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

THE REGISTRAR: In the Supreme Court of British Columbia at Vancouver on this the 26th day of February 2001, in the matter of the United Mexican States versus Metalclad Corporation, My Lord.

THE COURT: Yes, Mr. de Pencier.

MR. de PENCIER: Thank you, My Lord.

At the outset of the proceedings I indicated that I would be joined by a colleague. She is here, Kinnear, initial M., general counsel with the trade law division of the Department of Justice and the Department of International Trade.

THE COURT: Thank you.

MR. de PENCIER: Foreign Affairs and International Trade.

THE COURT: Mr. Giles.

MR. GILES: My Lord, at the outset I would like to express my appreciation to the Court and my learned friends representing Metalclad for allowing me to interrupt their submissions. It's a great convenience to have a fixed time.

My Lord, I filed -- or had filed the -- an outline of my submissions last Friday. And as a matter of fact, the previous Monday I had supplied the other parties with a draft. And the copy I filed on Friday is substantially the same, fine-tuned.

I also have this morning a book of authorities which accompanies the submissions. And in the submissions there are reference to tab numbers which correspond to the tab numbers in the book.

My Lord, there are two preliminary observations I wish to make, and the first is that Quebec's submissions are directed to the question of law raised by the award. It takes no position on the findings of the award regarding the merits of the case or whether the tribunal erred in its decision on those merits. And that point is made in the paragraph numbered 2 of my submission on page 1.

Quebec intervenes on the ground that it could

in the future be prejudiced by the effects of arbitral decisions based on reasonings -- reasoning similar to or derived from the reasoning of the award which is at issue in this petition. And that point is made in the paragraph numbered 1 of my outline.

My Lord, the submissions Quebec wishes to make are organized under three headings, and they are summarized at page 1 of my outline. The first is "State Responsibility and Municipal Law," and there are three submissions under that heading that Quebec wishes to make. And it might be useful if I gave you a reference in relation to each of these submissions or a reference to the paragraphs of the award which concern Quebec and give rise to those particular submissions.

And under heading (A) "State Responsibility and Municipal Law," the submission in paragraph 1 under that heading arises out of Quebec's concern with what is found in paragraph 73. And the submission in paragraph (ii) arises out of Quebec's concern with what's found in paragraphs 82, 92, 93 and 105. And submission number 3 arises out of its concern with what is found in paragraphs 88 and 89.

Under heading (B) "Transparency and the Minimum Standard," there are two submissions. And the first arises out of Quebec's concern with what's found in paragraph 76 and the second with what is found in paragraphs 99 and 100.

And finally under the heading "Expropriation," Quebec's concern arises out of paragraphs 104, 106 and 107.

Turning, if I may, to the first heading which is set out in paragraph 2 (sic) and the -- the -- which is "State Responsibility and Municipal Law," and the first of Quebec's three submissions under that heading is that, and I'm reading, the international law doctrine of State responsibility is not a ground for finding there has been a breach of international obligations by the State. It is, to the contrary, a consequence, and I stress these words, of an independently established breach of an international obligation.

In my book I have a copy of the award at tab 21. No doubt Your Lordship has it elsewhere as

well, but in my book it's at paragraph 21.

And in connection with this first submission, I refer, as I have said, to paragraph 73. And in that paragraph, which is under the heading "Responsibility for the conduct of state and local governments," the tribunal said that a threshold issue is whether Mexico is internationally responsible for the acts of SLP and the municipality. And it refers to a concession made by Mexico, and in particular it says four lines down:

> "[Mexico] was, and remains, prepared to proceed on the assumption that the normal rule of state responsibility applies..."
>
> And then the tribunal said this:
>
> "...that is, that the Respondent can be internationally responsible for the acts of state organs at all three levels of government."

Now, it's Quebec's submission that that is not an accurate statement of the normal rule of State responsibility, because in Quebec's submission it states it too broadly. The normal rule of State responsibility applies in my submission only to acts of the State organ that constitute a breach of a treaty obligation imposed on the State organ, be it municipality or province, respecting a specific matter in issue.

Now, I'll come back to the rest of this paragraph later in my submission, and particularly when I deal with three other submissions I want to make; that is, with the submission respecting deference to municipal law, the submission with respect to the investor's duty of due diligence, and the submission with respect to transparency, because it is my submission in each case the tribunal appears to have taken into account what I submit is its mistaken view of the nature and extent of the normal rule of State responsibility.

Now, if I may return to my outline with ref -- with ref -- with respect to what I submit is the normal rule, in paragraph 4 I -- my -- I state my submission this way: The responsibility

of a State for acts of State organs at all levels of government under the normal rule of State responsibility is not a basis in itself for finding that a State has breached its obligations under the NAFTA.

And I can pass over paragraphs 5, 6 and 7, because they're covered by what I've already said. And I go to paragraph 8, which is the substance of my submission. I say the doctrine of State responsibility does not establish breaches of international law. It is a consequence, not a cause, of an independently established breach of international law. And I would add "by the province" or "by the State organ."

Now, I'll pass over the Factory case because the -- the point made in it is summarized by the Kinsella article to which I refer. And that's found at tab 5 of my booklet of authorities, particularly at page 32. And at that page Your Lordship should find underlined the passage that I want to stress. Page 32, under paragraph 1, heading "State Responsibility":

> "Thus, the law of state responsibility is not concerned with the content of international law (i.e., what the rules are that states should not breach), but rather with the consequences of a violation of international law by a state."

In the result -- and this submission is in paragraph 9 of my outline -- the action of a province or a State must itself constitute a breach of international law before a party to a treaty may be held responsible for it under the principle of State responsibility.

Furthermore, where this is a breach of international law, in order for international responsibility to arise, the -- the internationally wrongful act must be attributable to the State under international law.

Now, I submit the section of NAFTA which sets out the central government's responsibility for the acts of the regional government is Article 105. And that's -- incidentally, the NAFTA provisions are found at tab 1. And this particular one is at page 4:

"The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance..."

That is the provisions of the agreement.

"...including their observance...by state and provincial governments."

The question is the province's or the municipality's compliance with the requirements of international law; that is, the province or the municipality's compliance with the provisions of NAFTA.

And so my submission is, and it's stated in -- in paragraph 11, it is by interpreting and applying this section to a particular case involving State or municipal measures that the tribunal should deter -- should determine whether the conduct of the federal State concerned is in conformity with the international obligations stated in the agreement.

In doing this it is submitted -- and this, in the submission of Quebec, should be the procedure, if you like, or the steps in the examination of the question -- the tribunal should, (a) -- and this is the starting point, what obligations the NAFTA imposes on the State or municipal governments respecting the specific matter in issue, first it looks to the obligations imposed upon the provincial government; secondly, whether the State or municipal government has acted in accordance with those obligations; thirdly, if there has been a violation of the provision of NAFTA by the State or municipal government, what necessary measures should the central government have taken in order to ensure the provincial and local governments observed those provisions; and finally, whether the central government has in fact taken such measures.

And it is submitted in paragraph 12 that it is only following such an examination or procedure that an arbitral tribunal should determine whether or not there has been a violation of NAFTA based

on a provincial or municipal action.

And that is the submission that Quebec wishes to make, the first submission it wishes to make, under the subject of State responsibility and munici -- municipal law.

The second submission is on page 5, Roman numeral 2, international law and municipal law exist in separate spheres of jurisdiction. And as a matter of international law, international tribunals must show deference to competent local authorities when required to make findings of municipal law.

Now, My Lord, in paragraph 14 is a reference to the paragraphs of the awa -- the award that concern Quebec. And it is submitted that a tribunal does not have authority to make findings on the correctness according to municipal law of the reasons underlying a governmental decision. And the paragraphs, as I've said, which give rise to Quebec's concern are set out there. And if I could just take a moment to refer to them, looking at tab 21 first, paragraph 86. There the tribunal expressed the opinion that:

> "Even..." is -- even if Mex "...Mexico is correct that a municipal...permit was required..."

And that's the first line of 86, and dropping down four lines:

> "...the denial of the permit by the Municipality by reference to environmental impact considerations in the case of what was basically a hazardous waste disposal landfill was improper, as was the municipality's denial of the permit for any reason other than those related to the physical construction or defects in this site."

In paragraph 88 -- 92, I should say, the -- the tribunal says:

> "The Town Council denied the permit for reasons which included, but may not have been limited to..."

And I didn't read those. But at the last sentence it says:

"None of the reasons included a reference to any problems associated with the physical construction of the landfill or to any physical defects therein."

And then paragraph 93, over the page:

"The Tribunal therefore finds that the construction permit was denied without any consideration of or specific reference to construction aspects or flaws of the physical facility."

And finally, 105; the tribunal makes a finding which appears at least as -- to Quebec and as reason for its concern, made a finding with respect to internal domestic law governing the distribution of powers in a federal -- in a federal State. In 105:

"The Tribunal holds that the exclusive authority for siting and permitting a hazardous waste fill [sic] resides with the..." Meximum "...Mexican...government."

Now, before I go -- go further, My Lord, it would be useful, I think, if I stated Quebec's concerns and the reasons for its concerns with respect to these findings, and that means going ahead in my outline on this issue to page 8.

And I should deal now with paragraphs 20 to 23 which highlight Quebec's concern in respect to what the tribunal did in the paragraphs I referred to. Paragraph 20, the constitutional division of powers within a federal State goes to the heart of a State's internal law. There is no class of law with a stronger claim to fall within the exclusive jurisdiction of States.

If international tribunals acting without the benefits of the evidence that could be presented to a domestic court and the benefit of full appellate review had the power to make findings on the allocation of powers between the levels of

government in a federal State and to assign consequences based on those findings, there is a grave risk that the distribution of powers in all federations will be affected both de facto and de jure. This is so because the domestic courts will thereafter be invited to reconcile domestic law on the one hand and the State's international obligations on the other.

It is submitted that in those circumstances there will be a grave risk that decisions by international tribunals on the allocation of powers between levels of government in a federal State will result in a greater centralization of powers in every federation. And this is matter which has profound appli -- implications for a regional government such as Quebec which enjoys areas of exclusive competence and authority under the domestic constitution.

If I may go back to paragraph 15, I thought it was useful for your -- for me to put before the Court those concerns before I developed my submission.

THE COURT: Just before we go back to paragraph 15, why do you say that it will result in greater centralization of the powers in every federation? Doesn't it depend on how the international tribunals would interpret the division of powers?

MR. GILES: Yes, My Lord. But I put it that way because I'm having regard to the -- to some extent to the doctrine of State responsibility. And in -- if you -- in -- in respect of that doctrine, together with this concern -- Your -- Your Lordship is quite right of course, it depends upon the particular -- the particular construction.

But I say, number 1, more often than not it is liable to result in greater centralization. And also my learned friend Ms. Colvin reminds me that the provincial governments are not before the international tribunals, and they're not represented in that respect, so the -- there is a concern that their point of view and their concerns about any encroachment --

THE COURT: Oh, I can see the concern, but I -- I think -- I'm just going to change the word "will" in your outline to "may."

MR. GILES: "May." And I -- I accept that, My Lord.

Now, if I may go back to my submissions with that background, it's in paragraph 15 where I submit that it's a clear principle of international law that international tribunals should avoid encroaching on the sphere of municipal law. The principle is illustrated in some of the earliest cases of the Permanent Court of International Justice, the precursor to the International Court of Justice. It is set out in the Nottebohm case, and I set out the quotation. And if I may just read the -- the sentence beginning in the third line:

> "[I]t may be said that it would not be in conformity with the function for which the Court is established if it proceeded to examine and decide whether the competent authorities of Liechtenstein have applied the various provisions of their Nationality..." Act "...of 1934 in the correct manner."

Under that I refer to a -- a number of cases which have passages to the same effect. The first is found at tab 7, and I have outlined the pertinent passage at page 181. I don't propose to turn it up, but at page 181 of tab 7, the matter it -- is referred to the same effect. Similarly tab 8 at -- at page 19, there is an underlying passage.

And at tab -- tab 9, I would like to take a moment to refer you to page 19 of tab 9, which is the certain German interests case. And the passage I would adopt as part of my submission is found at page 19, should be underlined in Your Lordship's book. And if I may just read the second -- or the third sentence, starting at the beginning of the third line that's underlined, because I wish to stress that:

> "From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do leading decisions or administrative measures."

And so I -- I make two points: The first is, if it's a fact then the finding must be based on evidence of what the law is, not in my submission on the tribunal's determination of the effect of the law. It's a matter of evidence as to -- because it's a fact which must be considered by a tribunal, but it's a mistake for the tribunal itself to adjudicate on -- on the meaning of the law.

And the second point that's important is when the law is determined as a fact, the question whether has -- it has been obeyed or not or complied with or not is a matter, at least in the first instance, for the internal courts and not in the first instance for the international tribunal.

And at tab 10 there's a helpful passage in the Brazilian federal loans case at page 46. And I've underlined the passage as well, and it's in the -- if I may start reading the third line of the underlined portion:

> "For the Court itself to undertake its own construction of..." munici "...municipal law, leaving on one side existing judicial decisions, with the ensuing danger of contradicting the construction which has been placed on such law by the highest national tribunal and which, in its results, seems to the Court reasonable, would not be in conformity with the task for which the Court has been established and would not be compatible with the principles governing the selection of its members."

Now, the first point is covered by these authorities, the question of internal law is one of fact for the tribunal; and the second, that the tribunal, with respect to whether or not it is being complied with, must show deference to the domestic courts.

And the second point is covered in paragraph 16 of my outline, the next paragraph. Where it is necessary for an international tribunal to apply municipal law, it must show deference to the decisions of domestic courts and to competent

local authorities within the sphere of municipal law.

And again, I refer to three cases; and if I may just give you the tab numbers and the pages: Tab 10, page 46, the passage is -- is marked; tab 11 at page 124; and tab 12 at page 47. Tab 12, I might say, is referred to by Mexico in paragraph 293 of its submission.

And if I may just turn up one of those, that's tab 11, and invite you to look at page 124, and there is -- there are three paragraphs underlined. In fact, they go over to the next page, 125. And if I may just read the first one:

> "Once the Court has arrived at the conclusion that it is necessary to apply the municipal law of a particular country, there seems to be no doubt that it must seek to apply it as it would be applied in that country. It would not be applying the municipal law of a country if it were to apply it in a manner different than that in which the law would be applied in the country in which it is in force."

And I note in paragraph 17 that this duty of deference has been reaffirmed by the appellate body of the World Trade Organization. And I -- I won't read the -- take the time to read the quote. This authority is found at tab 13 of my book. And the underlined passages are at pages 303 to page 304.

At -- paragraph 18 is reference to a recognized authority, Brownlie, and he said:

> "Interpretation of their own laws by national courts is binding on an international tribunal. This principle rests in part on the concept of the reserved domain of domestic...domestic jurisdiction and in part on the practical need of avoiding contradictory versions of the law from different sources."

And that reference is found at tab 14 of my book. I won't turn it up, but I refer particularly to the underlined portions at page

40.

And then I make the submission the -- the principle that, in international law, a federal State cannot raise its internal division of powers as a defence to a breach of international obligations does not allow -- allow -- does not allow an international tribunal to equate a breach of the State's domestic law in and of itself to a breach of international law. And in my submission this tribunal's view of the doctrine of State responsibility gives rise to the concern that this is what they did. And if so, in my submission they were mistaken.

Now those are my submissions under the -- well, my points under the second submission which is --

THE COURT: If I can just interrupt you before you go on, when I was reading your submission, I somewhat ironically was questioning myself: Well, what does it mean within the context of this particular case? And you've quite properly stayed away from getting involved in the issues between the parties, but if I could ask you this: In this particular case the tribunal was faced with a situation where it found that -- that Metalclad did not need to exhaust its domestic remedies and therefore it did not receive a court determination as to the State of the municipal law.

And then it was faced with a situation that -- that there were no decisions before it of what a domestic court would rule with respect to the municipal law. It had expert opinion before it as to what Mexican law was and then it proceeded to make it -- make its finding. What -- what do you say the tribunal should have done when faced with that type of a situation?

MR. GILES: Well, firstly, I say a tribunal in those circumstances should determine what the internal law is as a matter of fact, not a matter of its own determination or its own adjudication. And if --

THE COURT: But doesn't it do that by looking at the expert opinions and choosing one over the other? Isn't that really a finding of fact? Although they can say that they preferred the interpretation one over the other, by doing that, aren't -- aren't they really just making a finding

of fact?
MR. GILES: If -- well, that is a matter, I suppose, of construction of the award. And it -- my -- my submission is addressed to the situation where the tribunal, it -- if you properly characterized award, determined -- made the inquiry and determined themselves what the law, internal law, was. That is to say, in this case it appears that they concluded that these -- this permit could not be refused for any reason unrelated to construction infirmities.
THE COURT: Um-hum.
MR. GILES: And -- and they made a determination that the central government in Mexico alone had responsibility in respect of ecological matters or environmental matters.

