

1  
Submissions by Mr. Foy

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

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

5  
6 THE REGISTRAR: In the Supreme Court of British  
7 Columbia at Vancouver on this the 3rd -- 2nd day  
8 of March 2001, in the matter of the United Mexican  
9 States versus Metalclad Corporation, My Lord.

10 THE COURT: Before you continue with your reply,  
11 Mr. Foy, I've received a letter making a request  
12 of me which I propose to discuss at the end of the  
13 day when I anticipate that we'll be talking about  
14 some other housekeeping matters.

15       So, Mr. Registrar, would you give a copy of  
16 this to Mr. Foy and Mr. Alvarez, and I've given an  
17 extra copy for yourself.

18 MR. ALVAREZ: Thank you. Oh, I'm sorry.

19 MR. FOY: My Lord, I've handed up or asked the  
20 registrar to hand up three things, two binders,  
21 one containing a reply, one containing reply  
22 authorities and reply extracts, and then a loose  
23 document, the fifth submission of the  
24 United States of America.

25       I'd like to --

26 THE COURT: Okay.

27 MR. FOY: Before I get to the reply, and I -- I'll  
28 deal with the fifth submission of the United  
29 States of America, first of all, I've just  
30 provided this to my friend and to the Court. And  
31 the reason for that is that it -- this copy was  
32 obtained pursuant to an application under the  
33 United States Freedom of Information Act, and the  
34 release of this document was only obtained this  
35 morning. I wasn't sure if it was late last night  
36 or this morning. And that's the reason for my  
37 late delivery of it to you and to my friend.

38       And now I'll explain what it is. It is a  
39 submission being made in -- in yet another  
40 Chapter 11 arbitration by the United States of  
41 America under Article 1128, the article allowing  
42 non-parties to the dispute. This is a dispute

43 between Pope & Talbot v. Canada, allowing  
44 non-parties to the dispute to make submissions on  
45 the interpretation of the NAFTA, as you'll recall.  
46 The submission speaks to the Myers case upon  
47 which Metalclad relied, and again -- and that's

Charest Reporting Inc. (604) 669-6449

1 the reason for bringing it to your attention.

2 And I'll just quickly go through it. It's  
3 very short. It notes in paragraph 2:

4 [All quotations herein cited as read]

5

6 "After the United States filed its fourth  
7 submission on November 1st in Pope &  
8 Talbot, the tribunal in the NAFTA  
9 Chapter 11 case of S.D. Myers rendered a  
10 partial award."

11

12 And you'll recall that is the partial award  
13 that Canada has commenced a -- an application to  
14 set aside in the federal court. Counsel for  
15 Canada referred you to that fact during their  
16 submissions.

17

18 "...a partial award..."

19

20 And -- and this is the -- the same partial  
21 award to which Metalclad referred in its  
22 submissions.

23

24 "...in which it addressed, inter alia,  
25 Articles 1105 and 1102. Though that  
26 decision does not constitute binding  
27 precedence..."

28

29 And Article 1136 is referred to, again,  
30 the -- that -- that theoretical fact is noted,  
31 but:

32

33 "...it deserves comment as one of the few  
34 final awards in a Chapter 11 arbitration."

35

36 The United States goes on, over the page, to  
37 disagree with the S.D. Myers panel majority's  
38 treatment of Article 1105(1). The panel majority  
39 incorrectly defines the scope of Article 1105(1)  
40 and in -- incorrectly links 1102 to Article  
41 1105(1). You'll see there a variant of the  
42 alleged error that occurred here.

43 In -- in this case the linkage occurred  
44 between two articles within Chapter 11. You'll be  
45 aware that in -- in the case before Your Lordship  
46 the linkage occurred between Article 1105 and  
47 Chapter 18. And the United States goes on:

Charest Reporting Inc. (604) 669-6449

1

2

"The S.D. Myers panel majority correctly finds that Article 1105 incorporates certain rules of customary international law."

5

6

7

And you'll recall we relied upon that.

8

9

S.D. Myers -- sorry, the reference is there to the paragraph.

10

11

12

13

14

15

16

17

18

19

"After noting this essential point, two of the arbitrators inexplicably ignore the logical consequences of this conclusion by suggesting that a violation of standards that do not arise out of customary international law, i.e. standards of conventional law, the standards of Article 1102 may establish a breach of Article 1105."

20

21

22

The United States is saying that that doesn't -- that doesn't -- cannot follow.

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

"As the United States noted in its fourth submission, Article 1105 requires that parties accord investments of another party the international minimum standard of treatment which is an umbrella concept incorporating a set of rules that have crystallized over the centuries into customary international law in specific contexts. National treatment and most-favoured-nation treatment, however, are not such customary international law obligations; rather, they are treaty obligations binding on the NAFTA parties only by virtue of the parties' agreement to the NAFTA. Thus, concluding that Article 1102 has been breached..."

40

41

42

Concluding a treaty obligation has been breached:

43  
44        "...does not establish a breach of a  
45        customary international obligation. To the  
46        extent the S.D. Myers panel majority  
47        suggests otherwise, it is incorrect."

Charest Reporting Inc. (604) 669-6449

1

2

And then I said yesterday I hoped to be able to speak some more about F.A. Mann. This is what I was hoping to -- to adopt:

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

And Mann's submission is quoted that -- his argument is that the right to fair and equitable treatment goes much further than these other two treaty obligations.

"So general a provision that it's likely to be almost sufficient to cover all conceivable cases."

And then going on:

"Reliance on this citation by the panel majority on this point is misplaced. First, Mann's statement is that of an academic, arguing for what he thinks should be the appropriate construction of the terms fair and equitable treatment in British investment treaties. It does not purport to be a statement of accepted principles of treaty law, still less a principle so universally accepted by States that they have crystallized into rules of customary international law."

And you'll recall my emphasis on in this context, treaty context, the difference between the wording of the treaties and the need to have regard to that.

"Second, Mann provides no support for his construction of the terms in British investment treaties.

43 "Third, as demonstrated in the  
44 United States fourth submission..."  
45  
46 An earlier submission in this case:  
47

Charest Reporting Inc. (604) 669-6449



1            "...the drafters of Chapter 11  
2            specifically excluded Mann's thesis by  
3            selecting language in Article 1105 that  
4            fairly stated fair and equitable treatment  
5            to be a subset of customary international  
6            law, not an overarching duty that subsumes  
7            all other instances of substantive  
8            protection."  
9

10           And you'll recall that I referred you to this  
11           text authority of Dolzer who -- who came to the  
12           same conclusion, saying that it's clear that in  
13           the NAFTA fair and equitable treatment is subsumed  
14           under the customary international law standard,  
15           and that the manner in which they drafted the  
16           architecture of 1105 makes that clear.  
17

18           "The S.D. Myers award itself acknowledges  
19           that modern commentators might consider  
20           Professor Mann's statement on fair and  
21           equitable treatment to be an  
22           overgeneralization. The S.D. Myers  
23           arbitrators who form the majority on this  
24           point should not have relied upon authority  
25           so at variance with NAFTA's clear direction  
26           that fair and equitable treatment be  
27           construed to require compliance only with  
28           customary international law obligations.  
29

30           "Determining that alleged violations  
31           of other NAFTA provisions, whether found  
32           within or without Section A of Chapter 11,  
33           are caught within the ambit of 1105, would  
34           increase the scope of that provision and of  
35           Chapter 11 far beyond that contemplated by  
36           the NAFTA parties."  
37

38           Now, on the facts before Your Lordship, we  
39           don't need to go that far. I don't know whether  
40           there's a difference between a -- a provision  
41           which -- that is within or without the Chapter 11,  
42           but it is clear that provisions without Section A  
                 of Chapter 11 are in our submission outside the

43 jurisdiction of a Chapter 11 tribunal.  
44 And he goes on:  
45  
46 "In short, Myers Arbitrator Chiasson was  
47 correct in concluding as recording in the

Charest Reporting Inc. (604) 669-6449

1           award as follows: A finding of a violation  
2           of Article 1105 must be based on a  
3           demonstrated failure to meet the fair and  
4           equitable requirements of international  
5           law. A breach of another provision of the  
6           NAFTA is not a foundation for such a  
7           conclusion. The language of the NAFTA does  
8           not support the notion espoused by Dr. Mann  
9           insofar as it is considered to support a  
10          breach of Article 1105 that is based on a  
11          violation of another provision of Chapter  
12          11."

13  
14          And of course I would adopt that but just  
15          modify it to say "based on a violation of another  
16          chapter of the NAFTA."

17          So I mentioned that this is the United States  
18          taking a position in the case in which it is not  
19          directly implicated. This is an 1128 submission.

20          Now, I will return to -- before I start to go  
21          directly to the -- the written reply, I would like  
22          to complete my reply to some of the oral  
23          submissions that were made.

24          I will be taking you in the course of that to  
25          portions of the reply. And just by way of  
26          introduction, we have not had the time to edit  
27          the -- the reply, and I would reserve that right  
28          to make any corrections to the -- to the written  
29          document.

30          Returning then to the oral submissions, I  
31          want to go back to something I said yesterday. I  
32          talked about annex 1120.1.

33 THE COURT: Um-hum.

34 MR. FOY: And one of the things I should have said was  
35 I don't think I see this tribunal relying upon  
36 annex 1120.1, and I should have brought that to  
37 your attention yesterday.

38          The next topic I'd like to deal with is the  
39          1996 amendment to the option agreement. I, when  
40          making my submissions, advised Your Lordship that  
41          there was a subsequent amendment, but didn't take  
42          you to the details of it.

43 For the points that I was referring to the  
44 option agreement, the -- the 1993 amendment, the  
45 September 1993 agreement was for the purposes of  
46 demonstrating the knowledge of the investor at the  
47 time of the acquisition of the investment,

Charest Reporting Inc. (604) 669-6449

1 knowledge of the requirement to either obtain a  
2 municipal permit or to obtain a court order in  
3 order to allow operations.

4 Metalclad has pointed out that the option  
5 agreement was later amended at -- and -- and took  
6 you to some evidence of reasons given at a  
7 subsequent time for the amendment.

8 Excuse me, My Lord, I just need to get a book  
9 here.

10 And those references were to Mr. Kesler's  
11 evidence in -- at the respondent's book of  
12 extracts, tab 16, pages 250 to 252. And in  
13 that -- and I don't need to turn it up. I'll  
14 remind you that the -- Mr. Kesler said:

15  
16 "After receiving a number of federal  
17 assurances, we decided that, since a local  
18 construction permit was simply not an  
19 issue, we had no reason to have it in the  
20 agreement and no reason to have it  
21 conditional whatsoever."

22  
23 Giving the impression that this occurred as  
24 of 1995, that -- that -- that this, having  
25 received assurances with the Convenio in late  
26 1995, the amendment was made in late 19 -- in  
27 early 1996 on account of those subsequent insur --  
28 assurances.

29 That was not the explanation given in 1994 by  
30 the corporation's lawyers to the corporation's  
31 auditors with respect to this issue. And we have  
32 included in the new book of selected extracts at  
33 tab 11 a letter dated September 10, 1994, and I'd  
34 ask you to turn that up at tab 11.

35 This is a letter to Grant Thornton, who were  
36 the auditors of Metalclad Corporation at the  
37 time. And the issue that's on the table is  
38 whether or not is the auditors can remove the  
39 \$1.5 million contingent liability that is the  
40 subject of the conditional clauses.

