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Submissions by Mr. Cowper

1 28 February 2001 - Certified
2 Vancouver, B.C.

3

4 (PROCEEDINGS RESUMED AT 10:05 A.M.)

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6 THE REGISTRAR: In the Supreme Court of British
7 Columbia in chambers at Vancouver on this the 28th
8 day of February 2001, in the matter of the United
9 Mexican States versus Metalclad Corporation,
10 My Lord.

11 THE COURT: Yes, Mr. Cowper.

12 MR. COWPER: Thank you, My Lord.

13 Last evening I had just concluded Chapter 4.
14 And I looked at my notes overnight, and there are
15 two or three things that I should say before
16 moving to Chapter 5.

17 Yesterday I dealt with what in our view
18 constitutes the only possible -- or if I can say
19 it this way, potential issue of jurisdiction, and
20 that is relating to my friend's argument
21 concerning transparency.

22 My friend in his written submission
23 essentially asserts that that error as he alleges
24 it, jurisdictional in nature as he says it to be,
25 infected both the finding under 1105 and 1110.

26 With respect to that, let me say generally
27 that with respect to the interpretation of 1110
28 and the authorities under 1110, you'll find our
29 submissions in the chapter I'll come to later,
30 which is -- and it's in response to my friend's
31 chapter concerning alleged errors of law. That's
32 at Chapter 8 and following.

33 THE COURT: Um-hum.

34 MR. COWPER: So I haven't dealt with 1110 in the
35 chapter I've just covered. I deal with the proper
36 interpretation in Chapter 8.

37 Let me say this, and that is: On a fair
38 reading of the award in my submission, the finding
39 under 1110, that is the first finding, is not
40 infected by my friend's allegation respecting
41 transparency. And for that reason, as I've dealt
42 with it, it is an issue of interpretation, I say

43 it's not capable of being a jurisdictional point.
44 That's my position with respect to the first
45 finding on 1110.
46 And I say that because, with respect to the
47 finding of expropriation, the issue is not whether

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1 the processes were fair, but fundamentally what
2 was the net effect of the aggregate conduct?

3 And the difference between 1105 and 1110 on
4 the tribune -- tribunal's own wording essentially
5 is whether in addition to being unfair it
6 essentially constitutes a permanent deprivation of
7 property under 1110. And so I say -- although my
8 friend very briefly says the one infects the
9 other, I equally briefly say they don't. There's
10 no natural transition from a finding of 1105 with
11 references to transparency to saying the finding
12 in 1110 is necessarily infirmed if the
13 transpare -- transparency goals of the treaty are
14 unavailable to the arbitrators.

15 I say further that with respect to the issue
16 of jurisdiction that the tribunal's finding, if
17 I'm correct that they made an additional finding
18 with respect to the effect of the Ecological
19 Decree, has nothing to do with transparency.
20 That's a finding based upon a separate
21 governmental act construed by the tribunal as
22 affecting separately the permanent deprivation of
23 property by quite a separate governmental
24 decision, which is the Ecological Decree issued by
25 the State.

26 And so I say that with respect to the second
27 finding, that on my friend's argument there is no
28 evident jurisdictional complaint. And indeed,
29 unless my friend establishes in my submission that
30 that is not an independent ground, that there is
31 no jurisdictional ground that has -- attacks or is
32 capable of attacking the second finding of 1110.

33 I do agree that if my friend's submissions
34 with respect to the amendment of the claim are
35 correct, in other words, if he successfully
36 attacks the tribunal's finding of jurisdiction on
37 amendment, that that would then constitute a means
38 by which the second finding on 1110 could be done
39 away with. But I say, in effect, he has to
40 succeed on that as it relates to the second
41 finding on 1110.

42 I hope that's helpful.

43 With respect to a number of interpretive
44 issues, I would ask you as well to note in this
45 chapter I'm going to come, when I come to the
46 errors of law, to three important cases. And I
47 haven't dealt with them yesterday, and I've chosen

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1 to deal with them on interpretation.

2 My friend has a different view of their
3 impact but I will deal with the Biloune case, the
4 ELSI case that my friend put some emphasis on in
5 his submission to you, as well as the Myers case
6 as it relates to the -- to the matter largely,
7 when I come to it, to the error.

8 I should say, and I'll -- I'll take you to
9 this when I -- when I take you back to Myers, that
10 the separate opinion of Schwartz in Myers comments
11 on the transparency argument, and says that in his
12 view it makes sense or it is sensible but he's not
13 going to find it because in his view there was
14 inadequate argument, and he -- it's unnecessary
15 for his purposes.

16 But that passage in Myers is helpful in my
17 submission because it shows that another
18 international lawyer looking at this does not see
19 the conclusion reached by this tribunal as lying
20 outside the debate between international lawyers
21 concerning the proper interpretation of these
22 provisions.

23 So what I'd like to do today then is I'll --
24 I'll turn to the facts, which is really Chapter 5,
25 and deal with those. And we will then -- I'll
26 deal with Chapter 6, which is the separate
27 submissions made with respect to the allegations
28 of improper conduct.

29 We'll be dealing -- and I think we'll have
30 more than sufficient time today to deal with
31 Chapter 7. And we may get to the errors in law by
32 the end of the day, it really depends on how
33 quickly I go through the facts.

34 Turning to Chapter 5, I'd like to make a
35 couple of general observations which I haven't
36 made in the document and which really arise from
37 the manner in which my friend has approached the
38 facts. And let me start with what I have
39 attempted to do in Chapter 5 and what I haven't
40 attempted to do.

41 We have not attempted in Chapter 5 to lay out
42 before you all of the evidence on any of the

43 points raised by my friends. We've selected
44 evidence, and it is decidedly selected.
45 I do that because the burden which I see I
46 have here is only to per -- persuade Your Lordship
47 that there was contrary evidence or a body of

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1 evidence on which the tribunal could find the
2 conclusions it had made which are under attack
3 under this section by my friend.

4 In -- in my respectful submission, one of the
5 difficulties the Court's faced with in this
6 proceeding is that the parties are not joined with
7 respect to the nature of the factual issues
8 below. And to some extent I say with respect to
9 my friend that he did not endeavour to do that for
10 the benefit of the Court in his factual
11 submission. He did not endeavour to say what in
12 his view as counsel were the two views of the
13 facts. He, rather, selected out facts which in
14 his view on the evidence made the conclusion in
15 his submission patently unreasonable.

16 One of the difficulties in a case where
17 Your Lordship is faced with that type of record is
18 that the Court has -- and I -- and I say with
19 respect ought to have some unease about the total
20 body of fact that underlie the conclusions of the
21 tribunal. And I'll try to indicate to you in my
22 submission what I see, the nature of the issues
23 joined.

24 But there's no doubt that under Chapter 5 you
25 will find by and large a counterpart to my
26 friend's Chapter 5, which is selections of
27 Metalclad's view of the facts and Metalclad's
28 witnesses.

29 By way of general overview, let me say though
30 in complete answer to this chapter that in not one
31 case in my submission has my friend argued that
32 there is no contrary evidence. On no fact found
33 by the tribunal explicitly or implicitly has my
34 friend asserted that there was no contrary
35 evidence.

36 And so as a preliminary issue, it's important
37 for me to say this, and that is: In my submission
38 the -- what my friend characterizes as patently
39 unreasonable test ought not to be applied to
40 questions of fact. The question of fact in my
41 submission only elevates itself in this context to
42 a question of law if it can be said that there was

43 no contrary evidence or no evidence available to
44 the tri -- tribunal. And as in a more judicial
45 setting, the tribunal must be taken to have
46 listened to the evidence and the submissions of
47 the parties, and to have taken into account the

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1 body of evidence that was laid before them.

2 And I want in that connection to say this:

3 You have one unusual access to the process in that
4 there's not only a transcript of the evidence but
5 a transcript of the submissions.

6 And -- and I simply say this: It's not
7 necessary for Your Lordship, but if you have any
8 concerns, because an aspect of my friend's
9 argument is, well, here's a fact, and I'm going to
10 say there's lots of contrary facts. But even
11 there, part of my friend's message to you is,
12 well, why wasn't that dealt with either more
13 expressly, more comprehensively or more
14 inclusively if they didn't accept it?

15 If you dip into this record and you dip into
16 any part of the transcript you will see a tribunal
17 that is engaged, a tribunal that asks intelligent
18 questions, a tribunal that tells counsel what its
19 reaction is to the relevance of what's being
20 presented in a reasoned way and which repeatedly
21 offers counsel and the parties opportunities to
22 persuade them to the contrary and to present
23 their -- their point of view.

24 And I say -- and -- and it's perhaps notable
25 that my friend has not seriously challenged or
26 sought to use the record of the submissions before
27 the Court to support any finding that the tribunal
28 was doing anything other than honestly and
29 industriously trying to come to grips with the
30 facts and the law, legal issues that were before
31 them.

32 Now, the final comment I want to make,
33 because I've dealt with the facts as my friend has
34 put before them, is I do want to say this, and
35 that is: My friend's submission and my chapter
36 will not give you anything other than a -- a -- a
37 slight introduction to the true colours of the
38 battle on the facts before the tribunal.

39 And you have from the award what I've said
40 yesterday was a restrained set of conclusions.
41 You should and ought to know that there were
42 vigorous positions taken by Metalclad and equally

43 vigorous positions taken by Mexico which the
44 tribunal did not decide were necessary to resolve
45 to conclude whether the claims were made out or
46 not. And let me just give you two quick examples.
47 But it's important because, for example,

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1 Mexico's fundamental factual premise, as I read
2 the record, certainly one of their fundamental
3 factual premises was that this entire claim from
4 stem to stern was a part of an overall securities
5 fraud by Metalclad.

6 And the proof -- perhaps the easiest way to
7 introduce that is if you read the
8 cross-examination of the president of Metalclad,
9 Mr. Kesler, and I don't have a time knot on it,
10 but you can go for about two hours of transcript
11 in his cross-examination before you get to
12 anything that deals with the issues we've spoken
13 of to this point in the hearing.

14 They deal with securities filings, securities
15 disclosure, the state of the company and
16 otherwise, all in aid of a proposition that the
17 claim was brought in bad faith, that Metalclad had
18 acted in bad faith throughout, and that its
19 Chapter 11 filing was an attempt to rescue itself
20 from the consequences of its own securities
21 misdealing and the misconduct of its officers in
22 managing the business.

23 On the other hand there is a substantial body
24 of evidence which was present in declarations and
25 other forms in which Metalclad said that the
26 picture of the facts and conduct by the federal
27 government, the State government and the
28 municipality could be indicted as being motivated
29 by improper motives. And I won't in this context,
30 because I don't need to, and the tribunal didn't
31 make any findings, tell you about those.

32 But there was a substantial body of evidence
33 which Metalclad put into the record in support of
34 the view that if you had to explain what happened
35 here, a full explanation would require you to make
36 findings of credibility against the governor of
37 the State, against the municipal president and
38 against other Mexican witnesses.

39 Now, it's obvious from the tribunal's award
40 that they did not find it necessary to come to
41 grips with those issues of fact.

42 And in its closing Metalclad conceded that it

43 could not make out on persuasive evidence some of
44 its allegations of impropriety, or -- and it chose
45 to render and to submit its case on the more
46 modest basis which is reflected in the award.
47 The reason I'm saying it though is -- is that

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1 if you want to know what happened below, you have
2 to understand that the award reflects a restrained
3 conclusion and that there were many issues of
4 credibility between the parties, many issues in
5 which people -- one witness said another was
6 lying, that there were many issues of just
7 downright this person is lying about that meeting,
8 that didn't take place, that did take place, I
9 didn't say it, I did say it, there were improper
10 motives here, the company is acting as a --
11 essentially a fraudulent actor there, none of
12 which in my respectful submission are required for
13 determination by Your Lordship on a review of this
14 award.

15 Now, if I can then turn to Chapter 5 with
16 that introduction, and I've tried, and I may be
17 unduly simpleminded here, but I see the various
18 letters, and I think we go A to T in my friend's
19 chapter, and I've -- I think they really fall into
20 three headings. And these are inexact, but they
21 may be useful for the organization of my
22 presentation.

23 By and large let -- as I see it, letters D to
24 L deal with permits and federal approval, it may
25 be C to L in fact. And then M, N, O and P deal
26 with essentially municipal process and the facts
27 relating to the municipality. And then there's a
28 miscellaneous grab bag, if I may say, from Q
29 onwards dealing with some matters such as the
30 relative expertise of the witnesses, terms of the
31 Mexican constitution and municipal law, and the
32 effect of the Ecological Decree. So I think it's
33 useful to think in those three terms. And I'm
34 going to try as I go through to refer in my
35 references to which of those headings it fits
36 into.

37 By way of the broadest possible overview on
38 the first heading, if it's useful too for
39 Your Lordship to know where I'm going, I say that
40 virtually all of my friend's submissions
41 respecting permits, legal advice, the terms of the
42 permits, the option agreement, federal

43 representations and the like fail to account for
44 the findings of the tribunal respecting subsequent
45 events, the terms of subsequent permits and the
46 evidence respecting subsequent facts.
47 And I'm going to come back to this with

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1 detail, but it may be useful for you to hear just
2 sort of a one-sentence summary of where I'm going
3 with respect to some of these matters.

4 So, for example, with respect to the terms of
5 the original refusal, I'm going to take you to it
6 and say that on its face the '91 refusal was based
7 on the absence of federal permits and State
8 permits which were later obtained by the company,
9 and that the fact that there was an earlier
10 refusal on its face is unpersuasive with respect
11 to the refusal in 1995 by the municipality.

12 With respect to the legal advice, I'll say
13 that, with respect to my friend, he takes legal
14 advice, the total colour of which is this is a
15 risk, and converts it into the company
16 acknowledged and surrendered to authority of the
17 municipality.

18 On the whole of the evidence it's very clear
19 that the tribunal found as a fact that Metalclad
20 believed and acted on the basis of representations
21 by federal authorities that the municipality did
22 not have lawful authority. And it equally found
23 that Metalclad sought to solve the political
24 situation by addressing the municipality and
25 satisfying them, even though they did not regard
26 them as having lawful authority.

27 And with respect to that general area, I'm
28 going to take you to the permits and the
29 subsequent correspondence. And the central point
30 is a historical point, which is forgetting what's
31 happening early in the piece, the -- the central
32 dates of importance are from the spring of '94
33 through to the fall of '95, because that's when
34 construction of one form or another starts.
35 That's when you have the stop work order in the
36 fall. You have the continuing construction. You
37 have the completion of the construction and the
38 demonstration. You have the long period of time
39 when the permit application is outstanding. You
40 have the conclusion of the Convenio. And you have
41 the application and the successful obtaining of an
42 injunction by the municipality as it relates to

43 their challenge to the Convenio and their refusal
44 of the permit.

45 Now, that's the time period which is most
46 exhaustively and -- and comprehensively discussed
47 by the tribunal, and I'm going to say correctly

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1 so, because in each respect those facts answer my
2 friend's concerns.

3 Heading to the next one-sentence answer, my
4 friend put to you the option agreement as a fact
5 early in the -- in the piece, and he said with
6 some care that he did not argue that this
7 represented the final form of agreement between
8 the parties. And I thank him for that.

9 But the significance of this was that the
10 contrary case in the evidence was that Mr. Kesler
11 said subsequent to that option they waived that
12 provision because they received reassurances that
13 the municipal permit was not necessary, and that
14 if they applied for it, it would be issued as a
15 matter of course, and I'll take you to those
16 specific passages.

17 With respect to my friend's reliance on the
18 fact that Mexico's witnesses were consistent in
19 denying the existence of federal representations,
20 that of course requires the complete renunciation
21 of Rodarte's evidence, which my friend, I think,
22 more or less conceded. But, however criticized,
23 it was evidence that was available to the tribunal
24 under their reasons. But also more directly --
25 and if you actually go to the reply filed by
26 Metalclad, they rely upon the evidence of
27 witnesses other than Rodarte extensively with
28 respect to the proof of federal representations,
29 and I'll take you to it.

30 But there is a substantial body of evidence
31 about federal representations. And as the
32 tribunal in my submission properly found, the most
33 important period is what happens when the stop
34 work order is issued? What happens when the
35 company which has been constructing for some
36 period of time, maybe halfway through, I don't
37 know, you know, what construction timeline you're
38 talking about, but substantial construction has
39 been on at least through the fall of '94 -- they
40 get this, and what happens?

41 And as you know, the tribunal found
42 effectively that Metalclad believed that if they

43 applied they would get the answer. And I say
44 there was a substantial body of evidence to
45 substantiate not only the -- the good faith of
46 that conclusion, but also the rationality of it,
47 which was they had federal and State permits by

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1 that time, they had federal representations at
2 that time to that effect, and I'll take you to the
3 evidence. And not only that, as the tribunal
4 notes, shortly thereafter they got further federal
5 authority in relation to the very project, and
6 I'll take you to that.

7 With respect to the -- the point on remedial
8 construction, it's difficult to encompass it in
9 one sentence, because in my submission my friend
10 takes that as an ahistorical event when of course
11 it's in my submission a very historical event,
12 which was: In Metalclad's evidence, it said in
13 the summer of '94 when we had started construction
14 we had various permits and authorities, but we
15 were asked by federal authorities to go slow on
16 construction because of the assassination and the
17 pendency of the presidential election which was in
18 August of that year.

19 However, Metalclad said after the election in
20 the fall of '94 and going through to the spring of
21 '95, the -- the construction continued to pace,
22 increased its pace and was open and obvious to
23 evidence. And there's a tonne of evidence with
24 respect, and I've selected some. But there's a
25 tonne of evidence and reason to accept that the
26 construction in the fall of '94 through to the
27 winter of '95 was obvious to everybody and was not
28 possibly capable of being characterized as limited
29 to remediation or maintenance.

30 There was evidence about remediation and
31 maintenance work, and Metalclad included that,
32 that there was no doubt that there was such work
33 going on, but that the construction of the
34 facility later in '94 and '95 was not understood
35 by anybody to be limited to that, including the
36 municipality.

37 With respect to my friend's assertion
38 concerning the federal closure order, I'll take
39 you to that order. And there was a contrary case
40 with respect to the federal closure order, and it
41 was a very simple one, which was the federal
42 closure order was the closure of COTERIN's site

43 which was a transfer site. And it expressly
44 contemplated continuing federal oversight and
45 additional authorities being granted.

46 In other words, it was a closure order
47 subject to further and other authorities, and I'll

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1 take you to the chain of permits which flow
2 between then and '95 and '96 which are -- which
3 are continuously coming out of the federal
4 government and which authorized works. They
5 authorized construction. They authorize other
6 works. They authorize, for example, the partial
7 reme -- I don't know if remediation is the right
8 word, but the proper storage, if you will, of the
9 existing facility as well as the construction of
10 what was built.

11 And -- and I say with respect, having looked
12 at the record, I don't think there was a contrary
13 case. The federal closure order was clearly
14 subject to subsequent orders and subsequent orders
15 flowed.

16 My friend took the view that one of the
17 points of the earlier permit was that it had a
18 paragraph referring to local permits. I'll take
19 you to that. With respect, on a fair reading of
20 that document, I don't think anybody would have
21 thought that was a warning sign, that you had to
22 go out and get a municipal permit in relation to
23 the facility. And there's a substantial body of
24 evidence about oral representations and documents
25 which indicate the contrary.

26 Within the document itself, it indicates the
27 kinds of authority you have to get from a --
28 another corresponding authority that fall outside
29 the scope of hazardous waste, such as dumping or
30 removal of land elsewhere in the municipality, and
31 those are indicated with precision. And there was
32 a substantial body of evidence that they weren't
33 necessary for the operation of this facility, and
34 therefore those permits, which are not even
35 suggested by my friend to be necessary here, had
36 to be obtained. And those are expressly referred
37 to in the body of the permit.

38 And my friend takes, I think, the penultimate
39 paragraph, which is essentially boilerplate, and
40 says how can Metalclad today say that they -- that
41 the municipality didn't have authority?

42 With respect to municipal process, I -- I say

43 that the findings of the tribunal in respect of
44 the process are made out in the evidence. If you
45 read any of the evidence here it's quite clear the
46 municipality had no process for receiving or
47 issuing permits at all. And I think in the

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1 substance of my friend's presentation he came to
2 accept that, that the municipal application for
3 Amparo, that it's a reasonable conclusion for the
4 tribunal to conclude that the municipality was
5 uninterested in the application, uninterested in
6 the permit application, until it became
7 politically necessary to take steps against the
8 landfill site, and not for any legitimate
9 regulatory purpose.

10 With respect to what the argument
11 characterizes as an agreement to operate as a
12 non-hazardous site, I -- my friend, I think,
13 fairly in his material -- it's characterized as an
14 agreement in places, but I think in his oral
15 presentation, he made it clear to Your Lordship
16 that it was an offer, not an agreement, but an
17 offer. And I -- on Friday, frankly, with respect
18 to that, I think I dealt with that as fully as --
19 as I need to, but I'll give you some specific
20 references.

21 And then finally with respect to the
22 miscellaneous category, I say that there are
23 express, clear and reasonable conclusions with
24 respect to the municipal law. And I use -- or
25 domestic law, which includes constitutional, State
26 and municipal legal conclusions which were made,
27 and that it was a question of fact for the
28 tribunal, and that the relative expertise of the
29 witnesses, which my friend vigorously assails in
30 the submission, was not a matter that comes even
31 approaching a question of law, much less a cause
32 to set aside the award.

33 And I may say this in my material: I
34 actually observe, and I think it's -- it's
35 something that's fair to observe in this context,
36 that far from the expert witnesses for Metalclad
37 being the justifiable object of criticism, you
38 have a situation here where the United States of
39 Mexico had decided to respond to this claim by
40 saying this is -- and in fact some of the
41 witnesses say this is something we learn in
42 kindergarten, that the municipality has this

43 authority. This is a universal fact which all
44 Mexicans adhere to.
45 The lawyers for Metalclad said effectively
46 nonsense. What the United Mexican States are
47 saying is simply a distortion and a

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1 misrepresentation of their own law. And frankly,
2 lawyers who are willing to do that I think ought
3 to be regarded as having integrity and courage
4 rather than being criticized for not being closer
5 to the Mexican United States.

6 And with respect to selecting who got the law
7 right, you had, beyond any doubt, on the panel a
8 person who was more capable than anybody in this
9 room of deciding what the proper Mexican law was
10 in the form of Mexico's appointed professor of
11 law, Mr. Siqueiros or Dr. Siqueiros.

12 THE COURT: But by saying that, aren't you suggesting
13 that then, therefore, he made the finding of
14 domestic law rather than finding it as a matter of
15 fact?

16 MR. COWPER: No. I'm saying that for somebody who has
17 to -- and it's clear from the transcript that all
18 of the panelists understood it to be a finding of
19 fact, but that if -- if you're dealing with an
20 issue of law and selecting between two expert
21 treatments of a foreign law, that someone who's
22 familiar with a foreign law can more readily
23 understand the arguments respecting both sides
24 than someone who has a complete new introduction
25 to it. That's all I'm saying. I say there's no
26 support for the conclusion that the tribunal did
27 anything other than find this as a question of
28 fact before them.

29 Now, when you say -- and it's important of
30 course that the process of finding the law when
31 you're sitting as a tribunal and the question of
32 law, it's a question of fact before you, is the
33 same process that a lawyer undertakes in arriving
34 at a legal question if he's reaching a -- you
35 know, it still remains a legal question, but it's
36 a question of fact having regard to the containing
37 views of the law on the evidence before you. All
38 I'm saying is you had three people who are
39 international lawyers who approached it as a
40 question of fact, and one of them was familiar
41 with the legal system that was before him.

42 Now, I'd like to then, if you could, turn to

43 Chapter 5, and I can skip through some of this.
44 You should note in respect of Section B, which I
45 deal with at page 91, and there's a whole bunch of
46 evidence on this issue. But with respect to my
47 friend's characterization of the municipality and

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1 the community and the political climate, you ought
2 to know there was a substantial contest between
3 the parties as to whether in fact the local
4 community supported or opposed this.