Now, my submission is if that was a determination that the tribunal made as a matter of -- of its determination of what the law is, much -- much the same way as Your Lordship would determine what -- what the law is, then that -- that was a -- wrong and a serious mistake, and one that would give rise to the gravest concerns about a State such as Quebec, or any province, because in effect this was the international court, if that is a correct construction, determining for itself what the law of this muni -- municipality and this -- this State was.

Secondly, that given that the law is a question of fact for its determination, then the -- the question of whether or not the law has been followed or not followed, again in my respectful submission, would be a matter solely for the determination of the internal authorities, the domestic court. And that gives rise, in my -- prima facie to the tribunal standing back so that the parties may have an opportunity to exhaust any -- whatever rights there were -- there are to have the internal courts determine the -- the question of whether its law had been violated or not.

So those -- those would be my submissions assuming that characterization of the award.
THE COURT: On that latter point, are you -- are you saying that although the tribunal found that it wasn't necessarily for Metalclad to have exhausted its domestic remedies, that -- that the tribunal

should have -- properly required Metalclad to at least have gone to the -- to the next step of getting a -- a court determination of the domestic law, perhaps not having to appeal it, but at least initially obtain it?

MR. GILES: Yes, My Lord. In preference to going directly to -- saying, A, the -- this is the effect of the law in Mexico and, B, the refusal of the permit was a violation of Mexican law. It -- it -- an International Court of Justice is not a trial court, a court of first instance, for domestic law.

THE COURT: Um-hum. Thank you. Please proceed.

MR. GILES: My -- my third submission under the heading of "State Responsibility, Municipal Law," is on page 9 where I submit that foreign investors under the NAFTA are not relieved of a duty to act prudently by doing their own due diligence.

And I submit that, in paragraph 24, an investor is not entitled to rely on representations by officials of one level of government regarding the legal requirements of another level of government. And the -- the paragraphs of the award I've referenced here are paragraphs 88 and 89. And looking, if I may, at those two paragraphs, paragraph 88:

> "In addition, Metalclad asserted that federal officials told it that if it submitted an application for a municipal construction permit, the Municipality would have no legal basis for denying the permit and that it would be issued as a matter of course."

Then it -- it -- the tribunal made this observation:

> "The absence of a clear rule as to the requirement or not of a municipal construction permit..." and "...the absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit, amounts to a failure on the part of Mexico to ensure the transparency required by NAFTA."

Now, in my submission those two passages reflect a mistaken view of State responsibility. For there to be State responsibility there must be breaches of NAFTA by the municipality attributable to Mexico. And I raise the question whether these matters, the absence of a clear rule, as well as the absence of established practice, are these breaches of NAFTA by the municipality. And that -- that point I make elsewhere in my submissions.

But it's clear that the tribunal is attaching significance to the federal government, one level of government's representations with respect to the requirements of -- of another level.

And I make the submission in paragraph 25 that NAFTA -- the NAFTA does not relieve an investor of the duty to act cautiously and prudently regarding its own investment, nor was it intended to protect foreign investors with blanket protection from disappointment when dealing with public authorities and national courts. And I refer to the Azinian case. It was referred to by Mexico in paragraph 252, and I won't read the passage again. In my book of authorities it's found at tab 15, and the underlined portion in my book is at page 23.

So I submit in paragraph 26 every investor, whether domestic or foreign, is under the same duty to act cautiously and prudently and to exercise due diligence regarding their investment. This duty must be considered particularly germane where the officials in question are speaking outside the area of their own jurisdiction.

Now, the tri -- tribunal referred to Article 10 of the draft articles. And Your Lordship will see that, if I just stop there, at paragraph 73 of the award. And I referred to this before, but I didn't specifically refer to this -- this portion of paragraph 73. More than halfway down the middle there's a sentence that begins with the words:

> "This approach accords fully with the established position in customary international law."

And this approach consists of what I have submitted is a mistaken view of State responsibility, that is too broad a view. And it goes on to say:

> "This has been clearly stated in Article 10 of the draft articles on state responsibility adopted by the International Law Commission..."

And so on, that -- though:

> "...which, though currently still under consideration..."

And then I note with the concern of my client these words:

> "...may nonetheless be regarded as an accurate restatement of the present law..."

And the balance of that paragraph is set out in paragraph 28 of my outline at the top of page 10. And I won't take the time to read that.

But in paragraph 29, and this is the submission, I submit first international law has yet to determine the limits of this principle. And I refer to an authority which I'm advised is the leading authority in the francophone world on international law, and it's found at tab 16. And at page 751 I've underlined the passage upon which -- which I particularly rely. It's -- it's in French. There is no official English version, but I have our own translation at the last document -- or the last page under this tab to the effect -- this is what we say is the translation of what we've underlined in the French on page 751:

> "The practical implications of [Article 10] remain nevertheless uncertain; only practice will enable us to delimin..." delineate "...its extent."

And they -- the submission accordingly that Quebec makes is in paragraph 30. Under current international law, it cannot be assumed that an

act of any official of any organ of a State acting manifestly outside that organ's jurisdiction -- jurisdiction is, regardless of the circumstances, automatically attributed to the State. Although the fact of an official or an organ acting outside its competence can, under certain circumstances, be attributed to the State, it cannot invariably be so attributed.

And then the next sentence is in my submission supported by authority. The act must be performed according to a real or apparent power, or that power must be exercised as part of the functions of the organ.

And I refer again to the text at tab 5, and particularly the underlined portion at page 33. And I'll just read the second paragraph that is underlined on page 33:

> "An act of an agency of the state may invoke state responsibility, even if the act was beyond the legal capacity of the agency or official involved, as long as the officials 'have acted at least to all appearances as competent officials or organs or they must have used powers or methods appropriate to their official capacity.' The acts of individuals can also invoke the law of state responsibility if such individuals were acting on behalf of the state."

And in paragraph 31 I illustrate the point by saying an illustration of this issue is the question of whether assurances given by an official of a municipality regarding matters outside the jurisdiction of municipalities such as federal legislation could be attributed to the federal government and make the State liable under international law.

The answer in my submission is plainly no. And so I submit it is counterintuitive to suggest that an investor in a federal State would be acting cautiously and prudently in accepting assurances by officials of the central government regarding the exercise of powers by other levels of government.

Now, My Lord, if I may move to my second main

heading, which is transparency and the minimum standard. And there are two submissions that Quebec makes under that heading. And the first is that NAFTA imposes transparency obligations on the parties which are varying rather than uniform. It does not impose a general duty on the central government to correct misunderstandings.

And this submission is a result of Quebec's concern arising out of what is found -- what is found at paragraph 76 of the award, which is in my book at tab 21. And just looking at 76, and there, if I can just read the first six lines:

> "Prominent in the statement of principles and rules that introduces the Agreement is the reference to 'transparency'..."

And reference is made to Article 102(1), which in my book is at tab 1, page 1.

> "The tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party."

Now, in Quebec's submission that statement of the obligation under 102(1) is unjustifiably broad and beyond, we submit, the language of NAFTA.

And I have set out the remainder of that passage in my outline which elaborates on it in paragraph 33. The tribunal said:

> "There should be no room for doubt or uncertainty...once the authorities of the central government of any Party...become aware of any scope for misunderstanding or confusion...it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in..." confident "...in accordance with all relevant laws."

And the first submission or point I take is in paragraph 34, that the tribunal does not cite any specific source establishing a basis in international law for this -- or the transparency obligation it imposes in the award, including the one I've just referred to.

In paragraph 35 I refer to Article -- Article 1131, which is found at tab 1 of my book at page 273. The NAFTA makes it clear that a tribunal established under Chapter 11 must base its decision on the NAFTA itself and on the applicable rules of international law. And I stress that mandatory language is used, and I've set it out:

> "A Tribunal established under this Section shall..."
>
> And it -- under --
>
> "...decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

It's a direct, in my submission, mandate and mandatory requirement of the treaty directed to the tribunal.

And at paragraph 36 I make the point, supported by authority, as a matter of international law international tribunals interpreting treaties cannot create new obligations not agreed to by the parties to those treaties.

The role of an international tribunal is to interpret treaties, not to revise them. And I refer there to the case found at tab 17 of my book. And I've underlined para -- pages 228 to 229. And if I just may take a moment to refer to that, I won't read what I've -- I won't take the time to read what I've underlined, except to point out that, at the end of the underlying passages on page 229, the last sentence is the one I've borrowed in my submission.

> "It is the duty of the Court to interpret the Treaties, not to revise them."

Now, Article 102(2) of the NAFTA, the next article, and that's at tab 1 of my book, page 3, provides:

> "The Parties shall interpret and apply the provisions..."
>
> I stress that word.
>
> "...of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with..." the "...applicable rules of international law."

Chapter 18, tab 1, page 345, the last page under tab 1, publication, notification, administration of laws governs the general transparency obligations of the NAFTA.

Section 1802, which the tribunal refers to is applicable law states -- and I'm sure it's been read to Your Lordship before. I won't read it again. It's enough to say that it requires for prompt publishing or otherwise made available to enable interested parties to become acquainted with them.

Now, paragraph 19 -- 39 of my outline is a point that's made by Mexico in paragraph 246 of its submissions, that -- that -- that, in addition to the general provisions of 18, the NAFTA contains detailed and varied provisions setting out the transparency obligations of the parties. And I won't repeat that because that is an argument that they have made, but I associate myself with it.

In paragraph 40 I emphasize that in -- Article 102 makes it clear that it refers to transparencies set out in the remainder of the agreement, not to an independent standard of transparency. And it states:

> "The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favoured...treatment and transparency..."
>
> And it is Quebec's submission that the

results of 102 being interpreted as imposing transparency obligations on all sections of NAFTA would be to effectively subsume the variable standards in fact provided by NAFTA into a single standard. And you look at paragraph 76 of the award to see a description of the single standard which the trib -- appears to be accepted and acted upon by the tribunal.

I won't repeat what's in paragraph 42, because it's an argument Mexico has already made. A single transparency standard would impose on the parties to the NAFTA, including the province -- provincial and local governments of the parties, new transparency obligations regarding investment. And reference is made to Chapter 7, 9, 10, 14 and 16 which show they're all varying in different standards.

And I submit, in 43, a single transparency standard creates a substantial obligation different from the obligations specifically stated in the NAFTA.

And I submit that under the express terms of NAFTA, if there are any transparency obligations applicable regarding investments, they seem to be those in Chapter 18. But I say the transparency obligations set out in the award in 76 is far wider than the obligations set out in Chapter 18.

And I attach importance to the submission made in paragraph 45. A requirement there be "no room for doubt or uncertainty" regarding all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made or intended to be made under the NAFTA would impose on governments, including provincial and local governments, a burden that is not found in the express terms of NAFTA.

And I elaborate that submission by saying nowhere in Chapter 11 is there imposed an obligation on the central government to consult with the regional governments to make sure a common position is determined each time there is or may be a misunderstanding about an issue. And the NAFTA does not require the central government of each of the parties to create a centralized national information office to gather information from every level of governments regarding investment measures, which would be a reasonable

inference to be drawn from the -- the -- the standard the tribunal appears to have accepted.

And in paragraph 47, nowhere in Chapter 11 is there imposed an obligation on State, provincial and local governments to inform the central governments of their measures relating to investment. Their sole obligation in my submission, if any, under 1802 is to publish these matters or make them otherwise available.

And finally, I submit that if there is any transparency component to the minimum standard in 1105 arising from customary international law, this obligation would, at the most, be the obligation to publish laws or otherwise make available. However, the tribunal did not base its reasoning on any evidence of the existence of such a rule of customary international law.

If I may now go to the second submission I make under the question of transparency of minimum standards, and that is that an administrative action, such as a denial of a construction permit, cannot constitute in itself a violation of 1105 on the sole ground it is in violation of municipal law.

Now, it is submitted in paragraph 49 that a municipality's refusal to issue a permit, even -- even if it may be in violation of internal laws, does not in itself constitute failure to accord an investor treatment in accordance with international law, including fair and equitable treatment. And the paragraphs in this connection in the award that cause concern are 99 and 100. And if I might invite you to look at those, excuse me, in paragraph 99:

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

In paragraph 100:

> "Moreover, the acts of the State and the Municipality - and therefore the acts of Mexico - fail to comply with or adhere to the requirements of NAFTA...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 (such as the Municipality's stated permit requirements) does not justify failure to perform a treaty."

Now, having read that, it is important, I think, that I -- I -- I indicate to the Court the ambit of Quebec's submission, and that's found in -- under this heading. And that's found in paragraph 53, which is on the next page of my outline, page 16. And it's the -- you could call it surgical in the sense that it's directed to one point. And we say that Quebec takes no position on whether the facts of this case constitute a violation of the standard of fair and eq -- equitable treatment guaranteed by 1105 of the NAFTA. However, it submits that the requirement to get a permit or its denial cannot constitute a violation of fair and equitable treatment guaranteed by 1105 on the sole ground the permit was wrongly refused under municipal law, particularly where the domestic remedies have not been exhausted.

And with that in mind, if I go back to paragraph 50 where I develop the submission that we make, I note that Article 1105 guarantees foreign investments -- investors protection from acts which are not fair and equitable. And subsection 1 provides:

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

What constitutes fair and equitable treatment as included in the minimum standard of treatment is not defined in the NAFTA and has not been, in Quebec's submission, clearly established in customary international law.

It is, however, submitted that Article 1105 must be interpreted restrictively. And I refer to two passages in the Myers case which -- which --

which, to the extent I can determine, have not been read at least to Your Lordship before. They are referred to in Mexico's paragraph 549. That is -- when I say "they are referred to," the case is referred to, but these two passages are -- are not set out. And I should read them because they are important in this connection:

> "When interpreting and applying the 'minimum standard,' a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many..." potential "...potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.
>
> "The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such...in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their...their own borders. The determination must also take into account any specific rules of international law that are applicable to the case."

And in -- in my book of authorities that case is found at tab 18 and the passage is at page 65 to 66.

So if I may go to Articles -- to paragraph 54 and make the point that 1105 does not exist in isolation. There are altogether three independent

standards.

I won't take too much time with this. I believe this has been brought to Your Lordship's attention already.

But there is Article 1102, national treatment; Article 1103, most-favoured-nation treatment; and Article 1105, the minimum standard of treatment.

And I make the submission in 55, the fact that there are two other standards suggests that the standard of treatment guaranteed by 1105 does not hold an expans -- expansive interpretation. If it had a wide scope, protecting foreign investors from every procedural difficulty, the other two standards, as well as other provisions set out in NAFTA, would be re -- redundant.

And finally under this point, we say that the statement in the award -- and again, it's back in paragraph 73, and I quote it. And this is the paragraph Your Lordship may remember which in my submission the rule of State responsibility is stated too broadly, the statement in the award that, quote:

> "The exemptions from the requirements of Articles 1105 and 1110 laid down in Article 1108...do not extend to state or local governments."

Now, in my submission that is a non sequitur. No one, a State or a central government, could rely on such exceptions, because the fact is 1108 only applies to 1102, 1103, 1106 and 1107, and in those cases exempts State and local as well as central governments. But 1108 has no application to Articles 1105 or 1110 regarding either the central government or the regional government.

So -- so the sole point to be made that I make with respect to the minimum standard of treatment under 1105 is that it is not to be given so expansive an interpretation as to include a requirement for a permit, construction permit, or its refusal.

Now, that leaves me with one heading, and -- which I can deal with very briefly, and that's "Expropriation."

The -- the submission that I make in -- that -- the one submission I make under this heading, that indirect expropriation under the NAFTA should receive the same restrictive interpretation it has received under customary international law, is one that has been fully made by Mexico. And in those broad terms, I do not intend to repeat, even though I have developed an argument in my outline. But I associate with -- with Mexico, and I needn't trouble you with anything further on that.

There's only one point that I do wish to make on behalf of Quebec, and that is in paragraph 58. And this is the sole point that I wish to make, and that is Article 1110 of the NAFTA, that's the expropriation article, does not impel a finding of expropriation on the ground the central government has, 1, permitted or tolerated interference with a project that it, and only it, has previously approved and endorsed; or, 2, where a permit otherwise required under municipal law is denied in violation of that law.

Now, I -- I make those points because it appears from the way the tribunal had approached the issue that it found those matters to constitute expropriation.

Now, I -- I have in mind of course that the finding of expropriation doesn't necessarily require a finding of some collateral breaches. There may be expropriation as defined by -- properly defined by the authorities, and then it's a question of compensation. But in this case the -- the -- the tribunal appears to have come to the conclusion there was expropriation because it found these other matters which it -- which it characterized as breaches. And Your Lordship will see that when you look at the applicable paragraphs of the award, that's 104, 106 and 107.

And looking at 104, it -- there -- there is the reference by the tribunal to:

> "...permitting or tolerating the conduct of..." the municipality "...in relation to Metalclad which the Tribunal has already held amounts to unfair and inequitable treatment breaching...1105 and..." thus by "...participating or acquiescing in the

denial to Metalclad of the right to operate the landfill, notwithstanding the fact...the project was fully approved..."