41 You'll recall that the change that was made  
42 in September of 1993 was to take and condition

43 payment of \$1.5 million upon either receiving the  
44 municipal permit or a court order. So that  
45 contingent liability is on the books. They want  
46 to get rid of it.  
47 And this is -- this is -- this describes that

Charest Reporting Inc. (604) 669-6449

1 issue. And dealing with the -- the first  
2 paragraph:

3

4 "This letter is written to confirm the  
5 substance of the conversation we had with  
6 Mr. Kesler last week concerning  
7 negotiations with the majority shareholders  
8 of COTERIN to modify the agreement between  
9 the company and the shareholders regarding  
10 compensation payable to the shareholders."  
11

12 So in 1994 they're already having  
13 negotiations, not on the basis of all these  
14 subsequent assurances in 1995, but on a different  
15 basis.

16 "The company..."  
17

18  
19 And then the -- the clause is set out -- or  
20 not set out. The letter goes on:

21

22 "The company previously acquired 94  
23 percent of the outstanding shares of  
24 COTERIN from the shareholders in  
25 consideration of the promise by the company  
26 to pay the shareholders 2 million cash, 5  
27 percent of the gross revenues, and to enter  
28 into employment agreements with the  
29 shareholders. \$500,000 of the  
30 consideration has been paid."  
31

32

33 You'll recall there was an initial \$50,000  
34 with the very first agreement, and then 450 with  
35 the exercise of the option.

36

37 "And 1.5 was to have been paid in 3 equal  
38 installments upon the full utilization of  
39 the landfill site owned by COTERIN. The  
40 agreement also provided the company would  
41 assume the responsibility of any site  
42 remediation. However, the costs of site  
remediation were to be offset against

43 payments otherwise owed to the  
44 shareholders.  
45 "It has been determined by the  
46 company and the shareholders that full  
47 utilization of the site will never occur.

Charest Reporting Inc. (604) 669-6449



1           Therefore, the contingent elements of the  
2           compensation previously agreed upon between  
3           the company and the shareholders will never  
4           become binding on the company. Although no  
5           formal legal opinions have been rendered,  
6           the company's counsel have informally  
7           concurred in this conclusion. The company  
8           and the shareholders have agreed to  
9           amend..."

10

11           And there is set out the text of the -- the  
12           amendment of -- of the agreement, which amendment  
13           is recorded in January of 1996.

14           The letter goes on to deal with the -- one of  
15           the amendments deals with the -- well, I'll just  
16           read the paragraph:

17

18           "In connection with an agreement with the  
19           Mexican government, the company's  
20           subsidiary, ECOPSA, will conduct an  
21           environmental audit during the next 12  
22           months to study what, if anything, needs to  
23           be done to remediate the portion of the  
24           La Pedrera site that was previously used  
25           for storage of waste prior the [sic]  
26           company's acquisition of COTERIN, and will  
27           complete the required remediation, if any,  
28           in the 36 to 48 months following the  
29           completion of the study.

30           "The company expects no significant  
31           remediation effort, because it currently  
32           anticipates the remediation will consist  
33           primarily of disposing drums of waste  
34           stored in the existing cells in an adjacent  
35           cell of the landfill under construction by  
36           the ECOPSA. However, until the  
37           environmental audit is completed, the  
38           company will not know what is required."

39

40           And I'll just pause there. You'll note that  
41           they have just said there will not be full  
42           utilization of this site. And that's consistent

43 with the construction of one cell, and one cell  
44 that you've seen constructed, to remediate the  
45 contamination that's been there since 1991.  
46  
47 "The company believes that substantial

Charest Reporting Inc. (604) 669-6449

1 amounts of one of the existing cells will  
2 yield waste that could be processed..."

3

4 For a service and burned and -- and have a  
5 source of revenue. So there's revenue that they  
6 rec -- hope to recognize from remediation alone.

7

8 "Handling the vast majority of the waste  
9 on-site over a period of 36 to 48 months  
10 will enable the company to complete the  
11 required..." medi "...remediation at the  
12 lowest possible cost. Some organic  
13 materials may be treated at other  
14 facilities operated by the company."

15

16 So there's the description of remediation,  
17 how it can occur without the introduction of any  
18 new hazardous waste on-site or with a portion of  
19 it treated at other facilities.

20 And then at -- it talks about the term  
21 providing for the issuance of shares.

22 Now, I also have under tab 11 a portion of  
23 a -- an extract from a report filed by Mexico  
24 describing those events. It really just -- and  
25 pages 7 and 8 takes you through the history that  
26 I've just taken you through.

27 And then as well we have, under that  
28 particular tab, a filing with the Securities and  
29 Exchange Commission by Metalclad Corporation for  
30 the fiscal year ended May 31, 1994. And I'd just  
31 ask you to turn to page 2 of that. The 2's at the  
32 bottom of the page. And at this stage they are  
33 telling the shareholders or the -- the public in  
34 the middle paragraph on that page, starting  
35 "ECOPSA," under "Introduction."

36 THE COURT: Um-hum.

37 MR. FOY:

38 "ECOPSA is completing construction of a  
39 permitted hazardous waste landfill."

40

41 Now, you'll know -- you'll know in fact that  
42 it's not permitted at that stage. They are

43 applying for a municipal permit in November of  
44 1994.  
45 And they talk about the amendment at page 5  
46 of that document.  
47 And in these documents, the La Pedrera

Charest Reporting Inc. (604) 669-6449

1 landfill is referred to it's -- as El Confine in  
2 the middle of that page. And there the amendment  
3 is described:

4  
5 "The agreement with the minority  
6 shareholders requires the payment of the  
7 1.5..."

8  
9 Sorry, the negotiations are described.  
10 And -- and it says towards the middle of that  
11 paragraph:

12  
13 "The agreement also provides that up  
14 to..."

15  
16 Sorry. Let me -- yes.

17  
18 "The agreement also provides that up to  
19 500,000 of the minority shareholders'  
20 percentage of gross landfill revenues may  
21 be offset against any costs incurred by the  
22 company in remediation. The company now  
23 believes that the contingencies upon which  
24 the additional payments are conditioned  
25 will not occur. Consequently, the company  
26 is negotiating an agreement with the  
27 minority shareholders to issue 100,000  
28 shares of common stock of the company to  
29 them in consideration for the remaining 6  
30 percent of the capital stock of COTERIN,  
31 and their waiver of rights of contingent  
32 payments..."

33  
34 Contingent payments based on a revenue stream  
35 that they've just -- to the auditors they've said  
36 there will not be full utilization. We -- the --  
37 the risk that we contracted for is not going to  
38 occur, so let's amend the agreement. It goes on  
39 to say:

40  
41 "The company will also perform any site  
42 remediation as required by PROFEPA."

43

44

45

46

47

So the explanation given by Mr. Kesler in his  
testimony that these amendments were prompted by  
federal assurances occurring in November of 1995  
and in and around that time is not the explanation

Charest Reporting Inc. (604) 669-6449

1 for the amendment that was given in September of  
2 1994.

3 Now, I've troubled you with that detail  
4 because it is important to correct the record.  
5 But I come back to the foreknowledge Metalclad had  
6 at the time of the acquisition of the investment.

7 Metalclad admitted -- it didn't do this in  
8 the memorial. In the memorial you'll recall it --  
9 it represented that the first it heard of  
10 municipal permit issues was in November of 1995.  
11 It admitted in -- later that it had knowledge of  
12 the assertion of municipal permitting authority,  
13 and recognized when it purchased this investment  
14 that in order to proceed it would either need to  
15 obtain a municipal permit or a court order.

16 That was a risk that was recognized at the  
17 time of the acquisition of the investment, and  
18 Metalclad negotiated deferment of payment of \$1.5  
19 million on account of that risk. The risk  
20 materialized in my -- in -- in the events, and  
21 having acquired a partially permitted landfill,  
22 and having negotiated what will happen if we don't  
23 get a fully permitted landfill, that came to  
24 pass. Now, in my submission that cannot amount to  
25 a denial of unfair treatment -- de -- a denial of  
26 fair treatment or an expropriation.

27 Now, Metalclad attempts to marginalize the  
28 relevance of what it knew when it acquired this  
29 investment by a reference to subsequent oral  
30 assurances. And in my submission if this was not  
31 a treaty violation in 1993 when the investment was  
32 acquired but rather the materialization of a risk  
33 known to Metalclad, it cannot be transformed into  
34 a treaty violation by what -- by federal  
35 assurances made subsequently.

36 In the course of oral submissions Metalclad  
37 agreed that it was not the municipal permit denial  
38 alone that violated the minimum standard of  
39 treatment, but only when considered against  
40 Metalclad's subjective belief in oral  
41 representations. Now, a subjective belief, and  
42 I'll come back to whether it was reasonable, but

43 even if reasonable cannot transform what would not  
44 have been a violation of the NAFTA into a  
45 violation of the NAFTA.  
46 Metalclad purchased a partially permitted  
47 landfill with knowledge of the risk that it would

Charest Reporting Inc. (604) 669-6449



1 not necessarily become fully permitted. That risk  
2 materialized.

3 Now, that completes the topic dealing with  
4 the 1996 amendment to the agreement.

5 I'd like to turn to the oral submissions made  
6 with respect to the application of the  
7 international commercial act as opposed to the  
8 Commercial Arbitration Act.

9 Again, a number of points were -- were met by  
10 Metalclad that had not been made or attempted to  
11 be made by Mexico. Mexico did not assert that a  
12 State could not enter into a commercial  
13 relationship. That can occur, and often does in  
14 the context of concession agreements.

15 Metal -- Mexico did not assert that a -- a  
16 direct contractual relationship was the only way a  
17 commercial relationship within the meaning of the  
18 international act could arise. And Mexico did not  
19 assert that Metalclad had not made an investment  
20 in Mexico. Mexico argued instead that the  
21 relationship between Mexico and Metalclad was not  
22 commercial within the meaning of the act.

23 Now, that point -- I'll come back to that  
24 point, but rather than start with that point,  
25 Metalclad argued that since Metalclad had made an  
26 investment, and since this arbitration arose out  
27 of -- in its investing, and it was international,  
28 that the arbitration fell within the jurisdiction  
29 of the international act.

30 The act does not apply to all international  
31 investment disputes. That's not its language. It  
32 is also required that the dispute arise out of a  
33 commercial relationship as defined.

34 And COTERIN, it's conceded, was an investment  
35 located in Mexico but it was not an investment  
36 with Mexico. It did not arise out of a commercial  
37 contract with Mexico.

38 The relationship, and this is agreed in the  
39 written materials by Metalclad, arises out of  
40 regulatory measures taken by Mexico. And the  
41 quote is from paragraph 61 of Metalclad's response  
42 where it's agreed that this arose as, quote:

43

44 "...part of Mexico's general regulatory  
45 activity."

46

47 Now, given that agreement, whether you take a

Charest Reporting Inc. (604) 669-6449

1 wide or narrow -- and we have no issue with taking  
2 a wide interpretation of commercial. Given  
3 agreement on that point, that this arose out of a  
4 regulatory relationship, we're content to take  
5 a -- as directed by the commentary to take a,  
6 quote, wide meaning. But a commercial  
7 relationship is not a regulatory relationship.

8 Now, having agreed on this point, that this  
9 arose out of regulatory activity, Metalclad then  
10 argues in -- again in the same paragraph,  
11 paragraph 61, that the nature of the specific  
12 action taken by Mexico is irrelevant to  
13 determining the nature of the underlying  
14 relationship. Now, that's -- there's the  
15 difference between us.

16 Is it relevant that the action taken by  
17 Mexico is -- is the action -- is the nature of the  
18 specific action taken by Mexico relevant or  
19 irrelevant? Well, in our submission the nature of  
20 the specific action is not only relevant, it's a  
21 jurisdictional requirement. Only actions that  
22 amount to a measure can give rise to a Chapter 11  
23 arbitration. Chapter 11 is restricted in its  
24 application to governmental regulatory measures,  
25 as Mexico and Canada demonstrated by reference to  
26 the -- to the text. That point was not  
27 addressed.