5 And Metalclad's theory of fact, which it led
6 substantial evidence on, was there was no genuine
7 political opposition to this. It was motivated by
8 political decisions made by officials, rather than
9 acting on the will of the people, which was what
10 was said in the evidence.

11 And the principal places that I -- I'm sorry,
12 the principal points of evidence are that the --
13 Metalclad in fact conducted polling. Metalclad
14 called witnesses or filed declarations of people
15 who said this project has substantial support
16 because it provides jobs, the local people do not
17 object to its -- its conduct. And then there was
18 a whole body of evidence that was led by Mexico to
19 the contrary. All I'm indicating is that wasn't
20 an accepted fact before the tribunal. The
21 tribunal didn't find it necessary to reach a
22 conclusion on that, but you ought to know that
23 that was one of the contests in the evidence
24 before them.

25 If you go to page 92, I'd like, if I could --
26 my friend filed as part of his case a -- black and
27 white photographs of what I think he -- I think
28 somewhat ungraciously referred to as a building
29 and a hole in the ground, which is my -- my
30 client's site and facility.

31 If you could go to our extracts, which are
32 the blue binders, and I'm going to be dealing with
33 this for the rest of the presentation, so you may
34 want to have those at hand.

35 And at 44 we have provided coloured
36 photocopies for Your Lordship of photographs of
37 the site. And I believe these are all photographs
38 which my friend filed in -- in black and white or
39 in -- in less quality in any event.

40 Are you at that tab?

41 THE COURT: I am.

42 MR. COWPER: I'm not going to deal with each one, but

43 you'll see that the first one is an evaporation
44 pond. And that membrane is an aspect of the
45 operation of the -- of a facility like this.
46 You can skip the next one. The next one
47 shows the collection ditch.

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1 And you don't need to worry about the maps.
2 If you go to the -- and these were exhibits,
3 I believe, to the Triple A report, which is what
4 it says at the top left. But you'll see if you go
5 to what's called page 1, but it's about five pages
6 in --

7 THE COURT: I have it.

8 MR. COWPER: -- you have a facility entrance and
9 guardhouse. Down at the bottom you'll see there's
10 a number of buildings, view of the buildings
11 area. I can say parenthetically I don't think
12 you're going to hide that.

13 If you go over to the next page, you'll see
14 there's a view over cell 4. At the bottom is the
15 change house, that's for employees.

16 Over at 5 is a storage area for drums
17 containing materials.

18 Page -- photo 6 is the truck unloading dock.

19 At 7 there's a view of the truck scale and
20 weigh house.

21 At 8 there's a view of the faculty su --
22 facility substation, the overhead power lines to
23 the underground.

24 Over at 9 you'll see that this is a view of
25 the completed cells, 1 to 3. And I'm reasonably
26 sure, although my grasp of the record isn't of
27 course what my friend's is, but what those show is
28 what happens after the proper storage of the
29 photographs my friend showed you. The coloured
30 photographs of the barrels all on the surface
31 and -- and the things that he was criticizing
32 which were left with the prior owners, Metalclad
33 took those materials and under federal supervision
34 put them into cells. And "cells" just describe
35 the constructed pit and whatever, whether there's
36 a membrane or not, the constructed pit and then
37 the materials are put in and then put in the top.

38 And there are various facilities for the
39 gathering, depending upon whether it's a permanent
40 or a temporary facility.

41 MR. FOY: I don't --

42 MR. COWPER: Is this wrong?

43 MR. FOY: Yes. Yes. This is what has to be
44 remediated. This is the --
45 MR. COWPER: Yeah. I'm not --
46 MR. FOY: -- mixed together --
47 MR. COWPER: Yeah, absolutely.

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1 MR. FOY: Oh, okay.

2 MR. COWPER: That's what I'm saying.

3 MR. FOY: I thought you said it was properly stored.

4 MR. COWPER: No, no.

5 What I'm saying is -- and I think I'm -- I
6 think I'm right on this -- I remain right on this,
7 is my friend gave you a photograph of everything
8 on the surface, barrels lying acluster (sic),
9 et cetera.

10 What happened is under supervision they said
11 before you remediate those hazardous wastes,
12 they're not even properly stored right now. And
13 Metalclad put them in these cells. And then the
14 plan was to take the materials out of these cells
15 to neutralize them, to properly treat them, to put
16 them in proper storage areas and put them in other
17 sites, and I believe that's correct.

18 Well, my friend and I can talk off the
19 record, but I believe that's correct.

20 The -- the bottom is a view of a cell being
21 constructed with -- with membranes.

22 Now, my friend said there's a hole in the
23 ground and a building. And with respect, that's
24 not an accurate characterization of the facility.
25 But most importantly, one of the central issues of
26 fact is can you build what you've just seen in a
27 municipality which my friend says has never had
28 any commercial activity, has never had anybody
29 other than subsistence farmers wandering with
30 their burros, can you build that and use the
31 labour to build it and the mayor doesn't know
32 what's going on, for not only 13 months but
33 potentially a much longer period of time.

34 And the tribunal was asked to accept the
35 explanation that for a substantial period of time
36 no one knew that was going on. And I say with
37 respect that's just as preposterous today as it
38 was before the tribunal.

39 And if you go back to C, I'd like to take you
40 to the -- the history that I deal there with the
41 prior site.

42 And if you could go to tab 43, and if you'd

43 make a note -- it's generally in reference to
44 this, but you can make a note under paragraph 272,
45 go to previous tabs. And my understanding is this
46 is what was marked as the September '91 order.
47 It's a translation, I believe.

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1 And -- do you have that tab?

2 THE COURT: Um-hum.

3 MR. COWPER: And this is a federal order by SEDUE as
4 it then was, and it's obviously not everything.

5 But if you go to the next page, you'll see, as --
6 and you have to go about ten lines up:

7 [All quotations herein cited as read]

8

9 "As per official letter dated September 3,
10 '91 the total temporary closure of the
11 company was determined from this moment and
12 until further legal resolution. It is
13 clarified closure seals were not placed in
14 the access doors at this moment so the
15 company may withdraw and return to its
16 places of origin the 170 tonnes of
17 hazardous waste described above."

18

19 And that is the medical waste as I read it,
20 and that's clear from the second paragraph on the
21 first page of this exhibit. And it says:

22

23 "Once this is done the closure seals will
24 be placed. The company is forbidden from
25 this moment on to introduce any type of
26 waste or material or to continue with the
27 construction of the works that the company
28 has been performing until a competent area
29 of this Secretary of State resolves
30 whatever may proceed."

31

32 So I -- the difference between my friend and
33 I is there was a closure order, but I say with
34 respect that my friend's presentation doesn't take
35 into account that this order naturally
36 contemplated ongoing federal oversight and
37 potential approval of development of the site.

38 And what happened between now and the next
39 ongoing approvals were of course further federal
40 approvals, not only to COTERIN, but also of
41 importance to COTERIN when it was owned by my
42 client.

43 And I simply say that what you have to do is
44 read that in the light of all the subsequent
45 federal permits which were granted, and I'll take
46 you to a number of them.
47 Now --

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1 THE COURT: In -- in your paragraph 272 you -- you --
2 you refer to this -- this document. Do I take it
3 then that there's a typographical error in 272 in
4 referring to 1992 as opposed to September --

5 MR. COWPER: Yeah, I think it's September '91. I'm
6 sorry about that. Thank you.

7 Now, at page 94 I've given you a -- I've
8 already given you the references and the award
9 which I've quoted at the bottom of 276. And --
10 and I say beyond any doubt the tribunal was aware
11 of the issue of remediation and dealt with it in
12 its findings respecting the Convenio.

13 And the Convenio was the conclusion of a -- a
14 massive amount of evidence, of -- of things going
15 back and forth with respect to how -- that -- this
16 was going to operate, how it was going to move
17 forward. The -- the permits are in relation to
18 different matters. There's certainly an ongoing
19 debate with respect to whether the company would
20 be allowed to remediate at the same time it
21 operated.

22 As you know, the municipality said and sought
23 to have the federal governments disallow
24 concurrent operation and remediation. The company
25 said we can't do it otherwise. And that
26 conclusion in the Convenio was to -- was to
27 effectively side with the company and say
28 concurrent remediation and operation will be
29 permitted.

30 And it -- I don't think there can be any
31 doubt that's what the Convenio permits, among many
32 other matters.

33 Now, the other -- at the bottom of 95 it's of
34 some importance, I think, for Your Lordship to
35 know that in addition to permits and other
36 matters, and there's a -- a very substantial body
37 of evidence, only some of which was marked, about
38 the efforts that were made by the company to
39 commission environmental audits, audits of the
40 site, geological studies -- or I don't know if
41 that's the exact phrase, but suitability studies
42 with respect to the nature of the -- the clay and

43 the geology of -- of the site, to satisfy the
44 environmental authorities of the federal
45 government that it was a suitable site and that it
46 could with proper engineering serve as a safe
47 hazardous waste disposal site.

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1 Now, I say that briefly, but there was a
2 substantial amount of effort that was going on
3 through the historical period to satisfy federal
4 authorities to that effect.

5 What had happened when Metalclad had become
6 involved is that the previous owners hadn't
7 successfully completed all that was necessary.
8 They had some permits in place, my friend says
9 partial permitting, and that's a fair statement as
10 of the date that Metalclad becomes involved. And
11 then Metalclad underwent a number of efforts to
12 satisfy, and did satisfy, and the tribunal found
13 that the federal authorities were satisfied, as to
14 the environmental suitability of the site and the
15 proposal for the plant and what was built with
16 respect to the operation of such a facility.

17 At the bottom of 279 you may just want to
18 make a note, and I won't quote you to it -- take
19 you to it. But with respect to the issue of local
20 community under tab 22, there's some evidence as
21 it relates to polling in the community which the
22 company relied upon to -- to contradict Mexican
23 officials saying it was unpopular.

24 And there was also cross-examination of Mayor
25 Ramos, which included challenging him as to
26 whether there was any reliable or objective or
27 even subjective way of determining whether there
28 was genuine opposition in the population as a
29 whole. And, for example, at page 81 and following
30 Arbitrator Civiletti asks the mayor -- I'm sorry,
31 tab 1, page 81:

32
33 "I meant if you're trying to determine in
34 order to grant or deny a permit whether the
35 people approve or disapprove of it, do you
36 determine that by a survey? Do you
37 determine it by a plebiscite, by a
38 referendum? How is it determined?
39 Well, this is determined -- well, by a
40 recount. This count or this survey is done
41 surveying. There never was a referendum.
42 At least the new municipality never did

43 it. But we do know the population, we know
44 the people, we know the communities. And,
45 well, we saw the interest in order not to
46 give or to deny that permit. I want to
47 repeat that this is the will of the

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1 people. And I think it is fair to respect
2 the decision of the people.
3 And speaking of the people, how many of the
4 people would it be necessary to determine
5 that the people approved or consented, or
6 it was that will? Is it a substantial
7 minority? 20 percent? Does it require a
8 majority or what?

9 The truth is that I would actually tell you
10 that 90 percent or 80 percent of the people
11 of Guadalcazar were against this project,
12 against this landfill. I think that the
13 will of the majority makes the decision.
14 Even though it would be different, I think
15 that every citizen in Guadalcazar has the
16 same opportunity, they enjoy the same
17 rights. No one has more weight or carries
18 more weight than others, because there is
19 an equality of rights in our country.
20 Therefore, since they represented the
21 majority or even are being the majority, I
22 imagine I think that this should be taken
23 into account. And I dare say that it
24 represents 80 percent or 90 percent that
25 rejects or does not accept this landfill."
26

27 And pausing there, there wasn't a document
28 that supported the view that there was a poll or a
29 plebiscite or a referendum saying 8 or 9 (sic)
30 percent. This was the mayor's opinion.
31

32 "Arbitrator Civiletti: If I understand
33 your testimony correctly, as opposed to the
34 use of the landfill for waste, that there
35 was never any intention on your part or on
36 the part of the council to allow reopening
37 for hazardous waste. Is that correct?
38 A. That is so."
39

40 Now, if I could go to page 96, and this deals
41 with the first real permitting point, I think.
42 And that deals with the -- what my friend says is

43 without prejudice or without detriment, depending
44 on your translation, of the terms of the first
45 permit. In this part I say with respect that
46 the -- that the argument is flawed both in its
47 nature and its scope. It's -- it's flawed in that

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1 it does not account for or give credit to the
2 contrary view of the very permit that my friend
3 relies upon and fails to take into account
4 subsequent facts.

5 Now, at page 97, and I'll take you to the
6 permit in a moment, I do remind you that the
7 tribunal found that even on the most expansive
8 view of the municipality's authority that the
9 municipality exceeded it in its consideration of
10 denial, and I've given you the paragraphs which I
11 read to you yesterday at page 97 and 98 there.

12 At the bottom of 98 I remind you that
13 Mexico's assertion regarding the terms of the
14 federal and State permits ignores the tribunal's
15 finding that Mexico -- Mexican federal government
16 made numerous assertions regarding a lack of
17 necessity for a municipal construction permit.
18 And the tribunal found those representations had
19 been made. And forgetting the written permits
20 contained in the federal/State permits, Metalclad
21 accepted and believed that it would get the
22 municipal permit if it asked for it and that it
23 was not lawfully required, and you'll see the
24 findings. And I -- I say at 88 -- 85, 87 and 88
25 they -- they are clear findings to that effect.

26 Now, I'd like to turn now, if I may, to the
27 permits --

28 THE COURT: Either there's an elephant in the building
29 or we're having an earthquake.

30 MR. THOMAS: We're having an earthquake, yeah.

31 MR. FOY: Thank you, My Lord. I was wondering what
32 that was.

33 MR. COWPER: I thought it was a good point. But I
34 hadn't really gotten a -- to the purchase --

35 Should I continue or -- I've never been
36 interrupted by an earthquake before, so I don't
37 know what the protocol is.

38 MR. FOY: We're supposed to get underneath things.

39 MR. PEREZCANO: This is Mexico.

40 MR. COWPER: I won't -- I won't blame my opponents
41 for -- for the present --

42 Should I continue? I don't know if

43 Your Lordship wants to -- to take a break or --
44 or -- to know whether there's some --
45 THE COURT: I think we can continue, although
46 there's -- there's bound to be some af --
47 aftershock, I would think.

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1 MR. COWPER: It scared somebody off, I think.

2 I think Mr. Registrar is going to check to

3 see what --

4 Tab 5 of Volume 1, if you --

5 MR. THOMAS: Well done on the reporting.

6 MR. REPORTER: Yeah, thank you.

7 MR. COWPER: -- just to -- just to take you to

8 the points, just to remind you, if you go to the

9 second-to-last page you'll see the paragraph my

10 friend relied upon:

11

12 "This authorization was granted without

13 detriment..."

14

15 THE COURT: Um-hum.

16 MR. COWPER:

17 "...if the holder applies for and obtains

18 other authorizations, concessions and

19 licences, permissions or such that are

20 required for the realization of the work

21 that is the motive of the present

22 authorization or elsewhere, its operation

23 or other phases, when the time comes and in

24 consideration of the laws that correspond

25 applications made to the secretary of

26 social development and other federal, State

27 or municipal authorities."

28

29 Now, on the point of construction,

30 Metalclad's counsel below said it's very easy to

31 know what they're talking about if you take that

32 and you go to the very beginning because there are

33 three specific local permits that are required to

34 be obtained depending upon the design of the

35 facility.

36 And it's -- it's -- if you take for example,

37 if you go to the second page -- and I'm not going

38 to get all of this right, but it -- I'll try. If

39 you go to the second page, 1.3:

40

41 "The development of banks for the loaning

42 of materials not authorized in such

43 case..."

44

45 Do you have that with me?

46 THE COURT: No, I don't.

47 MR. COWPER: Okay. I.3, second page under paragraph:

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1

2 "Site preparation stage."

3

4 THE COURT: I do. Yes, I have it now.

5 MR. COWPER: Okay.

6

7 "...in such case..."

8

9 That is, in other words, if you have loaning
10 of material, you say:

11

12 "...in such case the respective permission
13 must be applied for before the competent
14 local authorities, and notification of this
15 same permission must be presented before
16 this general office within a time period of
17 no more than one month after obtaining it."

18

19 And there was viva voce evidence that that
20 permit, and Mr. Kesler explained it, was never
21 necessary because of the way in which this
22 facility was designed.23 If you go to the -- and as I understand it,
24 they're essentially -- on this footing, they're
25 essentially the need for local permits if you're
26 having to go off the site to obtain material to
27 cover your pits. In other words, if you have
28 to -- to lift material off land elsewhere and put
29 it on the pits, you need a local permit to do the
30 hauling and to take that material and to have the
31 location. Equally -- and that's, I think, called
32 a burrow pit. I'm not going to necessar --
33 there's different pits here.34 Equally, if you take the material that you're
35 using to excavate your own pits, and you have to
36 take it off-site, you need a dumping permit from
37 the local authority, because that's not a
38 hazardous waste permit, that's a dumping permit.39 But as Mr. Kesler explained, because of the
40 geological suitability of the site, the very
41 material that was taken out was temporarily stored
42 and was then going to be used to layer and put on

43 top of the waste that was being stored inside the
44 cells. So that permit wasn't required.

45 The only point I'm making here is that there
46 was a contrary case in relation to this very
47 document which is rational, which is that the

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1 permits referred to at the end are not permits for
2 the construction of a hazardous waste facility,
3 but are permits for the moving or excavation of
4 land off the site, which is within the scope of
5 competent authority but was unnecessary.

6 Now, the only other comment I would make with
7 respect to this permit, and this is the January
8 '93 permit, is if you look at the -- and I'm
9 going to take you to subsequent permits. Look at
10 the scope of the authorization at page 1.

11 THE COURT: This is at which tab?

12 MR. COWPER: This is the same tab.

13 THE COURT: Same tab?

14 MR. COWPER: It's just a separate point with respect
15 to it.

16 I'm passing on from -- what I'm saying is in
17 re -- answer to my friend's point, there are these
18 specific references in the course of the body of
19 the permit to potential need, and the words "in
20 case" or "if required," for permits for moving
21 dirt or depositing dirt within the scope of the
22 responsibility for the municipality, and that
23 that's -- was the explanation offered for the
24 tribunal for the end. But it's all supervene --
25 superseded by the later findings of fact and later
26 representations.

27 But I'm saying that with respect to my
28 friend's construction of the permit, that is
29 taking boilerplate at the end which has an easy
30 and obvious explanation and purporting to make a
31 jurisdictional error out of it, which I say is --
32 is a bridge way too far.

33 With respect to the second point though, look
34 at the scope, if I -- if I may ask you to, on the
35 first page of what the authorization purported to
36 be about, under:

37
38 "First, the present authorization grants
39 to the company the right to realize in the
40 terms presented the works pertaining to the
41 construction and operation of a technical
42 landfill for industrial wastes which will

43 consist of the transport, stabilization
44 and/or neutralization, and final
45 disposition of wastes with a capacity of
46 100 tonnes per day or 36,500 tonnes per
47 year on the site owned by the company and

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1 located in the State with a total surface
2 area..."

3
4 Talks of -- contemplates 46 cells,
5 complementary installations of 4 acres and areas
6 of reforestation. And you'll see that it's for a
7 period of a year, going over to the next page, and
8 in fact requires the conclusion of the
9 construction of the project within a year of
10 beginning of the date (sic).

11 And there were extensions granted later, but
12 if you read this permit as a whole, in my
13 submission the federal government is essentially
14 saying in this permit you have authority to do
15 precisely that which Mr. Kesler testified he
16 understood he had under the federal permit that
17 was granted to him.

18 And I'm not forgetting that we have a land
19 use permit, because if you go to tab 6, you'll see
20 that in May of '93 a State land use permit was
21 obtained. And if you have that tab, I just draw
22 your attention to the fact that the -- the --
23 under the measurement and borders and location, if
24 you go to the -- page 2, you'll see that the use
25 of the land says:

26
27 "...on which has been in operation a
28 temporary transfer station..."

29
30 Do you see that under paragraph 3?

31 THE COURT: Um-hum.

32 MR. COWPER:

33 "...as an antecedent to the technical
34 landfill requested."

35
36 So the State understands that what's happened
37 is you had a transfer station and were moving
38 forward, we're approving something different
39 that's going to be moving forward.

40 And you'll see under the -- documentation
41 referred to a number of documents relating to
42 authority, and the first one, for example, is:

43
44 "The authorization of the mentioned site
45 for realization of the executory project of
46 controlled landfill for hazardous
47 industrial..." waits "...wastes, this

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1 authorization granted by the
2 sub-secretariat of ecology through the
3 office of prevention and control and other
4 similar documents."
5

6 And then the -- the -- the grant is at the
7 next page. And you'll see in respect of the --
8 under construction on the next page -- do you have
9 that?

10 THE COURT: Yes.

11 MR. COWPER: It says -- other than the area, it says:

12
13 "The project must adapt to the
14 specifications and technical requirements
15 that the corresponding authorities
16 indicate."
17

18 Now, if you go to tab 7, which is, I think,
19 the next tab, and we're now in August of '93,
20 you'll see at the top it says:

21
22 "Translation of COTERIN operating permit."
23

24 THE COURT: Yes.

25 MR. COWPER: We're still in '93, and I just ask you to
26 say -- to -- to note that this is an additional
27 authorization by the federal authorities. And
28 you'll see under paragraph 1 it contains:

29
30 "The activity is the operation of a
31 controlled landfill through the collection,
32 transport, treatment, temporary storage and
33 final disposition of toxic waste."
34

35 And if you -- if you turn over, you'll see
36 that there's specific reference to the type of
37 waste, there's specific reference to the various
38 other requirements for operation. And it goes on
39 for pages, requirement for logbooks. I'm just
40 skipping, but paragraph 13 is a requirement for an
41 area of the change room; and I showed you a
42 picture of the changing of the building earlier;

43 the requirements in relation to residues and
44 samples; requirements with respect to reporting;
45 requirements with respect to any closing to
46 generate -- the general treatment neutralization
47 and stabilization, paragraph 20; reference to

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1 other technical norms; all the types of things
2 that you would see and expect to see in an
3 approval for -- for the operation of such a
4 facility.

5 Now, interesting enough, if you go to the end
6 of that, and this is the operation of the
7 landfill, there's no paragraph that I've seen
8 anywhere in here which says, oh, by the way, it's
9 August of '93, where's your municipal construction
10 permit? Go and get your municipal construction
11 permit. Here's an operating permit. And there's
12 no language such as that my friend relies upon in
13 the earlier permit referring in any way to local
14 authorities.

15 I don't see in fact, and I -- I may be --
16 there may be an occasional reference, but there's
17 no substantial reference to anybody else having
18 authority in relation to the matters covered by
19 that document.

20 Now, if you go to tab -- I'd like to go to
21 the -- tab 29 next, but keep that volume open,
22 because I'll come back to tab 8.

23 THE COURT: Just before leaving this, this tab 7, what
24 does this authority or permit give COTERIN that
25 the previous one did not --

26 MR. COWPER: Well --

27 THE COURT: -- because the previous one seemed to be a
28 permit for construction --

29 MR. COWPER: Yes.

30 THE COURT: -- and operation.

31 MR. COWPER: Yes. And I think that this essentially
32 is a more detailed set of guidelines for the
33 operation of the facility. They -- they don't --
34 they're not exclusive. They -- if you read the
35 permits as they move along, they -- they don't
36 necessarily have totally new content. There is
37 additional content. And I -- reading the two
38 together, not being a Mexican lawyer, it would
39 appear that the second deals more principally with
40 operation and -- rather than construction, and
41 gives a number of operating requirements as it
42 relates to operation. That's as best I can do

43 of -- on reading the two documents.
44 It was, I believe, characterized in the
45 evidence as an operating permit as opposed to a
46 construction and operation permit.
47 I think the first permit contemplated all of

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1 the phases of the project. And the -- the
2 operating permit placed a large number of details
3 with respect to operating on it. And there's a
4 number of other correspondences and letters.
5 You -- you can expect that there would be a
6 substantial volume of documentation flowing
7 between the federal and the -- federal authorities
8 and the company. And there was a substantial body
9 of documentation.