And so on.

So, first of all, we have reference to the -- Mexico permitting or tolerating that matter. And then in 105 -- no, no. Then in 106, as determined above -- this is the second matter:

"...the Municipality denied the local construction permit in..." becau "...in part because of the Municipality's perception of the adverse environmental effects of the hazardous waste landfill and..." geograph "...geological unsuitability of the landfill site. In doing so, the Municipality acted outside its authority."

And Your Lordship has my submission with respect to that, but I'm pointing out now that this is the second leg of finding there was expropriation. This paragraph goes on:

"As stated above, the Municipality's denial of the construction permit without any basis in the proposed physical construction of any defect in the site, and extended by its subsequent administrative and judicial actions regarding the Convenio, effectively and unlawfully prevented the Claimant's operation of the landfill."

And then in my submission 107 shows the reason why Quebec has concern, because the tribunal held:

"These measures, taken together with the representation of the Mexican federal government..."

You have my submission on that.

"...on which Metalclad..." rely "...relied, and the absence of a timely, orderly or substantive basis for the denial

by the Municipality of the local construction permit, amount to an indirect expropriation."

Now, I make no submissions on whether there was expropriation for any other reasons. But in my submission the -- the tribunal was mistaken in finding an expropriation on the basis of those considerations.

Those are my submissions, My Lord.

THE COURT: Thank you, Mr. Giles.

We will now be hearing the submissions on behalf of Metalclad. Before we do that, I'll take the morning break.

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

(MORNING RECESS)
(PROCEEDINGS ADJOURNED AT 11:08 A.M.)
(PROCEEDINGS RESUMED AT 11:25 A.M.)

THE COURT: Yes, Mr. Cowper.

MR. COWPER: Thank you, My Lord. I filed with the registrar, and I think you have, I hope, in front of you all the volumes which were made available this morning.

I thought what I would do at the outset of today is simply locate us in time and place, and tell you how we're going to proceed through the materials, and which counsel are going to take responsibility for which part, and -- and indicate something about timing.

Firstly, let me say that I'm not going to say anything further by way of outline. I didn't intend my comments on Friday to be comprehensive, but I think they are an introduction to our position on each of the central parts of the petitioner's case. There is an outline under tab 1 which Your Lordship can refer to which is very brief.

With respect to the remainder of the volume, you'll see that we've elected to, for the purpose of clarity if nothing else, try to follow the chapters as my friend has organized his material, and so we've done that as much as possible. So we've dealt with jurisdiction under Chapter 2, the standard of review under Chapter 3.

My friend dealt with the excess of jurisdiction and the treatment of 1105 and 1110 separately from the errors of law, and we've done that as well. So you'll see Chapter 4 is the submissions with respect to excess of jurisdiction.

Chapter 5 is our answer to his chapter dealing with failure to have regard to the relevant evidence. And we have, as he has done, separately dealt with the allegations of improper acts, separately in Chapter 6. The issue of full reasons is dealt with in Chapter 7. The errors of law which relate to 1105 and 1110 we've dealt with in Chapter 8, and the scope of relief available to the petitioner in Chapter 9.

I have done something different. And I don't know if Your Lordship had a chance to look at this at all over the weekend, but you may want to make just a mental note that what I've tried to do at the very end is to do something a little different than just asking that the petition be dismissed and try to give you from our point of view what the logical pathway is required by reason of the nature of the issues raised in the petition.

And you'll see under Chapter 9 we deal -- try to deal with that in a logical path, as Your Lordship undoubtedly has seen by reason of the statutes. Depending upon which statute we're in, there are a number of discretionary decisions Your Lordship has to make. And we've tried as best we can to try to identify which ones those are.

The most difficult one for counsel to deal with, because my friend's relying on two different statutes, is to deal with all of the permutations that Your Lordship may find yourself in as you make preliminary decisions.

So I've done the best I can. I haven't been able in any comprehensive way to isolate and decide what matters if Your Lordship found were in error would be appropriate for remission rather than set-aside. I don't think my -- my friend has taken the position that all of the errors would exist if -- if proven would justify setting it aside. At the end of oral argument I'll endeavour to try to do that orally. I haven't at this point intended to or tried to capture that in the

document.

With respect to counsel, I will be dealing with much of the material. Mr. Alvarez will deal with the next chapter, which is Chapter 2, as it relates to the applicability of the international act versus the commercial act. And he'll deliver our submissions in relation to that issue. I'll deal with the second part of that chapter, which is the nature of the Court's jurisdiction under the two statutes.

I'll deal with Chapter 3, which is the jurisdiction to review -- the standard review, I should say, standard of review. And I will deal with the excess of jurisdiction chapter as well.

I'll introduce Chapter 5 but by -- by and large our submissions will be made by Mr. Parrish with respect to the evidence. With respect to the -- Chapter 6, I will deal with Chapter 6. Mr. Greenberg will deal with Chapter 7. And then Your Lordship will have to hear me again with respect to Chapter 8 and closing.

Now, I should say one other thing, My Lord, and we're going to order -- organize it this way: My friend dealt orally with what in his submission were the findings of the tribunal, and I looked at the transcript as best I could on the weekend. There are a number of features of difference between my friend and I which remain between us as to what the tribunal found and did not find.

I propose to deal with that quite extensively, but I thought that would fall in best after we dealt with the applicable statute and the jurisdiction under the two statutes, and before we turn to the award itself. But I could certainly change that order if Your Lordship wishes.

So if that's satisfactory, I'll ask Mr. Alvarez then to deal with Chapter 2.

THE COURT: Yes, Mr. Alvarez.

MR. ALVAREZ: Thank you, My Lord.

My Lord, I'm in Chapter 2, paragraph 20, page 5 of our argument, and I'll take you through this section on the applicable statute.

The petitioner's position is that the International Commercial Arbitration Act properly applies in this matter. It creates a specific regime of limited review for international commercial awards. On the other hand, the

Commercial Arbitration Act, as we've heard and you will hear in greater detail, was conceived of and it is intended to apply to domestic or internal arbitration within British Columbia.

We say that the award in this matter is manifestly international in nature. It arose we say out of a commercial relationship, and I will take you through that.

We say that the narrow interpretation that the petitioner would have you adopt of "commercial" gives rise, first of all, to a broad scope of review which was not intended for arbitrations of this nature, particularly review on the merits by way of an appeal. And we say that the effects of applying the Commercial Arbitration Act would lead to a number of anomalous results which cannot have been intended by the legislature or parties engaging in this type of arbitration.

In summary, my points will be that, first of all, the legislative regime established in British Columbia requires a broad interpretation of the applicability of the International Commercial Arbitration Act, and specifically in this case of the term "commercial" in its relationship to that expression, a "commercial relationship."

NAFTA and specifically Chapter 11 we say creates a relationship of investing between a qualified investor and a State party to NAFTA, in this case Metalclad which invested in Mexico, the host State.

The host State which receives the investment promises to provide certain treatment to investors, and provides them with a right to resolve disputes arising out of their investment in their territory in the -- in the country. And in the event that there's a failure to meet the standard treatment which is promised to investors, there is a right to directly invoke arbitration against the State.

And I'll talk about that right, but the right is independent of any agreement by the home State of the investor. It is exercisable directly against the host State party, in this case Mexico, and gives rise in the event of success to damages against the host State. It is neither diplomatic protection nor is it activity in the courts of any

State.

We say that this relationship created by the treaty and the -- the promise and the consent given by the private party completes an arbitration agreement and constitutes an -- a relationship which falls we say easily within the broad definition of a, quote, commercial relationship under NAFTA.

We say that, in any event, independent of the NAFTA and Chapter 11, the definition of "commercial" in our International Commercial Arbitration Act is very broad and is intended to cover, and does cover, a relationship such as this.

Metalclad invested in Mexico. It undertook an economic activity. And we'll see how investing is listed in the series of relationships or activities set out in article -- or Section 1 of the international commercial act, the International Commercial Arbitration Act. We say that activity in and of itself and the relationship of investing in Mexico gives rise under the broad interpretation we urge you to accept of "commercial" to a commercial relationship for the purposes of the application of the act.

Now, before embarking on a consideration of the applicable legislation, I think it's useful to recall the circumstances in which this arbitration took place and the members of the panel.

You will find -- and I'm not suggesting you need to turn to it now, but you will find the curricula vitae of the arbitrators in Volume 20 of the record, I believe at pages M 1 to M 20. You will notice that Mr. Siqueiros' curriculum vitae is in Spanish. I don't believe we have an English translation. But I'm able to, and I think with my friend's permission, Mr. Perezcano can correct me if I'm wrong, but an example of some of -- and I only select a limited number of things that Mr. Siqueiros has done, is -- he lists that he has been the Secretary-General of the government of the State of Chihuahua, Mexico, and the interim governor between 1956 and '62. He's a professor of private international law at the faculty of law at the National Autonomous University of Mexico. He has been the president of the Inter-American

legal committee of the OAS. He's been an external advisor to the secretariat for external affairs. And he's a highly experienced arbitrator.

That, I think, should give you some idea of his qualifications. As I say, the others of the curricula vitae, which were before the parties at the time the tribunal were selected, are in English.

I think it's also useful to recall, My Lord, that the arbitration took place pursuant to the arbitration additional facility rules, which we will have a look at, and that pursuant to those rules Vancouver was chosen as a place of arbitration. But the parties never travelled here. There were -- no hearings ever took place here. In fact, the hearings took place in Washington, D.C.

Turning now to the International Commercial Arbitration Act itself, as you've heard, it creates a separate regime for international commercial arbitration, and it adopts what is known as the UNCITRAL Model Law, which has been adopted with limited changes throughout Canada in all its jurisdictions, and in fact in Mexico and a number of the United States.

You'll see I've cited a number of authorities which refer to the Model Law. And the Quintette case and the Corporacion Transnacional case both comment on the adoption of the Model Law, the limited regime of judicial intervention and review, et cetera.

I would ask you to look just very briefly, if you would, Your Lordship, to the second reference which is Redfern and Hunter, which you will find in the respondent's authorities at tab 58.

And perhaps just before -- and I would ask you to turn to page 68, and while we're here ask you just to note the importance that the authors attribute, first of all, to the New York Convention, and you'll find that at paragraph 1-121, where they state:

> "The New York Convention represents a vital stage in the shaping of modern international commercial arbitration. No convention since 1958 has had the same impact."

And you will hear later from me that in fact the New York Convention is at the heart of the international commercial arbitration system as we know it today.

Turning then to the comments of the authors on the Model Law, you will see that at page 69 at paragraph 1-123. And you'll see that the Model Law came out of an original proposal to reform the New York Convention. However, that was not done, and a -- a separate text was adopted.

You'll see that the authors state that the Model Law has been a major success. And in 1995 they state that 25 States had adopted it. In fact, you will see in the materials, which I'll refer you in a minute, that in fact now I believe approximately 33 States have adopted the Model Law. And you'll see the approving comments and views of the authors on the Model Law, which is the regime that we have adopted in British Columbia.

Your Lordship will find at our tab 36, and we don't need to turn to it now, but you will find there a recent listing of the States which have adopted the Model Law according to UNCITRAL which keeps a -- an official record of those States which it considers to have adopted the Model Law.

And, as I say, I understand there are 33 States and then a number of States within the United States, I believe 4 States. But both Canada and Mexico have adopted the Model Law. Interestingly, Mexico applies the Model Law to both domestic and international commercial arbitrations.

When one considers the interpretation of a statute, and particularly this statute, you'll see that certain principles are applicable. And I've set those out in the recent decision of the Supreme Court of Canada in R v. Sharpe which sets out familiar principles of statutory interpretation. You'll note particularly the reference in the Interpretation Act that an act:

> "...must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

And refers to the title and preamble of an enactment.

And if one reviews the preamble of our International Commercial Arbitration Act, and in fact some of the legislation that's looked -- I'm sorry, the case law that has looked at it, including the Quintette case, I think one can summarize that the intention is to create a hospitable legal environment and encourage the holding of international commercial arbitrations in British Columbia, as well as to establish the regime of the Model Law for judicial intervention and review of international commercial arbitrations. You'll see that that intention is reflected in the comments of the Attorney General when he introduced the Model Law back in May of 1986.

You've also seen and my friends have referred to the fact that in interpreting the Model Law, the Court is specifically entitled to look at the working papers of the working group which prepared it. And you have in the front of you in, I believe, the petitioner's tabs two of the key documents which did that, the analytical commentary and the report of UNCITRAL on its Model Law dating back from 1985.

Now, one of the key aspects of the regime established by the UNCITRAL Model Law is its limitation of judicial review or recourse against awards as the sole basis to challenge an award. And in that regard, My Lord, I'd like to turn you, please, to an article by Dr. Gerold Herrmann, who was the Secretary-General throughout most of the development of the Model Law. And if you could look at petitioner's tab 109 to start with --

THE COURT: This is the petitioner's?

MR. ALVAREZ: Yes, My Lord. We've tried not to duplicate, and so I'll be going through two different sets of -- I think it's one of the smaller of the binders. Yes.

THE COURT: Yes, I have it.

MR. ALVAREZ: Thank you, My Lord. And if you could turn to pages 7 and 8, I'll start there.

In this article -- and you will see there is another article we've cited when Dr. Herrmann came to British Columbia to inaugurate the first

implementation of the Model Law.

In this article at pages 7 and 8 he talks about some of the purposes for the implementation of a Model Law and specifically this Model Law. And you'll see that at the bottom of page 7 and going on to page 8 he talks about the surprises and inconvenience of mandatory rules of local law for parties that are involved in international commercial arbitrations. And you'll see at the -- the second half of page 8 he talks about unexpected results and problems ensuing from non-mandatory or non-existent provisions. And he says:

> "Not only the mandatory provisions of the applicable law may be a source of disappointment to the parties, but also the non-mandatory ones."

And if you look, and I direct your attention specifically to the bottom of that page where he talks about adverse effects of surprises by local laws, he says:

> "In international commercial arbitration, as in any international context, at least one of the parties is and often both are confronted with unfamiliar provisions and procedures. The above problems and undesired consequences, whether emanating from mandatory, non-mandatory or from a lack of pertinent provisions, are thus aggravated by the well-known fact that the national laws on arbitral procedure differ widely."

And then I draw your attention as well to the penultimate paragraph in that section which commences with:

> "The applicable law, whether or not known to the parties from the outset, tends to suffer a weakness which may be regarded as the main reason and justification for UNCITRAL's Model Law project. Apart from possibly being outdated, fragmentary or otherwise in need of revision, it is likely

to have been drafted primarily, if not exclusively, for domestic arbitrations. It should be noted that this is an understandable and legitimate approach by any national legislature since, even today, the bulk of cases governed by such national laws would be of widely domestic nature."

And then he goes on and says:

"The unfortunate consequence, however, would be to have voiced traditional concepts and local peculiarities on what is essentially an international process."

And I will be submitting -- and we will be looking at the Commercial Arbitration Act in due course. And I say that's precisely the problem with the Commercial Arbitration Act. And I think this should inform your interpretation of our international act which, as we know, expressly adopted the Model Law and has been commented on by our courts.

And then turning, My Lord, to the regime of restriction of judicial review, you'll see that Dr. Herrmann deals with that at the bottom of page 24. And he talks there about how national laws often equate arbitrations with court decisions and provide for a variety of means of recourse against arbitral awards. And you'll see that there are often extensive lists of ground which vary widely from legal system to legal system. Then he goes on to say:

"The Model Law attempts to ameliorate this, this situation, which is of great concern."

And you'll see that he provides that there's only one exclusive method of challenging arbitral awards under the Model Law, and that is Article 34 which is our Section 34 of the Model Law. He goes on to state:

"It is not only the sole recourse provided by the Model Law but also, by virtue of the special character and priority of the Model

> Law, the only one available at all; i.e., to the exclusion of any other means of recourse regulated in procedural law of the State in question."

He goes on to state in the next paragraph the importance -- and this is one of the key aspects of the Model Law, one of the great progresses of the Model Law -- was to tie these exclusive grounds for setting aside to the grounds for refusal of recognition and enforcement of an arbitral award under the New York Convention. And I'll discuss that later.

But essentially what it does is it creates a harmonious system so that there's some sense on the grounds on which an award can be set aside at an international standard as opposed to setting aside of international awards on local domestic peculiarities.

And you'll see that the Model Law not only adopts the same grounds as the New York Convention, but it imports the New York Convention provisions into its chapter on enforcement. So we'll see that the Model Law has Articles 35 and 36 which essentially are the same as Articles 4 and 5 of the New York Convention. So there's a -- a very close harmonization which was intended from the outset between the Model Law and the New York Convention.

This intention we say of limiting judicial review is clearly reflected in the preamble in Section 5 of the international act, which you will see says:

> "No Court shall intervene, except as provided in this act."