28 And I'd ask Your Lordship just to -- I'm at a  
29 point where I can direct you to the reply, the  
30 written reply, to turn up paragraphs 13 through  
31 18. And I've made the points in -- in -- orally  
32 that are contained in -- in 13 through 17, and I  
33 just add paragraph 18.

34 I'll just note there Metalclad relied upon  
35 the Carter case. And in our submission that case  
36 confirms that you must examine the relationship  
37 between the parties inter se, not simply the  
38 activities of one of the parties. You'll recall  
39 that in that case that involved a sale of the  
40 home. Neither of those parties, both of whom were  
41 individuals engaging in transaction for personal  
42 purposes, could be characterized as commercial in

43 nature. I -- neither was acting in that way. But  
44 because they interrelated in a commercial fashion,  
45 their relationship was determined to be  
46 commercial.  
47 And the case that Metalclad relies upon

Charest Reporting Inc. (604) 669-6449

1 demonstrates the incorrectness of their point in  
2 paragraph 61. You must examine the relationship,  
3 both sides. One side is not irrelevant (sic).  
4 And when you take that together with an agreement  
5 that Mexico was acting as part of its general  
6 regulatory activity, you cannot construct a  
7 commercial relationship.

8 Now, Metalclad -- that's the primary issue, I  
9 think, for Your Lordship with respect to the issue  
10 of the application in any event. A number of  
11 subsidiary points were made by Metalclad, and I'll  
12 deal with those quickly.

13 Metalclad argued that the application of the  
14 international act would lead to an unharmonious or  
15 anomalous result because there might be two  
16 different legal systems governing two situations  
17 of setting aside a -- an award under the law of  
18 the place of the arbitration and enforcing an  
19 award in the place of enforcement.

20 Now, Metalclad suggested that didn't make  
21 sense. Well, that makes perfect sense when the  
22 two legal regimes are different. That's common in  
23 international arbitrations. And Article 1136 of  
24 the NAFTA, which recognizes judicial review of  
25 Chapter 11 arbitrations, does not make any attempt  
26 to harmonize the law of the places of arbitration  
27 that may occur. Article 1136 recognizes that  
28 there may be a mosaic of different laws that  
29 apply. So while my friend might have rewrit --  
30 rewritten the NAFTA to achieve a more harmonious  
31 result, that's not the way the NAFTA was  
32 constructed.

33 Metalclad then argued that it would defeat  
34 the object of the international act to interpret  
35 it as inapplicable to Chapter 11 arbitrations, the  
36 object and purpose. This does not follow. When  
37 the international act was enacted, Chapter 11  
38 arbitrations didn't exist. It was enacted in  
39 1986. So it cannot have been the specific object  
40 of the legislator's intent.

41 Could it have been their general intention?  
42 In my submission it was manifestly the general

43 intention of the legislatures to make -- in  
44 British Columbia to make the Commercial  
45 Arbitration Act and not the international act the  
46 statute that would apply to, quote, any other  
47 arbitration. That's the language that's used in

Charest Reporting Inc. (604) 669-6449

1 the commercial act. It was open to the  
2 legislators to include language like that, like  
3 "any other international arbitration" in the  
4 international act. They didn't do so in 1986 when  
5 it was enacted, nor did they take the opportunity  
6 in 1994 to amend the statute as was done at the  
7 federal level with the federal Commercial  
8 Arbitration Act. So I suggest that the -- as  
9 reflected in the language used by the legislators,  
10 the object and purpose was clear, to make the  
11 commercial act the residuary act, not the other  
12 way around.

13 Now, Metalclad referred to Article Roman  
14 numeral 2 of the New York Convention in what  
15 appeared to be a -- an attempt to argue that only  
16 the international act could be said to comply with  
17 the New York Convention's requirement that  
18 agreements to arbitrate be respected.

19 Well, Canada has been a party to the New York  
20 Convention since before the passage of the  
21 international act. And the commercial act as well  
22 is re -- the commercial act also recognizes and  
23 respects the agreements to arbitrate. That didn't  
24 occur simply in the international act. Both  
25 statutes do that.

26 Metalclad referred to the commercial act as  
27 out of date. Now -- and I just note it was  
28 enacted at the same time as the international  
29 act.

30 Metalclad referred to the provisions of the  
31 commercial act that -- that envisage the  
32 assistance of the Supreme Court to -- in an  
33 attempt to argue that those references somehow  
34 made the commercial act somehow inappropriate for  
35 international arbitrations. If you look at the  
36 provisions of the international act, you'll see  
37 numerous cases in which the act calls upon the  
38 Supreme Court for assistance, Sections 2, 9, 11,  
39 13, 14, 16 and 27 and others are provisions of the  
40 international act calling at various stages in an  
41 arbitration upon the assistance of the Supreme  
42 Court.

43 Finally, Metalclad suggested in oral  
44 submissions that it -- if a measure of review is  
45 applied by this Court, British Columbia will be  
46 less attractive as a place of arbitration. And in  
47 my submission that is not a basis to transform

Charest Reporting Inc. (604) 669-6449



1 what Metalclad agrees to be -- to arise out of a  
2 regulatory activity into a commercial  
3 relationship.

4 The next topic I'd like to deal with is  
5 the -- whether Quintette is binding authority on  
6 the interpretation of the international act. In  
7 our submission Metalclad's position in this  
8 respect is -- is contradictory.

9 When discussing the Commercial Arbitration  
10 Act Metalclad agreed that there -- and their  
11 language was there was no, quote, binding  
12 authority on the application of that act to an  
13 arbitration like this. When discussing on the --  
14 the international act, on the other hand, it was  
15 argued that Quintette was binding even though  
16 Quintette did not involve an arbitration like  
17 this. Mexico does not question the correctness of  
18 Quintette as applied to the type of arbitration  
19 before the Court there. Mexico argued that  
20 different considerations apply here.

21 Again, a point of agreement, Metalclad agreed  
22 that different considerations apply in different  
23 contexts and to different arbitrations, and one  
24 should be careful about those different contexts.  
25 We've heard -- we heard vigorous argument that  
26 anything said by the ICSID annulment committee in  
27 review of ICSID annul -- of ICSID awards should  
28 not inform the jurisdiction of this Court at all.  
29 It was different.

30 I -- we will come back to whether the ICSID  
31 annulment regime is closer to this type of  
32 arbitration than the Model Law regime. But at  
33 this stage I just make the point that both  
34 arbitration law, as it -- as, I think, recognized  
35 in Quintette, and the pragmatic and functional  
36 analysis dictated by the Supreme Court of Canada  
37 for, we say, review of subordinate tribunals of  
38 limited jurisdiction of any type allow the  
39 flexibility to -- for these different factors to  
40 play out in different ways in different contexts,  
41 and doesn't require the direction given by the  
42 Court of Appeal in Quintette to be a single

43 standard against which all other arbitrations that  
44 happen to be reviewed under that statute are  
45 measured.  
46 Moreover, we pointed out that -- or we point  
47 out now in reply that when interpreting provisions

Charest Reporting Inc. (604) 669-6449

1 that are involved in the creation of jurisdiction  
2 of a tribunal, like Section B of Chapter 11, a  
3 different standard of review would apply than  
4 decisions clearly within their jurisdiction.

5 Now, in discussing jurisdictional review  
6 under the international act, counsel for Metalclad  
7 focused on the word "the dispute" in that -- in a  
8 portion of the language in Section 34(2)(a)(iv) in  
9 an attempt to argue that this tribunal dealt with  
10 the dispute before it and that's the end of the  
11 analysis.

12 Counsel did not read, either when going  
13 through the act or when going through Quintette,  
14 the additional language of Section 34 which states  
15 that the ar -- which allows for review where the  
16 arbitral award contains decisions on matters  
17 beyond the scope of the submission to  
18 arbitration. And we have made extensive  
19 submissions about how this award contains  
20 decisions on transparency, on chap -- on the  
21 obligations of -- under Chapter 18, and other  
22 matters beyond the scope of submission to  
23 arbitration.

24 Coming back briefly to the flexibility  
25 allowed by the Court in the application of the  
26 standard of review, even if this is a -- somehow  
27 fit -- gets into the international act and is  
28 found to be commercial in some way, the  
29 distinction between the public rights that are  
30 involved here and the very private rights involved  
31 in a private commercial arbitration between  
32 commercial actors should have a bearing on the  
33 approach of the Court.

34 Counsel for Metalclad spent a lot of time  
35 arguing that we were asserting there should be a  
36 narrow interpretation of "commercial," and we  
37 don't assert that. We are content with a wide  
38 interpretation.

39 Metalclad's counsel made some comments about  
40 sovereign immunity. And I would like to record  
41 that on our understanding of the issues before  
42 Your Lordship, we haven't spoken about sovereign

43 immunity, that -- that that is not an issue that  
44 is engaged, and I just want to record that.  
45 Insofar as sovereign immunity and enforcement is  
46 concerned, that is not an issue that is before  
47 this Court.

Charest Reporting Inc. (604) 669-6449

1 Counsel for Metalclad argued that this --  
2 well, it had some aspects -- that this type of  
3 arbitration had some aspects of confidentiality  
4 about it, and therefore it became a private  
5 arbitration just like private commercial  
6 arbitration. And that does not follow,  
7 particularly in this case where Mexico's interest  
8 is as a regulator. And it is that that gives rise  
9 to the public interest in the issues, which is  
10 separate from the issue of confidentiality.

11 The -- that's the -- those are the  
12 submissions in response to the oral points made  
13 with respect to the application of the  
14 international act versus the commercial act.

15 I'll come back to the issues dealing with the  
16 questions of law and the application of -- and  
17 appropriateness of the application of the  
18 commercial act.

19 And I'd like a -- to continue with the -- the  
20 next topic in terms of responding to oral  
21 submissions deals just generally with the issue of  
22 the -- the -- the allegations made with respect to  
23 patently unreasonable error. And on that -- with  
24 respect to that point, Metalclad took the position  
25 that it was necessary for Mexico to argue that  
26 there was, quote, no evidence to support a  
27 particular finding of fact before this Court could  
28 review the situation before it would give rise to  
29 either a question of law or give rise to review  
30 under -- for jur -- on -- on jurisdictional  
31 grounds. Again, this is partially a response to a  
32 point not made. Mexico did not argue that point.

33 Mexico argued instead that the tribunal  
34 failed to have regard to documentary evidence  
35 produced by Metalclad, undisputed evidence, that  
36 when examined rendered -- rendered the findings  
37 that it did make patently unreasonable.

38 Now, the difference between us appears that  
39 Metalclad attempts to -- urges the Court that as a  
40 matter of law the patently unreasonable review  
41 test is only available in the administrative law  
42 context and is not available in the review of --

43 of an arbitra -- in the arbitration context.  
44 And I think we've already referred to the  
45 authorities in -- in that regard that refute that  
46 argument, but I -- and I'll remind you of those  
47 and -- and take you to a new one.

Charest Reporting Inc. (604) 669-6449

1 First of all, we referred to the Shalansky  
2 case, the Supreme Court of Canada review of -- in  
3 the arb -- a consensual arbitration context where  
4 the objectively unreasonable test is referred  
5 to -- patently unreasonable -- patently  
6 unreasonable test is referred to.

7 In our submission that test is available for  
8 the Court's review of any tribunal with limited  
9 jurisdiction, whether those limits flow from a  
10 legislative grant of jurisdiction or whether they  
11 flow from a consensual grant of jurisdiction. The  
12 common feature is the limit on the jurisdiction.