10 You'll see at the very last tab there's, I
11 think -- I've lost count. As I said, it was 65
12 yesterday. But there's a large number of exhibits
13 reflecting communication largely in Spanish
14 between the company and the -- and the federal
15 authorities.

16 If we go though to the -- the next document,
17 which is tab 29, just in the -- in the sequence, I
18 want to take you because -- taking you later in
19 the historical piece, but it's similar in its
20 character. And it's of some telling import,
21 because we're now at February '96. So we have the
22 construction and operation permit, we have the
23 operation permit, we then have all of the events
24 of '94/'95.

25 As Your Lordship knows, we have the
26 Convenio. We have the opposition to the
27 Convenio. We have the demand that the munici --
28 that there's a stop work order, there's the permit
29 filed. And by this date, if I'm not mistaken, we
30 have the refusal of the construction permit, all
31 of which are, not to be surprised, notorious
32 public facts.

33 We then go to February 8, 1996. And what
34 does the federal government do at this point? It
35 expands the capacity of the facility.

36 And if you go to the language and the colour
37 of this, this is not a federal authority saying,
38 oops, this is a halt to the project, we're not
39 doing anything because the municipality, which is
40 a coordinate constitutional body, has -- has put a
41 halt to this. If you look at the language of this
42 document, the second paragraph says:

43
44 "The regulation of the general law of
45 ecological equilibrium for the environment
46 in the matter of hazardous waste points out
47 in its fourth article, Fraction 10 that it

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1 is up to the federation to authorize the
2 construction and operation of installations
3 for the treatment, confinement or
4 destruction of hazardous waste. Based on
5 the aforesaid and in agreement with the
6 technical revision realized to the
7 information presented by you to solicit an
8 increase in the capacity of handling of
9 hazardous waste..."

10

11 I point out the following, paragraph 1:

12

13 "...COTERIN is authorized to increase the
14 capacity of its handling of hazardous waste
15 to 30,000 tonnes per month. Installations
16 that are located in La Pedrera with a
17 surface..."

18

19 Et cetera. And you'll see that there's a
20 number of other matters dealing with supervision
21 of the site, neutralization, et cetera.

22

23 But the point being made is that the --
24 forgetting all of the detail, in light of all that
25 happened, the federal government -- and my friend
26 said, well, there was no evidence of federal
27 assurances that the municipal permit wasn't
28 needed. But look at what they've said here, in
29 light of what the municipality has done, the
30 federal government authorizes an expansion by
31 tenfold two months later. And if you go to the
32 final document, you'll see there's no reference to
33 the necessity for obtaining a building permit.

34

35 Now, I'm not -- it's not my task -- and I
36 said earlier this morning, it's not my task to --
37 to persuade you one way or the other on the facts,
38 but I must say with respect to my friend that
39 there's a substantial body of persuasive evidence
40 that the federal government was solidly behind the
41 project in the face of municipal disapproval.

42

43 Now, let me point you to tab 8 just while
44 we're on that, which is a year earlier. And
45 putting it in the historical story, as I can -- as

43 best I can, this is a letter by the federal
44 authorities to Mr. Miranda the year earlier.
45 And just putting it in its context, if I
46 understand the piece here, you have the
47 construction which has occurred perhaps in a slow

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1 pace in the summer of '94. In the fall of '95 it
2 picks up. You have the -- the municipal stop work
3 order in the fall, October-November, of '94. You
4 have -- and we haven't gotten to the Convenio
5 which is the fall of '95.

6 So we have the permit out -- the application
7 for the permit has been made by this date based on
8 what Metalclad says is representations that in
9 view of the federal and State permits and other
10 matters they -- they will issue it to you, but you
11 should show respect. I think in fact the viva
12 voce evidence says they were told to show respect
13 for the municipality but it would be issued as
14 matter of course.

15 The -- the language in light of that
16 historical point in the period of this letter of
17 January 31, '95 I say is quite telling. It says,
18 starting in the second paragraph:

19
20 "The bylaws of the general law of..."
21 equili -- ec "...ecological equilibrium and
22 the protection of the environment in the
23 matter of hazardous wastes points out in
24 its Article 4, Fraction 10 that it is the
25 responsibility of the federal authorities
26 to authorize the construction and operation
27 of the installations for the treatment and
28 confinement of hazardous waste. Based in
29 the aforementioned and in accordance with
30 the technical review of the information
31 sent by you consistent with the
32 construction plans of the disposition and
33 support works for the cell of the
34 controlled landfill, it is observed that
35 this information complies with the
36 requirements established in the official
37 Mexican norms..."

38
39 And then there's documentary references:

40
41 "...for which this general direction of
42 which I am in charge authorizes the

43 construction of the final disposition cell
44 for hazardous waste as well as the
45 complementary works consisting in the
46 administration building, treatment unit,
47 road system, laboratory, dressing rooms,

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1 maintenance, temporary storage, evaporation
2 lagoon...lagoon and fuel station."

3

4 And then he talks about the deposit being
5 previously treated, et cetera.

6 And if you go over to the next page, just the
7 last paragraph I'd like to read you, it says:

8

9 "Besides I let you know that the
10 supervision and inspection..."

11

12 Do you have that paragraph?

13 THE COURT: Yes.

14 MR. COWPER:

15 "...that are realized during construction
16 of the corresponding works as well as the
17 operation of the cell will be up to the
18 federal attorney's office for the
19 protection of the environment on the part
20 of its delegation in the State as well as
21 of central office."

22

23 No reference to any authority, supervision or
24 legitimate role for the municipality in that
25 document.

26 Now, if you go at page 100 -- oh, I've been
27 told I'm going on, but if I could just leave you
28 with a reference and then perhaps we'll take the
29 morning break.

30 If -- if you care about the relationship
31 between the specific permits required for
32 burrow -- burrow material, deposit material and
33 otherwise, Mr. Kesler, in his evidence in the
34 reference I gave you at 288 at the bottom --

35 THE COURT: Um-hum.

36 MR. COWPER: -- he explains what he understood those
37 references to be. I'm not going to take you
38 there, but there was viva voce evidence saying
39 hold it a second, you -- you haven't understood
40 this at all. These are -- this is a reference to
41 these other specific permits which weren't
42 necessary, weren't sought because they were never

43 required.
44 And that's perhaps an appropriate point to
45 break.
46 THE COURT: Yes. We'll take the morning break now.
47 THE REGISTRAR: Order in chambers. Chambers is

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1 adjourned for the morning recess.

2

3 (MORNING RECESS)

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

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

6

7 THE COURT: Yes, Mr. Cowper.

8 MR. COWPER: I gather my last submission was 6.1 on

9 the Richter scale. I don't know if that's normal,

10 above normal.

11 THE COURT: Actually, there is a TV in the judges'

12 lounge. It was Seattle, and they're saying it was

13 6.4.

14 MR. COWPER: Oh.

15 I was at page 101 and paragraph 290, and if I

16 can take you to some of the viva voce evidence.

17 And I'm going to take the Mexican witness, if I

18 may, and that's Secretary Carabias at tab --

19 and -- and I've read her evidence. And I can tell

20 you I think it's fair to say that she wheels

21 around this issue significantly. But I'm going to

22 just give you one extract of part of her evidence.

23 If you go to 66:

24

25 "Madam Secretary..."

26

27 At the bottom.

28 THE COURT: Yes.

29 MR. COWPER:

30 "Madam Secretary, let me see if I can ask

31 it this way: If the municipality took it

32 upon themselves in the process of reviewing

33 the application for a municipal

34 construction permit to review the

35 environmental integrity of the project and

36 found it lacking, you are unaware of what

37 those conclusions might have been as you

38 sit here today. Is that correct?

39 No. I repeat, the municipality does not

40 undertake an evaluation of overall

41 environmental impact. Building permit

42 applications are reviewed on other grounds,

43 not environmental grounds."

44

45 And then she goes to talk about, second
46 paragraph down, engineer safety, physical safety,
47 et cetera.

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1 Now, if you go to paragraph 291, there was,
2 as my friend pointed out to you, the evidence of
3 Rene Altamirano that a -- contrary evidence with
4 respect to Minister Altamirano's statement
5 concerning the municipal permit requirement. He
6 was the witness my friend relied upon to say that
7 it was patently unreasonable to reach a conclusion
8 that there were any representations or assurances
9 the municipal permit would be forthcoming or that
10 the municipal authority did not extend to
11 considerations beyond construction, and I've
12 listed a number of other pieces of evidence.

13 In general, Rodarte, Kesler, Neveau are all
14 to the contrary. Perhaps I can just give you one
15 or two examples. If you go to Kesler at tab 40,
16 page 3, and the numbers are at the bottom,
17 paragraphs 11 and 12:

18
19 "I can underscore the fact that such was
20 not the statutory environment Metalclad
21 sailed into. It was rather much like that
22 described in Mr. Altamirano's testimony.
23 Our due diligence turned up the fact that
24 municipalities can issue construction
25 permits, but nothing indicated that it was
26 a prerequisite to constructing and
27 operating a federally approved hazardous
28 waste landfill. Certainly the 1998
29 LGEEPA..."

30
31 And that's the federal law.

32
33 "...made it clear that hazardous waste
34 authority resided with the federal
35 government. Matters of non-hazardous waste
36 are within the authority of State and local
37 governments."

38
39 Paragraph 12:

40
41 "Federal officials confirmed this to us
42 when we raised the question of the

43 municipal construction permit with them in
44 September of 1993. They, Dr. Lujan,
45 instructed us that federal authority was
46 primary in matters of hazardous waste, that
47 a municipal construction permit was not

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1 necessary. They, Mr. de le Cruz confirmed
2 this in October of 1994 when the
3 municipality purported to shut down our
4 construction because we had no construction
5 permit. It was reconfirmed in January '95
6 when INE..."

7
8 And that's another federal authority.

9
10 "...authorized more construction at the
11 site which was carried out under
12 PROFEPA..."

13
14 And that's the federal -- another federal
15 agency.

16
17 "...supervision. It was ratified in
18 November '95 in an agreement with SEMARNAP,
19 the Convenio, and again in February '96
20 with another authorization from INE, this
21 one increasing our landfill capacity by a
22 factor of 10."

23
24 The -- he was not the only witness who said
25 that. There were -- there's a substantial body of
26 other evidence.

27 But if you go to tab 15, just to take one
28 other witness for the moment, and you go to
29 Mr. Neveau -- oh, and you need to turn to page
30 138. These are extracts. It's about five or six
31 pages in, line 18.

32 THE COURT: Um-hum.

33 MR. COWPER: Are you with me at line 18? Sorry.

34
35 "We didn't believe that the city had any
36 authority or the municipality had any
37 authority over the construction of the site
38 at all. As a matter of fact, we discussed
39 it at length with both Garcia Leos and
40 Senior de le Garza and the permit was not
41 an issue. I want to confirm this, Mr.
42 Neveau. It is your testimony today that

43 the company did not have a policy of
44 applying for local authorizations.
45 No. That's not true. The company had a
46 policy of complying with all local
47 regulations. This was not considered one

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1 of them."

2

3 Okay. And -- and in respect of my friend's
4 reliance on Leos, if you could turn over to page
5 140 and 141.

6 And I don't know if Your Lordship observed,
7 but Mr. Leos, in his declaration, referred to some
8 exhibits respecting letters he had prepared. And
9 then without reference to a document he says:

10

11 "I subsequently gave an opinion that a
12 permit was required."

13

14 No rubber -- no -- no document to that
15 effect.

16 Mr. Neveau's evidence to the contrary is
17 contained in the following passages, you'll see
18 starting at the -- line 20 of 140:

19

20 "A. [sic] No. Your letter of September
21 the 9th asked Mr. Leos, Garcia Leos, for
22 his opinion as to the primacy of federal
23 permits."

24

25 I think that should be a "Q" rather than an
26 "A." If you look over the top, it says:

27

28 "A. It did."

29

30 THE COURT: Um-hum.

31 MR. COWPER:

32 "A. It did.

33 Q. This states as a fact that federal
34 construction and operating permits take
35 precedence over State and local
36 authorizations. Do you see that?

37 A."

38

39 Yes. Sorry.

40

41 "It does.

42 Q. Are you aware that Mr. Garcia Leos

43 testified that he subsequently informed the
44 company that the statement that federal
45 permits take precedence over local permits
46 was not correct and that it was necessary
47 to obtain a municipal permit?

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1 A. I was not aware he ever testified to
2 that, nor do I think it's a fact."

3

4 And I've given you at the -- at the reference
5 to 291, and I'll read you some of Ambassador
6 Jones's evidence, and you have as well evidence
7 from Kesler in his redirect.

8 I will draw your attention to the fact that
9 Rodarte's memorial is to the same effect on tab
10 13, but I -- I think for my purposes I've referred
11 to enough evidence on that point.

12 The -- if we go to page 102 next, the point
13 my friend makes in relation to Mexican legal
14 advice as I understand it is that, either through
15 due diligence or the evidence of Leos, the company
16 had learned that a municipal permit was required,
17 and there was similar contrary evidence. There
18 were -- officers of the company said no.

19 Fundamentally what we were told is we should
20 challenge any assertion of authority by the
21 municipality. We should go and seek an Amparo if
22 they seek to assert their authority, but that it
23 might be a problem. And as -- the central answer
24 I have to my friend is: Metalclad said through
25 our due diligence we've learned about the prior
26 permit. We learned about the risk of municipal
27 construction.

28 And then they commenced their story to say
29 how they were persuaded that it was not -- that
30 they didn't have any authority; that the federal
31 officials told them that there was no authority;
32 that they continued with the work without applying
33 for it on the basis of those representations; that
34 that work continued openly and in the sight of
35 everybody for a substantial time; that when the
36 stop work order came, federal officials said don't
37 stop, continue, but apply out of respect for the
38 municipality.

39 Now, I've given you the -- and I've just read
40 you the reference to de Neveau dis -- Neveau
41 disagreeing with the alleged receipt of oral
42 recommendations from Leos, who was the former

43 counsel who was called by Mexico.
44 So I'd like to turn, if I can, to 104. And
45 my friend placed great emphasis on this document.
46 But I -- I'd like to draw your attention to its
47 particular terms.

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1 If you go to tab 42, and I don't think I've
2 done this yet, done it myself. If you turn to tab
3 42, this is Exhibit 43, and this is the '91
4 refusal.

5 THE COURT: Um-hum.

6 MR. COWPER: You'll see this is informing you of the
7 decision to deny the permit as a result of the
8 Cabildo session. Then after the capitalized names
9 you see:

10

11 "The applicant company does not have, 1,
12 environmental impact study as required by
13 SEDUE..."

14

15 Or SEDUE (inflection), which is a federal
16 agency; number 2:

17

18 "...land use authorization as required by
19 the State government."

20

21 And then:

22

23 "3, control of high risk imposed by this
24 project."

25

26 And it says at the bottom:

27

28 "In addition, the number of studies
29 conducted by Gonzales show the area is not
30 suitable to establish the cemetery, thus
31 the application is denied."

32

33 My point being here, first of all, the first
34 two grounds for refusal are the absence of federal
35 permits and State permits which were subsequently
36 obtained. The miscellaneous and the third ground
37 are directly related to environmental
38 considerations which the tribunal found were
39 beyond the authority of the municipality.

40

41 So for my friend to say, well, how -- how
42 could the tribunal overlook this, when the history
 is that subsequent to this the permits were

43 obtained, the State land use permit was obtained
44 and all of the concerns respecting the
45 environmental issues were addressed and answered
46 to the satisfaction of federal authorities, how he
47 can say, well, how -- the municipality can clearly

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1 turn down the permit in '94 and '95 because they
2 turned it down in '91. That fails to account with
3 respect to the contrary case, which was that the
4 situation had changed dramatically and there was
5 no existing basis for the municipality to decline
6 the construction permit when it was supplied by
7 the new management -- or applied for by the new
8 management.

9 Now, I do make a brief point on page 105. My
10 friend said I think on several occasions that
11 there were two denials. And if you look at the
12 second document, I say with -- and I've given you
13 the reference at 302, the second document is
14 simply a rubber stamp by the municipal president
15 who is newly elected. There's no new
16 consideration of anything. There's not a new
17 application. All they say is we confirm the
18 earlier conclusion.

19 And if you go to tab 19, I say that's evident
20 from the document itself at tab 19. And you go to
21 the -- it's the attachment to the translation of
22 the declaration of Mendoza. It's headed
23 "Letterhead."

24 Do you have that?

25 THE COURT: Yes.

26 MR. COWPER: Sorry.

27 And it says the first substantive -- it's the
28 second full paragraph:

29
30 "The only order of business is the denial
31 that was issued by the municipality during
32 the period of 1989 and '91 in regard to the
33 construction of the industrial cemetery
34 located in the site of La Pedrera."
35

36 And then they go on to talk about how
37 they're -- they don't like it, and they say at the
38 bottom:

39
40 "Today, in light of a possible reopening,
41 this honourable municipal council, after
42 hearing the voice of the residents and

43 through..."
44
45 I think it should say.
46
47 "...its representatives, determines the

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1 denial of any permit that favour the
2 continuity of this company."
3

4 There was no permit application before them.
5 This was simply, if you will, a declaration of
6 continued political will on the part of the
7 municipality.

8 Now, over to page -- I think I've essentially
9 given you what I say in 105 and 106, and refer
10 going to the terms of the Convenio in 106.

11 And I just remind you that at the hearing
12 Metalclad acknowledged the notice that there might
13 be a risk and the notice that there might be a --
14 a -- an assertion of authority from the
15 municipality and dealt with that in its subsequent
16 evidence as to how it investigated and how it was
17 satisfied there was no authority, and how it
18 determined to go forward with the knowledge and
19 approval of federal officials.

20 So I go to the next point, which is the
21 option agreement. And I said earlier this morning
22 that my friend stopped short of an important point
23 in his dealing with the evidence, which was what
24 happened to that option agreement subsequently
25 rendered it completely irrelevant to the issues
26 before the tribunal.

27 And if you go to the reference at 311, which
28 was Kesler's re-examination or redirect -- and
29 I've given you the '96 amendment agreement extract
30 as well. But if you go to tab 16, and it's at --
31 and -- and you may want to -- let me just --
32 this -- this actually addresses several of my
33 friend's points. But while I'm there, if I may,
34 I'm going to give you references on a number of
35 points.

36 But let me start at 250, and this is again
37 Mr. Kesler. At the bottom at line 19 is the
38 question:

39
40 "Do you recall the essence of the amendment
41 in this agreement?

42 Well, this came 18, maybe 15 months after

43 we purchased the site and the landfill had
44 been built. You know, we never complete
45 these things, but it was essentially ready
46 for operation. Indeed, we had -- anyway,
47 we had accomplished all of the construction

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1 and training and so forth that had to
2 precede the actual operation. And it was
3 important..." for us to make -- or "...to
4 us to make an arrangement with Mr. Aldrett
5 whereby we reduce some of the long-term
6 payments in favour of other considerations
7 on his part. It was a negotiation of three
8 or four months that led to this amendment
9 and reflected the fact that we had now
10 completed it.

11 Mr. Kesler, in the document that we
12 referred to just before this one that
13 contains the language that Mr. Thomas took
14 you through..."

15
16 And that's the amended agreement my friend
17 relies upon, the earlier document.

18
19 "...about some contingencies with respect
20 to the governor's support and
21 the...municipal...the issue of the
22 municipal licence. That language is not in
23 this agreement of January 10, '96, is it?

24 A. You're exactly correct.

25 Q. Why isn't it there?

26 Because by January 10, 1996 we had received
27 assurances from the highest level of the
28 Mexican government that our project would
29 open. And let me tell you what I mean by
30 that. Not only had we signed the Convenio
31 with PROFEPA on November 24th, but we had
32 been granted an expansion of our permit
33 recognizing the created capability of the
34 treatment facility so that it was now
35 licenced for 360,000 tonnes instead of 36
36 per year. The federal government had
37 lifted the seals that were put in place at
38 the time the transfer station was closed,
39 so that enabled us to then open the
40 transfer station and begin remediation.
41 They had agreed with us we could operate
42 for at least five years. And there was

43 another permit given, if I'm not mistaken,
44 at the time the liner was -- I'm sorry, the
45 liner permit came after the agreement."
46
47 After the January agreement, there's another

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1 permit from the federal government in relation to
2 the use of a double liner or a liner on the
3 facility. That's what he's talking about there,
4 but it occurs after this point in time.

5
6 "There was one other thing we relied on,
7 however, before this agreement. In October
8 '95 President Zedillo was to visit the
9 United States. We had been working with
10 not only the embassy but the Department of
11 Commerce to try to get a message to
12 President Zedillo we needed his help, that
13 there was a federal versus State
14 confrontation brewing that needed his
15 involvement in. And we were able to get a
16 commitment from the White House to take our
17 case to Mexico.

18 "And in a meeting that occurred a few
19 days before President Zedillo's visit to
20 Washington that fall, Mack Maclarty of the
21 White House met with Luis Tellez..."

22
23 Or I may have gotten that wrong.

24
25 "...Tellez, who was President Zedillo's
26 chief of staff at that time, to discuss
27 issues that would be on the agenda between
28 the two presidents when they met.

29 "And I understand this is something
30 that is common before two heads of State
31 meet. We were on that agenda. And after
32 this meeting Mack Maclarty came back and
33 reported to our counsel here in Washington,
34 Senator Dubai, that he was assured by
35 Mr. Tellez that this matter would be solved
36 and to take it off the agenda, so that when
37 the presidents meet together, it's not part
38 of what they're going to discuss. You have
39 my assurance, he said, this is solved.

40 "And for that reason we felt like
41 this issue of whether or not we had to be
42 prevented because of a local construction

43 permit was simply not an issue and no
44 reason to have it in the agreement and no
45 reason to have it conditional whatsoever."
46
47 Now, my friend put to you that on a patently

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1 unreasonable basis the option agreement showed
2 that Metalclad was concerned with, aware of,
3 worried about the municipal permit. And with
4 respect, in light of that evidence, you would have
5 to find the tribunal to be well-founded in finding
6 that that evidence goes nowhere because it
7 immediately gets amended. There's an explanation
8 for the amendment. And the amendment, which my
9 friend didn't take you to, takes that out because
10 of the assurances which were in the evidence. And
11 those very assurances were accepted and found as a
12 fact by the tribunal.

13 THE COURT: You say it was immediately amended.

14 MR. COWPER: I'm sorry? Amended later, yes.

15 THE COURT: There's two intervenors.

16 MR. COWPER: There's a substantial time period, I
17 understand.

18 THE COURT: Yes.

19 MR. COWPER: Did I say immediately? I'm sorry.

20 THE COURT: I thought you did.

21 MR. COWPER: I -- I apologize.

22 THE COURT: Perhaps I misheard you.

23 MR. COWPER: Just -- just understand I actually take
24 and put some weight on that time period, because
25 that's the critical time period the tribunal deals
26 with, which is the construction, the
27 representations, the additional permits. And
28 that's why I took you earlier to that period. So
29 we're dealing with a period when it's removed, all
30 of that's occurred. And so it is, with respect, a
31 responsible explanation for what's happened. And
32 it's -- it's responsive to what they say, which is
33 we knew of the risk, but eventually we were
34 satisfied that the risk was not going to be
35 realized. And we had assurances from the federal
36 government it either wasn't necessary or at the
37 period in '96 it would follow as a matter of
38 course.

39 I'm at -- going on to the next point, unless
40 the -- you have another question on that issue --

41 THE COURT: Oh, I'm just thinking that really the
42 critical time is when -- when Metalclad made the

43 next payment under the agreement, because the
44 payment was conditional upon getting the municipal
45 permit. The time that they waived that was when
46 they made the next payment, not -- not in January
47 of '96. It just so happened that they amended the

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1 agreement in January '96 --

2 MR. COWPER: Um-hum.

3 THE COURT: -- and no longer felt it was necessary to
4 put that provision in there.

5 MR. COWPER: I'll look at that over the break.

6 But I think that the -- the critical question
7 is not whether the payment was made, the critical
8 question was was there a body of evidence on which
9 the tribunal could conclude that Metalclad
10 believed, as it held, they believed and honestly
11 believed at the material times that the
12 municipality did not have authority to refuse, and
13 that they had authority to continue. That's
14 the -- you know, that's the issue of fact for the
15 tribunal.