And then goes on, and in fact goes beyond the Model Law to exclude any review under the Judicial Review Procedure Act or otherwise. And then you'll see Section 34 of the Model Law included at -- in our Section 34 as well.

You will know, and we will see in due course, that the Quintette case in this province was the first to look at this scheme and went directly to the analytical commentary on the report of UNCITRAL in developing its test of a very limited

scope of review and a high degree of deference to international commercial arbitral awards.

Now, I would refer you only to one other authority, My Lord, and that is the analytical commentary at petitioner's tab 82. And then, My Lord, if you're with me, you will find at page 160 of tab 82 reflection in the analytical commentary of UNCITRAL of what I've just referred you to, Dr. Herrmann's comments. And I'll -- I won't read the passages, but I draw to your attention paragraphs 1 and 2 at page 160, and paragraphs 7, 8, 9 and 10 on the following page, 161. This again, I say, clearly setting out the intention of UNCITRAL and its drafters in creating this exclusive and limited scope of review.

If you'd like to keep that binder handy, we'll be coming back to it a number of times.

Now, Your Lordship, there have been a number of occasions on which our courts have done just that, and gone to the analytical commentary or the report of the Secretary-General. I've cited at paragraph 30 one case which we will come back to, because it to my knowledge is the only one that went and looked at the analytical commentary with respect to the definition of the word "commercial," and I say gave a very broad meaning to that term. We'll come back to it in due course, but that is one of several examples of reference to the commentary.

We turn then to the provisions of the International Commercial Arbitration Act. And you'll see I've quoted Section 1 in our outline of argument. And for present purposes, it's just useful to remember the test under 1(6):

> "An arbitration is commercial if it arises out of a relationship of a commercial nature including, but not limited to, the following..."

And you have a list of grounds. And a number of them are relevant to us. Probably of primary relevance is ground (p), investing.

A review of that list of grounds with -- with nothing more indicates, we say, a wide range of arbitrations which have in common an international character and which would be covered by the act.

The list of elements is explicitly broad ranging and general.

It's interesting to note that the list is both inclusive including, but not limited to, and general. And it talks about a commercial -- a relationship of a commercial nature. And when one looks at the examples there, My Lord, you'll -- you'll see references both to commercial areas of activity and substantive areas of law; for example, distributorship agreements, agency. But we all see -- also see descriptions of pure economic activity, consulting, financing, investing.

Also interesting to note that some of these are expressly contractual in nature, such as an agency agreement, exploitation agreement, and so on, but others are clearly not. It's simply expressed as a form of economic activity.

We will see that the Model Law and our international act does not require a contractual relationship for it to apply. You will see repeated several times that it applies to relationships, quote, whether contractual or not, et cetera.

Important in this circumstance to note that this list does not exclude in any way relationships involving States. In fact, we say investing is something that is often a relationship with a State, relating to a State, involving a State. And I point out, for example, and we'll return to it, the fact that one of the relationships set out is one of an exploitation agreement or concession which typically is concluded with a State. So we say this list clearly contemplates relationships with a State.

And I come now, My Lord, to refer you to the definition of the term "commercial" as originally elaborated by UNCITRAL and its working group. And you will find that at tab 88 of the petitioner's brief of authorities. And there you have the full text of the UNCITRAL Model Law.

You'll see that the working group sets out purposefully that the term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature. And you'll see they list a numb of -- a number of them, including investment, exploitation

agreement, concession, et cetera. And you will see that British Columbia has taken that list and, for the most part, the precise wording of the footnote and integrated it into our Section 1(6) of the Model Law and our international act.

Now, the analytical commentary, My Lord, devotes two or three pages to the commercial footnote and the definition of "commercial." And I've set out for you the most relevant passage, but I commend to your attention the -- the full section on commercial, which you'll find now at tab 82, just six tabs forward from where you are now. And you'll see that the relevant passages are at pages 106 and 107.

Of particular interest for our purposes is the paragraph 18, which you'll see I've quoted in our outline of argument. And there to note what the working group says, about midway through that paragraph it says:

> "Although the examples listed include almost all types of contexts known to have given rise to disputes dealt with in international commercial arbitrations, the list is expressly not exhaustive. Therefore, also covered as commercial would be transactions such as supply of electric energy, transport of liquified gas via pipeline and even 'non-transactions' such as claims for damages arising in a commercial context..."

They continue to say and to find that, however, things such as labour and employment agreements or consumer claims are not intended to be covered. I say again this demonstrates the wide scope and the fact that a contractual relationship is not required.

While we're there, My Lord, and to save further flipping, I ask you just to have a look at page 107 at paragraph 21, and it talks about the question of State involvement. It starts by noting that the text does not deal with the touchy issue of sovereign immunity, but goes on to say:

> "On the other hand, it seems equally noteworthy that the Model Law covers those

> relationships to which a State organ or governmental entity is a party provided, of course, the relationship is of a commercial nature."

Referring back to the broad interpretation in the footnote.

Now, we may have occasion to talk about the concept of sovereign immunity, but generally it has no place in international arbitration, or an arbitration for that matter, because arbitration does not involve submission to a State entity or to an emanation of the sovereignty of another country. And this has been held frequently by a number of tribunals and courts. We say that in any event here there's been a complete submission by Mexico to both arbitration and the jurisdiction of this Court, so immunity really isn't a topic which should concern us.

I'll come back to that, because I think that the petitioners, and Canada even, are applying a -- an immunity analysis to the nature of what is commercial, and I think, with respect, mistakenly.

Continuing back to what we've done then in the International Commercial Arbitration Act, if you look at Section 7 of the act, which I've quoted for you at page 12 in paragraph 36, you'll see that it makes it very clear that the act covers relationships whether contractual or not.

And forgive me, there's a typo in my version, in the second line of second -- 7(1). It says:

> "...the parties to submit to arbitration all..." or "...certain disputes which have arisen or which may arise...in respect of a defined legal relationship, whether contractual or not."

Now, My Lord, you'll see that is the same language of the UNCITRAL Model Law, Article 7(1), and interestingly and importantly, of the New York Convention. And this might be a useful time to turn to the convention which you'll find at tab 89 of the petitioner's book. And then there, My Lord, you'll see at page 431 of the extract that you have there the text of the convent --

convention commences.

Article 2(1) in fact is the origin for the language in the Model Law and in our International Commercial Arbitration Act talking about the enforcement of arbitration agreements. It's important to remember that the New York Convention deals with agreements as well as awards, not just the enforcement of awards. But it is the seminal point of departure for the enforcement of arbitration agreements. And that's why I said earlier this convention is at the heart of the international commercial arbitration regime.

If you look at 2(1), you'll see:

"Each contracting States..." recognizes "...agrees to recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which..." have given rise -- or "...which may arise..."

I'm sorry.

"...between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

And then it goes on into sub (3) to require contracting States, when seized of a matter which the parties refer to arbitration, to stay their proceedings and refer the parties to arbitration.

Now, with respect to the question of contractual relationships, a number of courts, Canadian courts, have held that arbitration can apply to more than simply contractual relationships. I've cited for you two cases from Alberta which hold that tort disputes fall within the scope of arbitration.

Now, I believe I had heard some suggestion from my friends that -- but it still requires a contractual relationship. And if there's something related to a contractual relationship that's tortious or statutory or otherwise, it might be arbitrable.

With respect, there's no basis anywhere for saying that. I think the language of the

legislation of the Model Law is quite clear. If the parties agree to arbitrate, they can do so without an underlying contract between them; they can simply contract to arbitrate, agree to arbitrate a matter which is commercial in nature. I think that's eminently clear. And I think there's no basis for suggesting that you have to have a contractual relationship.

Which brings me to this point, and that is that what you must look at is the underlying relationship does not require a contract, it requires a form of relationship which the statute, the International Commercial Arbitration Act, read in light of the Model Law, classifies as commercial.

Now, I'd like to turn to Chapter 11 of NAFTA and talk about the -- the scheme of it briefly. Mr. Thomas has taken us through it, but there are some points that I would like to emphasize. And that takes me to paragraph 40 of my outline.

Now, as I stated in opening, the -- in our view the host State in Chapter 11 promises a certain standard of conduct. Now, while that standard of conduct is contained inter -- in an international treaty, the conduct is directed and the method of enforcing that standard of conduct is directed to investors.

A qualifying investor who makes an investment under the very broad definitions of Article 1139 of the NAFTA, where you'll see there's a broad definition of various forms of enterprise and business activity which qualify as an investment and qualifying investor, once one meets those qualifications, that investor is entitled to go directly to arbitration to enforce what it alleges to be a breach of that standard of treatment.

We've seen the mechanism, Articles 1116 and 1117, permit the commencement of an arbitration by an investor on its own behalf or an investor on behalf of its enterprise or investment against a State party.

It's interesting that this gives rise to a claim to go directly against the host State. There's no requirement for permission from the home State. There's no requirement for diplomatic protection. And it allows the investor to claim damages directly against the State.

Now, this is somewhat new, but we've seen the development. You've had discussion -- you've had a description of ICSID for example. ICSID, back in 1965, permitted investors, qualifying investors, to go to arbitration to -- directly against a State. You heard a lot about bilateral treaties and the American bilateral treaties which implemented this. This is becoming a more frequently used form of dispute resolution. It encourages investment. And in fact, if one reads Chapter 11 and NAFTA as a whole, it's clear that one of the aspects of encouraging investment is the provision of this form of dispute resolution provision to investors.

And I pause just for a moment here to say that, although my friends and Canada have said Chapter 11 is just one chapter amongst 22, I think that's of -- of little relevance. If one looks at the breadth of Chapter 11 in and of itself, it's a very broad code of investment protection. It's clearly delimited in the implementing legislation.

You'll recall Mr. Thomas reading to us from the WTO Implementation Act and the NAFTA Implementation Act. Very clear exception is made to permit and protect this Chapter 11 system and permit investors to in fact exercise a right of action against a State under Chapter 11.

And I think it's also worth making the point that Chapter 11, this mechanism is not mandatory on an investor. An investor has a choice, can -- can seek diplomatic protection of its home State if that's what it chooses to do, as ineffective and politically affected as it may be. It may also choose to litigate in the courts. Chapter 11 implies a different independent choice to which the investor must consent and waive rights to proceed in other fora. And you'll see I've set out some of these other provisions, My Lord, at paragraphs 42, 43, 44 of our outline.

It's interesting to note there that the parties, for example, confirm the requirements of the New York Convention. For example, in Article 1122 they specifically provide that:

> "The consent given by the State party and the submission of a disputing investor to a

claim shall satisfy the requirements of Article 2 of the New York Convention and Article 1 of the Inter-American convention for an agreement."

Coming back again to the New York Convention.

You'll see, and we've seen, that there's also the right for the investor to choose one of three sets of arbitration rules. And in this case, what we saw were the arbitration additional facility rules of ICSID.

Now, there's been some talk about privacy. And my friends and Canada have said, well, this is not a private arbitration. And they focus very much on confidentiality. And I'd like to spend just a little time just before the lunch break on this notion, because I think, with respect, it fails to distinguish between privacy and confidentiality, which is something that has been recognized in international commercial arbitration.

Now, there's been reference made to the fact that in Articles 1127, 1128 and 1129 other State parties to NAFTA can intervene to make submissions on the interpretation of NAFTA. And I -- I stress that that's the extent of their intervention. They don't become parties to the arbitration or to the dispute. Otherwise, I suggest we wouldn't be here because Canada intervened, and Canada being a party, if it were a party to the arbitration, we'd be under the federal act. So there's a limited scope of intervention on a limited point which is the application of the NAFTA.

If one looks at the rules selected in this case, you'll see they provide in my submission for a private process. And you will see that in the -- Articles 39(2) and 44(2) of the arbitration additional facility rules, which you will find at tab 85 of the petitioner's brief of documents. And if you could turn first, My Lord, to Article 39(2):

"The tribunal has the power to decide with the consent of the parties which other persons besides the parties or their agents can attend."

And this I submit is a clear indication that the arbitration hearings are private. And unless people are the parties, agents, counsel and advocates or witnesses, unless there's a consent of the parties, the proceeding, the hearing, is private.

Equally under Article 53(4) -- I'm sorry, I think I'm referring you to the wrong section. 44(2) you'll see that:

> "The minutes of the arbitration shall not be published without the consent of the parties."

Again, an indication that this is a private proceeding. We're not in court where in the name of the sovereign the court is open to all to attend. We're not in the International Court of Justice. We're in a private form of dispute resolution. Now, we'll see that in fact some of the arbitral decisions that we've been referred to deal with just that.

I say you have to distinguish between this private nature of the process and the confidentiality of documents which may emanate from that.

If one looks, My Lord, at the Methanex decision, which we were referred to, and that's in petitioner's tab 37.

I'm sorry, petitioner's tab.

You'll recall, My Lord, that this was one of the authorities relied upon to say, well, there's no real confidentiality in these proceedings as there would be in private commercial arbitration. Well, with respect, the case needs to be looked at a little bit more carefully, because it does distinguish between privacy and confidentiality.

And without taking you through it all, if you look at pages 18 through 21, you'll see there the tribunal's dealing with the privacy, the private nature of the proceedings, under the UNCITRAL rules, which I say are -- are parallel to these. And you'll see at page 19, just above the -- paragraph 42, you'll see the tribunal says the following:

"However, as discussed further below, Article 25(4) relates to the privacy of the oral hearings of the arbitration and does not in light terms address the confidentiality of the arbitration."

And then it goes on to talk about the privacy of the proceedings, and notes that the claimant in that case had given no consent to others to attend. And it says:

"The tribunal must, therefore, apply Article 25(4). And it has no power or inclination to undermine the effect of its terms. It follows that the tribunal must reject the petitioner's request to attend oral hearings."

And then it goes on and talks about the different regimes of confidentiality in different countries. And it's clear that in some countries there's very little confidentiality accorded to commercial arbitrations, whereas in others, in England for example, there's a strong implied duty of confidentiality. And that's dealt with in the following paragraphs.

It's interesting at the end of the day what the tribunal decides. What had happened here is you had environmental groups seeking to submit written briefs to the tribunal. And the question was: Could the tribunal accept the briefs? At the end of the day it ruled that under the general rules of the UNCITRAL rules and the flexibility they offered, they had the ability to accept written claims, but not to introduce a new party, not to allow these parties to attend the proceedings, nor even to receive the pleadings and submissions of the parties. They did not decide in -- that they would necessarily accept briefs but said they had the power to do so.

My point is that many of the submissions that my friends have made about reduced confidentiality or no confidentiality in these proceedings is nothing new. There has been an assumption for a long time that there's a strict duty of confidentiality in international commercial arbitration. That has to be examined rather

carefully before one can draw the conclusion that because there's a reduced level of confidentiality this is not a private proceeding. I think they're completely different. And I come back to my position that this is a private proceeding also in the sense that it is not a State proceeding; it's not in a court. It's a private agreement to go to arbitration. Yes, it is somewhat unusual that you have State parties, and they have an ability to make submissions on the interpretation of NAFTA.

Now, the other case that you were referred to and is worth going to, My Lord, is the S.D. Myers case, which is in Canada's book of authorities at tab 1. Now, Mr. de Pencier referred you to paragraphs 8 and 9 of that decision. And you'll see that there the tribunal said that he didn't see any -- they didn't see any general principle of confidentiality which exists in the arbitration such as that currently before it, and then noted that there was no direct contractual link between the disputing parties. However, it goes on to comment a little bit further about the nature of the proceedings and the private nature of those proceedings. And I draw your attention to paragraphs 11 and following. And specifically at paragraph 11 the tribunal says:

> "Following common practice in international commercial arbitrations, the tribunal directed that the evidence in chief, direct testimony, the opening submissions and the trial exhibits should be delivered to the tribunal and exchanged between the parties in advance of the substantive hearing. Much of this material would otherwise have been presented at the hearing."
>
> Et cetera. And says in paragraph 12:
>
> "It would be artificial and might adversely effect the efficient organization of Chapter 11 arbitration proceedings if such materials were to be deemed to be less private merely because they were delivered in advance of an oral hearing..."
>
> Et cetera. And here the tribunal is

discussing a previous order that it had given regarding who could attend the hearings and the privacy of the hearings.

It's interesting to note that at page 4 the tribunal spends some time and some care in talking about how far proceedings -- transcripts and documents produced in the proceedings could be distributed, and stated in -- in response to Canada's position that they shouldn't be sent to the other provinces unless a province was directly involved in a NAFTA claim -- and its actions were the object of a NAFTA claim. You'll see that at paragraph 16 and 17.

And finally I'll just draw your attention to paragraph 19 where the tribunal holds that:

> "In the absence of agreement between the parties, the tribunal has no power to direct that the in-camera provision contained in Article 25(4) of the rules shall not be applied."

And it goes back to original procedural order.

So, with respect, I think Canada confuses the notion of confidentiality with that of privacy. And I -- I commend to your attention what the tribunal has to say about privacy there.