13 And you'll recall I took you through at some  
14 length a decision of the Supreme Court of Canada  
15 dealing with the application of the patently  
16 unreasonable standard in the situation where the  
17 tribunal had failed to have regard to relevant  
18 evidence, the case -- the school board case in  
19 which the letter that the -- had been overlooked,  
20 where -- where that gave rise to patently  
21 unreasonable findings and fatal error.

22 And just to remind the Court, that was --  
23 I'll just remind the Court Shalansky was tab 61,  
24 and the Board of Education case was 66. Sorry,  
25 I've got the wrong -- I think I've got the wrong  
26 one. No, that's right. It was 66.

27 I will now take you to another reference, and  
28 this is in the written reply at page 13. And I'll  
29 just note quickly paragraphs 49 and following. In  
30 our submission a patently unreasonable error does  
31 not fall within an arbitrator's jurisdiction, that  
32 it's a basic rule of justice in Canadian public  
33 policy -- we're making two points here -- that a  
34 tribunal with limited jurisdiction not exceed that  
35 jurisdiction. Chief Justice McLachlin has drawn  
36 clear links between the pragmatic and func --  
37 functional approach of judicial review in  
38 determining excesses of jurisdiction and the very  
39 essence of the modern rule of law. And we've  
40 included in the re -- supplementary reply  
41 authorities, an article describing the development  
42 of that pragmatic and functional test in the last

43 20 years.  
44 Another earthquake, My Lord.  
45 In the arbitration context, I commend the  
46 next reference. Lord Justice of Appeal Kerr of  
47 the Supreme Court of Judicature in England in --

Charest Reporting Inc. (604) 669-6449



1 in an article, I noted, that is called  
2 "Arbitration and the Courts, the UNCITRAL Model  
3 Law," dealing with the -- the very private  
4 commercial arbitrations dealt with, in that  
5 context, talking about the powers of review over  
6 the decisions of tribunals outside the hierarchy  
7 of the courts, noting that these are not rights of  
8 appeal generally -- and that will depend of course  
9 upon the statute -- but involved judicial review,  
10 and is exercised when the principles of natural  
11 justice have been infringed or where the -- or  
12 when the ultimate conclusion was one which no  
13 reasonable tribunal could have reached; noting  
14 that, with the exception of certain bodies, there  
15 is no one immune from judicial review in the event  
16 of improper conduct, breaches of the principles of  
17 natural justice or decisions which clearly  
18 transcend any standard of objective  
19 reasonableness.

20 And at the bottom of that, I'll just  
21 emphasize, he -- he notes at the bottom of the --  
22 of the paragraph:

23  
24 "Speaking from experience, I believe this  
25 to be as necessary in relation to  
26 arbitrations in England and abroad as in  
27 all other contexts."  
28

29 So on the law in our submission the -- the  
30 approaches available to the Court, even under  
31 the -- even in the case of the application of the  
32 international act and in the case of -- of  
33 arbitrations -- and that's the first reply to  
34 the -- the point that there has to be no evidence,  
35 in our submission other grounds are -- are  
36 available.

37 And having staked its ground on that point,  
38 Metalclad doesn't really meet our points. They --  
39 they go through a great number of facts on a  
40 number of issues in an attempt to show that there  
41 was evidence on issues, but what they don't do is  
42 go through the documents that we went through to

43 show how, properly considered or considered at  
44 all, those documents can stand with the findings  
45 that were made by the tribunal.  
46 They do take some attempts to render those  
47 documents irrelevant, for example, the documents

Charest Reporting Inc. (604) 669-6449

1 recording the -- the -- the documents recording  
2 the existence, exercise and abandonment of legal  
3 remedies in this case. They say, well -- they try  
4 and argue that that's irrelevant. But they in my  
5 submission don't demonstrate that, are not able to  
6 make that point out. And I've already -- I won't  
7 repeat those submissions.

8 In reply there, the -- in response then I  
9 think we have a bit of ships passing in the night  
10 because the points we made are in my submission  
11 not fully addressed.

12 I'm going to spend some time in reply to some  
13 of their facts, but not for the purposes of  
14 dealing with this question of whether there's any  
15 evidence or not but for the purpose of recording  
16 for the record an answer to one of my friend's  
17 questions which was, well, Metalclad -- or Mexico  
18 didn't appear to treat the Metalclad case with  
19 much credit, di -- didn't give enough credit to  
20 Metalclad's side of the story when telling the  
21 story. And I want to explain the -- the -- the  
22 perspective of Mexico with respect to that.

23 And I'd start by reminding the Court that,  
24 you'll recall, and I -- that in the original  
25 memorial the entire claim -- well, I -- I could --  
26 one can even go back. In the draft statement of  
27 notice of intent to claim that was in the  
28 materials, the allegations were directed against  
29 Dr. Medellin and related to a number of factors  
30 that we haven't heard anything about since.

31 In the original memorial, allegations were  
32 made that Metalclad didn't know about the permit  
33 issue until November of 1995. Allegations were  
34 made that Metalclad spent 20.5 million on the  
35 labour, construction and equipment of this  
36 facility. And allegations were made of serious  
37 issues of -- of corruption against the governor  
38 and other officials in SLP and in the  
39 municipality.

40 Now, as it happened, we've demonstrated  
41 already to Your Lordship that the -- the first  
42 allegation about them not knowing anything about

43 the permit was false, and that was later resiled  
44 from. We've also demonstrated that the statement  
45 that 20.5 million was spent on this facility was  
46 also false.

47 With respect to the allegations of corruption

Charest Reporting Inc. (604) 669-6449

1 that were contained in the original memorial,  
2 detailed witness statements were filed answering  
3 all of those allegations. And those witnesses  
4 that testified with respect to those answers were  
5 never challenged or cross-examined by the --  
6 although they were called for cross-examination by  
7 Metalclad, they were never cross-examined on those  
8 issues. And all of those allegations have, as  
9 is -- happened many times in this case,  
10 disappeared, and the case has turned into a -- a  
11 new case. The -- and this case is based upon the  
12 reasonableness of Metalclad's reliance on oral  
13 representations of federal primacy.

14 Now, we showed you the documents, the  
15 documents that showed that the federal authorities  
16 did not say that, that they said we don't hesitate  
17 to remind you, get a municipal permit.

18 Now, Metalclad's response to that -- with the  
19 exception of the evidence of Mr. Rodarte, which is  
20 always dealt with separately -- response to that  
21 was hearsay. It wasn't other documents. It was  
22 things like Mr. Kesler said, someone told me not  
23 to worry, apply anyway and you'll get the permit.  
24 de la Cruz, I think, was the person that he  
25 mentioned in there.

26 Now, if the witness statements of the federal  
27 officers who are alleged to have said these  
28 things, this hearsay evidence, are examined, you  
29 will see that they either don't say what was  
30 alleged, and Reyes Lujan is a good example of  
31 that, or they deny what was alleged, or they  
32 flatly contradict what is alleged with a positive  
33 statement, like Garcia Leos saying I told them  
34 whoever told you you didn't need to get a local  
35 permit was wrong. All those -- all those witness  
36 statements were filed.

37 None of those witnesses were called for  
38 cross-examination, nor were they contradicted by  
39 documents. And Metalclad tried to -- tried to  
40 leave the impression that this procedure was a  
41 purely continental procedure in which only witness  
42 statements were relevant, and credibility didn't

43 have to be dealt with in the -- by virtue of the  
44 common law approach. And in my submission that's  
45 not the case.

46 The system that was in play here was a  
47 mixture of the continental and common law system.

Charest Reporting Inc. (604) 669-6449

1 And that was made clear in the letter that I took  
2 you to, and I don't need to take you back to, but  
3 at tab 3 of the -- Volume 1 of Mexico's extracts,  
4 where it was noted that if a witness was  
5 contradicted by a document and you were content to  
6 rely upon the documentary evidence, it wasn't  
7 necessary to call them for cross-examination. But  
8 if you wanted to raise doubts as to general  
9 veracity, then that would be appropriate, to call  
10 them for cross-examination.

11 As I mentioned, Metalclad originally --  
12 when -- when Mr. -- when Metalclad's counsel  
13 started last week in their overview introduction,  
14 I heard it agreed that the only representations  
15 that were relied upon by Metalclad were oral  
16 representations.

17 Now, that subsequently changed and an attempt  
18 was made to say there were some documentary  
19 representations, and I'll -- and I'll get to  
20 that. But the fact is in my submission the  
21 witness statements to which I've referred were not  
22 contradicted by the documents. The -- the federal  
23 witnesses who said go get a municipal permit were  
24 confirmed by the contemporary documents that said  
25 go get a municipal permit.

26 Not having been called for cross-examination,  
27 having been confirmed not contradicted by the  
28 documents, how can the tribunal completely ignore  
29 that evidence?

30 And I'd take you to paragraph 320 of  
31 Metalclad's response. Paragraph 320 of the  
32 response talks about the evidence filed by  
33 Metalclad with respect to the hearsay evidence  
34 saying we were told this and we were told that.

35  
36 "Mexico forcefully argued that the  
37 evidence of Metalclad's witnesses should  
38 not be given weight, because other federal  
39 officials denied making any such  
40 representations. However, the tribunal in  
41 finding the federal officials had made such  
42 representations, despite their denials at

43 the hearing ..."

44

45 Now, I just want to pause there. I -- this  
46 may be just an inadvertence, but the witnesses,  
47 the federal officials who denied making the

Charest Reporting Inc. (604) 669-6449



1 representations, were never called for  
2 cross-examination. So it says:

3  
4 "...clearly made a finding of credibility,  
5 a finding Metalclad respectfully submits  
6 lies outside the scope of this Court's  
7 review."  
8

9 Those witnesses were available for  
10 cross-examination. Some of them were called in --  
11 and had to travel to Washington, and then were  
12 excused. But the fact is that the federal  
13 officials who denied making the representations  
14 where the documents supported what they said were  
15 not cross-examined.

16 THE COURT: Mr. Foy, would this be a convenient time  
17 for the morning break?

18 MR. FOY: Thank you, My Lord.

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

21

22 (MORNING RECESS)

23 (PROCEEDINGS ADJOURNED AT 11:08 A.M.)

24 (PROCEEDINGS RESUMED AT 11:25 A.M.)

25

26 THE COURT: Yes, Mr. Foy.

27 MR. FOY: My Lord, I'd just recounted the contest with  
28 respect to the reasonableness of this reliance,  
29 and I would add these points: Testing the  
30 objectiveness of the reasonableness of the  
31 reliance, we have to ask the question -- we have  
32 federal officials, or at least the one federal  
33 official, saying orally what a -- something about  
34 another level of government's jurisdiction when  
35 that other level of government makes it clear that  
36 that's not its view. We have oral representations  
37 contradicted by the documents. And we have these  
38 representations made on Metalclad's case after the  
39 investment has already been purchased. And the  
40 purchase agreement contemplates going to court to  
41 sort out the very issue.

42 We also have the tribunal, apparently

43 implicitly, not having heard any of these  
44 witnesses, but implicitly disbelieving all those  
45 witness statements filed by federal officials that  
46 said they didn't say that, implicitly disbelieving  
47 those witness statements when they're not

Charest Reporting Inc. (604) 669-6449

1 contradicted by the documents. And we have it  
2 being alleged that this is a credibility finding.

3 But what we don't have is the tribunal making  
4 that credibility finding. We don't see in their  
5 reasons I disbelieve all of the witness statements  
6 filed by the federal officials who haven't been  
7 called to be cross-examined -- cross-examined at  
8 this hearing. This failure to deal with that  
9 aspect of it is an aspect of the complaint of  
10 Mexico with respect to this tribunal's award in  
11 its failure to do its job properly. It's another  
12 demonstration of the absence of dealing with  
13 material questions, if you're going to defend  
14 this -- this result.