16 And I'm saying that my friend attacks that by
17 referring to this agreement. And the attack
18 doesn't go anywhere for two reasons; firstly, even
19 if it's paid, it's not an irrefutable fact. It's
20 just a fact which the tribunal, among a host of
21 facts, had to take into account. And there is an
22 explanation for it.

23 Now, it may be, as Your Lordship's observed,
24 that it's a fact that -- that -- that goes in
25 favour of Mexico's case. But there's a -- a
26 substantial body which go to the contrary, because
27 over that time period, as I've indicated to you,
28 the record is replete with correspondence and
29 authorities being provided by the federal
30 government. And the evidence is replete with
31 conversations occurring between Metalclad
32 officials, Metalclad representatives and the
33 federal officials urging and authorizing Metalclad
34 to proceed on.

35 Now, I think for the purposes of the -- the
36 legal consideration as the tribunal viewed it, it
37 was we have the investment being put in in -- you
38 know, the dollars are being spent increasingly
39 through the time period. But the critical period
40 is '94 and '95 when the -- when the facility is
41 being built, when the studies are being conducted,
42 when the environmental audit is being done. And

43 then it's not until, as you -- as Your Lordship
44 knows, the fall -- I say December of '95 that the
45 municipal permit issue comes back to effectively
46 be determined by the municipality to deny the
47 permit.

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1 So I think from the tribunal's point of view
2 what they had to determine was was Metalclad
3 acting in good faith in accepting the federal
4 assurances, in accepting the federal permits for
5 what they appeared to be and making that
6 investment. And it was the municipality acting
7 within its authority under Mexican law in
8 purporting to deny the permit and shut down the
9 facility. And they address those questions. They
10 talk about those questions. And I say they make
11 findings of them on the basis of substantial
12 evidence.

13 Now, with -- that leads to my next point,
14 which is the issue of representations by federal
15 officials. And in listening to my friend, I -- I
16 think he essentially said to Your Lordship, well,
17 none of the Mexican officials with the exception
18 of one possible exception agreed that they had
19 made representations.

20 He didn't deal, if you go to 110, with the
21 evidence of Mr. Deets, Mr. Neveau, Mr. Carvajal,
22 Mr. Kesler, Mr. Miranda. He said, and I take it
23 he is to say later, that no weight should have
24 been given to Mr. Rodarte, but that Mr. Rodarte is
25 clearly a -- a witness whose evidence was
26 available to the tribunal. He wasn't
27 cross-examined, and they may have decided as a
28 result of his non-appearance to put no weight on
29 it, but he wasn't alone.

30 On this footing, as you'll see at paragraph
31 314, there was a chorus of witnesses from
32 Metalclad's side saying we did indeed receive
33 those representations over the material period of
34 time.

35 Now, all I say is that in order for my friend
36 to succeed, he has to, I say of course under the
37 international act, elevate this to a
38 jurisdictional point, from an issue of fact to a
39 jurisdictional point.

40 Even under the commercial act it has to be
41 elevated into a question of law. And upon that
42 footing, my friend says it has to be patently

43 unreasonable. That's the -- I think the burden he
44 accepts. Whether it -- that's the burden or
45 whether the burden I've asserted is correct, which
46 is no evidence.
47 On either one, properly speaking, there is a

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1 substantial number of witnesses on this side,
2 there's a substantial number of witnesses on that
3 side. That is the core of the fact-finding
4 process I say that the tribunal went through.

5 Sorry, did you have a question on that?

6 THE COURT: I'm just wondering if the point you're
7 trying to make at paragraph 314 is different from
8 the point you were making at 291.

9 MR. COWPER: At 291?

10 THE COURT: Yes. You make reference to different
11 extracts, some of them the same.

12 MR. COWPER: Oh, okay. I -- I think, if you want to
13 make a note, the relationship between those is my
14 friend separately dealt with his reliance on
15 Altamirano and then the issue of the federal
16 representation. So what 291 does is give you a
17 selected answer to Altamirano particularly. And
18 then 314 is the broader selection of evidence with
19 respect to federal representations generally.

20 So I -- I guess logically 291 is a subset
21 of -- of the issues of fact dealt with in 314.

22 Is that responsive to your question?

23 THE COURT: Yes, it is.

24 MR. COWPER: With respect to these, and I'm not going
25 to go into them in great length, I say just
26 identifying the fact that there is a body of
27 witnesses is and should be sufficient. But I'll
28 give you a couple of references.

29 Let's take Mr. Deets as the -- as an
30 example. Tab 4.

31 THE COURT: It's only sufficient if you're right.

32 MR. COWPER: Yes, My Lord.

33 Actually, I'm going to take that, because I
34 say it's actually sufficient even if I'm wrong,
35 because I've said to you there's a substantial
36 body of evidence. But even if I'm wrong on that I
37 say my friend has to take this issue of fact, if
38 he's under the commercial act, and make it an
39 issue of law. And so I say he's actually
40 undershot the necessary burden.

41 Now, if I'm wrong on that, I say nevertheless
42 the obvious conclusion here from the evidence is

43 this isn't a case where you say here are ten
44 witnesses, here's a substantial body of evidence,
45 and the tribunal accepted the tiny slice of
46 evidence offered by the other side where -- where,
47 on review, if you were to say, for example, you

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1 had a jurisdiction, if you were to hold you had a
2 jurisdiction to interfere if you thought there was
3 a preponderance or a substantial imbalance in the
4 evidence on a review of the -- of the whole
5 record, and that the tribunal clearly erred in
6 giving weight and effect to a small piece of
7 evidence rather than a large piece of evidence,
8 even if that's the test, and I'm -- I have to be
9 wrong on a couple of things before we get there,
10 what I'm saying to you is it wasn't a -- one
11 witness, it wasn't just Mr. Rodarte, it wasn't
12 just Mr. Deets or Mr. Kesler, or Mr. Neveau; they
13 all contributed evidence which substantiated the
14 position of Metalclad that there were
15 representations.

16 And indeed, my friend said there was no --
17 no -- in his view no documentary evidence of the
18 representations.

19 I say to the contrary, that if you just take
20 the logical consequence of the two letters that I
21 read you earlier this morning and say if I receive
22 these, would I -- after having a federal official
23 say I am in charge, this is my project, here it
24 is, would I conclude that I can't continue with
25 the construction which has been ongoing for six
26 months which he and I know have been going on for
27 six months unless and until I get a construction
28 permit from a local municipality?

29 I say we don't even on this point get to a
30 question of uneven weight. In fact, I think on a
31 reading of the whole, it's quite clear that the
32 protestations to the contrary were insubstantial
33 by Mexican officials. But I say that even if I'm
34 wrong on those first two points, I nevertheless
35 submit to you that Metalclad in this case had a
36 substantial body of evidence and the tribunal
37 accepted it.

38 Now, if you go to tab 24 under tab 4 -- page
39 24 under tab 4 -- now, I -- I'm sorry, I could be
40 wrong on the last one. No -- you know, that's --
41 that's obviously logically available. And if I'm
42 wrong and there's not a substantial body of

43 evidence at all, there's no evidence, then -- then
44 I -- I concede that my friend would -- would then
45 be -- be safely home with respect to this point.
46 At page 24 under tab 4 with Mr. Deets, you'll
47 see para -- paragraph 72:

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1
2 "Having reviewed parts of the
3 counter-memorial I am astonished that the
4 Mexican government now takes the position
5 that we were supposed to get..."
6
7 Do you have the same page as me?
8
9 "...a local construction permit. This is
10 not what they told us when we were siting
11 and permitting La Pedrera. I was aware
12 that Mr. Aldrett had applied for a local
13 construction permit and had been turned
14 down by the municipality because he was
15 missing some documents."
16
17 And that's actually not an unfair
18 characterization of the document I showed you
19 earlier. There's no land permit. There's no
20 federal permit.
21
22 "As part of our continuing due process, I
23 requested our local counsel to advise us on
24 whether we should apply for a permit
25 again. Our counsel subsequently advised us
26 it would be best to seek guidance from
27 INE."
28
29 Which is of course the federal authority.
30
31 "I wrote to Dr. Reus in September '93
32 right after we had made the decision to
33 purchase COTERIN. Since I was aware that
34 he intended to see Governor Sanchez within
35 the next few weeks, I stated what we had
36 learned from our local counsel and asked
37 his opinion. Dr. Reyes told me
38 unequivocally not to worry about applying
39 for such a permit since the 1988 ecology
40 law had reserved hazardous waste for the
41 federal government and, thus, a local
42 manifest construction permit was not

43 necessary. Since we had all our federal
44 authorizations, we were set in terms of the
45 required permits. See Exhibit 5 attached."

46
47 Now, he was cross-examined, and I've given

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1 you a reference under tab 17 to elements of his
2 cross-examination from page 263 and 266. But he
3 was a person who wasn't Mr. Rodarte, who my friend
4 said should be disregarded. He wasn't Mr. Kesler,
5 who my friend said should be disregarded. And he
6 was a witness who filed a declaration and was
7 cross-examined.

8 With respect to Mr. Neveau, I've given you a
9 reference under tab 15. His evidence is really
10 substantially to the same effect.

11 THE COURT: I think that's what you read previously --

12 MR. COWPER: Yes.

13 THE COURT: -- under the previous paragraph.

14 MR. COWPER: Thank you.

15 I don't believe I've referred you to
16 Carvajal, and that extract is under tab 20. And
17 you may recall that he had a declaration. If you
18 go to page 45, you'll see that he says:

19
20 "Now, in your opinion, Mr. Carvajal, the
21 construction permit was a legal
22 requirement?

23 A. Considering that there are no building
24 permits in Guadalcazar, it is a requirement
25 which is in the law but which, however,
26 there was no way to implement it.

27 Q. So it isn't..."

28
29 And this is his cross-examination. His
30 evidence in chief was essentially the same effect
31 of Mr. Deets.

32
33 "Q. So it isn't the law?
34 Yes. In the State law, but not in the
35 municipal. There was nothing to implement
36 it. There was not enough regulation,
37 municipal regulation. There was no way to
38 request a permit or to know how much it
39 cost."

40
41 You go over to page 47, and this is again in
42 his cross-examination, line 9:

43

44 "And you suggest the municipality told you
45 it was not going to follow the law?

46 A. Well, what the municipality told us
47 was that the permit to build was no problem

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1 in itself, so that if it was a legal
2 requirement, it would be issued without any
3 problem.
4 Is that what you understood?"

5
6 And I think that should be a "Q" there.

7
8 "Yes, Mr. Perezcano, or that they were
9 really not to observe, not to obey the law
10 as the rest of the people who are building
11 in..."

12
13 And I think it should be in Guadalcazar.

14 And he's referring there to the -- the fact
15 which appeared fairly notorious, and which my
16 friend referred to, which there had been building
17 going on and no one had either sought, obtained or
18 pursued a building permit.

19 And I give you another reference here which
20 is evidence that someone actually went to the
21 State office, which under the law is required to
22 receive all the building permits for the
23 municipality, and found not a one from Guadalcazar
24 and not a one from other municipalities in the
25 State of San Luis Potosi.

26 I give you a reference here to the
27 declaration of Mr. Kesler. And if you go to tab 3
28 at page 4, August '93 --

29 Do you see that?

30 THE COURT: Um-hum.

31 MR. COWPER:

32 "The operating permit was granted by the
33 federal government. At the time it was
34 granted, Rene Altamirano said that it would
35 be the federal government's responsibility
36 to obtain any needed political support
37 necessary in the State and local
38 community. He assured us we had all the
39 legal authority we now needed to build and
40 operate but that Mexico was a country that
41 worked on the basis of broad-based
42 political support which he said they would

43 obtain on our behalf. In the meantime, he
44 asked us not to announce the fact that
45 we've been given the operating permit until
46 he had the opportunity actually to make the
47 announcement in the State himself with the

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1 State and local authorities.
2 "We also met with Dr. Sergio Lujan in
3 the month of August. And he reiterated the
4 fact that we had all of the legal authority
5 we now needed to build and operate our
6 facility. He also asked us not to make any
7 public announcements until he had the
8 chance to visit in person with the governor
9 and prepare the way for the actual
10 construction start."
11

12 That of course is a substantial body of other
13 evidence from Mr. Kesler on that theme, and I
14 won't take you to that.

15 If you go to tabs -- Mr. Miranda's evidence
16 at 21 and 22, and let's start at 21, if we can, at
17 page 5. And you'll see that at paragraph 19 to 25
18 he deals with the summer of '94. And he talks
19 about the construction maintenance going on at the
20 site.

21 And I said to you earlier that in the summer
22 of '94 the company had been asked to go slow, and
23 that there was construction and maintenance going
24 on during that time period. So there's -- my
25 friend says that was a cover for what was going
26 on, but the company said as part of its case that
27 in the summer of '94 construction remed --
28 construction maintenance was primarily going on.
29 But if you go to -- at 19, and I just refer you to
30 this, he says:

31
32 "During the summer and fall of '94 I was in
33 regular communication with officials at
34 PROFEPA both in the San Luis Potosi State
35 offices and the main offices regarding the
36 construction...construction maintenance we
37 were doing at the site."
38

39 And then I -- you can skip the next page
40 which talks about --
41 MR. FOY: Sorry, just to save my -- myself time, could
42 my friend read paragraph 20, please?

43 MR. COWPER: I can read 20 to 27 if my friend would
44 like.
45
46 "On July 18th I wrote to Garcia outlining
47 a specific task COTERIN was undertaking as

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1 part of a plan of regular maintenance."

2

3 The difference between my friend and I is not
4 that there was no reference to maintenance; it is
5 that my friend seeks to explain everything that
6 occurred on the basis of a representation about
7 only some of what occurred. And aside from it
8 being an intensely factual question that was
9 before the tribunal, it's not an overwhelming
10 point at all on the whole of the evidence. If you
11 look at paragraph 26:

12

13 "Further, PROFEPA officials knew that
14 COTERIN was constructing the infrastructure
15 for the landfill. They knew this through
16 their own inspections of the site and their
17 knowledge that remediation of the site
18 would be in situ, i.e., that remediation
19 would take place on-site. On-site
20 remediation in turn requires the
21 construction of the facilities where the
22 wastes are neutralized. This was the plan
23 that had always been contemplated by
24 COTERIN and the federal government."

25

26 And coming back to my friend getting excited
27 earlier in the morning, the cell that I showed you
28 was the place where the unremediated material that
29 had been on the surface was sitting there waiting
30 to be taken out again, neutralized, properly
31 treated, and then properly put into a hazardous
32 landfill. That was its temporary cell, okay, and
33 that's what he's talking about here.

34 Everybody knew that, first of all, it had
35 been put in there by Metalclad management, and
36 that the construction of the other cells was
37 necessary before you could take the material that
38 hadn't been remediated out, treat it with other
39 material coming in and put it into the new cells.

40 Now, if you go to page 7 --

41 Do you want to interrupt me again?

42 MR. FOY: Well -- no.

43 MR. COWPER: Okay.
44 MR. FOY: I think -- I think my -- just for a moment,
45 I guess.
46 What my friend has said is that the
47 construction that was occurring was for the

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1 purposes of remediation only, and I agree with
2 that.

3 MR. COWPER: No, I didn't say that.

4 I said that the purpose of the construction
5 was characterized in this as maintenance. And
6 my -- as I understood my friend, he said it was
7 related to remediation and maintenance. And what
8 I'm saying is he explains or purports to explain
9 the construction of the entire facility that was,
10 the tribunal found, out and for everybody to see
11 as somehow going on under the cover of maintenance
12 or remediation work, and that that's totally
13 inadequate to what the evidence is. It doesn't
14 even come close, with respect, to fairly
15 characterizing the evidence of the witnesses.

16 What Metalclad said was there's absolutely no
17 doubt that the work going on included maintenance,
18 included work in relation to the remediation, but
19 it also included the construction of the
20 facility. And that was a necessary conclusion
21 because federal officials knew that the facility
22 was necessary for the ultimate remediation of the
23 materials which my friend has gone on and on about
24 last week.

25 You can't remediate until you have someplace
26 to put them, if you're going to do it on-site.
27 And that's what this witness is talking about when
28 he says their knowledge that remediation of the
29 site would be in situ. You have to build the
30 facility in order to take those materials out,
31 remediate them with other materials and put them
32 in proper, permanent storage.

33 And you'll recall my friend said, well,
34 there's another alternative. You can truck it or
35 burn it, take it to some other facility. But
36 that -- what I'm saying is in relation to the
37 facts of this case. The question was: Did the
38 municipality know what was going on? Did the
39 federal officials know what was going on? Did
40 they know the site was being built?

41 And I say there was overwhelming evidence
42 that everybody knew the site was being built, and

43 that the municipal contrast -- protests to the
44 contrary were -- were feeble indeed.
45 And I'll take you to Mr. Ramos's evidence.
46 If you read all of Mr. Ramos's evidence and you
47 find him persuasive on any point, with respect,

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1 I'd be surprised. He is an unpersuasive witness
2 on any question of fact, just read on his own. He
3 says in relation to this point that they didn't --
4 he couldn't provide any explanation as to why the
5 permit hadn't been processed; he just didn't
6 know. But he thought that the company had
7 reminded them that they had applied for the
8 permit. And then when they were reminded, they
9 turned it down. That was his explanation for a
10 13-month delay while this whole facility was being
11 built within his municipality.

12 Now, page 7, if you go to paragraphs 38 to 32
13 (sic), you'll see:

14
15 "Mr. Rodarte and I spoke with
16 Mr. de la Cruz at the PROFEPA offices
17 in Mexico City."
18

19 THE COURT: Sorry, where are you?

20 MR. COWPER: I'm at 28, page 7.

21 THE COURT: Oh, okay. Sorry. I thought it --

22 MR. COWPER: Yeah. This is dealing with the -- the
23 order to stop construction in the fall of '94.

24 THE COURT: Um-hum.

25 MR. COWPER:

26 "...with whom I communicated on a frequent
27 basis about the municipality's order to
28 stop construction. We asked him whether
29 the Guadalcazar Cabildo had the authority
30 to close down the construction at the site
31 as they had purported to do."
32

33 Now, bear in mind the context. He's already
34 explained that construction beyond remediation, as
35 my friend phrases it, has been ongoing for some
36 time to the knowledge of federal officials. He
37 says:

38
39 "The federal government..." has "...had
40 always told us it had exclusive
41 jurisdiction over the regulation of
42 hazardous waste disposal matters. de le

43 Cruz reaffirmed the federal government's
44 pre-eminence in the area of hazardous waste
45 disposal to us, but suggested that as a
46 sign of respect for the municipal
47 government, COTERIN should apply for the

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1 permit anyway. He said that we should
2 continue to construct. And he assured me
3 that the municipality would issue the
4 municipal construction permit as a matter
5 of course on the payment of fees. In any
6 case, de la Cruz said that there was no..."
7 reases "...no reason for the municipality
8 to deny COTERIN's application.
9 "I submitted..."

10

11 This is the man who made this -- made the
12 application:

13

14 "I submitted COTERIN's application to the
15 municipality on November 15, 1994, but we
16 heard nothing on the application until
17 December of the next year that the
18 application had been refused.

19

20 "Meanwhile, as instructed, we
21 proceeded with construction. We even
22 received an additional federal construction
23 permit on January 31, '95..." offering us
24 "...authorizing us to do the final
25 construction works on the landfill."

26

27 And I think I referred that to you earlier.
28 Paragraph 32:

29

30 "All of our construction was highly
31 public. A number of officials and citizens
32 visited the site between October 26th, '94
33 and the completion of construction."

34

35 Now, this was hotly contested. I mean,
36 Mexico said and provided -- you've heard my
37 friend's explanation for it. But there was clear
38 and direct evidence available to the tribunal that
39 when the municipal stop work order arrived, that
40 it was federal officials who represented that the
41 company should continue constructing, and that the
42 municipal permit was not necessary to continue,
and that they'd have no choice but to issue the

43 permit, and direct evidence that nobody heard from
44 the municipality until December of the next year,
45 when coincidentally the Convenio was concluded on
46 terms that did not expressly include the State and
47 the State's governor, and did not include the

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1 municipality. That's when the municipal permit
2 was denied.

3 Those were all facts that are found in the
4 tribunal's award and were available to them on the
5 evidence.

6 Now, Mr. Parrish has said that in my
7 enthusiasm I've also taken you to -- and the cite
8 I just gave covers the extracts which I've
9 referred to under J at page 116, so you may want
10 to make a cross-reference there to the references
11 I make at 332. Because I'm -- I'm dealing at 314
12 with the general knowledge, general federal
13 representations. And then I deal in detail at 332
14 with the -- my friend's argument that the work was
15 remedial only.

16 But while I'm with Mr. Miranda, let me turn
17 to tab 22, which is another declaration of
18 Mr. Miranda, if I could. And you'll see on page
19 2 -- he says at the top of page 2. It's not
20 numbered. Tab 22, page 2:

21
22 "I was in charge of supervising the
23 construction work performed in the
24 landfill. During the time that the
25 construction of the landfill..."

26
27 And it goes May '94 to April '95.

28
29 "...took place, several groups of people
30 from the municipality, the State and
31 authorities from the municipality visited
32 the landfill."

33
34 He talks -- the purpose of invitations was to
35 create awareness of the benefits that the landfill
36 would bring to the region and to let the people
37 see for themselves the landfill.

38 And the third paragraph, he says:

39
40 "Overall, during construction time more
41 than 30 elementary school teachers and more
42 than 300 inhabitants..."

43
44
45
46
47

I take that of the municipality.

"...visited the landfill."

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1 If you go to the next page, the third full
2 paragraph -- or second -- third full paragraph:
3
4 "Officials from the delegation of PROFEPA
5 in San Luis..." Potos "...Potosi,
6 particularly..." no -- no "...David Leon
7 Carvajal, attended regularly, every six
8 weeks on average, to verify that the
9 construction was taking place according to
10 what the company informed in its monthly
11 reports to INE and to..." FRO "...PROFEPA.
12 "During the construction period, the
13 company asked me to collect signatures of
14 support from the communities surrounding
15 the landfill. I collected around 600
16 signatures during this period. In all
17 cases the great majority of adults were
18 willing to sign the petition for support to
19 the landfill without receiving any kind of
20 retribution."
21
22 And I think he means "contribution" in that.
23
24 "During the construction period there were
25 no indications the municipality opposed the
26 construction of the landfill or that we
27 should have obtained a local construction
28 permit until October of '94 when the
29 municipality informed the company they did
30 not agree with the construction."
31
32 Over at the top:
33
34 "We suspended the works briefly but
35 re-initiated them once..."
36
37 And I think it says -- under the stamp it's
38 "we," w-e.
39
40 "...once we obtained the consent of
41 PROFEPA and the positive opinions of all
42 federal officials we consulted with. Their

43 arguments were that if the federal
44 government issued its permits and the State
45 had already issued the land use permit, the
46 municipality could not oppose the
47 construction of the landfill in such a

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1 location. At best they only had to review
2 the details of the construction marked in
3 the State laws. They stated this was
4 equivalent to buying a house in a zone
5 where houses were to be built according to
6 a State licence, and then having the
7 municipality denying the permit instead of
8 just regulating the maximum heights and
9 other characteristics proper of such
10 investments."

11
12 So the -- the contest of fact here was around
13 this issue really along these lines: Metalclad
14 said we were served with -- and I think this is
15 a -- a handwritten stop work order in October.
16 And it explained what subsequently happened by
17 telling the tribunal, in this and other testimony,
18 that we were concerned because now the
19 municipality had purported to exercise authority
20 through some form of official action. And we went
21 to the federal authorities we had been dealing
22 with.