Now, My Lord, I'll just move a little bit more quickly on some of the other features of the arbitral regime established in this proceeding and perforce under Chapter 11.

You'll see that under the arbitration additional facility rules the tribunal has the jurisdiction to -- to rule on its own jurisdiction or competence, to rule on its own competence. And that's contained in the additional facility rules, Article 46.

And also interesting that the rules also provide that the award shall be final and binding between the parties. And I draw that to your attention because I recall Mr. de Pencier saying, well, there's no privative clause here. Well, I don't know that "privative clause" is the right term to use in an arbitration context or agreement because traditionally those are used in administrative law to exclude the courts from the

jurisdiction of an administrative tribunal.

But we have very much and very clearly an indication by the parties that the award in this matter should be final and binding. And if you look at the additional facility rules, Article 53(4), you will see that clause. And to save you the -- it simply says the:

> "The award shall be final and binding on the parties."

And you'll recall that also Chapter 11 says that the award shall be binding only upon the parties.

And just one reference which I think is -- is useful for the Court is to look at respondent's tab 58. That's the extract from Redfern and Hunter where they comment on precisely this language.

If you look at Redfern and Hunter at page 417 of that extract, which is about six pages in -- and here the -- the authors are introducing the whole notion of challenge of arbitral awards. They say at paragraph 906:

> "The final, and perhaps most important, introductory remark concerns the intended finality of arbitral awards. Arbitration rules, such as those of UNCITRAL, the London Court of International Arbitration, and the ICC, provide unequivocally that an arbitral award is final and binding. These are not intended to be mere empty words. One of the advantages of arbitration is that it is meant to result in the final determination of the dispute between the parties. If the parties want a compromised solution..."

Et cetera, they can go off to somewhere, to some other forum.

Now, Your Lordship, I -- I think this might be an appropriate place to break, if it's convenient for you, before I move on to another aspect of Chapter 11.

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

MR. ALVAREZ: Thank you.
THE REGISTRAR: Order in chambers. Chambers is adjourned until 2 p.m.

(NOON RECESS)
(PROCEEDINGS ADJOURNED AT 12:27 P.M.)
(PROCEEDINGS RESUMED AT 2:00 P.M.)

THE COURT: Yes. Please continue, Mr. Alvarez.
MR. ALVAREZ: Thank you, My Lord.
When we broke I had just finished talking a little bit about this privative clause issue and the fact that the rules adopted for this arbitration proceeding provided for a final and binding result to the arbitral award.
THE COURT: But as I understand the submissions of Metalclad, that you don't think that I should use the pragmatic and functional test in deciding upon the standard of view, but rather you say I'm bound by Quintette.
MR. ALVAREZ: That's correct, My Lord. You will hear at some length from my friend Mr. Cowper that in fact you are bound very strictly within the confines of a legislative scheme which has been interpreted by Quintette, and you'll hear further from Mr. Cowper on that.
Moving along, if I may --
THE COURT: But I guess if I were to disagree with Mr. Cowper in that regard, you'll point out to me that there is a privative clause of sorts.
MR. ALVAREZ: Correct. And the reason I raised it, My Lord, is to -- to -- to show that there's an intention of finality. And the approach taken in arbitration is quite different in my submission from what we have traditionally taken at administrative law dealing with statutory tribunals within Canada. And I say we've established a very special test of deference for international commercial arbitration.
And I was -- I had just left off, and I'll try to move along a little bit more quickly here, a private party is entitled to commence an arbitration and to recover damages, interest and costs against a State.
We've seen that there is no principle of stare decisis or precedent here. That's made very clear by Article 1136(1) which is consistent with

what happens in all arbitrations. Only the parties in the circumstances of the case are bound. There is no principle of stare decisis. It applies strictly to the parties and the circumstances.

Pursuant to Article 1136(6) of the NAFTA an investor may seek enforcement directly pursuant to the New York Convention or the Panama Convention or the Inter-American Convention, as it is sometimes known, which I say puts these awards clearly in the mainstream of international commercial arbitration.

I referred you to the importance of the New York Convention for international commercial arbitration for enforcement directly in the courts of parties to the convention.

Article 1136(7) states that a claim submitted to arbitration pursuant to Chapter 11 shall be considered to arise out of a Canad -- commercial relationship or transaction. And I stress the distinction, which again highlights the -- the fact that there's no need for a transaction for this -- for the convention to apply or the ICAA to apply. And it states for the purposes again of the New York Convention and the Inter-American Convention that they're considered commercial in nature.

I say that this reference to the New York Convention and the Inter-American Convention in both Articles 1122 and 1136(7) shows a clear intention of the State parties that these arbitrations and the awards are in the mainstream of international commercial arbitration. These are hallmarks of the international commercial arbitration process.

Now, all three of the NAFTA parties have ratified the New York Convention. And to the extent that you need backup on that, you will see that the -- the UNCITRAL status of conventions that we looked at, that I referred to this morning, sets out the date of ratification and the reservations, if any, taken by Canada, the United States and Mexico.

Now, Canada has taken the commercial reservation for all jurisdictions except Quebec, has not taken the second reservation which is known as the reciprocity reservation, which for

our purposes now is not particularly relevant. It just says we'll only enforce an award in our country if it was rendered in the -- another country that has ratified the convention. Canada hasn't taken that approach. We'll -- we'll enforce any foreign arbitral award wherever made. Whereas the United States, for example, will only enforce arbitral awards made in another convention country.

The United States has taken the commercial convention, as has Canada. Interestingly, Mexico, as far as I know, has not taken either convention. Now, if I'm wrong, I'm sure my friends can correct me. I notice that that wasn't the position taken in their outline of argument, but the best of my understanding is Mexico hasn't -- doesn't require an arbitral award to be commercial for the purposes of enforcement under the convention, nor does it have the reciprocity reservation.

Mexico and the United States have adopted the Inter-American Convention.

Now, it's worth thinking a little bit about these conventions, because in fact they do more than simply apply to arbitral awards. And I think it -- that's a -- an important point. We saw this morning the New York Convention also applies to the enforcement of arbitration agreements.

And you will find these two conventions, My Lord, at the petitioner's tabs, 89 for the New York Convention, and the Inter-American Convention is 87. And if you wouldn't mind, I'd like to have a look at those two conventions briefly.

THE COURT: That's a typo then in your submissions because it says 89 for both.

MR. ALVAREZ: I'm sorry, it is a -- it is a typo. These were -- there were a few last-minute changes. You'll find the Inter-American at 87 and the Inter -- and the New York at 89.

And you'll recall that we looked at Article 2 of the convention of -- the New York Convention which requires a court seized of an action --

THE COURT: Oh, it's here. That's why I can't find it. Okay. Sorry.

MR. ALVAREZ: Not at all.

It requires a Court, when seized of an action

by parties who are party to an arbitration agreement, to stay its proceedings and refer the parties to arbitration. And you'll find that in Article 2(1) and then 2(3) at page 431. Effectively, what that means, and we've seen it applied many times in our courts, is that once you have an arbitration clause, a party has a right to require that it be enforced.

And I say in these circumstances when the NAFTA says that the agreement, the exchange of consent by the State and the private party, constitutes an agreement for the purposes of the New York Convention, that's another dimension of the application of the convention.

And if a State has taken the commercial reservation, such as the United States, it has to be a commercial arbitration agreement. So when it's deemed that -- or when it's stated in NAFTA that the exchange of consent shall constitute an arbitration agreement for the purposes of the New York Convention, that has to include the commercial element if a State has taken the commercial reservation, otherwise it would be of no application and of no value.

This point is perhaps illustrated even more clearly if you look at the Inter-American Convention, and you'll find that at tab 87. And in its Article 1 it says:

> "An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them, with respect to a commercial transaction, is valid."

So the Inter-American Convention by its terms applies only to commercial arbitration agreements.

So I say that's another indication that the parties, first of all, apply -- intended a broader application than simply the enforcement of awards and, secondly, by saying they consent exchanged, pursuant to the terms of Chapter 11 of NAFTA, constitute an agreement for the purposes of Article 1, Article 1 refers only to commercial agreements. And I say it's another indication that the parties intended this to be in the

commercial stream of arbitration.

Which allows me to raise one other point in response to a submission by Mr. de Pencier on behalf of Canada. He, and I believe also the petitioners, pointed out that the NAFTA deals with private international commercial arbitration elsewhere. And that's true. It deals with settlement of international commercial disputes between private parties in the free trade area in Article 2022.

Now, what's interesting in this of course is that the parties undertake an obligation to the maximum extent possible to encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes. And to this end they are to -- in Article 2022(2), they are to provide appropriate procedures to ensure observance of agreements, et cetera. And then they are deemed to be in compliance with that obligation if they've ratified the New York Convention and the Inter-American Convention.

What's interesting is this is exactly the same regime to which the States are submitting their arbitral awards under Chapter 11. So I say very interesting that the NAFTA deals with dispute resolution in a general manner to promote it between private parties in Chapter 20. I think even more interesting is that the States look at precisely those obligations and implement them and apply them to their arbitral awards under Chapter 11. So far from showing some distinction, I say it's interesting that in fact they are applied precisely to the Chapter 11 awards.

Now, it was also alleged that the State parties could have gone further and could have said: And these awards will be -- or these arbitrations will be considered commercial for the purposes of the Model Law. Well, I don't think that's very practical in an instrument like the NAFTA. First of all, not all the parties to NAFTA are part -- have adopted the Model Law. The United States has a different law, quite a different law. And I don't think it would be appropriate or feasible to deal with that, to change the law of the United States to deal with that issue. Reference to treaties commonly known

in international commercial arbitration is quite another matter.

Moving along, My Lord, then to Section D of our outline of argument, we say, first of all, that the arbitration in this matter is manifestly international. We have parties from two different States applying the NAFTA. And international law in a relationship arising out of investing by a U.S. investor in Mexico which comes to Canada, notionally comes to Canada for the resolution of its dispute as the place of arbitration.

In these circumstances I say that it cannot reasonably have been in the contemplation of the parties to NAFTA, of the parties to this arbitration or the arbitrators, that somehow the internal domestic regime of British Columbia would apply, a regime which has been developed in the context of British Columbia law, and I say, particularly when you look at the appeal provisions, to control and monitor the development of British Columbia law to review its merits.

I'll return to this point a little later, because when we look at the British Columbia law, and I recall the words of Dr. Herrmann that we looked at earlier this morning, that many local laws are not designed for international arbitration, may be partial, may be inadequate, may be out of date.

And, with respect, I think many of those things apply to our Commercial Arbitration Act. And I'll deal a little bit with how it's really not a suitable law that was contemplated for application in these circumstances.

But before passing to that, the -- the analysis that we've seen from Mexico is that it really stresses the commercial side of things, and tends to ignore perhaps the international dimension of this process and this debate. I say that you can't just focus on commercial. You've got to look at the whole definition, international commercial arbitration, which arises out of an agreement between the parties.

And I think properly interpreted in that context, where you have an agreement which is international in nature, that's precisely where the term "commercial" is to be given a broad meaning. When we look at the language of the

Model Law and of the commentary in the report, it deals with international commercial arbitration. It's in that context that they've said "commercial" should be given a very broad meaning.

So I think it's artificial to focus just on commercial without recalling that we're talking about an international agreement to arbitrate, and in that context to -- to recall the importance of giving the broad liberal interpretation which was originally intended.

When one looks at Article 1115 of the NAFTA, you will see that its object is the resolution of investment disputes. I think that's -- it's very clear by definition. It puts us squarely within the definition of "commercial" in our International Commercial Arbitration Act.

And you'll see references at paragraph 57 that this is consistent with other aspects of the NAFTA which, for example, in Article 102 and the preamble, are intended to ensure a predictable commercial framework for business, planning and investment, and to increase substantially investment opportunities.

Now, turning to one case which has looked at this question -- and that's the case of Carter and McLaughlin which you'll find at the respondent's tab 7 of the authorities. And you'll see there, My Lord, a decision of the Ontario Court, General Division, of 1996 which dealt, interestingly, with the sale of a principal residence in Michigan by one party to the other, and then the vendors moved to Canada. It turned out that they were 9 or $10,000 short because of a -- well, there's an added expense because of a defective -- allegedly defective septic system. An ar -- this resulted in an arbitration. And there was an attempt to enforce in Canada.

And the question was: Did it fall within the scope of the International Commercial Arbitration Act and was it, quote, commercial? In that context the Court did a pretty thorough review of the analytical commentary, which you will see at page -- starting at page 797. And you will recognize a number of the passages that I cited to you this morning are set out in full.

Just prior to going on, you'll note that in

this case the Court looked at one dictionary definition, and accepted a rather broad one at that, which you'll see at page 796. It looks at "commercial," and it says -- it uses the definition relates to or is connected with trade and traffic, or commerce in general, is occupied with business and commerce, generic form of most aspects of buying and selling. Then went on and looked at the analytical commentary. And then its conclusions are set out at page 798, a finding that the award in this case should be viewed as commercial, and noting that although the sale of the house was unrelated to the regular business of the parties, et cetera, that it was what was intended to be commercial in the legislation.

And I say this -- this case is a more appropriate approach to that definition than the case we see cited in the petitioner's outline of argument, the Borowski case, which was an interesting case. First of all, it didn't deal with the analytical commentary. It didn't go back to the sources and review that. Secondly, it found that the agreement in question was an employment agreement which, as we saw this morning, is one of the categories that UNCITRAL itself recognized from the outset was not intended to fall within the definition of "commercial."

Now, My Lord, our position is that the relationship that must be contemplated here is the underlying relationship of investment. We've heard a lot that you should take into account the nature of the act of the State, which is alleged to be regulatory in nature.

I say that it's -- it's not appropriate to look at the act of one State creating the dispute to define the relationship. The rela -- the relationship, the precondition to that, was the existence of investing, an investment activity and relationship underlying the act taken by the State.

We have to recall that what's relevant here is the nature of the relationship for the purposes of the International Commercial Arbitration Act, and that is what requires a relationship out of which arises an arbitration. You'll recall the definition is an arbitration is international if it arises out of a commercial relationship, and

then it lists a number of them.

That I say is the underlying basis for the whole relationship and the fact that the State may have taken what it considers a regulatory action. If one considers the nature of the action of States, they could always say that they're acting in the public good. And I say that would defeat the purposes of Chapter 11 and this broad definition. So I say you should go to the underlying definition or under -- underlying relationship.

Now, you'll see reference in the petitioner's materials to a case, the Corcoran case, which dealt with a situation where there had been insurance contracts. And there was an insolvency, and a liquidator was appointed under the New York State Insurance Act. And one of -- well, the liq -- the -- the insolvent party wanted disputes to go to arbitration, didn't want -- wanted to exclude the intervention of the superintendent, and tried to rely on the New York Convention to say, oh, no, just a minute, I had an arbitration clause.

Well, amongst the many findings of the Court in that case was that, first of all, there was no arbitration agreement between that party and the superintendent. The arbitration agreement had been between the two parties to the various insurance contracts and not with the superintendent who intervened by statutory mandate in that relationship.

There were a number of other findings, for example, the fact that the matter was not arbitrable, that this intervention by the superintendent under the New York insurance act was an exclusive jurisdiction of the superintendent.

I say that our situation is quite different, because here, by the very words of Chapter 11 and de facto, you have an arbitration agreement directly between Metalclad and Mexico. You have the agreement to arbitrate disputes there, and I say that's quite different.

Interestingly, you would have in this -- if -- if the present parties were in the similar situation, you would have, according to the NAFTA, a commercial arbitration agreement between these

two parties. We looked at the terms of the New York Convention. Chapter 11 says New York Convention applies. The -- the consent constitutes an arbitration agreement for the purposes of the New York Convention. In my submission the circumstances here are very different, and therefore very little can be derived from the Corcoran case.

With respect to the Pfizer case my friend referred to, it dealt with the World Trade Organization Implementation Act. And in that case Pfizer was trying to commence an action based on the international treaty.

Again, I say the circumstances here are quite different, because the NAFTA Implementation Act makes it very clear that Chapter 11(b) is excluded from this general prohibition of a right of action arising from the treaty. It's made very clear, and is clearly accepted, which -- and in fact what it does is it gives a private right of action to the private party, the investor who qualifies under NAFTA.

Mexico also relies on a passage from Mr. -- a Mr. Stewart's article at paragraph 38 (sic) of its outline saying that sometimes it's been suggested that these types of mixed arbitrations are somewhat different.

If you read -- and you'll see I've extracted -- extracted the continuing part of that quotation, the author goes on to say leaving aside special regimes, such as ICSID and the U.S. claims tribunal, this -- it should be said here there's:

> "...no judicial authority that can be cited for the proposition that the question of sovereign immunity is within the scope of Article V(2)(b)."

And it's clear that the author here is stating a view, and I don't think an approving view or a supported view, of this suggestion.