15 Now, with respect to this question of whether  
16 oral or documentary representations were made, on  
17 Friday I -- Friday last I heard counsel for  
18 Metalclad agree that the only representations that  
19 were made were oral representations. Later in the  
20 week reference was made to an extensive chronology  
21 of documents. And it was pointed to, and they say  
22 look at this extensive chronology of documents  
23 between federal officials and Metalclad. None of  
24 those documents -- you weren't taken to any of  
25 those documents by Metalclad.

26 We did take you to two of those documents.  
27 In their chronology it was LL and MM. And in our  
28 selected extracts it was tab 47 and tab 49,  
29 federal letters from federal officials at the time  
30 my friend says construction has been approved by  
31 the federal authorities, federal letters which  
32 say:

33  
34 "...in the understanding that your company  
35 shall obtain the corresponding construction  
36 permits for the described works from the  
37 municipal and State authorities in  
38 accordance to their respective  
39 jurisdiction."

40  
41 Tab 47 saying -- tab 49:  
42

43 "I do not omit to mention that your  
44 represented companies shall obtain the  
45 corresponding permits and authorizations  
46 from the competent State and municipal  
47 authorities."

Charest Reporting Inc. (604) 669-6449

1  
2       So without taking you to the documents, it's  
3 alleged that there's all this documentary  
4 evidence. The documents show the federal  
5 authorities at the time construction's ongoing,  
6 making it clear to Metalclad municipal permits and  
7 State permits are -- are -- are something that it  
8 is the responsibility of Metalclad to deal with.

9       Now, I turn to a different reply subject.  
10      Counsel for Metalclad in a -- in what I submit was  
11 an attempt to write a different award suggested  
12 that this tribunal's conclusions were restrained,  
13 and that they could have concluded a number of  
14 other things.

15      It was suggested that they, the tribunal,  
16 could -- could have concluded that there had been  
17 bad faith in the classic sense of -- on the part  
18 of the municipality.

19      It was suggested that they, the tribunal,  
20 could have concluded that the police actions  
21 following the March 1995 demonstration could have  
22 formed the basis of the tribunal's reasoning.

23      It was suggested that the federal failure to  
24 go to court on behalf of Metalclad in a  
25 constitutional controversy could have been a  
26 finding the tribunal was -- made.

27      It was suggested that there could have been a  
28 finding that the governor of the State's evidence  
29 was -- was incredible.

30      None of those findings appear in the award.  
31 Some of those points were specifically dealt  
32 with. There was -- and I'll just deal with the  
33 police action -- specifically dealt with in -- in  
34 argument by both sides. The police actions are in  
35 and around March 1995.

36      Metalclad took another legal remedy in  
37 respect of that, alleging that State officials --  
38 alleging in a separate Amparo that State officials  
39 had violated some aspect of the -- of the -- of  
40 the law. And that Amparo was described in Garcia  
41 Barragan's summary of all of the legal proceedings  
42 that this tribunal failed to have regard to. And

43 in that proceeding Metalclad was unsuccessful.  
44 It was all -- it was argued for a time at  
45 this hearing that this failure to -- that there  
46 was a failure on the part of the State to provide,  
47 quote:

Charest Reporting Inc. (604) 669-6449

1  
2 "Full protection and security within the  
3 meaning of Article 1105 by failing to take  
4 an active step."  
5

6 Full protection and security is one of those  
7 international obligations which can require a  
8 State to take active steps to protect investors.  
9 That argument was made and abandoned, and does not  
10 form part of the award.

11 And none of these points, this -- the  
12 rewriting of what the tribunal could have done had  
13 it been less restrained form part of this award,  
14 and nor do they adequately explain what -- the  
15 award that is before us.

16 In oral argument Metalclad emphasized the  
17 finding by the tribunal of the absence of an  
18 established practice and procedure as to the  
19 manner of handling municipal permit applications.  
20 And I'll just point to the -- again, the  
21 documentary facts, and note again the tribunal's  
22 omission to deal with the legal remedies that were  
23 available in that respect.

24 Metalclad was able to get legal advice, was  
25 able in its due diligence to discover COTERIN's  
26 previous permit application and the laws upon  
27 which it was based, was able to file the  
28 application in November of 1995 in the right place  
29 with the municipality, received notice of the  
30 denial of that application, was able to file an  
31 application for reconsideration before the  
32 municipality, and was then able to file an Amparo  
33 proceeding in the Mexican domestic courts with  
34 respect to that denial. And I suggest that those  
35 facts demonstrate an established practice and  
36 procedure that was discoverable and that was  
37 exercised in this case.

38 The tribunal stops at the initial municipal  
39 denial, doesn't look at anything further, in fact  
40 alleges -- or allege -- doesn't really -- averts  
41 to some alleged finding of lack of due process by  
42 the failure to provide notice of the meeting

43 without going on to examine the facts with respect  
44 to the notice of the decision, the filing of the  
45 application for reconsideration, the filing of the  
46 Amparo after that. And their conclusion of a lack  
47 of established practice and procedure cannot stand

Charest Reporting Inc. (604) 669-6449



1 without examination of the legal system as a  
2 whole.

3 Metalclad's counsel criticized the  
4 municipality for delay in dealing with the  
5 municipal permit application. And I'd just remind  
6 the Court that there was -- contrary to what the  
7 tribunal says, there was evidence that the matter  
8 was considered in February of 1995 by the incoming  
9 administration who determined that it had to be  
10 dealt with by the -- the session as a whole.

11 And you must recall as well that the  
12 construction that Metalclad was undertaking was  
13 completed by the end of February. Metalclad  
14 wasn't waiting for consideration by the  
15 municipality of this -- of its application in  
16 order to proceed.

17 There was also record evidence with respect  
18 to the fact that in Mexican law a proponent, an  
19 applicant for a permit, if there's delay in  
20 application, can bring that delay to the attention  
21 of the Courts and -- and have the -- have the  
22 matter dealt with. But that's the proponent's  
23 obligation. An applicant for a permit can go and  
24 get the decision made. And of course in this case  
25 the decision was made and they went off to court  
26 after that, which was not referred to by the  
27 tribunal.

28 Counsel for Metalclad criticized the  
29 municipality for not conducting a poll before they  
30 resolved to deny the permit. And I've already  
31 mentioned that the municipality acted in a  
32 representative capacity. What I'd like to  
33 emphasize in reply is to -- is the fact, again on  
34 the record evidence, that this was a new  
35 administration that had -- that had campaigned on  
36 a -- on a platform which included opposition to  
37 the introduction of new hazardous waste to the  
38 landfill. They'd just been elected, which --  
39 which in most democracies is a -- is a --  
40 considered a poll.

41 Now, I'd like to go from there to the written  
42 reply, My Lord. As with the original written

43 submissions, I'm not going to read you all of the  
44 reply. But I don't want you to take by having it  
45 not read that I've abandoned any of it; we reply  
46 upon all of it. I've covered some of the points  
47 already in oral submissions, and I'll highlight

Charest Reporting Inc. (604) 669-6449

1 some of the others. And I've covered up to page  
2 11 at the bottom, footnote C -- or note C.

3 Sorry, I -- there's one point that I had to  
4 bring to your attention that I -- that I didn't  
5 cover.

6 At -- one of the points that was made in the  
7 re -- response is that this was analogous to a  
8 concession contract. And at paragraphs 19 and  
9 following -- the Convenio, it was alleged, was a  
10 concession contract. In paragraphs 19 and  
11 following we set out authorities defining what  
12 concession contracts are. And in fact there's  
13 been -- this subject's been reviewed by the  
14 commission of European communities recently in the  
15 con -- in their context. And this is -- you'll  
16 see, and I leave with Your Lordship those  
17 definitions, the Convenio was, as admitted in  
18 paragraph 61, the exercise of a regulatory  
19 measure, these arose out of regulatory measures,  
20 and was by no means a concession in the meaning --  
21 within the meaning that is understood, and that  
22 point's made in paragraph 25.

23 And I deal with the argument about this  
24 arising out of construction of works in paragraph  
25 27 and say that's equally inapposite.

26 The -- the involvement of Mexico in these  
27 works was in the regulatory capacity, issuing  
28 closure orders, denying permits, not as in the  
29 Biloune case where there was a contractual  
30 relationship. The -- the construction of the  
31 resort arose out of a contract -- contractual  
32 relationship with a governmental agency.

33 And then I go to point D on page 8. It was  
34 suggested to you in a number of contexts that  
35 reliance upon the commercial act or even this  
36 Court engaging in review of issues of  
37 international law was somehow outside the purview  
38 of this Court's experience and expertise, and that  
39 this Court was somehow not equipped to -- to deal  
40 with those issues. And at one point in the oral  
41 argument it was suggested that this Court had no  
42 useful role.

43        Now, Canadian superior courts have experience  
44        in this area. And we've referred to the Supreme  
45        Court of Canada decision in which an argument had  
46        been made that the question -- a question of  
47        international law arising in the Quebec success --

Charest Reporting Inc. (604) 669-6449

1 succession reference was, quote:

2

3 "...beyond the competence of this Court as  
4 a domestic court because it requires the  
5 Court to look at international law rather  
6 than domestic law."  
7

8 Now, the Supreme Court of Canada said this:

9

10 "This concern is groundless."  
11

12 Reference is made to a number of instances in  
13 which Canadian superior courts have been required  
14 in the appropriate context to take into account  
15 principles of international law and to -- and to  
16 deal with them.

17 This is not a basis for a finding that -- or  
18 the suggestions that have been made that somehow  
19 this is something outside the purview of this  
20 Court's experience is -- is -- is groundless. And  
21 I refer in paragraph 33 to two other cases, one  
22 we've referred to already, the Baker case; the  
23 other one, the United States and Burns and Rafay  
24 is a -- a recent decision of the Supreme Court of  
25 Canada, again dealing with an international treaty  
26 and the Minister's obligation under that treaty.

27 Now, we also point out that this assertion is  
28 contradicted by Metalclad's reliance upon the  
29 international commercial act itself which, as --  
30 as you're well aware, is based upon a Model Law  
31 which was negotiated at the -- the -- or devised  
32 by one of the U -- United Nations working groups.  
33 And this Court -- having been implemented as  
34 legislation, this Court is required to -- to deal  
35 with that.

36 It's also noted that in this regard, this  
37 Court has been provided with the assistance of  
38 submissions from all three parties to the NAFTA.  
39 And I've already taken you to -- we've heard from  
40 Mexico, we've heard from Canada, and I've taken  
41 you to the submissions of the United States. And  
42 there I -- at paragraph 36 I quote the passage to

43 which I read you yesterday where, with respect to  
44 this particular case, the United States takes the  
45 position it's wrongly reasoned.  
46 I've dealt adequately with the -- I think,  
47 already with the points that are made at page 10

Charest Reporting Inc. (604) 669-6449

1 over to page 11. And I go to the bottom of page  
2 11 at C where an -- an argument was made that the  
3 fact that a tribunal has jurisdiction to consider  
4 its own jurisdiction ought to be persuasive. We  
5 argue here, in reply, that there's a fundamental  
6 distinction between the submission to a tribunal  
7 of the question of jurisdiction and the Court's  
8 review of that decision.

9 At the outset of arbitral proceedings, it's  
10 often the case where the Courts will in enforcing  
11 a submission to arbitration say we'll leave to the  
12 tribunal to -- to deal with whether they think  
13 they have jurisdiction with the issue, always  
14 reserving the right of review of that question at  
15 the end of the proceeding. And that's the point  
16 we make in paragraph 44. With this award having  
17 been made and jurisdictional determinations been  
18 made by the tribunal, I'll come back to that,  
19 Courts now engage to -- in its -- in its reviewing  
20 function.