23 And the tribunal had before it the evidence
24 that the federal officials did not stay silent,
25 did not say, oh, better not do anything while
26 you're trying to get that permit, but rather said,
27 no, they don't have authority, keep building.

28 And Your Lordship asked me what was a
29 critical issue on another fact, the critical point
30 here is that after the municipal's stop work
31 (sic), there's clearly construction ongoing. How
32 can the municipality explain -- assume that
33 somehow all this activity had gone without their
34 notice or was understood to be remedial by, as my
35 friend would have it said, until the time the stop
36 work is issued.

37 I mean, the municipality has determined to
38 stop work. And we know as a fact, and no one's
39 disputing, that the -- that the -- in January and
40 February and March there was substantial
41 construction ongoing because there was an opening
42 in early March. Where is the municipality? And

43 why would Metalclad go ahead and complete the
44 construction if it thought that it had no
45 authority to do so? And why would it not discuss
46 the matter with federal officials?
47 And finally, if the federal officials didn't

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1 make these representations, if this wasn't their
2 position, why would they continue to issue
3 authorities, permits as I've indicated to you,
4 affirming letters, and indeed continue to receive
5 reports and otherwise be aware that the
6 construction was being completed? That was the
7 issue of fact.

8 And I say with respect on that issue,
9 Metalclad had a very compelling and indeed
10 overwhelming case with respect to those facts.
11 And that's what the tribunal found led to the
12 unfairness of the subsequent shutdown of the
13 facility.

14 Now, I make the narrative on that point at
15 110, page 111. And then we've dealt with page --
16 that -- with respect to the point I -- I think
17 I've essentially answered that, and I've given you
18 the references there.

19 I've indicated to you the contest in the
20 evidence between Leos and Neveau, which I've given
21 you a reference to at the top of page 115.

22 With respect to the point on 116, I've --
23 I've read you the -- Miranda's evidence with
24 respect to that.

25 There is a chronology which I've referred you
26 to on the third reference in paragraph 332. One
27 of the exhibits here was a chronology of
28 effectively correspondence between the company and
29 the federal officials on a number of topics. And
30 if you could just turn to that so I can tell you
31 what it is, and I won't read you a lot of it, but
32 if you go to tab 24 --

33 And Mr. Parrish says I got the number wrong
34 yesterday, so I won't assay a number, but you'll
35 see that between A --

36 Do you have that tab in front of you?

37 THE COURT: Um-hum.

38 MR. COWPER: The first few pages are effectively index
39 and characterization of the documents which
40 follow. And it goes from A to triple letters, and
41 I think triple letter N, as it goes through the
42 alphabet a couple of times.

43 And it's in reverse chronological, so that
44 the last one is the earliest one. And if you go
45 to, say, for example, page 7 and come back, you'll
46 see that there are inspection reports in '93. The
47 last two mentioned documents are inspection

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1 reports from the federal authorities.

2 And if you follow that up, and just stay to
3 the chronology, what you see is a substantial
4 volume of documentation passing between the
5 company and the federal officials and back and
6 forth with respect to various miscellaneous
7 matters throughout -- between December of '93 and
8 February of '96, which is the -- the first
9 mentioned document, relating to the progress on
10 the project, what is being built, what's going to
11 be built, construction -- essentially construction
12 reports, inspection reports and the like.

13 And that evidence was all available to the
14 tribunal and was a basis on which they could find
15 as a fact that these events were well-known to
16 federal officials, and it was a body of evidence
17 as to what was happening so they could arrive at a
18 conclusion as to whether any protestations on the
19 part of the municipality ought to be accepted that
20 they didn't know what was going on.

21 Now, Mr. Ramos or Mayor Ramos I refer to at
22 333. And his evidence, which is a bit of a
23 highlight of the case here, included, as I've said
24 at the top of 117, that he admitted on
25 cross-examination that members of the council, I
26 believe, observed the construction of the site
27 through field glasses.

28 Now, he is translated. And I don't know if
29 it's the translation or -- or his own language,
30 but it's -- it's -- some parts of his evidence are
31 difficult to understand. And they are on points
32 apparen -- apparently contradictory of other
33 points he makes. But let me just say that he
34 says, if you go to Mr. Perez -- Perezcano's
35 evidence leading him at page 63 under tab 1 --

36 Do you have that?

37

38 "Don Leonel, do you know on what date the
39 construction of works at the landfill was
40 concluded?"

41

42 And he says:

43
44 "The landfill works were carried out in
45 different stages I don't believe
46 consecutively. When an environmental audit
47 was carried out, it's mentioned at some

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1 point. It says that it was shut down, it
2 was closed. But even while this
3 environmental audit was being carried out,
4 the people from the company were building."
5

6 So he volunteers in his own evidence in chief
7 that he knew, he knows that when the audit was
8 being carried out, the people from the company
9 were building.

10
11 "The site was closed down. Personnel from
12 the...A..."
13

14 My -- my friend got this right.

15 MR. THOMAS: Ayuntamiento.

16 MR. COWPER:

17 "...Ayuntamiento inspected the place, and
18 it was found that works were being carried
19 out within the property.

20 Q. But do you know on what date the works
21 concluded definitively?

22 Well, no. That would be difficult for --
23 after that the works continued within the
24 property. And this is because we sent
25 people to review the scene. Indeed,
26 periodically we were looking in from
27 outside through binoculars, because from
28 the fence to where the work was going on
29 was different forums..."
30

31 And I think he may mean different views.

32
33 "...including when we were told the result
34 of the audit. We pointed that out, that
35 having a permit and an audit, this
36 corresponded to the federal or State
37 government, the famous environmental law on
38 ecological factors. And in tandem, the
39 construction work was going on. So during
40 the three years it was being asked why is
41 construction going on when there's no
42 construction permit?"

43
44 So on Mexico's witnesses' evidence, I think
45 it's a fair construction to say that a trier of
46 fact listening to that could draw a fair
47 conclusion that the mayor was aware through

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1 personnel he sent out, through inspections,
2 through people looking through binoculars, through
3 whatever other sources he had during the material
4 time period that people were asking why is
5 construction going on when there's no construction
6 permit?

7 And I'll stop there if I may.

8 THE COURT: I don't know if this is a minor point, but
9 I think that you're missing page 64 in your --
10 that you read.

11 MR. COWPER: Oh, thank you. I'll find that.

12 THE COURT: You read it as if it was continuous,
13 but --

14 MR. COWPER: I don't think 64 -- 65 is not
15 continuous. And I -- I found that last night, and
16 I -- and we didn't get the -- the page. I'm
17 sorry.

18 THE COURT: We will now take the luncheon break and
19 reconvene at 2.

20 THE REGISTRAR: Order in chambers. Chambers is
21 adjourned until 2 p.m.

22

23 (NOON RECESS)

24 (PROCEEDINGS ADJOURNED AT 12:30 P.M.)

25 (PROCEEDINGS RESUMED AT 2:00 P.M.)

26

27 THE COURT: Yes, Mr. Cowper. Please continue.

28 MR. COWPER: Thank you, My Lord.

29 We -- we were able on the break to capture
30 Your Lordship's copy of page 64, which -- which we
31 did not have in the record. And if I could take
32 that opportunity to ask you to go to tab 1, and
33 I'll just complete the -- 64 and indicate some
34 other matters. You'll recall that I -- I read
35 from the bottom of 63 over to 65. And the answer
36 at the bottom of 63, starting at the beginning of
37 that sentence, not in the middle of the answer:

38

39 "Indeed, periodically we were looking in
40 from outside through binoculars because
41 from the fence to where the work was going
42 on was quite some distance. Indeed, there

43 was movement of machinery. There were
44 details suggesting that they continue to
45 operate and working and, indeed, they never
46 stopped working within the facility.
47 President Lauterpacht: ...follow up on your

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1 last answer, Mr. Ramos. You said
2 that...I'm just following up your last
3 answer, Mr. Ramos. You said that you sent
4 people to review the scene and that they
5 used binoculars. Now, when did you do
6 that?

7 That was done during the three-year
8 period. We took care through the person in
9 charge, which was the director of public
10 works, to check whether work was going on
11 inside because this problem was exclusively
12 under the director of public works who was
13 the one who initiates a request or
14 application for construction.
15 You said this -- you said you did this
16 during the three years."

17
18 And just pausing, he -- he -- and I think
19 it's clear, he came into office in January of
20 '95. This is the mayor.

21
22 "My question ought to be, therefore, more
23 specific. Did any of this observation take
24 place during the period from January to
25 December '95?"

26
27 And that's the reason that the president has
28 picked that time, is that that's the first year of
29 his serving as mayor. And December of '95 is the
30 date of the refusal.

31
32 "On different occasions in different forums
33 including when we were told the results of
34 the audit, we pointed that out, that having
35 a permit or an audit that this corresponded
36 to the federal or State government, the
37 famous environmental audit."

38
39 And I read that before the break.
40 Now, I should say I re-read this. I won't
41 read the next five or ten pages, but let me
42 summarize what I think they do.

43 Essentially President Lauterpacht and the
44 witness go back and forth for the next several
45 pages with President Lauterpacht trying to be --
46 trying to understand what he knew when, and trying
47 to narrow it down, and trying to understand what

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1 part in December and what part in January.
2 Effectively the witness comes back to the theme
3 that we did it periodically or we did it
4 continuously, it was always going on. It's quite
5 clear that the witness never gets exact about it.

6 But on the reading of the whole of the
7 evidence, it's my submission that it's very clear
8 that the witness was saying that at the time he
9 and other people in the municipality were aware
10 that construction was ongoing.

11 And if you go to the very end of the passage,
12 because then Arbitrator Siqueiros comes in on page
13 71. And if you go to page 73, 'cause the witness
14 as he goes on is getting the point that ev --
15 that -- I -- I think, and just reading between the
16 lines, everybody is wondering if all of this was
17 known, why wasn't any steps taken? If you go to
18 the bottom of 73, it says:

19
20 "This is why in due course..."

21
22 Do you have line 20?

23 THE COURT: Um-hum.

24 MR. COWPER:

25 "The only thing I would want to tell you is
26 I don't know why it wasn't followed up on
27 at the time. The truth is I don't know why
28 it was followed up on as soon as the
29 company reminded us."

30
31 And that was the evidence I referred to you
32 earlier with respect to the best explanation he
33 could give having regard to his earlier admissions
34 as to why the permit was refused in December of
35 '95.

36 And you'll see at the bottom that
37 Mr. Perezcano for -- counsel for Mexico comes back
38 to this, talks about the demonstration. And the
39 witness again on 75 comes back and said -- says,
40 and this is in relation to March of '95:

41
42 "I understand that the majority of the

43 facilities had already been built because
44 it was going to be -- it was going to be an
45 opening for their operation. I want to
46 repeat that they continued working, but I
47 think the basic thing, that they already

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1 had that. And afterwards they continued
2 constructing. But I think that the basic
3 part was already built, and the facility
4 almost was constructed in order to be able
5 to operate."
6

7 So I simply say that from one of the central
8 players in the municipal side of matters read as a
9 whole there was substantial evidence before the
10 tribunal that part of their finding that the
11 construction went on openly, not only as it
12 related to the matters explained of by my friend,
13 which he characterizes as remediation, which might
14 otherwise be called remediation or maintenance,
15 but also the construction of the facility. And
16 even within the confines of this witness alone, I
17 say there is no other reasonable construction of
18 the evidence.

19 Now, I'm at -- and I think I can go on to
20 119. And I need to correct something in our
21 argument here.

22 You'll recall that on Friday I told you that
23 my construction of paragraph 46, which refers to
24 the demonstration, is that there was not a finding
25 of fact that the demonstration was caused by the
26 government. And you'll see that in paragraph 340,
27 in this document we assert the implicit finding.
28 I don't say that. There are -- there was a view
29 within our team that that was an implicit
30 finding. I don't assert that to you. So you
31 should take out that first sentence from our
32 submission.

33 And my submission is, as I said on Friday,
34 over on page 120, that I read the final sentence
35 as a finding of chronological observation rather
36 than a narrow finding of causation; that is, these
37 were part of the events. And chronologically from
38 that point on, the landfill was never operated.
39 There were a number of causes, and they're
40 referred to in other parts of the tribunal. I
41 don't say that the tribunal found that that was
42 the sole cause that prevented the operation of the

43 landfill.
44 If you could go to page 120, there's another
45 correction I need to make. And by the way, the --
46 the references at the top I don't take you to are
47 the -- some of the evidence in relation to the

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1 demonstration. There's no doubt it was and had a
2 chilling effect on the operators in respect of
3 their perception of what was likely to happen to
4 their ability to operate the landfill.

5 If you go to 120 at paragraph 344 --

6 THE COURT: Um-hum.

7 MR. COWPER: -- there's a correction here because we
8 were having difficulty finding -- if you go five
9 lines down, we say the previous order was not put
10 into evidence. I wasn't able to find that.

11 We did find that, and that's at tab 28, if
12 you can make a note there. And I'd ask you to
13 turn to that, because there are two points which
14 emerge from that document.

15 And you'll -- there was this -- there were
16 several references in the evidence, and I think
17 I've read you at least a couple, of people saying
18 that in the fall we got the authority to lift the
19 seals, and that that was a part of being able to
20 operate the plant and to remediate the -- the
21 improperly, not-yet-remediated material that was
22 in the cell that I showed you this morning.

23 If you go to tab 28, this is the document
24 saying:

25
26 "...lifting the seals in the landfill,
27 September 94."
28

29 There are two documents. You'll see on
30 page 2, and I think this is a translated document
31 again, at the top of that second page:

32
33 "...located and lifted closure seals in
34 the fronts of a bunch of equipment and
35 places."
36

37 Do you see that?

38 THE COURT: Um-hum.

39 MR. COWPER: And then if you go over two pages,
40 September 6th, '94, if you go down below, it's the
41 third paragraph, the paragraph after the
42 capitals.

43 THE COURT: Um-hum.
44 MR. COWPER: You'll see:
45
46 "With the purpose to reiterate the closure
47 seals on..."

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1

2 And I think that is effectively lifting, but
3 it says:

4

5 "Front-end loading, front-end loading and
6 storage materials located in the inside of
7 the land field with that sill [sic]."

8

9 So my understanding of the oral evidence and
10 that document is that the seals were lifted. And
11 at least potentially what that meant was the
12 federal authorities were putting the landfill in a
13 position, which was then confirmed in the
14 Convenio, that access could be had to the old
15 material, which my friend has given you a number
16 of submissions on, as well as new material which
17 could then together be treated properly,
18 neutralized or otherwise rendered into an inert
19 form, put into a form that would be properly
20 stored and then put into a proper hazardous
21 land -- waste landfill.

22 I think I can skip -- I've given you
23 basically all of what I had to say from there
24 through to -- there are a number of other
25 references, but I won't take you to them until you
26 go to page 127.

27 And I wanted to take you briefly to
28 Ambassador Jones's evidence. And if you go to
29 that tab, which is tab 14 I believe, Ambassador
30 Jones became involved later in the piece. He was
31 the U.S. ambassador to Mexico, as I understand it,
32 from '93 to '97, so he -- his office comprehends
33 the -- the relevant period of time. And if you go
34 to page 2, paragraph 4:

35

36 "Mexican officials at the federal level
37 told me that they had agreed with our
38 position on Metalclad and that they had
39 tried very hard to convince the officials
40 of both the San Luis Potosi State
41 government and the Municipality of
42 Guadalcazar of the merits of the project

43 and to accept and approve it. However,
44 these same officials al...also emphasized
45 that they were powerless to force State and
46 local officials in San Luis Potosi to
47 support the Metalclad project."

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1
2 And then he talks about Governor Sanchez.
3 And effectively, through a variety of diplomatic
4 initiatives, the ambassador became involved in an
5 attempt to solve the political problem and get the
6 governor onside, and that's really the body of his
7 evidence here.

8 But he speaks about the governor. And just
9 to give you a -- a sense of the -- of the debate
10 here, not only as it relates to the ambassador
11 versus the governor in which the ambassador paints
12 the governor's involvement in very unfavourable
13 light, but also as to the dispute between the
14 evidence because, in somewhat undiplomatic
15 fashion, this evidence takes issue with the
16 governor's evidence in pretty clear and
17 unvarnished terms.

18 You'll see in paragraph 5 he says after
19 the -- respecting gover -- meetings with the
20 governor:

21
22 "On some occasions he would promise to help
23 resolve the issue. At other times he
24 alleged that Metalclad had committed
25 improprieties or said that the company had
26 no legal rights he could enforce."

27
28 And then paragraph 6:

29
30 "In his witness statement, Governor
31 Sanchez Unzeuta says that in our first
32 meeting in or about May of '96, he told me
33 that Metalclad would never be able to
34 obtain municipal permits that would allow
35 them to legally operate the La Pedrera
36 hazardous waste landfill. He also states
37 he was able to convince me that Metalclad
38 was a dishonest company.

39 "Contrary to the governor's statement
40 that we met a few weeks after he received a
41 phone call from Hermio Blanco in May of
42 '96, I believe it was not until August of

43 '96 that I finally met with Governor
44 Sanchez Unzeuta for the first time. And
45 then not until..."

46

47 Over the top of the next page:

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1
2 "...I had threatened to list the State of
3 San Luis Potosi as being unfriendly to
4 foreign investment that he requested a
5 meeting with me."
6

7 And you'll see he says in paragraph 8:
8

9 "Furthermore, and contradictory to the
10 governor's witness statement, I believed at
11 the time, and still do, that it was the
12 governor or his government of San Luis
13 Potosi who was less than honest about the
14 events surrounding the permitting of the
15 landfill rather than Metalclad.

16 "I had spoken with Metalclad
17 representatives on several occasions and
18 believed they were doing everything
19 possible to satisfy the federal
20 government's and the governor's concern
21 about the technical suitability of the
22 site, gaining the necessary permits,
23 educating the community about the benefits
24 of the project and so forth."
25

26 And then at the bottom he talks about a
27 request he had made of the governor in paragraph
28 9. He says with respect to (a) at the bottom of
29 page 3, in respect of one assertion he says at the
30 bottom that the governor's assertion is
31 incorrect.

32 Do you see that? It's not on a matter of
33 substance, but just giving you a sense of the
34 difference between the witnesses.

35 Over on the top of page 4, and this is in
36 relation to -- let me read the whole thing:
37

38 "Governor Sanchez Unzeuta's assertion that
39 in a meeting of September '96 I said I
40 would send the evidence against Metalclad
41 regarding alleged improprieties committed
42 by Metalclad in getting a..." stand lee

43 "...State land use permit from his
44 predecessor's government to the Department
45 of Justice is incorrect. On the other
46 hand, both I and the commercial officer
47 present in the meeting only told him we had

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1 a sworn obligation to uphold the laws,
2 which included the Foreign Corrupt
3 Practices Act. Our official obligation was
4 to report alleged violations such as this.
5 Notwithstanding this, as far as I know,
6 these allegations were found not to have
7 merit."

8
9 With respect to (b) he refers to his
10 testimony about disregarding intention he says is
11 false. He says -- then states that to the
12 contrary. And then he -- with respect to (c), he
13 characterizes the governor's evidence as an
14 attenuation of the truth. That's four lines down
15 from (c).

16 And he says that he was not applauding the
17 governor at all. If you go over to the next page,
18 paragraph 11:

19
20 "When I left Mexico as ambassador in June
21 '97, I never fully understood why neither
22 the State government of San Luis Potosi nor
23 the municipality would permit Metalclad to
24 operate when, A, the company seemed to have
25 all the necessary legal documents and
26 requirements and, B, the technology
27 Metalclad brought to the project would
28 actually improve the environmental
29 conditions for the people of that area.
30 All this in a nation whose land is plagued
31 by the urgent and threatening reality of
32 millions of tonnes of hazardous waste being
33 dumped unlawfully in its environment every
34 year."

35
36 Now, for a diplomat, that's a pretty
37 strong-worded disagreement with the governor, the
38 governor's stated role and the views as to whether
39 Metalclad had been treated fairly.

40 Now, I can pass from that all the way
41 through -- I'm coming close to the end of this.

42 If you go to page 130, one of the aspects --

43 and I say this at 365. One of the aspects of the
44 curious delay in this is that the various time
45 periods referred to as being responsive to a
46 construction application were either ten days or
47 at the outset four months.

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1 And there was expert evidence on the
2 four-month period as I recall. One of the Mexican
3 law experts says that would be regarded as the
4 furthest extent that would be considered
5 permissible.

6 And my understanding is that Mexico and the
7 tribunal, before the tribunal, conceded that four
8 months would be the outside time period. So my
9 friend is mumbling, and I'll try to find that from
10 the memorial and so you have a specific
11 reference.

12 If you go to -- at that point, could you add
13 to the references under 365 pages 73 and 74 of
14 Mr. Ramos's evidence? I don't think you need to
15 refer to it. But I say that the dilatory aspect,
16 that is, the -- the curious and I say not
17 satisfactorily explained coincidence of the timing
18 of the denial of the permit, and the delay since
19 the permit had been applied for, was an important
20 fact before the tribunal.

21 The other fact that I refer to at 366, which
22 I indicated to you on -- on Friday, and -- and
23 obviously Ambassador Jones puts the governor more
24 centrally in the piece, as you'll see at 366,
25 included in the evidence as it related to the
26 municipal process was the governor's involvement
27 in two -- I'm just pick -- picking two respects,
28 but two important respects, one of them being that
29 it was clear on the evidence that the lawyer,
30 Mr. Serrato, who became involved with the
31 municipal council, was either recommended or sent
32 by the governor.

33 And I've given you the extracts at 366 which
34 are to that effect, and it's at page 16 of the
35 governor's evidence, and I think it's at page 15
36 of Mr. Ramos's evidence.

37 Also -- and the second point is that -- yes.
38 It's page 16 in this, of the governor, in which he
39 essentially said that Mr. Serrato had become
40 involved at his request.

41 And the second point though is that on the
42 critical meeting, and I said this to you earlier,

43 it was the governor who chaired the municipal
44 council. This governor came down and chaired this
45 meeting which resulted in the -- in the denial.
46 And that's at page 21 of Mr. Ramos's evidence, tab
47 27, lines 9 to 11. He attended and presided at

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1 the meeting.

2 And so there was before the tribunal evidence
3 from which you could conclude that, far from it
4 being an independent concern of the municipality,
5 that the municipality's decision to deny the
6 permit was part of the governor's political
7 opposition which flowed from the fact that the
8 federal authorities had not included him in the
9 negotiation of the Convenio and had taken
10 exclusive responsibility for that.

11 I can then go to -- skipping through to 133,
12 and I -- I only say in relation to -- and I
13 checked the transcript, but although the title of
14 P in my friend's book says:

15
16 "...failure to have regard to agreement
17 allowing the operation of the site as a
18 landfill..."

19
20 In his oral submissions he characterized that
21 as a proposal or as an offer by the municipality,
22 and I say that has no controlling importance in
23 the matter before you.

24 If you go to 134, if -- if you're so curious,
25 Mr. Kesler in his memorial talks about the
26 substantial amount of work that was involved at
27 this time period, and it's the reference under
28 378, which was carried out in relation to a
29 2,000-page environmental audit. And there's a
30 summary in the record, not the full audit.

31 Then there was a reaudit of that audit, which
32 involved -- and I can get confused here. But
33 there are members of the university who became
34 involved and audited the audit. There were
35 environmental and health studies, numerous other
36 things which were carried out by the company
37 throughout that time period to satisfy federal
38 authorities and to satisfy or what they hoped
39 would satisfy any political opposition.

40 Now, if you go to page 135 I on Friday told
41 you that in our submission the whole proposal of
42 a -- of a dump made no sense. In page 381 I -- I

43 have been unable to find the specific reference to
44 the prices per tonne. Those were what I
45 understand to be the right prices. But let me
46 just refer you to this, and I'll give you the
47 specific reference.

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1 There was a general report about the
2 economics, which is the Triple A report which is
3 attached, it is Volume 3 to the memorial. The
4 whole report is there. And the point I'm making
5 there, it doesn't matter what the precise number
6 is, is that the -- the price that you can command
7 for the operation of a hazardous waste landfill is
8 in a completely different order, understandably --
9 just common sense tells you that -- than it --
10 than it is for just dumping of ordinary waste.
11 And those are totally different facilities,
12 totally different uses of the property.