If one goes to the author cited by Mr. Stewart, a Professor Sawneraja, he talks about political disputes. And I say here this is quite different. We have parties that have agreed to arbitrate these disputes and have specifically referred to the New York Convention, the

Inter-American Convention as applicable to these awards.

Further, and in any event -- and you'll recall this morning I -- I mentioned that immunity has no place in arbitration. But in any event, Mexico has clearly submitted to arbitration, has clearly submitted to the jurisdiction of this court, and cannot, I say, claim any form of immunity. And certainly then I think that considerations of immunity are not relevant to our discussion.

You'll see, My Lord, at paragraph 66 of my outline I've cited an article by Mr. Delaume, a former senior legal advisor at ICSID, which you will find at the respondent's tab 44 where he points out -- and I -- I don't think that you need to turn to it, but you can do so at your leisure. It says it is clear the New York Convention is applicable to awards involving States in a number of cases. And he points out examples of claims by States, by public authorities, and against States to which the New York Convention has been applied.

And one example that you may find useful, My Lord, is the decision in Gould, the Ministry of Defence of Iran in fact v. Gould which you will find at the respondent's tab 23. And this -- this dispute originally arose out of an agreement to supply and install certain military equipment by an American private party in Iran. And if you're interested, there's a very interesting description of the background to all the Algiers agreements and the taking of hostages.

But the long and the short of it is that the U.S. through the Algiers accor -- Algiers Accord, all actions in the U.S. courts against Iran were stayed and referred to the Iran-U.S. Claims Tribunal. They went to arbitration. In the end of the day, Iran had an award -- received an award of some 3-odd million dollars and sought to enforce it, sought to enforce it in the U.S. courts.

The Court here undertakes an analysis of the award, and decides to -- to uphold and grant enforcement. And the interesting passages for our purpose start at page 1362 where it talks about the applicability of the New York Convention. And

you'll see it re -- it quotes the now-familiar language in the middle of that first paragraph under Roman 3, at the bottom it talks about -- and you'll see how the American statutory language tracks the New York Convention. It talks about a provision which provides that an arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract or agreement described in Section 2, et cetera.

In the next paragraph the Court goes on to state three conditions of application. You'll see the award must arise out of a legal relationship which is commercial in nature and which is not entirely domestic in scope. These three conditions are clearly satisfied here. It finds the application of a New York Convention there.

It's interesting, and the Court went on to -- to look and see if there was an agreement in writing, found that the directive of the president and the signature of the accords constituted an agreement in writing for the purposes of the New York Convention, which you'll see in the following pages.

And it also dealt with the question of whether or not an award which didn't apply a national law constituted an award for the purposes of the convention, and said again that it did; it was made in the territory of another State, and therefore the New York Convention applied. So an example of the application of the New York Convention to an arbitration involving a State.

Now, My Lord, if one looks at some of the other elements in the definition of "commercial" in the International Commercial Arbitration Act, you will find other categories which I say are of relevance.

One of these I say is the reference to a -- an exploitation agreement or concession. I say, first of all, the inclusion of such an element clearly indicates the possibility that State parties or awards invol -- and arbitrations involving State parties were contemplated under the ICAA and the Model Law. You'll see I've set out various definitions of "concession" which typically involve the granting of privileges by a government to a private party.

Now, I say that the Convenio, which you will hear more about during the respondent's case, is analogous to a concession. Clearly it's not the large, formal concession that we saw in the -- the large Libyan oil cases, for example. However, I say it has a number of elements of a concession.

And if one looks at some of the facts, the indications I've set out at paragraph 69, I think it is fair to draw an analogy to a concession agreement. So, for example, the Convenio provided for and allowed for the commercial operation of the landfill for a period of five years. It provided that a number of tasks and obligations were to be undertaken by COTERIN in exchange for that. For example, it was to undertake remediation which was permitted to be done simultaneously under the Convenio with commercial operation. It was to provide a discount in costs to waste treated which came from the State of San Luis Potosi, et cetera.

So I say, first of all, the -- the -- the inclusion of a concession is -- reflects an intention not to exclude, but rather to include relationships which would involve States. And, secondly, I say you can draw an analogy to a concession agreement in these circumstances. There was an agreement here which clearly was part of the dispute between the parties which gave rise to the arbitration in these proceedings.

You'll see in paragraph 71 I make a similar analogy with the question of construction of works.

Now, one final point which I think is useful to bear in mind, and that is that in the selection of the UNCITRAL rules or the additional facility rules the parties agree to the application of national law. At the end of the day it's contemplated that national law will apply. And you can see that from the -- and let's take the additional facility rules, Article 1, which you'll find at the petitioner's tab 85, My Lord, and there you need to go into page 35.

And there you will see at -- that Article 1 provides that:

> "Where the parties to a dispute have agreed that it shall be referred to

arbitration under the rules the dispute shall be settled in accordance with these rules, save that if any of these rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail."

And that's a indication, My Lord, that the applicable law to the arbitration, in this case the law of the place of arbitration, British Columbia, will apply. I say this takes the arbitration out of the inter-State type of arbitration, brings it down to commercial, private arbitration.

And in that regard I'd like to refer you to an extract from leading French continental authors, the Fouchard, Gaillard, Goldman text which you'll find at respondent's tab 46. And there, My Lord, you'll see some discussion of, first of all, the contractual basis for arbitration.

And you'll see -- at the first full paragraph under 44, you'll see:

"Recent developments concerning arbitration of disputes arising out of State contracts do not directly affect this principle, that is that arbitration is founded upon the common intentions of the parties to submit to arbitration. However, they do qualify the requirement that there be a true contract containing the parties' consent to have their dispute resolved by arbitration. Increasing numbers of international treaties allow a private entity, usually an investor, to commence arbitration proceedings against a State that has signed a treaty or against a public entity of that State where the..." party "...private party alleges that its rights guaranteed under the treaty have been infringed by the State or public entity.

"Although there is no arbitration agreement in its traditional form, the arbitrator's jurisdiction results from the

initial consent of the State or public entity expressed prior to arbitration in abstract terms in the treaty or in the State's own legislation and the subsequent consent of the plaintiff who accepts the arbitrator's jurisdiction by beginning the arbitration."

And then it goes and cites a number of examples, and amongst them the ICSID Convention, the NAFTA, and the Energy Charter Treaty which has a system very similar to the NAFTA. And you will recall I mentioned this morning a significant number of bilateral investment treaties that incorporate this same type of mechanism.

You'll see the authors go on and talk about civil and commercial arbitration. And I point out -- point to your attention pages 36 and 37 of the extract, the fact that the authors have noted that British Columbia has picked up the definition of commercial in its legislation at the bottom of -- at page 36. It talks about the broad interpretation to be given to the term "commercial" at paragraph 63 on page 37.

Then at page 41 the authors talk about the arbitration of State contracts, and you'll see paragraph 70 at page 41. You'll see:

"Based on the understanding of commerciality discussed above, disputes involving public entities arising from their international trade transactions should be included in the definition of international commercial arbitration, whether it is the States themselves or their various offshoots that are actually involved. It is sufficient for them to participate in such a transaction for the resolution of any resulting disputes to fall within the definition of international commercial arbitrations. Disputes arising from State contracts where such contracts contain an arbitration clause are therefore within the scope of the present study."

Then it goes on, My Lord, and it talks about ICSID at paragraph 73 on the next page, which --

and while it recognizes there are some peculiarities about the ICSID system, it classifies these -- and you'll see midway down paragraph 73:

> "These arbitrations are, therefore, properly considered as international commercial arbitrations. That's not to say that ICSID does not retain specific features, especially as regard to questions of jurisdiction..."

Et cetera. And then, finally, on the page over, top of page 43, the authors go on to say:

> "The same will most likely be true in the future in arbitrations regarding State contracts and organized under international treaties, which will generally be between a private investor, the claimant and a defendant State."

And you'll see there's a reference forward to a -- a -- another section. And you'll see that in the footnote it refers to paragraph 239(3), which you'll find a few pages later. And there they refer specifically, recent multilateral conventions, investment protection conventions, and among them the NAFTA.

And I -- I refer to that extract to -- to indicate that certainly these authors, who are leading continental authors, see these types of arbitrations falling within what they classify as international commercial arbitration. And I say if you look at what's happened here, there are -- it is in the international commercial system. I say it's a private arbitration procedure subject to the New York Convention, which is at the heart of the international commercial arbitration system.

I say, therefore, My Lord, that adopting the broad approach that the Model Law, the UNCITRAL analytical commentary and our International Commercial Arbitration Act mandates, the interpretation of the word "commercial" should be accepted broadly, and that the arbitration in this matter fall squarely within that definition on a

fair reading of the same.

Now, you -- this morning you heard me say, and I maintain without going through the detail because the analysis is much the same, but I say that independent of the arbitration relationship created by NAFTA, you still have an international commercial arbitration. You still have Metalclad going to Mexico, engaging in investing in Mexico, engaging in that economic activity as it is set out and defined in the international act. You have to recall that neither the act nor the Model Law requires a contractual relationship to meet the definition, and then you have an arbitration which follows.

Whether you look at the arbitration clause created by the exchange of consent or the arbitration created by the claim of Metalclad in its statement of claim, notice of claim, and the response, the submission to arbitration, the certification of the secretary general that the matter was an investment dispute and properly fell within, excuse me, the additional facility rules, I say you have exactly the same process; you have an arbitration which falls squarely under our international act.

And finally there's nothing in the international act nor in our case law interpreting that act which excludes a relationship to which a State is party from the definition of international commercial arbitration for the purposes of the application of the act.

Which brings me then to the federal act. We've heard a little bit about the federal act. And we've heard that the federal government in fact took the step of amending its act, Section 5 of the act, in order to -- as stated in Canada's statement on implementation, to ensure that these arbitrations fell within the scope of the -- their Commercial Arbitration Act. And you'll see I've laid the extract out at paragraph 75.

In paragraph 76, you see I've -- I've laid out the operative section of the federal act. And if you look under 5(4), the language is:

> "For greater certainty, the expression 'commercial arbitration' in Article 1(1) of the code includes..."

And it specifies directly an arbitration under the NAFTA or, interestingly, an arbitration under the Canada-Chile Free Trade Agreement which has been adopted since then, and implements the NASHTA -- NAFTA regime, as do a number of other foreign investment protection agreements which Canada has signed since the NAFTA.

I say the language "to ensure" and "for greater certainty" is not deeming language. It's clarificatory language. It confirms what I say is the clear intention of Canada which negotiated this agreement and which amended its legislation for greater certainty -- certainty to make sure it fell within its implemen -- implementation of the Model Law.

And I say that the federal government did make a choice here when it decided to apply this Model Law regime to both domestic, that is to say federal government and Canadian party arbitrations, as well as federal government international or foreign party arbitrations, it opted for the limited judicial review regime of the Model Law. And here it has made it clearly applicable to NAFTA Chapter 11 arbitrations.

I was somewhat surprised when I heard Mr. de Pencier representing the Attorney General of Canada argue in this court that an arbitration -- the arbitration matter here is not commercial in nature when Parliament has specifically clarified that arbitrations involving Canada are clearly commercial for the purposes of the application of the Model Law wherever Canada is a party to such an arbitration.

What's interesting is what this means is that the interpretation that Mr. de Pencier would have you accept is that while in arbitrations in which Canada is a party you have the level of judicial review of the Model Law, but wherever Canada is not a party and a Chapter 11 case takes place within Canada, there will be a different standard of review, the domestic standard of review, including review on the merits of an appeal, will apply to an arbitration where Canada's not a party, which I think is indeed unworkable but also a strange result.

Which takes me to some of the other -- what I

classify as anomalous results of the interpretation urged upon you by the petitioners and Canada. As we've seen, and we saw this morning, the Model Law introduces a very limited and specific regime of judicial intervention and review under the international act, under the Model Law. We saw those.

And you'll see I've set out Section 34 of the act at paragraph 81. It's interesting to note while we're looking at it that, first of all, it's the exclusive regime, but then if you read the introductory language of Section 34(2) it states:

> "An arbitral award may be set aside by the Supreme Court only if..."
>
> Certain grounds are met.

You'll recall that these grounds are the same as those of the New York Convention, which are also the same grounds which are contained in Article 36 of the Model Law which deals with recognition and enforcement of awards under the Model Law.

Now, this effort, as -- and as we looked at this morning, this was a conscious effort to harmonize the grounds for recognition, enforcement with setting aside.

And to help you understand why that was, I'd like you to turn, please, to the analytical commentary which you'll find at the petitioner's tab 82. And if you turn, My Lord, to page 161, at paragraph 7 you'll see they talk there. And they talk about the -- the list of reasons contained in Article 34 of the Model Law, and it's based on two different policy considerations which, however, converge on the result, first of all:

> "...the extensive analysis and the decision to stick with one exclusive list."
>
> And then carrying on to paragraph 8:
>
> "Second, conformity with Article 36(1) is regarded...desirable...as desirable in view of the policy of the Model Law to reduce the impact of the place of arbitration. It recognizes the fact that both provisions

with their different purposes, in one case reasons for setting aside and then in the other case grounds for refusing recognition or enforcement, form part of the alternative defence system which provides a party with the option of attacking the award or invoking the grounds when recognition or enforcement is sought. It also recognizes the fact that these provisions do not operate in isolation, the effect of traditional concepts of the -- and rules familiar and peculiar to the legal system, ruling at the place of arbitration is not limited to the State where the arbitration takes place but extends to many other States."

Quotes Article 36 of the Model Law, Article 5 of the New York Convention, and then in paragraph 9 goes on to state:

"Drawing the consequences from this undesirable situation, the Geneva Convention cuts off this international effect in respect of all awards which have been set aside for reasons other than those listed in Article 5 of the New York Convention. The Model Law merely takes this philosophy one step further by going beyond the angle of recognition and enforcement to the source, and aligning the very reasons for setting aside with those for refusing recognition or enforcement. This step has the salutary effect of avoiding split or relative validity of international awards, i.e., awards which are void in the country of origin but valid and enforceable abroad."

And this flows from the permissive language in the New York Convention and Article 36 of the Model Law which says a Court may set aside only if. We've had examples in Canada of Courts holding that in fact just because a ground under the New York Convention may be made out does not require the Court to refuse recognition and enforcement. The Court still has the discretion

to enforce an award.

And we've had a number of interesting examples where -- there's a very famous case known as the Chrome Alloy case where an award was set aside in Egypt yet enforced sometime later in the United States under the New York Convention. The reason for that is the New York Convention allows a party to apply or to -- to request the application of a more favourable right at the place of arbitration.

You can always rely on the national law of arbitration at the place of arbitration. And that law does not require refusal to recognize and enforce an award because it's been set aside in another State.

The purpose of putting the two together was to bring the grounds for recognition and enforcement or refusal of recognition and enforcement in line with the exclusive grounds for setting aside. And in fact this attempt at harmonization has been picked up and recognized, for example, in the Corporacion Transnacional case, which you'll see referred to at page 27.

You will also see, My Lord, at paragraph 82 reference to two Ontario cases, the Schreter and Gasmac case, and the Noble China case, both of which point out that setting aside or refusal to recognize and enforce is vol -- it's not mandatory, it's permissive. So the State can still choose to enforce even if a ground is made out, which emphasizes the importance for bringing these grounds together.

Now, the -- the effect of the interpretation being urged on you in these circumstances is that the New York Convention and its grounds for recognition and enforcement would apply to the awards, but with respect to setting aside a different standard, and in this case an internal domestic standard which includes review on the merits, would apply.

I say that's a -- anomalous and cannot be an intended result. It would affect part of the important -- one of the important purposes of the Model Law and the harmonization of these grounds. And I say the Court should adopt an interpretation which does just the opposite, which supports, which gives effect to the intention of the

drafters of the Model Law, which we've adopted here.

Now, Your Lordship, I don't know if you would like to take a break now. I have a -- another few minutes, but I'm drawing to the end.

THE COURT: You're going -- you're going to be covering up till the end of page --

MR. ALVAREZ: I'm going to get to the end of page 33.

THE COURT: 33. I think -- let's -- let's have the break first.

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

(AFTERNOON RECESS)
(PROCEEDINGS ADJOURNED AT 2:59 P.M.)
(PROCEEDINGS RESUMED AT 3:11 P.M.)

THE COURT: Continue, Mr. Alvarez.

MR. ALVAREZ: Thank you, My Lord.

To return to a moment to the situation I was explaining that -- we find ourself in an anomalous situation. (sic)

Canada has adopted, has clearly stated that for the purposes of Chapter 11 arbitrations, for greater certainty, they are commercial in nature.

So we have the interesting situation, and you've heard about the S.D. Myers case where Canada has now applied to annul the S.D. Myers case. And you'll find, for your information, Canada's application at tab 24 of the petitioner's materials.