21 Now, I think I've covered the points in --  
22 I've either covered or don't need to emphasize the  
23 points in 46 through 48, and I'll go to 49. And I  
24 think I've taken you to these already, 49 through  
25 51.

26 In 52 we deal with the Food Services case,  
27 and I'll leave you with that.

28 I'll turn to paragraph 58, paragraph 58.

29 THE COURT: Um-hum.

30 MR. FOY: There we're replying to the -- Metalclad's  
31 reliance on primarily English authorities which  
32 concern different legislation, some of which  
33 contain leg -- as Mr. Cowper correctly noted,  
34 fairly noted, some contain legislative definitions  
35 of questions of law.

36 And we note that you have to make a  
37 distinction in de -- in this question of  
38 determining whether something's a question of law  
39 or not. It arises at different stages. It can  
40 arise in proceedings where you are identifying the  
41 degree of curial deference. And it can arise in  
42 the different context of whether you're

43 identifying whether any scope of review is  
44 available under particular statute. Those are  
45 different contexts.  
46 And the Supreme Court of Canada, and we refer  
47 to a new case, Biniaris, has held that great care

Charest Reporting Inc. (604) 669-6449



1 should be taken when defining a question as being  
2 other than a question of law when the effect of  
3 that construction would be to evoke a procedural  
4 bar against the consideration of the question on  
5 its merits. Now, that's not exactly the case  
6 here, because here the -- the procedural bar is  
7 the seeking of leave, but the -- the point is made  
8 we have raised questions of law under the  
9 commercial act. And strict, watertight  
10 definitions of what's mixed law and fact in our  
11 submission don't -- needn't concern the questions  
12 of law that we've raised here. But we bring this  
13 to your attention to ensure that the different  
14 contexts of which those statements are made is  
15 appreciated.

16 In 61 and following we deal with our reply to  
17 the propositions or the submissions that are made  
18 as to why leave should be denied. There are three  
19 points made. The arbitration was commenced in  
20 1997, that's referred to. This Court does not  
21 have sufficient expertise to address the issues.  
22 And the parties may have recourse to the  
23 commission.

24 Now, I've dealt -- the first one is -- is  
25 groundless. The Article 1136 expressly  
26 contemplates judicial review and -- and puts in  
27 place an automatic stay of enforcement. Mexico  
28 has moved promptly, as have -- as has everyone in  
29 this case, in order to bring substantive review  
30 before this Court.

31 I've already dealt with the expertise issue.

32 And I'd like to turn to paragraph 65, the  
33 role of the commission. The -- the role of the  
34 commission is fundamentally unlike the reviewing  
35 function of this Court, and -- and the one does  
36 not exclude the other. A commission was not  
37 intended to be a reviewing body for individual  
38 cases. That's the function that's recognized in  
39 Article 1136 for this Court.

40 If this Court -- in our submission if this  
41 Court exercises that supervisory role, it will be  
42 unnecessary for anyone to ever have recourse to

43 the commission. In our submission this award does  
44 not represent a systemic problem with the NAFTA,  
45 but rather the instance of one tribunal exceeding  
46 its jurisdiction and making fundamental errors.  
47 And the correction of that is a matter, we submit,

Charest Reporting Inc. (604) 669-6449

1 for this Court.

2 Now, a suggestion is made that the parties  
3 should simply amend the NAFTA and this Court need  
4 not deal with it, and we deal with that in  
5 paragraph 67.

6 Your Lordship will recall the difficulty  
7 involved by all of the three parties in concluding  
8 the NAFTA. And it's even more difficult, I'm told  
9 by those experienced in this practice, to amend  
10 the treaty once concluded. This is not a reason  
11 for failure to -- for this Court to exercise its  
12 jurisdiction.

13 There's a typo in page 16. Paragraph 61(c)  
14 should not read "Article 2022," but rather  
15 "2202."

16 The pragmatic and functional analysis  
17 referred to in 68 has been -- I've -- I've made  
18 those points, and I -- I leave that with you.

19 In the treatment of Article 1105 at the  
20 bottom of page 18, we reply there, as noted, that  
21 the -- Metalclad deals with most of its  
22 submissions with respect to 1105 in this part, and  
23 that's -- that's where we deal with it.

24 But the one introductory point we make is on  
25 the top of page 19. And that is just again to --  
26 to make the point that this was not seen as a  
27 straightforward analysis of well-understood  
28 principles. We refer to Metalclad's own counsel  
29 immediately after this award was delivered in  
30 which he said, and it's quoted:

31  
32 "This is a groundbreaking decision in  
33 international law that will be cited  
34 frequently as it is the first case ever to  
35 our knowledge where a host State has been  
36 found to breach its duty of fair and  
37 equitable treatment."

38  
39 Now, the -- we've -- we've -- the citation  
40 frequently has been demonstrated to be correct.  
41 We also agree that it's groundbreaking. It  
42 does -- it is not part of the substance of

43 international law. And I think he's correct that  
44 it's the first case ever. And we submit it's --  
45 it's -- the reason for that is that it's a  
46 decision in excess of jurisdiction and wrongly  
47 decided.

Charest Reporting Inc. (604) 669-6449

1 And I'll skip 74.

2 At 75 we do not suggest strict construction  
3 of any of the provisions of Section B of  
4 Chapter 11.

5 We'll go to paragraph 79. Reliance was  
6 placed upon the de Sabla case without the details  
7 of the case being brought to Your Lordship's  
8 attention.

9 First of all, the treaty obligation there was  
10 different. The treaty obligation was an  
11 obligation to consider claims, quote:

12  
13 "...in accordance with the principles of  
14 international law, justice and equity."  
15

16 Moreover, there was an express -- express  
17 provision in Article 5 which made domestic  
18 remedies with respect to the claims that were the  
19 subject of that commission irrelevant.

20 Article Roman numeral 5 is quoted there, it  
21 says:

22  
23 "No claim shall be disallowed or rejected  
24 by the commission through the application  
25 of the general principle of international  
26 law that the legal remedies must be  
27 exhausted as a condition precedent to the  
28 validity or allowance of any claim."  
29

30 So there's the complete waiver of any -- of  
31 the relevance of any local remedies. No claim  
32 should be dismissed on that regard. And of course  
33 we have no such express abrogation in the NAFTA  
34 like that. So there are no parallels either to  
35 the treaty obligation in -- in play or to the  
36 relevance of local remedies.

37 It's important to note though that even at --  
38 that the -- the commission in that case did  
39 examine the Panamanian legal system as a whole and  
40 found it wanting. There was a -- what had  
41 happened there was that the -- the titleholders to  
42 land were dispossessed when their lands were

43 transferred to third parties on application of  
44 those third parties. And the Panamanian law at  
45 issue allowed third parties to make application  
46 for anyone's land, and -- whether they held it  
47 under a title or not. And the titleholder was

Charest Reporting Inc. (604) 669-6449

1 required to come forward in each case in which  
2 somebody had made an application for their land.

3 They didn't have a title system where they  
4 could rely upon their title. They had to defend  
5 it over and over and over again. And in the  
6 course of a number of applications, the -- the --  
7 the landholder was dispossessed, their -- more  
8 than dispossessed, their title was transferred to  
9 third -- third parties.

10 We deal in paragraph 82 with Tattler, and  
11 again regard was had in Tattler to domestic  
12 remedies available there. In fact, the -- the  
13 compensation was only awarded up to the point  
14 where the domestic remedy was -- was made  
15 available. This was seizure of a -- of a ship for  
16 a few days.

17 We distinguish Buckingham. That -- on the  
18 facts it's -- it's not worth referring to.

19 And we deal with some of the -- response made  
20 by Metalclad with respect to the application of  
21 the Vienna Convention in paragraphs 84 and 85.

22 In the next section we deal with the question  
23 of the use of preambular language. And I quoted  
24 to you yesterday the passage which is found at  
25 paragraph 87.

26 In paragraph 88 and following we deal with  
27 the -- the point that was made that, well, Mexico  
28 never objected to the tribunal's consideration of  
29 Chapter 18 or this transparency concept. That --  
30 that was argued, didn't make it clear enough that  
31 you thought this was a jurisdictional problem.

32 And we refer to Mexico's counter-memorial  
33 here in which we -- Mexico is responding to the  
34 allegation that:

35  
36 "...actions relating to the landfill were  
37 disjunctive, contradictory and lacking in  
38 transparency and predictability...the  
39 Complainant argues that...a new federal law  
40 made it clear that local construction  
41 permits..."  
42

43 This is interesting, and I pause on this.  
44 One of the arguments made by Metalclad was that  
45 until 1997 when a -- another Mexican law came into  
46 force that said before -- before we will give you  
47 a federal permit, you need to get a local permit.

Charest Reporting Inc. (604) 669-6449



1 It said before that this system was totally opaque  
2 to us, but just once we were told, well, you won't  
3 give us a federal permit until we get a municipal  
4 one, it became -- everything became crystal  
5 clear. That was the argument that they were  
6 making there to try and demonstrate it was opaque  
7 before this change.

8 We know on the facts that they -- when they  
9 acquired the very investment, they were aware of  
10 the need to address the municipal permit issue.  
11 So on their own argument the system was  
12 transparent.

13 But leaving that aside, Mexico's response to  
14 this argument -- and I -- Mr. Cowper has read  
15 this, but I will give it a different emphasis, he  
16 said:

17  
18 "Quite apart from the facts, there is no  
19 authority for interpreting fair and  
20 equitable treatment to extend to  
21 transparency."  
22

23 Mr. Cowper emphasized "interpreting" and said  
24 this is just a question of interpretation. We  
25 emphasize "authority" and say this tribunal had no  
26 authority under a consideration of customary  
27 international law to -- to deal with treaty  
28 obligations. And we say in the footnote too that  
29 these matters are addressed in Chapter 18.

30 Now, the point that Chapter 18 lays outside  
31 Chapter 11 and is not referred to in Section A of  
32 Chapter 11 appeared to us to be trite and  
33 obvious. And it also, it appears, was that way to  
34 Metalclad, because as -- as was pointed out, that  
35 Metalclad didn't claim or try to import Chapter 18  
36 into its claim. It -- this appeared in terms of  
37 the applicable law in the tribunal's award for the  
38 first time. And it having appeared and having  
39 raised a jurisdictional objection, there's no  
40 authority; you have no authority over that. This  
41 is dealt with somewhere else. We're now here  
42 maintaining the same jurisdictional objection.

43           Now, we ask -- we answer the question, well,  
44           why did you address the issue of Metalclad's  
45           knowledge of the municipal permit -- permitting  
46           requirement if this was something outside the  
47           jurisdiction? We address that because Metalclad

Charest Reporting Inc. (604) 669-6449

1 had falsely stated in its memorial that it wasn't  
2 until two years after it acquired COTERIN that any  
3 government authority asserted a municipal permit  
4 was necessary. That was the assertion that we  
5 were facing with the original memorial.

6 We were also facing an expert report that  
7 said Metalclad reasonably could have been unaware  
8 of the municipality's assertion of jurisdiction.

9 We re -- had to and did meet each of those points,  
10 and filed evidence of domestic law with respect to  
11 that point, not to invite this Court to transform  
12 itself into a Mexican domestic court to determine  
13 that issue of Mexican domestic law, but to refute  
14 those allegations.

15 Now, I think I have, yesterday, adequately  
16 covered 93 through 103. Those passages include a  
17 reference to a -- the quotation from the Methanex  
18 decision that I gave you yesterday.