13 And the finding of the tribunal was the only
14 reason this investment was made, the sole purpose
15 of making this investment was the operation of the
16 facility for a hazard -- hazardous waste landfill,
17 and that's what was built.

18 At the bottom of 135, just giving you a
19 little bit of an explanation of what treatment is
20 in -- has in mind, I've given you a -- a
21 cross-reference to the evidence that the waste is
22 taken in; it's removed; it's put in treatment
23 containers; it's neutralized either by addition of
24 base or acid materials; it's solidified by
25 evaporation; it's added -- cement's added; the
26 waste is formed into blocks and then placed in a
27 lined storage cell.

28 That's essentially what the -- the operation
29 involves, and that's apparent from the permits and
30 other things. You can inter -- and I've given you
31 the reference at the bottom which also explains
32 that.

33 Now, we can then go to Q at 137. And I've
34 quoted you there, and I don't know that I need
35 take you to it, but I will just briefly, at tab
36 32, at those pages there's the exchange between
37 counsel and the tribunal respecting the role of
38 domestic law in the overall matter. And you'll
39 recall in this passage we dealt with local
40 remedies.

41 If you -- if you -- well, maybe the best way
42 to do it is to start at 140. And just bear in

43 mind these aren't continuous, so the previous page
44 is not 139. This really starts the debate, and
45 this is counsel, I believe:
46
47 "The president earlier raised the question

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1 of what is the role of Mexican law in this
2 proceeding, and it is an important question
3 because I think every witness of the
4 respondent, with the exception of the
5 experts, and perhaps even they, was
6 cross-examined as to fine points of Mexican
7 constitutional and environmental law. I
8 would record that all of the witnesses who
9 appeared on behalf of Mexican State in the
10 past two weeks were laywitnesses. They
11 were not expert witnesses."

12
13 So a very large grain of salt ought to be
14 taken with respect to the statements of
15 laywitnesses under cross-examination with respect
16 to fine points of Mexican law.

17 But the most important point with respect to
18 this issue is this:

19
20 "It is well-established that international
21 arbitral tribunals recognize the domain of
22 the domestic courts. It is the domestic
23 courts who are vested with the jurisdiction
24 to determine questions of domestic law.
25 International arbitral tribunals are not
26 vested with the jurisdiction to make these
27 determinations."

28
29 And if you go over to 142, President
30 Lauterpacht says:

31
32 "Just pause there, because the points you
33 were raising raise quite fundamental issues
34 of international jurisdiction.

35 "How do you distinguish the situation
36 confronting us in this case where we were
37 having to look at Mexican law for the
38 purpose of determining whether Metalclad
39 had acquired a valid right to operate on
40 which claim it is based from the situation
41 in relation to, let us say, an exhaustion
42 of local remedies that might come up in any

43 international tribunal, where the defence
44 of the respondent State is that the
45 national on the claim of State [sic] has
46 not exhausted local remedies and a debate
47 ensues on that very question, was there a

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1 local remedy to exhaust?"

2

3 The point he's saying is, even if you're in a
4 local remedies rule, you have to have evidence
5 before the international tribunal as to whether
6 there was a local remedy; that's a question of the
7 local law, and you tend to call expert witnesses
8 to establish or refute the existence of local
9 remedies.

10 So that's -- he's saying even if you are in
11 that territory, there's still evidence before the
12 tribunal and a finding necessary.

13 Mr. Thomas's answer:

14

15 "Yes. Well, on the facts of this case
16 there was a local remedy to exhaust.
17 That's not the question I'm raising.
18 I'm saying -- Mr. Thomas -- in principle
19 [sic]..."

20

21 Question by President Lauterpacht:

22

23 "You are submitting that we do not have
24 jurisdiction to decide a question of
25 Mexican law, though the consequences of
26 that assertion we will come to in a
27 moment. But you're saying as a matter of
28 principle an international tribunal does
29 not have the right to decide a question of
30 Mexican law. That is how I hear you.

31 "I then say to you, if that is so,
32 how do international tribunals in other
33 cases where the question of local remedies
34 is relevant proceed?"

35 Mr. Thomas: Perhaps I've not stated the
36 proposition correctly.

37 "If I've evoked the question that you
38 propose back to me, my point is not that
39 this tribunal has no jurisdiction to
40 consider Mexican law as a matter of fact.
41 The questions of domestic law are fact, and
42 that is well established in the

43 international jurisprudence.
44 "But questions as to the internal
45 invalidity of rules of national law
46 according to the concept of the reserve
47 domain of domestic jurisdiction fall to the

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1 domestic courts."

2

3 And if you go over to 145, just reading the
4 president's observations starting at line 10:

5

6 "Just stopping for a moment, let's leave
7 fair and equitable aside and concentrate on
8 expropriation.

9 "For purposes of expropriation,
10 something has to be expropriated. We have
11 to identify those. And we can only
12 identify it in terms of the rights of
13 Metalclad under Mexican law.

14 "Supposing we agree with you entirely
15 that Mexican law is a question of fact.
16 The tribunal still has to decide as a fact
17 what the content of the relevant Mexican
18 law is. You are quite right in saying it
19 is a matter of evidence.

20 "But when all the evidence has been
21 heard at the end of the day, the tribunal
22 has to decide as a fact the content of
23 Mexican law. Do you disagree with that?
24 May I consult? Pause. Well, as a matter
25 of principle, we think the way in which you
26 put the propositions are correct. We agree
27 that these are questions of fact."

28

29 So I -- I simply say in reading the colloquy,
30 if that's the right word, between counsel and the
31 tribunal, that both understood that what was being
32 done was determining questions of Mexican law as a
33 question of fact, and in -- the subsequent
34 determination of whether there had been a breach
35 of the treaty arose out of the findings of fact as
36 to Mexican law and other facts.

37 And if you go to page 138, I've given you the
38 references at the bottom of 389 to the battle
39 adjoined on those issues.

40 Now, I say with respect I'm not going to deal
41 with R and S at any length. Those are matters
42 which in my submission do not rise to points of

43 law, let alone points capable of reversing or
44 setting aside the award; that is, issues of
45 municipal law fall within the submissions I've
46 already made. And the weight of experts surely in
47 my submission must be a matter squarely within the

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1 jurisdiction and the privileges of the tribunal.

2 Now, the -- the last section in my friend's
3 submission on this point deals with Ecological
4 Decree. And I've already -- it's a little bit
5 difficult to follow because of the nature of his
6 attack on it and then my response, and then his
7 further supplemental term.

8 But let me just leave you with this on the
9 Ecological Decree: My friend ultimately in his
10 submission, if he has to deal with Ecological
11 Decree, says that the tribunal erred in
12 interpreting the decree and that their
13 interpretation was unreasonable. I say that's
14 squarely a question of law. That's an
15 interpretation of a quasi-legal document. It's
16 clearly a question of law.

17 It's a question of law of -- of, if you will,
18 Mexican law. But it's a question which was a
19 finding by the tribunal within their
20 jurisdiction. I think you could characterize it
21 as a question of Mexican law, because it's an
22 interpretation of a Mexican document that was
23 commented on by all of the experts. So for the
24 purposes of the tribunal it's a question of fact.

25 But even if it was in some form or fashion
26 capable of being elevated to a question of law,
27 when he gets to the decree, if he has to, he's
28 ultimately resigned in my submission to -- to
29 quibbling over the interpretation of the decree.
30 And the tribunal found that the effect of the
31 decree was to permanently ban the operation of the
32 landfill.

33 Now, the only point that I haven't dealt with
34 there is my friend's interpretation of 109 and 111
35 of the award. And I looked at the transcript on
36 this, and I -- I don't think I've commented on it,
37 and I do need to.

38 If you could go to the award, because I
39 understand my friend makes a different point that
40 I haven't really addressed, which was in his
41 submission the finding in 111 was conditional, if
42 I understand what he's submitted, and I'll just

43 take it there.

44 If you have page 36 of the award -- sorry.

45 THE COURT: Um-hum.

46 MR. COWPER: I believe my friend -- the words he used

47 in characterizing 111 was -- was that the tribunal

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1 found that the decree would, if implemented,
2 constitute an expropriation. And that's his
3 characterization, as I understand it, of the last
4 sentence of paragraph 111.

5 And in reply, let me say that that
6 interpretation is, firstly, irreconcilable with
7 the last sentence on paragraph 109, which says the
8 decree had the effect -- had the effect of barring
9 forever the operation of the landfill. But it's
10 also, with respect, not a fair interpretation of
11 the final sentence of paragraph 111.

12 What I say is, well, aside from the obvious
13 observation that the word "if" is not in the
14 sentence, that the reference to implementation and
15 the word "would" is the implementation of the
16 Ecological Decree would, in and of itself,
17 constitute an act tantamount to expropriation.

18 In other words, the decree would, if it was
19 by itself, constitute an act tantamount to
20 expropriation, not if it were implemented
21 constitute an act tantamount to expropriation. So
22 that's my respectful submission with respect to a
23 fair interpretation of those two paragraphs.

24 Now, on page 145, and I've indicated this to
25 Your Lordship, Metalclad's position below was on
26 this issue the tribunal had before it evidence
27 which would have required some embarrassment to
28 the government of Mexico. But it had evidence
29 before them which was reports from the governor
30 reported in the press on which he was
31 cross-examined, and they make no findings about
32 this, in which Metalclad strenuously urged the
33 tribunal, said you should have regard to the fact
34 that he was reported as saying that's the very
35 purpose of the decree.

36 And I say on the finding they -- they clearly
37 say we do not have to make any finding of intent
38 or purpose. They clearly say that's unnecessary
39 for them, but it was a matter that was before
40 them. They could have on the evidence chosen to
41 disbelieve the governor and to find that --
42 indeed, forgetting the fine niceties of

43 interpretation -- that the governmental purpose
44 behind the decree was to forever bar the
45 landfill.
46 And if you think of the context, what's
47 happened is, not only everything that's happened

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1 has occurred, there's then a filing of
2 Chapter 11. There's a highly public claim made
3 against Mexico. And then, as you know, the decree
4 is issued later. It fits with the story of the
5 governor's -- as advanced by metal -- Metalclad of
6 the governor's opposition to the project.

7 That finishes Chapter 5. And I'll deal with
8 Chapter 6 very briefly.

9 There are essentially two points made here,
10 and my friend Mr. Thomas made these last week.
11 The first point which he dealt with at length was
12 the issue of the accounting and the handout, and
13 the allegation that the -- there was a deception
14 on the tribunal.

15 And I deal with that in Section B of this
16 chapter. And I dealt with this on Friday
17 afternoon. And I'm content to rest on my
18 submissions that I made you -- to you Friday
19 afternoon in respect of that issue.

20 As I set out in my submission, that is a
21 matter squarely within the common experience of
22 tribunals, squarely within the revenue -- the --
23 the area of fact, and even more importantly is not
24 something which it can, even at the beginning,
25 constitute an allegation of deception on the
26 tribunal or -- and I believe my friend used the
27 word "fraud" on several occasions.

28 The second point he takes I can deal with
29 similarly shortly, and it is: He briefly took the
30 point as it related to corrupt practices alleged
31 to arise from the payments to Ms. Ratner and then
32 the subsequent association with Mr. Rodarte.

33 Now, aside from the preliminary observation
34 that the question was one of fact on which there
35 are no findings -- because there's no -- not a
36 breath of finding in this award with respect to
37 these allegations -- I make this observation, and
38 that is: With respect to Ratner, my friend was
39 not as careful as I -- in my submission he said --
40 he ought to have been to delineate the fact that
41 the agreement to make the payments to Ratner
42 predated Metalclad's purchase of the company.

43 In other words, the commitment to make these
44 payments -- and that's why I think we're now
45 dealing with Chapter 6, and we've already dealt
46 with however many factual points before this --
47 the agreement to make the payments predated.

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1 And during Metalclad's supervision I think
2 there's a \$10,000 payment. But on Kesler's
3 evidence they were committed to making those
4 payments to all the Mexican shareholders in the
5 pre-existing company. She received equal
6 consideration with other shareholders. And he
7 testified he did not know until later that she was
8 the wife of Mr. Rodarte. Clearly a question of
9 credibility. Clearly no finding. Clearly no
10 basis in my submission for setting aside award on
11 the basis of fraud or public policy.

12 With respect to the second arm of that, which
13 is at the very end of my -- of his submission he
14 started to talk about the '93 period as opposed to
15 the '91 period and when Mr. Rodarte was a
16 consultant to the Mexican government and also, as
17 he set out, performing duties for Metalclad, and
18 he set that out.

19 In my submission, what -- what isn't done
20 there with respect to his presentation of it is
21 that he doesn't take you to the response of
22 Mr. Kesler, which I've given you at page 154,
23 paragraph 446 which is to say, no, he wasn't an
24 employee in '93 and we weren't violating the
25 laws. We were satisfied that his involvement with
26 our company while he was a consultant as opposed
27 to an employee was not a violation of Mexican law.

28 Now, with respect, those are points which, if
29 they had this severity and the gravity that the --
30 my friend suggested, they ought to have been
31 raised and pointed to with far greater specificity
32 and far greater persuasiveness than my friend even
33 attempted.

34 In my friend's 110-page argument before this
35 tribunal they are mentioned on about a
36 page-and-a-half. In the oral argument which went
37 for a long period of time, and we read it a couple
38 of times, but there may be a few syllables on this
39 point, but no more. And so the absence of any
40 finding by the tribunal is a -- is a product of
41 the way in which the argument's evolved.

42 There's also, by the way, no mention of my

43 friend's first theory, which was this is a
44 securities fraud. And I -- you can go and read
45 Mr. Kesler's cross-examination. There are hours
46 of allegations in his cross-examination of
47 securities fraud. By the time you get to the

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1 final denouement of this case, Mexico is not
2 pursuing that theory. Now, the -- I'm not
3 suggesting they abandoned it, but I'm saying in --
4 in the context you can understand why the tribunal
5 didn't deal with it at all.

6 Now, and finally, on principle even the case
7 my friend refers to says as it relates to a
8 portion of an award that might be characterized as
9 an improper payment perhaps that ought not to be
10 enforced as a matter of public policy. And if you
11 look at that, that is a white chip; in this
12 particular poker game, it's \$10,000 or
13 thereabouts. It's nothing in my submission to
14 justify even a consideration of setting aside the
15 award as a whole.

16 Now, that completes my submissions on Chapter
17 6, and we then have Chapter 7. And I'm afraid I
18 have to tell you that I didn't leave anything for
19 Mr. Parrish on the facts by the time I finished
20 it. I did warn him that that might actually
21 occur. But you won't be hearing from
22 Mr. Parrish.

23 But Mr. Greenberg was going to take Chapter
24 7. And because I haven't stopped it -- started
25 it, he still has something to say. So I'd like to
26 pass it over to him, if I may.

27 THE COURT: Yes, Mr. Greenberg.

28 MR. GREENBERG: Thank you, My Lord.

29 As Mr. Cowper said, my submissions will
30 address the issues covered in Chapter 7 of our
31 outline of argument which relate to the alleged
32 failure to give sufficient reasons in the award
33 addressing all of the questions before the
34 tribunal.

35 My submissions will cover four general
36 themes, that's, first, that the award on any
37 standard provided sufficient reasons dealing with
38 the questions before the tribunal.

39 Second, that the law in Canada in regard to
40 arbitral awards is that the failure to give
41 sufficient reasons or even any reasons at all is
42 not a basis for judicial intervention.

43 Third, that the law under the ICSID
44 Convention which is relied on by Mexico as the
45 sole basis for this part of its submissions
46 involves a different arbitral regime with a
47 different review process, different review

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1 criteria, and which was made expressly
2 inapplicable to the form of arbitration under the
3 additional facility rules.

4 And we've quoted in our outline Article 3 of
5 the additional facility rules which states
6 expressly that the ICSID Convention does not apply
7 to this form of arbitration.

8 Fourth, the legislature in both of the
9 arbitral -- arbitration acts before you, and the
10 drafters of the additional facility rules, have
11 provided for other procedural safeguards
12 specifically to address the issue of insufficient
13 reasons, and Mexico has failed to avail itself of
14 those remedies.

15 Now, dealing first with my -- my first theme
16 that sufficient reasons were given, I begin with
17 this theme because in my submission it provides a
18 complete answer to my friend's complaints on any
19 measure of -- of what are sufficient reasons. And
20 the Court need not go beyond the terms of the
21 award itself to dispense with my friend's argument
22 on this point.

23 Now, dealing first with the complaints
24 relating to the sufficiency of reasons which are
25 found in my friend's outline of argument, those
26 are, first, that the tribunal failed to address
27 prior contamination and remediation and, second,
28 that the tribunal failed to deal with the
29 existence of domestic legal remedies.

30 Now, I note before going on at this point
31 that even the authorities relied on by my friends
32 relating to the ICSID Convention accept the
33 proposition that a tribunal need not expressly
34 address a ground in its reasons that is implicitly
35 ruled out by another finding within the award.

36 And at paragraph 467 of our outline of
37 argument I quote from Professor Schreuer, picking
38 up where my friends left off. And you'll see in
39 the second paragraph of the quote:

40
41 "A tribunal need not provide reasons if it
42 rejects arguments that are logically ruled

43 out or rendered irrelevant by the reasoned
44 acceptance of other arguments."

45

46 Now, in my submission that paragraph covers
47 off most of my friend's complaints with respect to

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1 the tribunal's treatment of contam -- the
2 contamination and remediation issue.

3 On that question, the tribunal held that
4 environmental issues relating to a hazardous waste
5 landfill, including questions of contamination and
6 remediation, fell within the exclusive authority
7 of the federal Mexican government, and that it was
8 satisfied in respect to those issues.

9 Those findings are found at paragraph 48 --
10 and I won't read them to you, because I think all
11 of these paragraphs have already been referred to
12 you -- in paragraph 48, which the -- in which the
13 tribunal dealt with prior contamination of the
14 site and remediation obligations in addressing the
15 Convenio; in paragraph 86, the tribunal held that
16 the federal authority was controlling and
17 exclusive; and in paragraph 96, in which the
18 tribunal held that the federal government was
19 satisfied that the project was sensitive to
20 environmental concerns, principally relating to
21 the agreement in the Convenio.

22 In my submission the combined effect of those
23 findings cover the field in respect of
24 contamination and remediation and make it
25 unnecessary for the tribunal to address the
26 municipality's view of those issues.

27 Now, as a subset of that first issue, my
28 friends have impugned the tribunal for failing to
29 address the motives of the municipality
30 specifically in respect of denying the
31 construction permit. However, the tribunal held
32 that the motivations for the municipality denying
33 the permit outside of construction considerations
34 were improper.

35 That implicitly addresses the other motives
36 the municipality may have had. And those findings
37 are found at paragraph 86 in which the tribunal
38 held that the authority of the municipality only
39 extended to appropriate construction
40 considerations, and that the municipality's denial
41 of the permit for any other reason related to
42 anything other than the physical construction or

43 defects in the site was improper.
44 Now, additionally at paragraph 92, and I -- I
45 will ask you to have reference to paragraph 92 of
46 the award, paragraph 92 the tribunal held:
47

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1 "The town council denied the permit for
2 reasons which included but may not have
3 been limited to the opposition of the local
4 population, the fact that construction had
5 already begun when the application was
6 submitted, the denial of the permit to
7 COTERIN in..." nine "... December 1991 and
8 January 1992, the ecological concerns
9 regarding the environmental effect and
10 impact on the site and surrounding
11 communities."

12
13 And then the tribunal concludes:

14
15 "None of the reasons included a reference
16 to any problems associated with the
17 physical construction of the landfill or to
18 any physical defects therein."

19
20 So the tribunal clearly dispensed with the
21 issue of the motivations underlying the
22 municipality's conduct in denying the permit on
23 the basis that its jurisdiction was limited
24 generally to non-hazardous waste landfills, and
25 specifically in respect of the construction
26 permits was restricted to considering actual
27 construction issues.

28 Now, the second assertion in my friend's
29 outline is that the availability of domestic legal
30 remedies was not dealt with. Now, that particular
31 submission has been addressed ad nauseam in our
32 submissions so far.

33 Paragraph 97 and the note therein addressed
34 the issue of domestic legal remedies. Now, in
35 their submissions my friends take issue with the
36 correctness of those conclusions. But the
37 correctness of those conclusions is not the issue
38 when you're dealing with the sufficiency of the
39 reasons.

40 Now, Mr. Cowper has already addressed the
41 point that my friends raised regarding the
42 municipality's willingness to allow a

43 non-hazardous waste site. There was no agreement
44 in place regarding that. There was nothing for
45 the tribunal to consider in its reasons in that
46 respect.

47 In the course of their submissions, my

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1 friends stated that there was no reference by the
2 tribunal to the permitting history. In paragraph
3 50, however, the tribunal notes that the
4 municipality recalled its decision to deny a
5 construction permit and noted the impropriety of
6 Metalclad's construction of the landfill prior to
7 receiving a municipal construction permit.

8 And then, again at paragraph 92, as I've
9 already read, there was reference to both the
10 previous denial and the fact that construction had
11 already begun. And it -- the tribunal held that
12 those were among the reasons that did -- were not
13 associated with the physical construction of the
14 landfill. So it gave its reasons for not placing
15 any weight on those submissions.

16 Now, my friends in their submissions also
17 referred to the demonstration and the lack of any
18 finding of attribution. And Mr. Cowper's already
19 addressed this. But in my submission there's also
20 no finding that the demonstration was a basis for
21 the breach of either 1105 or 1110.

22 You can go through the entire section on the
23 tribunal's decision and you'll see there's no
24 reference to the demonstration as a basis for any
25 liability. The reference in the facts section was
26 merely part of the chronology.

27 Now, my friends in their submissions also
28 contended that there was no reference by the
29 tribunal to Metalclad's knowledge of the
30 requirement for a municipal permit. In fact, the
31 tribunal addressed that issue at paragraphs 31,
32 53, 80, 87 and 89 of the award.

33 And in particular, if you'll have reference
34 to paragraph 53 of the award, the tribe -- the
35 tribunal makes a specific reference in paragraph
36 53 to Mexico's assertion that Metalclad was aware
37 through due diligence that a municipal permit
38 might be necessary on the basis of the case of
39 COTERIN 1991/1992, and other past precedents for
40 various projects in SLP.

41 And then if you'll flip to paragraph 80 the
42 tribunal notes:

43
44 "When Metalclad inquired prior to..." the
45 "...purchase...prior to its purchase of
46 COTERIN as to the necessity for municipal
47 permits, federal officials assured it that

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1 it had all that was needed to undertake the
2 landfill project."
3

4 Then in paragraphs 85, 87 and 89 the tribunal
5 goes on to hold that Metalclad was led to believe
6 that federal and State permits allowed for
7 construction and operation of the landfill, that
8 Metalclad relied on those representations of the
9 federal government, and that Metalclad was
10 entitled to rely on those representations.

11 So those findings taken together necessarily
12 dispense with the point on due diligence knowledge
13 of the potential requirement of a municipal
14 permit. Metalclad inquired. They were told they
15 had all they needed. They relied on that
16 representation, and they were entitled to. Those
17 were the findings of the tribunal.

18 Now, I believe that covers all of the
19 allegations of failure to provide sufficient
20 reasons that my friends raised. My principal
21 position in respect of all of them is that the
22 complaints as to the sufficiency of the award are
23 not borne out by a fair reading of the award.

24 My next theme is that under the law governing
25 the review of arbitral awards the failure to give
26 sufficient reasons or even give any reasons at all
27 is not a basis for setting aside the award. Now,
28 this review in this Court is governed entirely by
29 one of the two arbitration acts before you.

30 And my friends have now submitted in their
31 further supplemental outline that the treatment of
32 reasons falls under the review provisions of
33 either the International Commercial Arbitration
34 Act or now the Commercial Arbitration Act as an
35 error of law.