You'll see there that the application is clearly made under the Model Law, the Commercial Arbitration Act which implements the Model Law for Canada. On the other hand, if the interpretation that we are to give to the international commercial arbitration that Mexico and Canada urge upon you is adopted, an arbitration such as this which does not involve Canada has very little connection with Canada, just happens to have chosen Canada has the legal situs for arbitration, would be subjected to our domestic internal review on the merits, subjecting this type of arbitration which has very little connection with Canada to our internal or domestic standards of review.

This, I think, reflects a certain irony in this position. We hear a lot of talk about public

acts and regulatory acts, yet the end result is not to give more deference or greater hands-off, but to subject public regulatory acts to the internal review of the domestic courts of a third State, which I say in the circumstances doesn't make sense, and reveals, rather, an attempt to find a more convenient standard of review to question the result.

I say the situation would also affect one of the underlying intentions of the International Commercial Arbitration Act, which was to make British Columbia a more hospitable environment for international commercial arbitration and attract these types of arbitrations to British Columbia.

And that becomes apparent, My Lord, if you look at the decision in the Methanex case, which you'll find at the petitioner's tab 37. And you may recall that was the case that dealt with the dispute between the United States and Methanex as to what the place of arbitration should be. And you'll -- you'll have seen it quoted in the -- in Mexico's materials. And in fact they cited an extract from the submission of the United States to the tribunal.

And you'll find those materials, as I say, My Lord, at tab 37, and it's the second decision at tab 37. And behind it you will find the U.S. submission.

And in context, you see the U.S. submission is set out at page 9 at -- at the back. That would be approximately -- about five pages from the back of that tab. And you'll see there that the -- the point starts midway down the page:

> "Fourth, there is uncertainty as to the central premise of Methanex's argument that the UNCITRAL Model Law would apply if Toronto were designated as the place of arbitration."

Now, I say, first of all, with respect to the United States' submissions, they have to be taken with a grain of salt, because the -- the lis between the parties here is whether the arbitration was going to be in Washington or in Toronto. And it's not surprising perhaps that the United States would take this position in an

attempt to have Washington designated the place of arbitration, which I understand was the final outcome. What is interesting is the fact that the non-application of the Model Law is cited as a reason for having the arbitration in Washington.

We've -- we'll see in the Ethyl case, and we see it here, that one of the considerations tribunals take into account in determining the place of arbitration is the suitability of the arbitration law and the regime which will apply.

In this case the pitch by the United States was: not clear the Model Law will apply, you should come to the United States, because the law is more favourable there.

I say that if you adopt the interpretation urged upon you, this is the situation that's going to arise. I think it defeats the intention. By taking a narrow interpretation of commercial, it defeats the intention to make this a hospitable place for arbitration and increase international arbitration here.

THE COURT: But it doesn't seem to make any difference. You can simply name it as a place of arbitration and then have the arbitration somewhere else.

MR. ALVAREZ: Well, with respect, My Lord, it -- it does in this sense, because if you name it as the place of arbitration, it's going to be the national arbitration law that applies.

And, sure, we may not have it here, but it -- it -- it operates at two levels. I agree you can always say that's the place of arbitration, but we'll meet somewhere more convenient.

But secondly, if the legal regime here is seen as, quote, inhospitable or unduly interventionist, we won't even have the application of Canada law. Canada will be -- British Columbia will be shunned as a place for international commercial arbitration, or its legal regime will be shunned.

THE COURT: But if the arbitrations aren't going to take place here, what do we care?

MR. ALVAREZ: Well, with respect, I think we do care very much about our reputation of the regime that applies to international commercial arbitration, because if we had a -- a reputation for intervention, particularly on the merits of

international awards, we're not going to -- it's -- it's going to make things worse, certainly not better.

And in closing I -- you will hear that I -- this case is attracting a lot of attention in the international commercial arbitration community. And my friends are quite right when they say the eyes of the world are on us, because to review the merits of an international commercial arbitration award is strange, indeed, and I say not well-regarded in the international commercial arbitration community, let alone to -- to -- raises this novel proposition: that it's not the arbitral tribunal selected by the parties that will interpret the provisions of NAFTA, but rather a domestic court of one of the three parties, and even a domestic court of one of the parties on -- on -- on an appeal on the merits with very little connection. I don't think that can be a legitimate expectation of the parties.

Now, if one looks then at the result that the -- the result that's being urged on you here, it's -- this arbitration is not commercial for the purposes of the application of the International Commercial Arbitration Act with respect to review. But with respect to the enforcement of arbitral awards and enforcement of arbitration agreements, it is commercial.

I say that makes very little sense, no sense. As I've mentioned, it breaks up the harmonization factor that was intended in our international legislation. But it also -- it's -- it's a highly complex and, I say, unworkable result, unworkable in the sense that the federal act applies not only to arbitrations involving the federal government, but also has an applica -- a section where it applies to maritime and admiralty matters. What does one do in that area? Further complicating the scenario.

And, My Lord, I'm sorry, I -- when I gave you page references, I was working from a draft.

THE COURT: I realize that.

MR. ALVAREZ: I'm about half a page behind you, and I -- and I'm getting to the end.

This brings me to my -- the final section. And before entering on a -- a brief review of the Commercial Arbitration Act, the -- our domestic

act and why it doesn't apply, we say that we succeed on whatever standard you apply. My references to the Commercial Arbitration Act are going to be in regard of its unsuitability or its nature which could not have been contemplated for this type of dispute.

Mr. Cowper will talk to you about standards of review and how we meet whatever standard of review, how the award is defensible under whatever standard that might be.

Now, you will have foreseen much of what I'm going to say about the Commercial Arbitration Act, the fact that it was developed in a commercial context -- in -- internal context, I'm sorry, for application in British Columbia, to British Columbia matters and disputes. And I say that particularly the appeal provisions are related to this jurisdiction and the control of British Columbia law.

You will see I refer again, and I will -- to the -- to the suitability of the arbitration law, the place of arbitration. And you'll see that the Ethyl case referred to at paragraph 91 deals with that. And we've just talked about the Methanex case.

In that vein, I submit that the Commercial Arbitration Act is, in the words of Dr. Herrmann we saw this morning, out of date, unsuited, perhaps fragmentary, not the type of act that parties to this type of arbitration would expect to apply.

And just to give you a flavour of some of the types of provisions which I think are odd in the context, and I think reflect the intention that it's to apply to internal arbitration, I've listed a number of sections in paragraph 94 from the Commercial Arbitration Act which you will find at petitioner's tab 73.

I'm taking only a few examples. In fact, you'll find -- I'm sorry, My Lord. You'll find a more recent version at tab 74.

Taking just a few examples of the Commercial Arbitration Act which I say reflect a different focus, one could look to Section 11 which talks about the assessment of costs by the registrar of the Supreme Court which, in international commercial arbitration, is indeed a strange

result. Arbitral institutional rules provide for this and give great discretion to arbitrators to do that.

If you look at Section 16, you'll find that Section 16(3) in fact refers to a number of non-existent provisions in Section 15, there being on the books amendments for 10 years which have yet to be passed in that area. And leaving that quite apart, the conditions for removal of an arbitrator which continue under Section 16 include odd provisions such as whether the matters in dispute are factually or legally complex.

And you'll see that, My Lord, if you go back to the -- the previous version of the act, if you go to the Commercial Arbitration Act at tab 73. You'll see 615(3)(b) continues to look at the -- the fact of whether the matters in dispute are factually or legally complex in deciding whether or not an arbitrator's authority ought to be revoked. I say these are circumstances which would not be expected to apply in international commercial arbitrations.

Another good example is Section 22 of the act, which provides for the applications of the rules of the British Columbia international commercial arbitration centre for domestic commercial arbitration.

Or finally, under Section 26, you see the ability to tax the fees and expenses of arbitrators by any party under the provisions of the -- the Legal Profession Act.

My point is that the Commercial Arbitration Act is focused and targeted on a different animal than these international commercial arbitrations. I say therefore that the -- the Commercial Arbitration Act cannot properly -- and were not intended to apply in these circumstances.

In closing, My Lord, I'll just summarize very briefly the submissions I've made. Firstly, that the meaning of "commercial" should be given a broad and liberal interpretation in deciding on the application of the International Commercial Arbitration Act, that that task is defined by looking at the underlying relationship which gives rise to the arbitration. And I say in this case it's clearly one of investing under Chapter 11 of NAFTA, and independent of that I say there's a

very strong -- the strongest position is clearly that NAFTA intended investment disputes, and there was an investing activity.

I say that the results -- the interpretation urged by the petitioner in this case would lead to anomalous results. We've seen the higher standard of review imposed on unconnected parties to the form, the breaking up of the harmonization effect that was intended. There was a strong purpose of bringing the grounds for setting aside in recognition of enforcement together in our international legislation.

And finally, that the Commercial Arbitration Act was not conceived or intended for application in this type of circumstance.

And that, My Lord, concludes my submissions. I'd like to turn matters over to Mr. Cowper.

THE COURT: Thank you, Mr. Alvarez.

MR. ALVAREZ: Thank you, My Lord.

MR. COWPER: Thank you, My Lord.

I think I'm taking over at page 35 of our submissions, and I'll complete this chapter. What I endeavour to do in the remaining part of Chapter 2 is to deal with the question of, if you will, the general jurisdictional concerns about review under the international act, what does it look like.

I'm going to answer your question about Quintette and the analogous -- or the proposal to apply pragmatic and functional tests based on the spectrum analysis that the Supreme Court of Canada applies. And I will deal with the -- the same jurisdictional questions which arise out of the other proposed statute. And I deal with some comments with respect to public policy.

So at the outset, let me just say this by way of introduction: The reason we're urging upon you the Quintette analysis is because in my submission it flows from the terms of the statute itself. This is a statute which does something very expressly.

It expressly confines the jurisdiction of the court in express terms to reviewing awards of this nature. And both statutes do this. It's not only the -- as you know, they both came out at the same time. And they -- they were both intended to capture and to confine the jurisdiction of the

court to the statutory language for a variety of reasons, some of which are different in the international act and some of which are -- which are differing in the domestic act.

The -- the fundamental point, I think, on which my friend and I disagree is whether the pragmatic and functional analysis which the Court, particularly the Supreme Court of Canada, has used to set the standard of review for judicial review or appeals from administrative tribunals, whether that's helpful when you look at the language of the act.

Now, clearly some of those cases have come down since the passage of these statutes. But the Quintette case was very careful to apply the language of the Model Law when it reviewed the matter. And the language of the Model Law under the international act was chosen with some care. And Mr. Alvarez has dealt with the idea of harmony.

But I say with respect the safe harbour here is to look at the language that the act has directed the Court to, and to pay regard to the fact that the statute expressly says the Court shall not -- and I'll get the exact words, but the Court shall not interfere except on these grounds.

What -- the problem that the Court has to address in other statutory contexts, if we take Pezim as an example, in the Pezim case you had a statutory right of appeal from the securities -- securities commission to the Court of Appeal. Leave to appeal was granted on a question of Canadian law. The principal issue was the interpretation of the Securities Act.

What the Supreme Court of Canada said was notwithstanding the fact there's an appeal, we know there's appeal because the statute gives us an appeal, the question is: How should the Court discharge its burden or its duty and its office of exercising that appeal? Ought it to do so as if it were the original administrative tribunal, or ought it to express and incorporate in its own deliberations, in a sense a self-restrained measure of deference, to the expertise of the tribunal, the statutory context in which they're operating, the practical results of an administrative system and regime?

And as Your Lordship knows, the Court has in that and the Southam case said that for domestic purposes it's important that we have an administrative system of justice which allows administrative tribunals to make decisions which aren't shackled by the formerly, if you will, almost artificially --

THE COURT: Yes.

MR. COWPER: -- rules of jurisdiction.

Now, there's a different story as it relates to arbitrations because the same history to some extent has a parallel in arbitrations, but it's a little bit different.

If you go back to the nineteenth century in the English cases -- and we haven't cited any here, although I notice in Quintette Mr. Butler cited a large number of the English cases of the nineteenth century -- when an arbitration applied a statute under an arbitration, a commercial arbitration, and it came to court, if the Court thought the interpretation of the contract was wrong, they could convert, if you will, or regard an error of interpretation as an error in jurisdiction, because there were the old cases saying if the arbitrators erred in his interpretation of the contract, then he's imposed a contract on the parties different than that which wo -- they agreed, and that would then be -- constitute an error of jurisdiction, not just an error of law.

So there was a very aggressive intervention in arbitrations, particularly in the nineteenth century, and the courts exhibited a fairly intensive oversight of the outcomes of arbitrations.

Now, as we go into this century and -- and into more recent years, obviously the relationship with arbitrations shifted, and the legislature began to see. And -- and of course there are many forces at work here, both commercial domestically and commercial internationally saying, no, there are advantages. There are, if you will, social virtues in finality, which the court system doesn't provide. There are other virtues in arbitration which the court system doesn't provide.

And when parties choose an arbitral regime,

we do wish the Courts to give deference to the characteristics of that regime, which not only include finality, but also include different rules, different procedures in many cases that are different than our common law tradition.

One of the -- taking -- plucking out of this case a -- a pure example, in this case the parties filed written pieces of evidence. And in the civilian system the Court said, look, if -- you don't have to call this person for cross-examination if you're just contradicting them. There's no obligation of confrontation in this system. If you -- if you want to call a person to cross-examine them because you think you're going to be able to affect their evidence, otherwise we'll weigh the written evidence of a witness against the written evidence of witness or otherwise. That's different from the common law system where you would draw an adverse inference from the failure to call a witness and to confront a witness with opposing versions.

So the arbitral regimes, and there are of course many of them, have developed rules of procedure and principles of fairness and procedure which have departed from some of our common law traditions without doing so illegitimately. They've sought to achieve valuable goals of finality, efficiency, speed and those matters separately from the court system.

And so by way of introduction, that's effectively the backdrop. And I've -- I've dealt with a lot of history in about a minute-and-a-half now to the international act.

And if you turn to my submission at page 35, as Your Lordship knows, Section 5 says:

> "...a court must not intervene unless so provided in this Act..."

Now -- and where I say -- and those lang -- those words, I think, are very clear, and they were given clear meaning in the -- by the Court of Appeal in Quintette and by Chief Justice Esson, as he then was, in this court. What I do say is that is actually more powerful in its context than a privative clause.

Privative clauses were dealt -- and -- and

sort of developed in the context where there was a recognition of judicial review, but the legislature wanted to solve the problem of the artificial consents of jurisdiction, so privative clauses were gradually developed particularly in the '70s to try to tell the Courts don't fiddle with the results during judicial review of administrative tribunals by applying artificial notions of jurisdiction.

This is a different thing. It's -- I'm not saying it's -- it's -- it's not opposite in the sense that there's a parallel process, but what's -- what's said here is that the Court's jurisdiction at a threshold is confined to its jurisdiction under the act.

Now, that's under sub (5)(a) (sic), and you'll see that the -- sub (b) is:

> "...an arbitral proceeding of an arbitral tribunal or an order, ruling or arbitral award made by an arbitral tribunal must not be questioned, reviewed or restrained by a proceeding under the Judicial Review Procedure Act or otherwise except to the extent provided by this Act."

In case there was any doubt about what paragraph A said.

So if you turn to page 36, if you would, it sets out the subheadings there, and the:

> "Recourse to a court against an arbitral award may be made only by an application for setting aside..."
>
> And sub (2) sets out -- it says:
>
> "An arbitral award may be set aside by the Supreme Court only if..."

And I've lost count. I think there's three or four indications of restriction there. But when you come to the subsections, it is interesting to read them in one go. The first one is incapacity. The second one is validity of the arbitration agreement itself. The third one is proper notice of the appointment or inability to

present your case; in other words, the most fundamental sense of fairness, rather than a precise procedural adherence.

Dealing with a dispute -- and I'd ask you to note that, because I'm going to put some force in that word 'cause I think it was chosen with some care. Sub (4), which is really the -- the closest one comes to a jurisdictional authority in the court, does not use the word jurisdiction. It -- it deals with -- it says:

> "...the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration..."

And -- and it is a jurisdictional concept. But the use of the term is quite important because I think the -- the drafters wanted to avoid importing some of the older laws that related to the notion of arbitral jurisdiction.

And what they were drawing the Court's attention to is the idea that the arbitrators are there to answer a dispute rather than to mechanically apply a jurisdiction. And the reason for that is that where arbitrators had previously been interfered with quite often, or where intervention was applicable under the law, was where they had, for example, asked the wrong question, or in asking the right question had applied the wrong principles, those kind of principles which I was taught in law school anyway with respect to jurisdiction.

And where the arbitral regimes went and said, no, no, if a dispute's given to us and we answer the dispute, that's what is our job, and we should -- we should cast off, if you will, the old artificial notions of mechanical jurisdiction.

Sub (5) is composition or the arbitral procedure was not in accordance with the agreement of the parties. And I'll come back to that, but the -- the notion there that, as always, it's a consensual process, and the arbitrators ought to follow the arbitral procedure, if there is one, in agreed -- in accordance with the agreement of the parties.

