, My Lord, yes. And I apologize  
45 for the miscommunication in that regard, it  
46 appears to have been mine.  
47 THE COURT: It mattered not. It didn't cause any

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1 significant problems.

2 So we will adjourn for the day and reconvene

3 at 10 tomorrow morning.

4 THE REGISTRAR: Order in chambers. Chambers is

5 adjourned until the 2nd of March at 10 a.m.

6

7 (PROCEEDINGS ADJOURNED AT 3:55 P.M.)

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