19 In paragraph 104 I add emphasis to -- we've  
20 talked about -- today we've talked about the  
21 U.S.'s position on Myers. There we just record  
22 Canada's position on Myers in its application  
23 before another Court to set aside that award, the  
24 allegation that it:

25  
26 "...deals with a dispute not contemplated  
27 by or...falling within the terms of  
28 Chapter Eleven...or is in conflict with the  
29 public policy...in finding a breach  
30 of...1102 essentially establishes a breach  
31 of...1105."  
32

33 And we've talked about that earlier today.

34 I'll go from there to paragraph 111. And  
35 this is the section dealing with this tribunal's  
36 failure to take account of the fact of the  
37 existence and exercise of domestic remedies. And  
38 I just note I think yesterday I said Article 1121  
39 may have modified the governing rule of customary  
40 international law. I think probably more  
41 accurately is to state it the way I've stated it  
42 in paragraph 111, that it is consistent with the

43 governing rule of international law.  
44 In paragraph 115 I deal with the limitations  
45 argument that was made. It was argued that, well,  
46 there's a three-year limitation period in the  
47 NAFTA. If you go and exercise domestic remedies,

Charest Reporting Inc. (604) 669-6449

1 you will miss the limitation period. That's a --  
2 that's in fact not the case. That -- if there is  
3 a domestic remedy, and you go and exercise it, and  
4 you're successful, well, then you're successful.  
5 If you go and exercise it and you're unsuccessful,  
6 that may -- whether that gives rise to a violation  
7 of the NAFTA will depend upon the provision of the  
8 NAFTA that you -- that you allege was violated.

9 But where you go and allege denial of fair  
10 and equitable treatment, it will be because of a  
11 denial of justice that has occurred in the court  
12 system itself, and it will not occur until that  
13 denial of justice. And your time for bringing  
14 your NAFTA claim will run from that time of the  
15 denial of justice, not from the violation of some  
16 domestic law.

17 This point's made I think quite clearly in  
18 the Azinian case that we referred to throughout  
19 the arg -- in the early stages of the argument  
20 where the Courts said, well, you go to the courts,  
21 you can't just complain of a breach of a  
22 concession contract, there must be something  
23 wrong, there must have been denial of access in  
24 the courts, denial of justice, something else,  
25 which of course only occurs in time once you  
26 engage the courts.

27 In paragraph 121 we reply to the argument  
28 that the international minimum standard in Article  
29 1105 is fact-dependant. We don't disagree that it  
30 is fact-dependent, but we don't agree that it has  
31 no standards whatsoever. And in particular, what  
32 counsel for Metalclad called the safe harbour that  
33 would -- what is particularly clear at  
34 international law is that regard must be had to  
35 the legal system as a whole. That is a standard  
36 that must be applied in the determination of  
37 whether there's been a denial of fair and  
38 equitable treatment. Article 1105 did not confer  
39 on this tribunal the jurisdiction to decide the  
40 case before it at -- ex aequo et bono.

41 And I just pause to note that both the  
42 commercial act and the international act re -- if

43 you're going to have that kind of arbitration, it  
44 requires the express conferral of jurisdiction of  
45 that jurisdiction on a tribunal. And it does  
46 not -- and I don't think anyone's arguing that  
47 this tribunal had that jurisdiction.

Charest Reporting Inc. (604) 669-6449

1 I've dealt in paragraph 132 with the -- the  
2 poll point, the failure to take a poll by the  
3 municipality.

4 I've dealt with the point that there were no  
5 other permits in this municipality in paragraph  
6 135, noting the terms of the permit application  
7 itself and the terms of the law requiring the  
8 permit for a project of this, quote, size and  
9 importance. That language appears both in the law  
10 and in the municipal permit application made in  
11 November of 1995 -- no, '94.

12 In paragraphs 136 and following we deal with  
13 the long discussion of Mexican domestic law that's  
14 contained in the response in order to support the  
15 tribunal's views.

16 Now, as we've noted many times, it was not  
17 necessary in our submission to address the  
18 international law issues in this case to refine  
19 and define points of domestic law. The  
20 international issues can be considered whether the  
21 municipality is correct or incorrect in its view  
22 of municipal law.

23 We note in paragraph 138 that the --  
24 Metalclad attributes findings to the tribunal that  
25 it did not make. For example, this one, the  
26 tribunal found that these representations  
27 superseded any written terms contained in the  
28 federal and State permits. And the passage quoted  
29 in our submission doesn't support that statement.  
30 The tribunal in our submission didn't have regard  
31 to the written terms contained in the permits,  
32 and -- and didn't have regard to the other written  
33 documents whereby the federal authorities made it  
34 clear, as I -- as I've read to you earlier, this  
35 is without prejudice to a need to apply for  
36 municipal permits, the announcement that was made  
37 at the time of the Convenio, federal permits are  
38 necessary but not sufficient authority for this  
39 project.

40 In some of the -- Metalclad's reliance upon  
41 the tribunal's interpretation of Mexican domestic  
42 law, it's clear that they are relying upon it not

43 as fact but as a finding of law in order to render  
44 irrelevant, they say, other facts. And just to  
45 take as an example, in the original permit denial  
46 in 1991 to COTERIN prior to its ownership by  
47 Metalclad, the municipality recorded its view that

Charest Reporting Inc. (604) 669-6449



1 this -- that there was an environmental risk with  
2 res -- associated with this project that was not  
3 properly dealt with.

4 The -- Metalclad attempts to render that  
5 irrelevant as a fact by saying, well, as a matter  
6 of Mexican law, that's outside their  
7 jurisdiction. Well, it's still a fact, it -- and  
8 doesn't become less of a fact because of their  
9 view of -- of domestic law. It shows the  
10 municipality considered its jurisdiction, included  
11 that as a matter of fact. The finding of whether  
12 or not the municipality's correct in law is  
13 something that should have been dealt with at the  
14 Mexican domestic courts.

15 And this -- this point's made as well in  
16 paragraph 148 where, according to Metalclad, the  
17 key question determined by the tribunal was  
18 whether the municipality was correct in its  
19 assertions. That -- in their view, the key  
20 question is a question of Mexican domestic law.  
21 We're in agreement on that. It's the wrong  
22 question, but for this tribunal it was the key.

23 In paragraphs 150 through 154 we deal with  
24 the -- Metalclad's response to this question of  
25 the demonstration and whether or not the tribunal  
26 when it referred to that fact was making simply a  
27 chronological observation or a finding of  
28 causation, and Metalclad wants to have it both  
29 ways. At one point in their response they say  
30 that the demonstration had a chilling effect on  
31 Metalclad, at another point they say it's simply a  
32 chronological observation.

33 And in paragraph 155 and 158 in particular we  
34 deal with this new assertion that the dropping of  
35 the Amparo action was because the governor  
36 appointed judges. As we've noted before in the  
37 admission, 630 is noted under paragraph 159, that  
38 was not the reason given for the tribunal.

39 In paragraphs 169 and following we deal with  
40 the tribunal's failure to have regard to the  
41 municipality's willingness to permit a  
42 non-hazardous waste landfill site.

43        One of the points I want to add, and I don't  
44        know if it's either here or if I've said it  
45        before, but in the -- Metalclad's SEC filings, you  
46        will find reference that it was in other States in  
47        Mexico planning on operating an industrial waste

Charest Reporting Inc. (604) 669-6449

1 landfill. It was one of the proposed investments  
2 it had in Mexico. And in that representation it  
3 demonstrates the -- the point we're making here.

4 There was no examination by this tribunal of  
5 whether or not this facility which the  
6 municipality was prepared to consider being  
7 allowed to operate as an -- an industrial waste  
8 landfill, not a hazardous waste landfill, there's  
9 no treatment by the tribunal of that issue, and  
10 I -- and I deal with that at 169 and following.

11 And in particular I take you to paragraph  
12 172. Having -- first of all, Metalclad says,  
13 well, the -- the tribunal found it was  
14 impractical. Well, there's no finding, express  
15 finding, to that -- in that regard because the  
16 tribunal didn't address the issue.

17 And then at paragraph 381 Metalclad argues  
18 that it was not economically feasible because they  
19 state revenues generated by the storage of  
20 hazardous waste is \$1,200 U.S. per tonne. In  
21 contrast, Metalclad says, the revenue generated by  
22 the storage of industrial wastes is \$12 U.S. per  
23 tonne.

24 Now, I asked counsel for Metalclad to provide  
25 me the record references for this assertion, and  
26 have been provided with none. And when -- when  
27 counsel for Metalclad dealt with this point, they  
28 said, well, I couldn't find the record, \$1,200, it  
29 doesn't matter.

30 Well, My Lord, it does matter. This is in --  
31 this -- and I don't attribute this to -- to  
32 counsel. But Metalclad has instructed counsel  
33 that you can get \$1,200 U.S. per tonne for this  
34 hazardous waste. There is no evidence of that.

35 The evidence, and it's found at -- in the new  
36 book, tab 15, shows it -- a range for hazardous  
37 waste of value per tonne depending upon the type  
38 of the -- of the waste from -- and depending upon  
39 how much of it you have in your mix, of somewhere,  
40 if you're talking about weighted -- weighted  
41 pice -- price per tonne, from \$12 to \$54 with a  
42 total of \$150 for the different -- four types of

43 waste. And that's the highest. There's no \$1,200  
44 anywhere. The -- that was -- that was Metalclad's  
45 evidence. Mexico's evidence was that the weighted  
46 average was more like \$120, depending again upon  
47 the mix of the things.

Charest Reporting Inc. (604) 669-6449

1 But I -- I'd note that even at \$12 a tonne,  
2 which is what Metalclad says you can get for  
3 non-hazardous waste, consider the economics, and  
4 just -- just -- of an alleged permitted capacity  
5 of 360,000 tonnes per annum at \$12 per tonne.  
6 It -- by my calculations that's over 400,000 --  
7 or, sorry, \$4 million per annum return -- gross  
8 return on the treatment of industrial waste.

9 Now, for a facility that, by our calculations  
10 so far, cost them \$500,000 to acquire the land,  
11 they don't have to pay the 1.5, and we don't have  
12 any calculation of how much was actually spent  
13 because the -- because they were never provided,  
14 although false allegations were made in that  
15 regard, but we did have -- attempts were made by  
16 Mexico's experts and came up with figures in the  
17 range of 1.5 to \$3 million for construction. So  
18 you have, let's take it at the highest, 3.5. And  
19 you're getting a return in the first year of -- of  
20 everything that you've spent, gross return.

21 Now, that to me doesn't sound like its  
22 impractical or totally uneconomic, or it doesn't  
23 sound to me like a use that should not at least  
24 have been considered by the tribunal, because the  
25 municipality wanted remediation, and they  
26 wanted -- and they were prepared to consider it  
27 being allowed to operate in that capacity.

28 Now, I'd like to turn to paragraph 182, and  
29 this is the Ecological Decree. And I need to  
30 summarize the position with respect to the  
31 consideration of the Ecological Decree and make a  
32 few points here, one of which I -- has not been  
33 made.

34 Metalclad's submission, primary submission,  
35 is that the tribunal did not have jurisdiction  
36 over the Ecological Decree. And in oral  
37 argument --

38 THE COURT: Sorry, you mean the Mexican position.

39 MR. FOY: Sorry, sorry. Thank you, My Lord. Thank  
40 you for that.

41 That the tribunal did not have jurisdiction  
42 to consider the Ecological Decree.

43       The -- in oral submissions Metalclad  
44       buttressed Mexico's argument as follows:  
45       Metalclad submitted that the Ecological Decree  
46       was, quote, entirely separate and, quote, not  
47       related in any way to the other claims. And in

Charest Reporting Inc. (604) 669-6449

1 our submission we agree and say that they -- that  
2 claim could not be, quote, ancillary within the  
3 meaning of the amendment rule. So that's -- on  
4 the jurisdictional point, we consider that our  
5 proposition has been buttressed by Metalclad's  
6 submissions.