Over to 37, if the Court finds the subject

matter not capable of settlement -- I don't think that really arises, because these are, if you will, fundamental local principles, the second one being:

> "...the arbitral award is in conflict with the public policy in British Columbia."

Now, as I -- I'm at 37 here. And I've referred to the UNCITRAL analytical commentary here which has been read to you a couple of times, and I won't turn back to this now. But this is part of an international process to restrict the courts to identify grounds. And those grounds are generally chosen in -- certainly in English-speaking countries with those words in mind with some minor changes.

Now, if you go to the re -- the authorities at 103, we go to Quintette. And as I say, in paragraph 103 in Quintette the Court held:

> "The ICAA severely circumscribes the jurisdiction of the court to interfere with arbitrations to which it applies."

And if you could go to the petitioner's tab 55, and if I can go to the petitioner's tab 55 -- I think this is my marked-up copy. Thanks. -- just a couple of points aside from the passages which we've -- we've read to you and recited in the argument. The first section of this tab is Chief Justice Esson's award. And you'll see at 203 that he refers to the -- the underlying objectives of the statute.

And I noticed your ob -- your observation a few moments ago is -- is -- is appropriate in the sense that, in one part, the legislature was hoping to actually create economic activity relating to arbitrations which those of us in the legal community in Vancouver would say has been a little underwhelming in the sense that the number of arbitrations taking place here has not lived up to its billing. That, I gather, has actually been the case for a significant number of international arbitration centres around the world which have similarly been competing for the best place to hold an international arbitration.

But with respect to the court's jurisdiction, that's -- whether it fulfilled its promises or not it's nevertheless one of the reasons why the legislature sought to create such a limited review for international arbitrations. It's -- it's one of the underlying reasons why in my submission the act reads as it does.

He -- Chief Justice Esson refers to the commentary and -- and quotes the commentary, and we rely upon it as well. And you'll see at 204 and following Chief Justice Esson, and this is also concurred in by the Court of Appeal, refers to substantial passages by Mr. Justice Richardson in the New Zealand Court of Appeal at 204 and over to 205, all of which are in support of the principle that international trends and jurisdictions weigh heavily against interference. And he, at the bottom of page 204, for example, is quoting from Mr. Justice Richardson when he is talking about narrowly interpreting public policy considerations.

One of the anxieties when this -- when the Model Law was developed was that no matter how you wrote the list, you would have to incorporate and allow courts to give effect to the fundamental public policy of the forum. In other words, it would -- it was not seen as appropriate to say that you have to afford -- enforce an award no matter what it contains if it offends the public policy of the court which is part of the system of law which you've asked to oversee the arbitration.

And what they were concerned about was that that jurisdiction might in some ways be a bolt-hole for other jurisdictional-like arguments which would elevate something which would be fairly pedestrian into a public policy basis for intervention.

And as I'll say when I come back to the moment, there is some danger of that in this present case. As I submitted on Friday, in my submission, Mr. Thomas's submission as it related to the damages portion of the award is precisely that; it's an attempt to elevate a fight over evidence which took place before the tribunal, not only into a question of law, but into a question of public policy. So the Courts have acknowledged

that risk.

And you'll see, for example, in the middle of 205 when quoting from, among other people, I take it, Jan Paulsson and the International Chamber of Commerce arbitration text saying that the Court -- the French Cour de cassation rejects judicial tampering with the decisions of international arbitrators.

With respect to awards rendered in France, it is clear the judge has no power to set them aside, even if he thinks the arbitral tribunal is distorted. And the French is given there. And my French isn't -- isn't good enough, but denatured or -- or taken out of its proper character is, I think, the -- the French translation there as distorted.

And then they quote the United States Supreme Court decision in Mitsubishi, which I think Your Lordship has -- has said.

And then if you go over to 206, Chief Justice Esson concludes the reason for his quote, and essentially saying that the views expressed by those Courts are substantially the same as the consensus referred to in the preamble to our international act and thus reflect the purpose of that act.

He then goes on to deal with the issue. And he -- the issue -- as Your Lordship may recall, this -- this was an arbitration which had -- had lives of its own. It occupied large numbers of the members of -- of a -- very distinguished law firms in British Columbia here and in Tokyo for a long period of time. And I think there was over 140 days of hearing, and it was to set the base price for coal or to set the price for coal, I guess, depending on your view of that issue.

The -- the issues as I see it from the authorities, and I'm sure there's a lot more to be said about it, was that on one view of the question it was only to set the -- the base price. On another view of the question, it was to set the price from the end point to the beginning point of the period covered by the arbitral submission.

And the attack was based on the fact that there were escalating prices, I think, on quarterly interviews -- quarterly intervals set by

the arbitral tribunal, so that they were asked to set a price. And the question is: Did they answer that; did they set the price when they set a price which included intervals? And I may have got that wrong, but that's as best as I can tell from the decision.

Both Chief Justice Esson -- and that's why I'm troubling you with that point. Both Chief Justice Esson and the Court of Appeal said, well, you could look at it either way. We're satisfied if you think it through that it's -- that it was within their authority to set the interval prices. But they also went out of their way to say they answered the dispute. The dispute was the price, and they answered the price. They answered that question.

And so I think in both levels of court the Court was careful to use the word "dispute," to think about it as framed by the statute and to regard their jurisdiction as properly framed and limited by the statutory language.

Now, with respect to the Court of Appeal decision, you'll see in Mr. Justice Hutcheon's judgment behind it, it's the pink page, at 221 he talks about in the fourth full paragraph the only dispute raised by the submission. And then he talks about the base price later.

Separate reasons over at the top of page 223. And then at the bottom of his reasons, he agrees with Mr. Justice Gibbs in the last paragraph of his judgment there:

> "I agree with Mr. Justice Gibbs in his discussion on the issue of judicial intervention under the International Commercial Arbitration Act. By way of addition, I would paraphrase a passage from Parsons and Whittemore that Quintette must overcome a powerful presumption that the arbitral board acted within its powers. Applying that presumption, I find that the decision in this case was within the scope of the submission to arbitration."

Mr. Justice Gibbs' judgment which was the -- the majority, although it was -- concurred in by Mr. Justice Hutcheon, starts at that page. And

you'll see at 224 in the third full paragraph, second sentence there, he says:

> "The act severely circumscribes the jurisdiction of the court to interfere with arbitrations to which it applies."

The first limitation is in Section 5 and continuing. He then talks about the second limitation in Section 34, and then he quotes down below. And then he talks about the argument concerning the base price. And I'll skip along, if I may.

He then talks about the trend as it was commented on by Chief Justice Esson at 227 of his reasons, refers specifically to the U.S. Supreme Court decision in Mitsubishi, which was also quoted by Chief Justice Esson, and the Badger case in the New Zealand Court of Appeal.

And then at 229 he sums up his view, or the Court of Appeal's view, I should say:

> "We are advised that this is the first case under the British Columbia act in which a party to an international commercial arbitration seeks to set the award aside.
>
> "It is important to parties, to future such arbitrations, and to the integrity of the process itself, that the Court express its views on the degree of deference to be accorded the decision of the arbitrators.
>
> "The reasons advanced in the cases discussed above for restraint in the exercise of judicial review were highly persuasive.
>
> "The concerns of international committee, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes spoken of by Blackman, are as compelling in this jurisdiction as they are in the United States or elsewhere.
>
> "It is mete, therefore, as a matter

of policy to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitration arbitral awards in British Columbia. That is the standard to be followed in this case."

And at the bottom he says, when he comes to the issue of the question, you'll see in the middle he says:

"The matter within the scope was what base price should be set?"

And he says:

"The arbitrators answered the question."

Now, Mr. -- one of the counsel, and I believe it was Mr. de Pencier, argued that the context of an investor-State arbitration arising from an international treaty provides a different context within which the Court is reviewing matters.

And my first answer to that question is that if this Court's jurisdiction flows from the international act, then we're dealing with a statutory structure which the -- Quintette has pronounced upon. It remains the same statute.

Now, it may have different expression depending upon what subheadings you're dealing with and the different contexts, but you're still, with respect, dealing with the statute. We don't rewrite the statute because there are different types of international commercial arbitrations to which that statute applies. The statutory restrictions still apply.

Now, I'm going to be submitting later that there's actually additional reasons in an investor-State context why this Court ought not to vary from Quintette, that in fact in an investor-State dispute arising out of NAFTA there are even more and better reasons why the Court ought not to entertain either direct or indirect attacks on the merits of the dispute because of

that context. And the most obvious one is that the law which governs the determination of those matters is the terms of a treaty between three States and the international law.

And so when we're dealing with references to the domestic court of one of the States, one of the dangers that, I -- I say with respect, a review on the merits presents is decisions of domestic courts of one of the three contracting States providing opinions on the interpretation of NAFTA and on international law, when I say, properly construed, NAFTA had that jurisdiction conveyed on the arbitral tribunals which are constituted under Chapter 11.

And that's not only because they're good at it and that they're expert at it, but it's also because it's an aspect of the regime which the States when they negotiated this consigned for investor-State disputes, that they did not contemplate review by a Court on the merits of the interpretation of the NAFTA, and you can understand why. There's three States involved. Whose court would be regarded as the final court of review with respect to the proper interpretation of NAFTA? By -- by -- the logical inference of that is of course -- one of the appealing virtues of referring to arbitral disputes is that you have them decided finally by an arbitral tribunal in a way that is not jurisprudential. It isn't precedential in the sense that court decisions are.

And then you have as a companion system in place for the parties; if they're unhappy with what the arbitral tribunals are doing with the terms, not only can they amend it, but they can have the commission pronounce upon the meaning of the treaty, and that that's binding upon future tribunals. So there's a complimentary system which has in mind, in my submission, the courts of the -- of the three countries not becoming in -- mired in the interpretation of the treaty or in the concepts of international law.

Now, two other aspects of the statute that I -- that I'll return to later, but I -- it is of some importance, is that under the statute, even after there is established to be jurisdiction for the Court to entertain an application for setting

aside, it's clear -- both on the international act and the domestic act -- that the legislature gave to the Court very broad discretion as to whether or not the Court ought to set aside the award and, if there was -- there were grounds to criticize a portion of the award, what the Court should do with that, excuse me, and its jurisdiction to remit rather than to set aside.

And -- and I'm running to -- close towards the end of my -- time in my day, but let me just tell you what I -- what I see of that, is I see from reading the act as a whole that the legislature has essentially said that deference is not only to be exhibited in deciding whether or not there are grounds for interference, but also in the Court's exercise of the jurisdiction which it's been given by the legislature.

And so if, for example, there are grounds of criticism but they would not affect the outcome, I say that it's clear that the net result of that would be a dismissal of the complaint. If there are parts of the award which are clearly wrong, then there is provisions for severance. And -- and other portions of the award would be -- remain enforceable.

And if there are aspects where -- where for one reason or another, and I'll get into them later, that the Court should consider remission, then that's a remedy that's available to the Court where it is unsatisfied with the disposition by the tribunal.

Now, at page 40 I've just given a note of the various cases which have similarly approved Quintette elsewhere, and I'll probably take you tomorrow to the Corporacion Transnacional case. But otherwise those other decisions essentially concur, if you will, in the -- in the conclusion reached by Quintette, and you'll see that the dates are continuing down to '95.

With respect, I've -- I've also quoted -- well, it's somewhat unusual, is a -- an article by your brother judge, Mr. Justice Lysyk, who has written on this subject matter, on the enforcement of international arbitration awards in Canada.

Now, a -- a couple of points and then I'll end for the day.

In my submission, and that's partly why I

took you through the -- the reasons as carefully as I -- I could, there is no room for my friend's submission that in the Court of Appeal the Court left open the question of the domestic test.

There's the passage where he says it would have even succeeded under the domestic test. I don't read that grammatically or in the context of the judgment as a whole as saying I'm not going to find what test applies, but rather for the reader to say, even if there was a domestic test, this award would still satisfy it.

Now, of course in -- I say one of the purposes of Chief Justice Esson and the Court of Appeal was to say fairly clearly what the appropriate standard was, and so I think my friend's interpretation of the reasons is somewhat strained, with respect.

And for that reason I say Shalansky and -- and the like are inapplicable to the present case, and really inapplicable to either -- either act in my submission.

Now, I can perhaps close on -- if you -- if -- I could either close right now or just make one more point and close. I'm in Your Lordship's hands.

THE COURT: Keep going.

MR. COWPER: I'm going to page 42.

And just dealing with what I think is an important point, which is the issue of the involvement of a State party. And I've already said that if we're in the international act, that's the statute we're under, and it happens to be an arbitral award and an arbitration which involves a State.

My friend relied upon or quoted the case of the Southern Pacific Properties involving the Arab Republic of -- of Egypt case, and I've talked about that at the bottom of 42 and 43. But that case actually gives you a couple of -- it's a long case. But there's a couple of interesting points there, one of them being --

The facts are curious, because what happened in that case was a foreign investor went into Egypt, entered into an agreement, as I understand it, with a minister of tourism to establish two large facilities in Egypt. They entered into an agreement of -- of sorts with the government, with

the Minister of Tourism in this case.

And then when the project went to the Egyptian assembly, which is the national democratic vehicle, people in the opposition said, no, we don't like that project, we want it to be killed. And effectively the orders went back down the -- the steps to say bring a halt to that project.

And the party who had invested several million dollars in the project said that's -- that's not appropriate and took the -- issued arbitration under the agreement against the Ministry.

The ultimate dispo -- deposition (sic) of that was you had the ICC in Paris and -- I'm going to get this wrong. Belgium? I'm going to get it wrong. Amsterdam? What was the other country? Oh. Oh, it was Amsterdam. The -- the court in Amsterdam in -- the one was concerning enforcement, which was Belgium, and the other was concerning an application to set aside on the basis of absence of jurisdiction.

The issue there was whether this was any agreement to arbitrate at all. My friend refers you to various comments in that in support of the view that the Court should have a more vigorous jurisdiction here. But the central issue there was: Was there any submission to jurisdiction at all?

Curiously enough, what happened was the -- the -- the Amsterdam court upheld the award and was prepared to enforce it. The Paris Cour d'Appel said, no, it should be set aside.

There was then an appeal to the Cour de cassation, which was the appellate court from the Cour d'Appel. The Amsterdam Court said, well, we'll hold off enforcing it while we await that.

The Cour de cassation said, no, it will remain set aside. As then, as you'll see in the reasons, they commenced a totally new jur -- a new arbitration under ICSID, which was the -- which you've heard about, the ICSID convention, based upon not any agreement, but based upon a provision of the Egyptian law which provided for arbitration.

And then the issue was whether there was -- whether that constituted a submission to

jurisdiction in ICSID.

Now, because it's a very long case I'll say that in my submission it doesn't help you on anything that's really in this case, because nobody is arguing that there isn't a submission to arbitration here; that's clearly provided for in the NAFTA, and there's no doubt that Mexico is bound by its submission to arbitration.

If that's enough for the day, I'll stop there, My Lord.

THE COURT: It is. But before we adjourn, can I just address the question of timing? And --

MR. COWPER: I -- I -- I -- I'll obviously know better by tomorrow afternoon. But I would anticipate that we would certainly finish by Thursday afternoon.

THE COURT: And, Mr. Foy, do you think you're going to be in a position to reply?

MR. FOY: Well, My Lord, this is the first I've heard that my friend was going to finish other than at the end of the week. So I'll take that under consideration.

MR. COWPER: Oh, I -- I'm sorry. I've forgotten. I thought that was the -- we had four days. And, well, I had been operating on the presumption that I had to leave Friday for my friend, and that's -- that's how we've set our time. So I -- I must have got the signals wrong, but that was my understanding.

THE COURT: Okay.

MR. COWPER: It doesn't matter. We've -- we've -- we planned it for Thursday afternoon and -- and we'll endeavour to fulfill that timing. If I've -- if I'm off by tomorrow afternoon I'll let Your Lordship know.

THE COURT: Because as I -- as I indicated before, I'm prepared to sit extra hours --

MR. COWPER: Yes.

THE COURT: -- subject of course to Mr. Foy's position that he's not sure that he's going to be able to reply given the -- the timing of when he received your submissions.

We'll just have to play it by ear. You --

MR. COWPER: I don't know that I can do anything about that, I would if I could in the sense of --

THE COURT: You can't --

MR. COWPER: I don't think finishing earlier in the

week would --
THE COURT: No, no. No.
MR. COWPER: -- would make any difference to my friend. He might want me to go later in the week in relation to that.
THE COURT: I appreciate that.
Okay. We'll play it by --
MR. COWPER: Perhaps -- perhaps we should address it tomorrow afternoon when I have a better handle on how quickly we're going and my friend and I can chat outside the courtroom.
THE COURT: Yes. That would be -- that would be useful. Thank you.
THE REGISTRAR: Order in chambers. Chambers is adjourned till the 27th of February at 10 a.m.

(PROCEEDINGS ADJOURNED AT 4:04 P.M.)

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