36 So I propose to deal briefly with the
37 relevant provisions of the act which relate to
38 reasons, and I'll start with the International
39 Commercial Arbitration Act. And in dealing with
40 that, I'll refer to a decision of this Court which
41 is referred to in our outline of argument in which
42 it was held that the failure to provide any

43 reasons at all, even where there was a requirement
44 to do so under the rules governing the
45 arbitration, did not run afoul of the
46 International Commercial Arbitration Act.
47 If you'll go to the International Commercial

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1 Arbitration Act at tab 76 of my friend's

2 materials --

3 THE COURT: I've got my copy here.

4 MR. GREENBERG: Oh, okay. Let me just catch up to you

5 then.

6 And just cataloguing the relevant provisions,

7 you'll see at Section 31 --

8 THE COURT: Um-hum.

9 MR. GREENBERG: -- subsection (1) --

10 THE COURT: Um-hum.

11 MR. GREENBERG: -- you'll see that the international

12 act requires that an award be in writing. Under

13 subsection (3) it requires the award to state the

14 reasons on which it is based unless the parties

15 agree otherwise or is a compromise agreement as

16 provided for in Section 30.

17 Now, if you'll skip over to Section 33(4)

18 you'll see:

19

20 "Unless otherwise agreed by the parties, a

21 party may request within 30 days after

22 receipt of the arbitral award the arbitral

23 tribunal to make an additional arbitral

24 award as to claims presented in the

25 arbitral proceeding...proceedings but

26 omitted from the arbitral award."

27

28 And then Section 34, which you've been

29 referred to, is in the next part entitled

30 "Recourse Against an Arbitral Award," and this

31 sets out the exclusive grounds on which a Court

32 may in its discretion set aside the arbitral

33 award.

34 And so as we've submitted a number of times

35 previously, to have the award set aside, the

36 failure to give sufficient reasons must be shown

37 to fall within one of these exclusive grounds in

38 order for it to be a reviewable error under the

39 international act.

40 Now, my friend correctly noted in his

41 submissions under this part that we rely on the

42 Food Services of America case which is found at

43 tab 28 of my friend's authorities. Thank you.
44 And Food Services of America dealt with the
45 enforcement of an arbitral award under the
46 International Commercial Arbitration Act in more
47 extreme circumstances than are present here in

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1 that the arbitral panel did not provide any
2 reasons as was required by the international
3 arbitral -- arbitration rules under which the
4 parties agreed the arbitration would proceed.

5 And at page 230 of the decision at -- at
6 paragraph 21 the Court begins its -- begins to
7 address the issue of the arbitrators failed to
8 deliver reasons for their award, and it says:

9
10 "Article 28(2) of the international
11 arbitration rules requires the arbitrators
12 to state reasons upon which the award is
13 based. In this matter written reasons were
14 not issued."

15
16 And the requirement for reasons in this case,
17 as here, as in the case at bar, was based on the
18 rules under which the arbitration was to proceed.
19 Skipping over to paragraph 27 on the next page,
20 the Court framed the issue as whether the failure
21 to give reasons is sufficiently serious to render
22 the arbitral procedure to have not been in
23 accordance with the agreement of the parties such
24 as to warrant denying enforcement of the award.

25 And in the next paragraph, at paragraph 28
26 the Court makes reference to Schreter and Gasmac,
27 and they cite it to the effect that the failure of
28 international arbitrators to give reasons did not
29 amount to a ground upon which the Court should
30 exercise its discretion to refuse enforcement of
31 the award.

32 Down to paragraph 29 the Court cites Casey's
33 to the same effect, that the failure to provide
34 reasons is not a reason in and of itself to refuse
35 enforcement of an award, and that the burden is on
36 the respondent that it fits within one of the
37 subsections of Section 36.

38 Now, that brings me to an important point,
39 and that is that the Court in this case was
40 dealing with its discretion to refuse enforcement
41 of an award under Section 36 of the international
42 arbitration act.

43 Now, the provisions in Section 36 for
44 declining to enforce an award are virtually
45 identical to the provisions in Section 34 --
46 THE COURT: Excuse me.
47 MR. GREENBERG: -- to the -- to the provisions in

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1 Section 34 which provide the Court with discretion
2 to set a -- an award aside.

3 And if you have reference to Section 34 and
4 36 of the act side-by-side you'll see that the
5 distinctions are mainly dealing with the law that
6 underlie -- underscores the -- the award.

7 Since the enforcement of the award could be
8 from another jurisdiction, Section 34(2) and
9 34(2) -- I'm sorry, 34(2)(ii) and -- and (v), and
10 Section 36(2)(ii) and sub (v) both state that --
11 in one case it's the law of B.C. that's the
12 default law, and in the other case it's the law of
13 the forum in which the award was granted; that's
14 the default law if there's no agreement by the
15 parties.

16 There's an additional ground under Section 36
17 to refuse enforcement of an award if it has not
18 become binding on the parties or is suspended or
19 set aside in the State in which the award was
20 made, but otherwise Section 34 and 36, the grounds
21 are virtually identical.

22 So although the Court in Food Services was
23 dealing with Section 36 discretion to refuse
24 enforcement of award, in my submission the
25 comments in this case apply equally to
26 considerations under Section 34 of the act.

27 Returning to the award at -- sorry, to the
28 decision at paragraph 32, the Court there rejected
29 the submission that the failure to give reasons
30 ran afoul of Section 36(1)(a)(v) of the
31 international act on the basis that the arbitral
32 procedure was not in accordance with the agreement
33 of the parties or of the law of the State where
34 the arbitration took place.

35 And you'll see that the Court held that:

36
37 "The issuing of reasons after the fact is
38 not part of the arbitration process
39 itself. The procedure of the arbitration
40 hearing itself..."

41
42 The Court noted, was in accordance with the

43 parties' agreement, and that was despite the fact
44 that the rules under which the parties agreed the
45 arbitration was to proceed required reasons.
46 And then the Court went on to hold further
47 that:

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1
2 "Even if the failure to give reasons were
3 considered part of the arbitral procedure,
4 the failure does not bring into question
5 the fairness of the hearing or of the
6 decision-making process, and is therefore
7 not sufficiently serious to violate the
8 parties' agreement to have an arbitration
9 in accord with the rules."

10
11 Now, my friend in his submission noted that
12 the Court found in Food Services that the parties
13 had waived their rights to rely on Section 36, and
14 he's correct in that.

15 The decision, however, in regard to failure
16 to provide reasons that the Court went on to
17 provide is directly on point with this case, and
18 that -- that reasoning was based on the authority
19 of Schreter and Casey's.

20 And just to close the loop on that, if we can
21 find the Schreter case at tab 59 of my friend's
22 authorities, and the quote is found at page 377 of
23 that tab, that the failure to provide reasons is
24 not a ground in and of itself to set aside an
25 award or, sorry, to refuse to enforce an award.

26 Schreter was also a case on enforcement of an
27 award. In that case they were dealing not with a
28 total failure to give reasons but the allegation
29 that there was an omission within the reasons.

30 So in my submission on the authorities the
31 failure to provide reasons despite the requirement
32 of the rules under which the arbi -- arbitration
33 was to proceed does not fall within Section 36 of
34 the international act, and in my submission
35 likewise does not fall within the Section 34
36 criteria.

37 And further, even if it could be
38 characterized as falling within the scope of
39 matters to be reviewed under Section 34, it is not
40 a matter which warrants the Court exercising its
41 discretion to set aside an award.

42 And that point applies in my submission with

43 even greater force to this case where reasons were
44 given and only sufficiency is questioned as in the
45 Food Services case where there was an entire
46 failure to give reasons.
47 THE COURT: Would this be a convenient time to take

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1 the afternoon break?

2 MR. GREENBERG: I think so, My Lord. Thank you.

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

5

6 (AFTERNOON RECESS)

7 (PROCEEDINGS ADJOURNED AT 3:05 P.M.)

8 (PROCEEDINGS RESUMED AT 3:21 P.M.)

9

10 THE COURT: Yes, please continue.

11 MR. GREENBERG: Thank you, My Lord.

12 I had just finished dealing with the
13 International Commercial Arbitration Act. And now
14 I'd like to just deal with a few provisions in the
15 domestic Commercial Arbitration Act which is found
16 at tab 74 at my friend's authorities.

17 And I'll start with Section 25 which requires
18 an award must be in writing and must be signed by
19 the arbitrator. There's no requirement for
20 reasons in that section.

21 Section 27(6):

22

23 "Within 30 days after receiving the award
24 a party may apply to the arbitrator to make
25 an additional award with respect to claims
26 presented in the proceedings but omitted
27 from the award, unless otherwise agreed by
28 the parties."

29

30 And then Section 33 which we've set out in
31 its entirety in -- in our outline of argument at
32 paragraph 489, Section 33(1):

33

34 "A party to an arbitration may apply to the
35 Court for an order that the arbitrator give
36 more detailed reasons for an award."

37

38 Subsection (2):

39

40 "On an application under subsection (1) the
41 Court may order that the arbitrator state
42 the reasons for the award in detail that is

43 sufficient to consider any question of law
44 that arises out of the award were an appeal
45 to be brought under Section 31."
46
47 And then subsection (3), which makes it clear

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1 that an award -- an order under subsection (2) is
2 only to be made where reason -- a reasoned award
3 was required in advance of the award being made,
4 or there's some reason -- some other reason why no
5 notice that a reasoned award would be required is
6 given.

7 Now, in my submission Section 33 creates a
8 separate statutory remedy independent of Section
9 31 of the Commercial Arbitration Act in
10 circumstances where an arbitrator has been
11 required in advance to give a reasoned award and
12 has failed to do so.

13 In my submission the implication of this
14 section is that it's not an error of law under
15 Section 31 to fail to give sufficient reasons,
16 otherwise Section 33 would be unnecessary.

17 Now, my friends have asserted that the
18 failure to give reasons falls within the
19 provisions which authorize review by this Court
20 under either of the acts. In my submission there
21 is no such scope for review, and in any event the
22 Court ought not to exercise its discretion under
23 either statute to interfere with the award on the
24 basis of the sufficiency of the reasons.

25 Now, my third theme: The ICSID Convention.
26 My friend in -- Mr. Thomas in his submissions on
27 this point relied exclusively on decisions of the
28 ad hoc annulment committees established under the
29 ICSID Convention arbitration regime.

30 And my friend cited in this section of his
31 argument the learned authors Mustill and Boyd for
32 the proposition that it is an analytical error to
33 apply the principles from one form of arbitration
34 to another.

35 Now, ironically he cited that principle in
36 the course of his submissions relying exclusively
37 on the ICSID Convention approach to annulment,
38 which is entirely a different form of arbitration
39 than the regime of arbitrations under the
40 additional facility rules.

41 In my submission it would be an analytical
42 error to apply the principles from the convention

43 rules to an arbitration under the additional
44 facility rules. And I note in this regard that
45 the ICSID Convention was made expressly
46 inapplicable to arbitrations under the additional
47 facility rules.

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1 And we've reproduced Article 3 of the
2 additional facility rules at paragraph 490 of our
3 outline of argument, and it's headed "Convention
4 Not Applicable":

5
6 "Since the proceedings envisaged by
7 Article 2 are outside the jurisdiction of
8 the centre, none of the provisions of the
9 convention shall be applicable to them or
10 to recommendations, awards or reports which
11 may be rendered therein."

12
13 Now, my friend Mr. Thomas noted early in his
14 submissions that Canada and Mexico are not even
15 signatories to the ICSID Convention. And so a
16 NAFTA arbitration could not proceed under the very
17 process on which my friend has rested this entire
18 part of his argument.

19 It's significant that the ICSID Convention
20 provides an entirely different scheme and
21 different criteria for a review of an award than a
22 review under the additional facility rules. A
23 review under the convention procedure goes to an
24 annulment committee. In that respect, the whole
25 process stays in-house, it's never referred to the
26 Courts.

27 The specific grounds on which an annulment
28 committee can annul an award are expressly set
29 out, and the easiest place to find those is at tab
30 60 of our authorities. Tab 60 is the review -- a
31 commentary on Article 52 of the convention by
32 Professor Schreuer, who my friend referred to.
33 And Article 52 is the annulment article under the
34 convention. And the very first page under the
35 cover plate at tab 60 sets out the provisions of
36 Article 52. Do you have that, My Lord?

37 THE COURT: I do.

38 MR. GREENBERG: And you'll see the specific grounds
39 are set out for that -- that -- the grounds for an
40 annulment are set out in subparagraph (1):

41
42 "Either party may request annulment of

43 the award by an application in writing
44 addressed to the Secretary General on one
45 or more of the following grounds."

46
47 And if you'll go down to (e) you'll see it's

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1 expressly set out that one of the grounds is that
2 the award has failed to state the reasons on which
3 it is based.

4 Now, that is very different from the
5 statutory regime that we are dealing with under
6 the additional facility rules and the two acts
7 which give this Court jurisdiction to review the
8 award to which I've just made reference earlier.

9 In my submission the ICSID Convention
10 provides for an entirely different arbitral
11 process, and it and the annulment decisions
12 rendered under it have no bearing on this matter.

13 Now, there's an additional reason beyond that
14 not to apply the ICSID Convention annulment
15 committee's peculiar approach, and that is that
16 it's been severely criticized for undermining the
17 finality of awards under that system.

18 Now, I've set out some of the criticism of
19 the ICSID Convention annulment committee's
20 approach to the requirements to state reasons in
21 our outline of submissions at paragraphs 495 to
22 498. And we haven't reproduced anywhere near the
23 entire academic debate on this point. But
24 essentially the criticisms can be summed up as
25 follows: An overly stringent standard leading to
26 frequent annulment destroys confidence in the
27 arbitral system by failing to ensure a sufficient
28 degree of finality in the decisions.

29 And you'll recall that there are different
30 international arbitral regimes, and parties can
31 agree to be bound under those different regimes.
32 Again, the ICSID Convention is not one which
33 Canada has agreed to.

34 It imposes an unachievable standard on the
35 tribunal in particularly complex and involved
36 matters to identify and expressly address every
37 single issue or potential issue of fact and law to
38 be decided. And, finally, that approach acts as a
39 disincentive to parties to present their case in a
40 selective and efficient manner.

41 And I note at this point that my friend
42 referred you to a passage in the MINE case which

43 sought to address one of these criticisms, the
44 criticism on finality. And just in passing, he --
45 he didn't refer you to the section where the
46 annulment committee addressed what the requirement
47 to give full reasons actually was in their view.

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1 So at tab 38 of my friend's authorities
2 you'll find the MINE case. And at page 88, do you
3 have that, My Lord?

4 THE COURT: I do now.

5 MR. GREENBERG: And paragraph 5.09:

6

7 "In the committee's view, the requirement
8 to state reasons is satisfied as long as
9 the award enables one to follow how the
10 tribunal proceeded from point A to point B
11 and eventually to its conclusions. Even if
12 it made an error of fact or law, the
13 minimum requirement is in particular not
14 satisfied by either contradictory or
15 frivolous reasons."

16

17 Now, that's more tempered language than the
18 first two annulment committee decisions that my
19 friend made reference to. And it's very similar
20 to the language used by the English courts in the
21 decisions cited by Redfern which are quoted in our
22 outline of argument.

23 My principal points under this theme are that
24 ICSID is a separate form of arbitration; it's been
25 made expressly inapplicable to the form of
26 arbitration that we're dealing with here; the
27 approach to the reasons applied thereunder has
28 been the subject of criticism, and for all of
29 those reasons the ICSID Convention and the
30 annulment committee decisions are not relevant to
31 the matters that you have to decide.

32 Now, the final theme that I wish to address:
33 additional procedural safeguards. My friend
34 sought to justify his submission that the award
35 ought to be set aside based on the insufficiency
36 of reasons because, in his submission, full
37 reasons are meant to ensure the integrity of the
38 arbitral process. We take no issue with -- with
39 that submission.

40 However, in -- in my submission, remedies
41 other than setting the award aside were intended
42 to address that issue. Now, I've already touched

43 on, in reviewing the legislative provisions with
44 a -- which deal with obtaining further reasons
45 from the tribunal, that. And there are also other
46 such provisions under the additional facility
47 rules which govern this arbitration which allow

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1 for parties to request further reasons.

2 Now, just before I come back to that, I note
3 that in this -- in this matter, and it's set out
4 in our outline of argument, the tribunal issued to
5 the parties questions for their response prior to
6 the post-hearing briefs being filed.

7 Now, I raise this point only because the
8 parties had an opportunity within this hearing
9 process to advise the tribunal that the questions
10 it believed were before it and required an answer
11 were insufficient or inappropriate, or didn't
12 cover the field.

13 Now, as I've said, I've already taken you to
14 the provisions of the statutes which permit
15 further reasons to be obtained from the tribunal
16 to correct a deficiency.

17 Additionally, under Article 58 of the
18 additional facility rules, the terms of which are
19 set out in paragraph 504 of our submissions, there
20 is an opportunity for the parties to have the
21 tribunal decide any question which it omitted to
22 decide in the award.

23 And my friend addressed this potential remedy
24 and said -- and I don't have a note of his exact
25 words, but said that they considered it but
26 decided not to rely on that section because the
27 matters that they believe were omitted were ones
28 of substance which may have changed the tribunal's
29 conclusion.

30 Well, in my submission that robs Article 58
31 of any real purpose. And the preferable approach
32 is the one set out in paragraph 506 of our
33 outline, which is a quote from J. Brian Casey
34 dealing under the Ontario legislation with the
35 provisions to obtain further reasons from a
36 tribunal, and he says:

37
38 "In some cases the tribunal may make an
39 award which fails to deal with an issue
40 referred to them. While there's been some
41 discussion by authors that in certain
42 circumstances this may taint the entire

43 award, this is not a ground for setting
44 aside an award.
45 "Instead, recourse should be had to
46 the provisions of the act requiring the
47 arbitral tribunal to explain a matter or

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1 which permit the tribunal to correct errors
2 or make an additional award. If the
3 tribunal refuses to make the additional
4 award, then possibly an attack could be
5 made on the entire award on grounds that
6 the applicant was not treated equally and
7 fairly, or the procedures followed in the
8 arbitration did not comply with the
9 appropriate act."

10

11 And in my submission that is the proper
12 approach to the various additional reasons
13 provisions in the acts and in the rules
14 themselves. The outcome of an application for
15 further reasons will either be the explanation
16 that the party desires or a clearer basis to -- to
17 seek a review of the decision.

18

19 In either case, it lies ill in the mouth of a
20 party to criticize a tribunal and seek to set
21 aside its award for insufficient reasons without
22 first seeking to avail itself of the very
23 provisions intended to remedy that complaint.

24

25 In my submission, Mexico's failure to request
26 a supplemental decision on matters it believes
27 were omitted belies the true purpose, which was to
28 cloak an appeal on the merits in the guise of a
29 complaint about the sufficiency of reasons.

30

31 Now, in summary of my submissions, the
32 tribunal provided sufficient reasons on any test.
33 And in any event, the failure to give reasons is
34 not a basis to set an award aside, nor is it a
35 matter on which the Court ought to exercise its
36 discretion to set aside the award.

37

38 The ICSID Convention approach is expressly
39 inapplicable, it's different; it's a different
40 regime and ought not to be applied. And to the
41 extent there is a complaint about the sufficiency
42 of reasons, these are to be addressed by different
43 sections in both the arbi -- the additional
44 facility rules and under either act.

45

46 That's -- subject to any questions, those are
47 my submissions.

48

43 THE COURT: Thank you, Mr. Greenberg.
44 MR. COWPER: Thank you, My Lord.
45 I have remaining Chapter 8 to do. I can
46 either start that now or I can start it tomorrow
47 morning. We're well within our time. We'll

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1 certainly finish before noon. I'm in your hands
2 if you'd like me to start now or -- or come back.

3 THE COURT: It doesn't make any difference to me.

4 Mr. Foy, do you have any preference or any --

5 MR. FOY: Does my friend have an estimate of the time
6 Chapter 8 will --

7 MR. COWPER: I -- I think -- I'll finish in the
8 morning. But I -- I can start. I don't mind.

9 But I'm just -- I'm in the Court's hands. I don't
10 know. I take it my friend doesn't have a
11 preference. I can go for -- until 4, if
12 Your Lordship would like me to.

13 THE COURT: Very well. I think -- I think Mr. Foy is
14 looking for tomorrow to -- to work on his reply.

15 MR. COWPER: Yes, okay. So we'll --

16 THE COURT: The more time he has tomorrow, I think, is
17 probably preferable to additional time today.

18 MR. COWPER: Okay, fine. I'll go -- I'll go until the
19 break then.

20 If you could turn to Chapter 8, and I should
21 say in relation that Your Lordship asked me a
22 couple of questions of detail, and I'll look at my
23 notes and make certain that I've asked (sic)
24 them. But I may come back tomorrow morning just
25 to give you any references that I haven't given
26 you.

27 Turning then to Chapter 8, which is
28 the chapter respecting alleged errors of law,
29 Your Lordship has heard me say that this is a
30 matter that does not arise in the case, and so
31 that's obviously my preliminary point.

32 If I am -- and I do deal with the issue of
33 how it should be properly construed. It is my
34 submission that my friend's alleged errors in
35 relation to both 1105 and 1110 ought not to be
36 accepted. And I've indicated to you that that can
37 sound either in a refusal to grant leave to appeal
38 under the commercial act in respect of the issue
39 of law, or it may sound, depending on
40 Your Lordship's view of the act, in failing to
41 find that the issues of international law that --
42 that the errors alleged meet any reasonable

43 standard of deference to the tribunal.
44 Now, with respect to the issues of error, let
45 me say firstly this, and that is -- and of the
46 Myers case, if you're at tab -- if you're at
47 Chapter 8, tab -- paragraph 510 --

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1 THE COURT: Um-hum.

2 MR. COWPER: -- I quote the Myers case. And if you
3 could go to the tab 58 of the petitioner's
4 material, and you recall that the -- this was a
5 decision -- and there are two. I don't know if
6 you've been told, but there are two written
7 reasons: There's the majority award, which I took
8 you to yesterday, and then at the back, which
9 unfortunately starts page 1 but it's about halfway
10 through, is the separate opinion of Brian
11 Schwartz.

12 THE COURT: Yes. I -- I did appreciate there were
13 different opinions. I -- I take it's -- it's
14 simply a separate opinion, not --

15 MR. COWPER: Yes.

16 THE COURT: -- a dissenting opinion?

17 MR. COWPER: As he says at his title page, it's a
18 separate opinion concurring, except with respect
19 to performance requirements. And I think there's
20 some difference there which I won't trouble you
21 with, because I don't think they matter.

22 The reason I'm referring you to Arbitrator
23 Schwartz's opinions, as I indicated, he actually
24 comments upon the principle that my friend speaks
25 about with respect to the potential application of
26 the principles of transparency in informing or
27 influencing the concept of what is fair and
28 equitable under 1105.

29 And if you go to 82, page 82, it's paragraph
30 250. And it -- the paragraphs I've quoted here
31 and refer you to are 253 to 255. And I just note
32 with irony that at paragraph 250 he notes that the
33 principles of transparency were drawn to this
34 panel's attention by the memorial of the
35 government of Canada, and then he quotes Article
36 1802.

37 And just going on, he says at 253:

38
39 "It appears to me that Canada may have
40 breached the specific terms of Article 1802
41 in this case. I will come to no definite
42 conclusion in this regard, however, as

43 S.D. Myers did not expressly argue that
44 Canada's conduct was contrary to Article
45 1802. I'm reluctant to find a breach of a
46 specific treaty provision where Canada has
47 not been properly alerted to the issue and

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1 thereby given a full chance to respond.
2 "I wish therefore to explore the
3 implications of Article 1802 primarily in
4 the context of the wider argument that is
5 suggested by S.D. Myers that the minimum
6 international standard in Article 1105 of
7 NAFTA includes a general principle of
8 transparency and fairness in the making of
9 regulations."

10

11 Now, before I go on, as I said yesterday, or
12 I intended to say, the context in which these
13 arbitrators are dealing with, it was a much more
14 difficult struggle between legitimate regulatory
15 oversight and the facts of our case, because what
16 they were dealing with were multiple possible
17 governmental goals, one of which was impermissible
18 under the treaty, and others of which were in fact
19 not only permissible but regarded as laudatory by
20 the Basel Convention and other international
21 standards.

22

23 So that some of the -- some of the purposes
24 of the legislation asserted by Canada were not
25 only proper in the domestic law sense, they were
26 approved of by international convention.

27

28 Just going on, it says:

29

30 "S.D. Myers has not provided evidence that
31 procedural fairness and transparency in the
32 making of regulations is part of general
33 international law and as such applicable
34 worldwide. They appealed to the letter or
35 stated the provision of the 1947 GATT and
36 case law associated with it to argue that
37 procedural fairness and transparency is
38 part of the minimum international
39 standard."

40

41 Then he says:

42

43 "But the GATT agreement, while widely
44 accepted, has by no means been adopted by

43 all States."

44

45 Now, I note that that wasn't in fact

46 Metalclad's argument below. They didn't argue

47 that the GATT agreement constituted the foundation

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1 for the argument.

2 But if he goes (sic) to 256, he says:

3

4 "The argument with respect to unfair
5 process must, if it can succeed, be
6 formulated..."

7

8 And then he sets down below a series of
9 propositions, the first being the terms of 1105,
10 being treatment in accordance with fair and
11 equitable treatment; the meaning of international
12 law on that phrase is coloured by the words that
13 follow, fair and equitable treatment and full
14 protection and security.

15 And if international law had its routine
16 meaning, those following words would be
17 pointless. The framers of NAFTA in adopting the
18 formulation they did must have had in mind
19 something more than whatever protection to
20 investors is accepted by the body of international
21 law that applies throughout the entire world.

22 The interpretation of an application of
23 Article 1105 must also take into account the
24 letter or spirit of widely -- though not
25 universally -- accepted international agreements
26 like those of -- in the WTO system and those
27 typical of bilateral investment treaties.

28 Even if a norm has not yet technically passed
29 into customary international law, that norm may
30 still be encompassed in the broad concept
31 expressed by Article 1105.

32 The fact that some States may not have an
33 elevated regard for the operation of the market,
34 the property rights or open trade should not be
35 used to radically restrict the interpretation of
36 the minimum standard in an agreement like NAFTA.

37 States that adopt treaties that include the
38 minimum standard as formulated in NAFTA and many
39 BITS with express references to just and equitable
40 treatment and full protection and security must
41 have in mind the expectations that are reflected
42 in a wide range of modern trade agreements and

43 practices.
44 Then he talks about the GATT as pointed out
45 in the Shrimp Turtle case and regional agreements
46 include specific provisions that recognize a
47 broader principle of transparency and regulatory

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1 fairness in the making of regulation. The broader
2 principles should be considered part of the
3 international law referred to in Article 1105.

4 Then he says, 257:

5
6 "This line of argument is one that does
7 appear sensible to me. It gives reasonable
8 value and meaning to all of the words of
9 Article 1105 of NAFTA. It invites
10 interpreters of 110...Article 1105 to look
11 to the state of the art in international
12 trade agreements to determine the content
13 of the minimum international standard
14 rather than relying on personal, subjective
15 notions of what is fair, equitable or full
16 protection and security."

17

18 And then he goes on.

19 The point I wish to make arising out of that
20 case is here's another international lawyer who
21 states a series of logical propositions which are,
22 I say, squarely within the debate of international
23 lawyers.

24 And as he concludes, the line of argument is
25 one that does appear sensible to me. It gives
26 reasonable value and meaning to the words of
27 Article 1105 of NAFTA, and in my submission that
28 is so; that is, if you read Article 1105 as a
29 person reading the English language, and you say
30 did the -- did the writer of that article intend
31 to confer on investors a right to be treated
32 fairly and equitably as a minimum standard, that
33 is fairly and equitably in relation to their
34 investment, I say that they did, and that the
35 reasons -- fair and equitable have a general
36 meaning which sounds in precisely the kind of
37 conduct which occurred in this case.

38 And so that with respect to the arbitrators
39 in this case and their application of that concept
40 to the conduct, they found they were not only
41 within their jurisdiction but clearly right in so
42 finding.

43 Now, what that deals with, and -- and it's
44 something that I averted to you earlier, and it's
45 always one of the awkward parts of dealing with
46 the system of law that we're not familiar with on
47 a daily basis, is, as you can tell from Arbitrator

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1 Schwartz and all of the other discussions that
2 you've had with respect to international law, that
3 international law doesn't have a central
4 Parliament. It doesn't have a body of statutes
5 that you can go to that is in one place at one
6 time and say this is statutory test. It is rather
7 an evolving set of principles with a variety of
8 sources for its finding and influenced by a
9 variety of traditions and a variety of
10 developments.

11 And it's not surprising, for example, that
12 the words "fair and equitable" appear in NAFTA at
13 the time in history they appear rather than
14 appearing in 1910, because the post-war
15 development of bilateral investment treaties has
16 as one of its central goals the guarantee of
17 something more than what was thought to be the
18 minimum standard of treatment in the last century
19 as it related to an investor's rights as it
20 relates to a foreign State.

21 And the interpretation of this treaty
22 requires, I say, the interpretation of the treaty
23 when you go to the concept of customary
24 international law. You don't leave the treaty
25 behind. It's the interpretation of the treaty in
26 the light of customary international law.

27 Now, in my argument on jurisdiction I
28 referred you to the late F.A. Mann who wrote on
29 the subject. And curiously enough, on almost all
30 other topics, I'm told, he was conservative to the
31 point of being a curmudgeon on -- in international
32 law standards. And yet he was firmly of the view
33 that the concepts of fair and equitable had to be
34 given a robust meaning in order for them to
35 achieve their objects within bilateral investment
36 treaties and otherwise.

37 And so the arbitrators in this case, I say,
38 not only were well within their jurisdiction but
39 they applied the terms fair and equitable as
40 understood properly by anybody reading the treaty,
41 properly having regard to the objects and purposes
42 of the treaty which I say, and I -- I won't say it

43 again, are expressly applicable to their
44 exercise.
45 They refer to them -- and I won't -- I
46 hope -- if you'll recall, within Chapter 11
47 there's a reference to the agreement, being the

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1 whole of NAFTA; the treaty and purposes section is
2 part of the agreement, and it referred -- the
3 treaty, in the object purposes, refers to the
4 agreement as a whole, including Chapter 11. So
5 those are not strangers. They're not hermetically
6 separated. The objects and purposes form part of
7 the context within which the meaning to fair and
8 equitable must be given.

9 With respect to 1110 --
10 And I think I'll -- I'll look at my notes.
11 But that's, I think, all I need to do with respect
12 to 1105.
13 -- the -- and -- and maybe just I'll close
14 on -- with the -- the Biloune case, because that
15 largely deals with 1105. And my friend in his
16 submissions distinguishes the Biloune case. As
17 you'll recall, in the award the arbitrators refer
18 to and rely upon the Biloune case. My --

19 THE COURT: Just before -- just before you get to the
20 Biloune case, could you just give me your
21 interpretation of 201 again? I don't want there
22 to be mis -- any misunderstanding. You corrected
23 it and I want to make sure that I've not
24 misunderstood --

25 MR. COWPER: Yes.
26 THE COURT: -- your position.
27 MR. COWPER: 102, you mean?
28 THE COURT: 102, I'm sorry.
29 MR. COWPER: Okay. The -- the objectives of this
30 agreement -- and I -- there's two different
31 points. And perhaps I -- if you're meaning the
32 reference to transparency, there's two different
33 points which have arisen in our discussion.
34 The -- the point I was making earlier was
35 that the reference to the agreement, which is a
36 defined term in 102 --

37 THE COURT: Um-hum.
38 MR. COWPER: -- is NAFTA, not NAFTA minus Chapter 11,
39 and that when you go to Chapter 11 and you look at
40 the provision respecting applicable law, which is
41 1130 or 1131, under guard -- governing law --

42 THE COURT: 1131, um-hum.

43 MR. COWPER: -- it's 1131(1), it says:
44
45 "A tribunal established under this section
46 shall decide the issues in dispute in
47 accordance with this agreement and

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1 applicable rules of international law."

2

3 I say that where my friend fails is that 102
4 and the objectives of 102 by its express terms,
5 and by reason of the incorporation into 1131(1) is
6 available to the interpreters of the treaty to
7 have regard to under both the terms of the treaty,
8 under the concept of the Vienna Convention which
9 expressly says as orthodoxy in international law
10 that the objectives and purposes of the treaty are
11 to be regard -- have regard to in interpreting
12 1105 and its meaning.

13 I don't say that an investor has a right to
14 enforce Chapter 18, and I say the ar -- the
15 arbitrators did not so hold, were not asked to so
16 hold. They found a breach of 1105.

17 With respect, if you're asking me about the
18 principles and rules reference, which I think I
19 confused last Friday, what I say -- and I think my
20 friend and I are in agreement on this -- is that
21 the principles and rules in 102(1) include the
22 references to national treatment, MFN treatment
23 and transparency, and the objectives are to A
24 through F. I --

25 THE COURT: Then I -- I did misunderstand what you
26 were saying on Friday then.

27 MR. COWPER: Yes. I think I -- I -- what I said
28 earlier was I got it wrong. I believe that
29 it's -- I believe it's correct, and I'll look at
30 it again. And I may be able -- I don't know that
31 it's a significant point.

32 THE COURT: I -- I took you on Friday to say that the
33 objectives of the act included transparency.

34 MR. COWPER: No. I understand. And that's why I came
35 back to it and said that I believe that the
36 objectives of the act -- but the grammar here is
37 as elaborated more specifically through its
38 principles and rules.

39 THE COURT: Yes.

40 MR. COWPER: So there's not a division between --
41 principles and rules are not related in any way to
42 objectives and A to F. Are you with me? Those --

43 they're not hermetically sealed either. It's the
44 objectives as elaborated more specifically through
45 its principles and rules.
46 What I said in error on Friday was the
47 principles and rules are A to F. Those aren't

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1 principles and rules, principles and rules and the
2 other concepts.

3 What I -- what I was intending to say on
4 Friday, and I apologize, is that the -- the
5 reference to as elaborated more specifically is a
6 reference to objectives; in other words, that the
7 objectives of the -- of the agreement, the goals,
8 if I can put it that way, of -- of the treaty
9 include not only national treatment, MFN and
10 transparency, but also those stated in A to F.
11 They're not strangers with one another. They're
12 different ways of stating ways in which they're
13 going forward.

14 Does that make sense? Or that's -- that's my
15 submission anyway.

16 THE COURT: I think I have your point, that you're
17 saying that the -- the -- you're saying national
18 treatment, most-favoured-nation treatment and
19 transparency are both rules -- principles and
20 rules and objectives.

21 MR. COWPER: Yes, precisely. They're -- they're
22 principles and rules which -- which are -- if you
23 will, elaborate more specifically. And I -- I'm
24 going to get the grammar wrong. But let -- let --
25 put it in its simplest terms.

26 Those principles and rules are allied to,
27 connected with and headed in the same direction of
28 achieving the objectives in A to F, and they're
29 both available. I'm not saying that only the
30 former available or only the latter. They're all
31 available as objectives of the agreement or
32 purposes of the agreement, principles of the
33 agreement or rules of the agreement. There's no
34 division between A -- either of those categories.
35 They're all available to the arbitrators to use as
36 interpretive tools.

37 And you'll recall in the Vienna Convention,
38 separate and apart from this argument, the Vienna
39 Convention taken as codification of the
40 interpretation of treaties commands people
41 interpreting treaties to have regard to the
42 treaties, purposes and object of the agreement.

43 THE COURT: Okay.
44 MR. COWPER: So my point is -- from a lawyer's point
45 of view, is if you're looking at what they did and
46 you're fairly reading their award, they found a
47 breach of 1105. And they used the transparency

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1 referred to in Article 102 properly within its
2 proper limits to inform the concept of fairness
3 and equity, and that -- that's within their job as
4 the arbitral tribunal having regard to the dispute
5 between the parties.

6 THE COURT: My -- my other question is --

7 MR. COWPER: Um-hum.

8 THE COURT: -- accepting that you're correct and that

9 1105 imports a concept of transparency, and the
10 tribunal has said that that concept of
11 transparency means that if -- if there's any
12 confusion as to what the appropriate standard is,
13 the federal government has an obligation to
14 clarify the matter and say what it is, the
15 tribunal has found that the federal officials said
16 that you don't need to worry about a municipal
17 permit, that we -- we govern, that the federal
18 jurisdiction governs.

19 MR. COWPER: Right.

20 THE COURT: And the tribunal has found that they were

21 right in saying that, because they found --

22 MR. COWPER: Under Mexican law.

23 THE COURT: Right.

24 MR. COWPER: Yes.

25 THE COURT: So hasn't Mexico done exactly what it's

26 required to do under the transparency

27 requirement? They just told Metalclad you don't

28 need to worry about the municipality.

29 MR. COWPER: Um-hum.

30 THE COURT: The municipality's wrong.

31 MR. COWPER: Right. Well, the -- the -- the

32 indictment of the federal government's conduct

33 under the tribunal's findings doesn't relate to

34 their correct representations as to Mexican law,

35 it relates to what happens when the municipality

36 fails to follow Mexican domestic law because --

37 And I read you the reference earlier in the

38 evidence to essentially the Mexican officials

39 telling company officials we're checking out of

40 here. There's not -- we can't do anything with

41 respect to the unlawful conduct of the

42 municipality. And we're not going to do anything

43 because we're power -- I think the word in the --
44 in the affidavit was "powerless."

45 So where transparency gives force to the
46 inequity in this situation is that having provided
47 the representations which encouraged the

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1 investment, then the Mexican federal government
2 checks out of the situation, checks out of the
3 problem and leaves Metalclad alone facing a
4 situation where it can't operate that which it's
5 been properly permitted to do, and that's the
6 unfairness. That's the inequity. That's the --
7 that's the violation of 1105 in my submission.
8 THE COURT: You say that. But -- but you haven't
9 really pointed me to any evidence that that's
10 the case, because what happened was that the
11 municipality didn't like the Convenio. The
12 Convenio was entered into.
13 MR. COWPER: Yes.
14 THE COURT: They didn't like it. They rejected the --
15 the municipal permit application at that stage
16 and -- in December 1995 --
17 MR. COWPER: Well, I --
18 THE COURT: But --
19 MR. COWPER: -- think --
20 THE COURT: -- then --
21 MR. COWPER: -- it's --
22 THE COURT: -- the --
23 MR. COWPER: -- clear that the State didn't like the
24 Convenio, but -- but --
25 THE COURT: The State.
26 MR. COWPER: -- I won't quibble with you, State or the
27 municipality, yes.
28 THE COURT: And then the municipality went off and got
29 an injunction.
30 MR. COWPER: Yes, based on the absence of authority
31 under the Convenio, that's correct.
32 THE COURT: Right.
33 MR. COWPER: Yeah. And so what Metalclad was stuck
34 with was can we secure relief for that under the
35 Mexican court system; in other words, will we ever
36 get a satisfactory resolution of this issue under
37 the Mexican court system and -- or does the
38 totality of what's happened to us, in light of how
39 we've been invited in, how we've been encouraged
40 to do this, constitute a breach of 1105 and 1110?
41 Does it constitute effectively in the
42 totality both unfairness and a taking of the

43 property? And that's what they went and presented
44 to the tribunal.

45 My point is that you have to look at what
46 they've done on transparency with some care,
47 because they indict transparency as it relates to

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1 the municipality in spades for which Mexico is
2 responsible.

3 And on that footing, if you look at the
4 evidence respecting, if you will, transparency in
5 its proper sense, there are -- there are no
6 records of municipal permits. Permits have never
7 been sought or approved. There's evidence that
8 they had never issued a permit, ever.

9 The permit is supposed to be granted or
10 considered within ten days, or four months at the
11 outset. That process isn't followed. The
12 governor takes over the process and chairs the
13 meeting to consider that permit thirteen months
14 after it's been standing, during which all of the
15 construction is present.

16 So -- and I'll come back to this tomorrow
17 morning, but my view is that the -- the ambit and
18 the thrust of the transparency concerns in the
19 case were directed to the municipal process,
20 criticizing the inability to obtain the permit
21 because of the absence of a predictable and proper
22 process.

23 And that with respect to the federal
24 government, that the federal government, if you
25 will, to use Your Lordship's phrase, actually
26 conducted itself transparently during the early
27 period of time but ended up at the end of the day
28 being found responsible for the absence of
29 transparency in the State and municipal carriage
30 of the same issue. So I say with respect to the
31 findings that clearly you have to be care (sic)
32 with what they do about transparency.

33 The second point that I would make as well
34 though is at the end of the day, if you look at
35 what they've found, the observation of
36 transparency in some respects is unnecessary for
37 them because they end up finding an unlawful
38 exercise of authority, that is, an excess of
39 authority contrary to Mexican law. And that's not
40 really, strictly speaking, a transparency
41 problem. That's a problem that the government,
42 for which Mexico is internationally responsible,

43 has ignored its own law and has jumped the traces.
44 Now -- and as I said to you, and I don't
45 retreat from this an inch, the fact that it's
46 unlawful may not be sufficient to found a breach
47 of international law, but it's relevant to a

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1 finding of a breach of international law.

2 All of the totality of circumstances the
3 tribunal draws together with respect to the
4 history of the project is what created the
5 unfairness and the inequity which was the breach
6 of 1105: the fact that the municipality knew
7 everything was going on; they knew the
8 construction was ongoing; they knew that this was
9 being committed by the company, that the money was
10 coming -- going into the ground; and that they
11 then thereafter acted unlawfully, after an
12 impermissible and unconscionable period of time,
13 and then went and got an injunction to shut it
14 down.

15 Now, ultimately --

16 THE COURT: They didn't get an injunction to shut it
17 down.

18 MR. COWPER: The injunction --

19 THE COURT: I think that's their ruling.

20 MR. COWPER: No, no. There was an injunction. I
21 think my friend's case is that the injunction
22 obtained in relation to the Convenio rested
23 against the company. If I've -- if I've missed
24 that, I'll look at that.

25 But the injunction is not only against the
26 governmental authorities, it -- it prohibited the
27 company from operating as I understand it under
28 the Convenio. There was a court order prohibiting
29 the company from operating under --

30 THE COURT: Operating under the Convenio, yeah.

31 MR. COWPER: Yes. But the Convenio was the authority
32 to operate, that was the concluded authority to
33 operate which the company needed in order to go
34 forward.

35 THE COURT: You've told -- you've told me that they
36 already had the federal authorities.

37 MR. COWPER: Yes, that's right. But the -- the --
38 what happened was the municipality sought and
39 obtained an injunction based on an argument that
40 that -- that the Convenio was without authority.
41 No. There's no contradiction there, with respect.

42 The -- the Convenio can be lawful, it -- as

43 in any system. And someone can say I can still
44 get a -- an injunction which can prevent anything
45 from happening based on an argument that there's
46 no authority. Okay? Now, the situation here
47 which is -- put -- put in a nutshell is, once

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1 you're there, once Metalclad's faced with that
2 situation, is it restricted?

3 And I think it -- in all candour, this is the
4 narrow point: Is Metalclad required to seek
5 justice in the Mexican courts? Or is it entitled
6 to say, I'm sorry, I'm not going to get justice in
7 American (sic) courts. I have rights which are
8 independent of my pursuit of justice in the
9 American (sic) courts. I don't trust the Mexican
10 courts. I don't trust the Mexican courts
11 enforcing their own law in my favour for whatever
12 reason.

13 That's precisely what Chapter 11 allows,
14 precisely what Chapter 11 on its own terms allows,
15 which I think the governments are all excited
16 about, is that an investor is entitled to say, I'm
17 sorry, I'm checking out of your system because I
18 think at this point I've concluded that I'm not
19 going to get justice. I'm not going to get fair
20 treatment here. And I'm going to discharge the
21 burden of proving that the totality of facts
22 and -- and where I am now constitutes a breach of
23 either 1105 or 1110.

24 Now -- and -- and just put yourself in
25 Metalclad's position for a moment at that point.
26 What are the forces arrayed against it? In Mexico
27 we have a governor who has now become implacably
28 opposed. We have a municipality which the
29 governor's coming down and sitting in meetings on
30 who's opposed. And the federal officials are
31 saying we're now powerless, even though we've just
32 concluded an agreement with you which was intended
33 to allow you to operate the facility, and intended
34 to provide for the political measures that would
35 meet the political opposition. We're now
36 powerless.

37 Is it -- with -- is -- is there any provision
38 in this treaty which requires Metalclad to say at
39 that point, okay, we still have to go further? We
40 now have to challenge the injunction. We have to
41 challenge and take whatever judicial proceedings
42 are in place in Mexico. And I say clearly under

43 1121 that's not the case.
44 THE COURT: Um-hum. But Metalclad had been ignoring
45 the municipality for at least the prior year.
46 MR. COWPER: Um-hum.
47 THE COURT: And -- and I wonder if the measure which

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1 is really the complaint of Metalclad is -- is not
2 the injunction.

3 MR. COWPER: Well, the -- let me come back to it and
4 say a couple of things.

5 Firstly on the facts, and my friend drifted
6 between Metalclad as a -- if you will, a legal
7 actor and Metalclad as a political actor, there's
8 no doubt during this time period on the evidence
9 that Metalclad was actively trying to placate the
10 political forces which were against the facility.
11 So with -- with -- with respect to the facts,
12 Metalclad wasn't ignoring anybody.

13 And the -- if you read the evidence, the
14 Convenio had as its purpose -- one of the central
15 purposes was answering, addressing and satisfying
16 the political forces. And you'll see in the
17 evidence, I think I've read you a couple of
18 references to the fact that ideally they wanted
19 the State governor to be party to the Convenio.
20 They wanted the municipality to be onside with the
21 Convenio.

22 One of the terms of the Convenio was to have
23 a State citizen group that was going to be invited
24 to come in that was going -- that -- under the
25 Convenio. That springs up directly from the
26 municipal concerns and the State concerns, may
27 have not had any legal authority to assert them,
28 but the con -- the purpose of the Convenio was to
29 address and answer them.

30 And indeed in Mr. Ramos's cross-examination
31 there's about six pages where Mr. Pearce takes him
32 through five or six paragraphs of the Convenio and
33 says: Isn't that something which you were
34 concerned with? Yes, it is. Isn't that, you
35 know, the citizen's committee, a discount for
36 waste produced within the State or within the
37 municipality on -- on waste and all those other
38 matters?

39 So with -- with respect, the measure in this
40 case was the municipal -- and -- and "measure"
41 properly spoke -- spoken of, as you know, is not
42 narrowly construed. It can be a number of

43 things. It can be an act, a regulation, a
44 practice, and I think clearly under international
45 law a course of conduct, it can be aggregate, it
46 can be cumulative. And so I say that the tribunal
47 properly had regard to what the measures were at

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1 each level.

2 Now, if Your Lordship's saying that the
3 measure or an aspect of the measure which was
4 being complained of was the obtaining of the
5 injunction, well, that -- it may have been a
6 factor directly related to the municipality's
7 excess of authority, but it's not a measure that
8 is independent of the government, if you're with
9 me.

10 There's no -- there's no -- we -- Metalclad
11 didn't say we are -- we are asserting that the
12 existence of an injunctive relief in Mexico is by
13 itself unfair, not at all. But it's quite within
14 1105 to say that, properly viewed, the conduct of
15 the municipality resulted in unfair and
16 inequitable treatment of our investment by the
17 date that we no longer could operate.

18 THE COURT: I think I'll just come back to say what
19 violation of the -- was there by Mexico of the
20 transparency requirement?

21 MR. COWPER: Okay. I'll -- well, I've had that
22 question and I've gone over the time, and I'll
23 come back to it in the morning.

24 THE COURT: We'll reconvene tomorrow again at 10.

25 THE REGISTRAR: Order in chambers. Chambers is
26 adjourned until the 1st of March at 10 a.m.

27

28 (PROCEEDINGS ADJOURNED AT 4:11 P.M.)

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