7 The next point we make relates to the  
8 question of the notice this tribunal has given  
9 with respect to its jurisdictional finding in this  
10 regard which, as Your Lordship, if you're not  
11 aware, should be aware, is made for the first time  
12 in the award.

13 Metalclad -- sorry, Mexico objected to the  
14 tribunal's jurisdiction to deal with the issue.  
15 Having made that objection, which was not ruled  
16 upon until the award, Mexico approached the matter  
17 as if it was not within the jurisdiction, did not  
18 adduce extensive evidence with respect to it. And  
19 it then is told in the award -- there was some  
20 evidence, but then is told in the award that it's  
21 had ample time to respond, we do have  
22 jurisdiction. And, although the tribunal says  
23 it's not of controlling importance, Metalclad now  
24 says it does -- it was.

25 In my submission again, and this is along the  
26 lines of the submission I made earlier, we are  
27 being more generous to the tribunal's reasoning.  
28 If the tribunal was to consider the Ecological  
29 Decree of controlling importance, then it ought to  
30 have given Mexico notice of its jurisdictional  
31 ruling and afforded an opportunity for Mexico to  
32 take whatever position it had on account of that.  
33 That notice came for the first time in the award,  
34 and we are here challenging that jurisdictional  
35 finding.

36 Now, I say as well that -- and I'm dealing  
37 with the -- did -- did this tribunal consider it  
38 to be of controlling importance? Did they make a  
39 separate award on this basis? And I make a point  
40 I did not make the other day, which is that the --  
41 if you look at the award itself and you look at  
42 the damages calculation, you'll see that this

43 tribunal fixes the date of our responsibility as  
44 December 5, 1995 and awarded interest from that  
45 date. That was almost two years before the  
46 passage of the Ecological Decree.  
47 This award on its face cannot be -- cannot

Charest Reporting Inc. (604) 669-6449



1 stand as a separate award based on the decree.  
2 And in my submission the tribunal never intended  
3 it to stand on that basis, because it said it  
4 wasn't of controlling importance, and went on to  
5 say, but if -- and -- well, I shouldn't say "if."  
6 I -- I'm adding that word. If implemented, it  
7 would be a -- an expropriation.

8 Moreover, I note that the tribunal didn't  
9 deal with the -- in finding -- if they did make a  
10 finding that it barred forever the operation of  
11 the landfill, although that wasn't of controlling  
12 importance, it didn't deal with the documentary  
13 evidence as to the effect of the decree. And I  
14 think I've read you this already. It's at the  
15 bottom of 191:

16  
17 "The operation of a controlled dangerous  
18 residues landfill is totally consistent  
19 with Article 14 of the Decree..."  
20

21 They -- they didn't -- they didn't refer to  
22 that.

23 Instead, the tribunal appears to have relied  
24 upon allega -- and this is from the facts and  
25 allegations portion of the award -- allegations  
26 and assertions made in 60 and 61 of the award made  
27 on the basis of newspaper reports from the Mexican  
28 media of statements allegedly made by the governor  
29 and Dr. Medellin.

30 Now, again we have -- so we have this hearsay  
31 evidence of a newspaper report, and Dr. Medellin  
32 and the governor are called. And -- and they  
33 do -- they are cross-examined. And they testify.  
34 They deny those reports. They deny that that's  
35 what they said.

36 Now, I leave aside entirely the legal  
37 significance of the subjective views of the  
38 governor and Dr. Medellin. That's another issue.  
39 But I -- I say that, unless the tribunal goes on  
40 to say, which it was agreed they did not -- unless  
41 they go on to say, well, governor, you know, I see  
42 this and I see your testimony, you deny it, and

43 it's legally significant. And I'm going to find  
44 that -- this evidence not credible, then the  
45 tribunal hasn't dealt with it.

46 And I -- I am not saying they did. In my  
47 submission they didn't consider it of controlling

Charest Reporting Inc. (604) 669-6449

1 importance and didn't have to deal with it.  
2 If, however, they were to find the decree  
3 itself a separate act, they would have to deal  
4 with these matters, they would be of controlling  
5 importance, you'd see a different damages award,  
6 and -- if that -- the -- if the tribunal, properly  
7 instructed, still found it to be an expropriation  
8 as opposed to something that allows this operation  
9 to -- to ongo (sic).

10 The fact of the matter is the landfill had  
11 been abandoned long before. And the testing of  
12 that -- of those facts was never tested.

13 And another issue that would be raised in  
14 that context was whether or not there was an  
15 obligation to find out according to Mexican  
16 domestic law whether or not there's any  
17 interference by this decree which covers such a  
18 large area with your operation.

19 Normally in the circumstances someone would  
20 either do one of two things: They'd operate and  
21 see whether or not it made any difference, or if  
22 they were concerned about the costs involved in a  
23 startup, they'd go and seek a declaration in -- in  
24 advance from the Mexican domestic courts. Does  
25 this decree preclude operation? I've got a letter  
26 here that says it's -- doesn't. And the issue  
27 would be resolved, as it should be, as a matter of  
28 Mexican domestic law.

29 Now, the tribunal didn't deal with any of --  
30 all of those issues, all of which -- that would  
31 have to be dealt with in order to properly found  
32 as a separate, entirely separate, matter a finding  
33 of entirely separate expropriation by this  
34 entirely separate decree.

35 Now, I think at that stage, My Lord, it would  
36 be appropriate to break. I'm going to be passing  
37 the podium to -- to my colleague Mr. Thomas, who's  
38 going to be dealing with what's starting at page  
39 45. And I see we're close to the luncheon break.

40 And I -- I think we're on schedule.

41 THE COURT: On what schedule?

42 MR. FOY: I've spoken to my friend Mr. Cowper, and

43 he's requested the opportunity to have 15 minutes  
44 at the end of the day to deal with new matters,  
45 and we're on schedule to permit him that time, if  
46 not more.  
47 MR. COWPER: Oh, I -- I should say that was asked for

Charest Reporting Inc. (604) 669-6449

1 and requested last evening at 4 o'clock before I  
2 received the 65-page document that I'm presently  
3 reading. I haven't accumulated a lot more points,  
4 but I will be asking for some time this afternoon.  
5 MR. FOY: I would have -- would have liked to get my  
6 friend the reply much sooner, but as Your Lordship  
7 knows --  
8 MR. COWPER: I'm not blaming him.  
9 I'm just saying 15 minutes was the estimate  
10 last night, and I -- my friend does have a lot.  
11 As I say, I haven't got a lot arising out of what  
12 I've heard from this morning but --  
13 THE COURT: I'm -- I'm not going to cut you off at the  
14 stroke of 4 o'clock, although once we get past  
15 4 o'clock everyone seems to get a little more  
16 anxious it seems. But I'll give you a proper  
17 opportunity to make a sur-reply, Mr. Cowper.  
18 We'll reconvene at 2 o'clock.  
19 THE REGISTRAR: Order in chambers. Chambers is  
20 adjourned until 2 p.m.  
21  
22 (NOON RECESS)  
23 (PROCEEDINGS ADJOURNED AT 12:28 P.M.)  
24 (PROCEEDINGS RESUMED AT 2:00 P.M.)  
25  
26 THE COURT: Yes, Mr. Thomas.  
27 MR. THOMAS: My Lord.  
28 My Lord, earlier in the week you had asked  
29 about the -- whether or not it's appropriate in  
30 the context of interpreting a treaty to refer to  
31 the title of the article. I handed up to you two  
32 excerpts from decisions of the World Trade  
33 Organization appellate body, and they answer the  
34 question in the affirmative. The first is an  
35 excerpt from a case called Argentina Safeguard  
36 Measures on Imports of Footwear. And if you look  
37 at paragraph 93, you'll see the appellate body  
38 states:  
39  
40 "Our reading is supported by the context of  
41 these provisions as part of the context of  
42 paragraph 1(a) of Article Roman numeral

43 19. We note that the title of Article 19  
44 is 'Emergency Action on Imports of  
45 Particular Products.'  
46  
47 So they are in this case referring to the

Charest Reporting Inc. (604) 669-6449

1 title of the article, and the same in the second  
2 case, Canada Term of Patent Protection, again  
3 another appellate body decision. And it, at  
4 paragraph 58, halfway through the paragraph --  
5 THE COURT: Sorry, is it together with this article?  
6 MR. THOMAS: Yes. They're just one-page excerpts from  
7 each of the reports. You wouldn't want to see the  
8 whole of the report.  
9 THE COURT: Yes.  
10 MR. THOMAS: The -- halfway through it you'll see  
11 again in -- in paragraph 58:  
12  
13 "Indeed the title of Article 70, quote,  
14 Protection of Existing Subject Matter,  
15 quote, confirms contextually the focus of  
16 Article 70."  
17  
18 So this is the practice of the World Trade  
19 Organization in respect of that issue.  
20 I'm going to begin, My Lord, by addressing  
21 Metalclad's argument which I note was entitled  
22 "The Alleged Failure to Provide Full Reasons."  
23 And in this respect Metalclad was responding to an  
24 argument that Mexico did not make.  
25 Metalclad -- Mexico's argument was not based  
26 on the insufficiency of reasons or the failure to  
27 give reasons. It was based on the failure to  
28 comply with what Mexico says is a mandatory  
29 requirement in the governing arbitral rules to  
30 deal with every question submitted to the  
31 tribunal. This is a concept which we agree is  
32 foreign to private international commercial  
33 arbitration, but it is of great significance to  
34 this type of investor-State arbitration.  
35 In Mexico's submission States have a very  
36 strong public policy interest in ensuring that  
37 international tribunals, particularly ad hoc  
38 tribunals that have no expert institutional  
39 support, fully comprehend the factual and legal  
40 defences that are raised by a sovereign State.  
41 Now, Mr. Greenberg said that this concern is  
42 inapplicable here because Canada is not a

43 signatory to the ICSID Convention, and therefore  
44 this Court ought not to have regard to how this  
45 issue has been addressed in ICSID Convention  
46 cases. And he makes the subsidiary point that the  
47 domestic statutory framework under which this

Charest Reporting Inc. (604) 669-6449



1 Court is operating cannot accommodate this special  
2 feature of investor-State arbitration.

3 In our submission neither one of these  
4 arguments is persuasive, and I'll explain the  
5 reasons why. The first is that -- I should point  
6 out that Mexico did not argue that the Court was  
7 bound by a treaty that Canada has not signed.  
8 What we argued was that it makes sense in a case  
9 of first impression to have regard to the closest  
10 analogous system of arbitration that can shed  
11 light on issues of first impression for this  
12 Court.

13 And there's absolutely no question, and I'm  
14 going to demonstrate it empirically in a minute,  
15 that the ICSID Convention is far more similar to  
16 the ICSID additional facility arbitration rules  
17 that governed this arbitration than the UNCITRAL  
18 rules which of course are part and parcel of the  
19 UNCITRAL Model Law approach to private  
20 international commercial arbitration.

21 Now, I handed up to Your Lordship a -- a  
22 second-handout entitled "Reference Table." This  
23 was not photocopied with the additional facility  
24 rules that are contained in Mexico's statutes and  
25 treaty materials. It's a -- it's like a  
26 concordance table. It's at the back of the  
27 published volume of the ICSID additional facility  
28 rules. And this is actually a good empirical  
29 indication of the similarity and differences  
30 between different arbitral rules.

31 The columns go from -- they're in -- vertical  
32 of course. And the first column is the additional  
33 facility arbitration rules, so you see all the  
34 rules listed down the left-hand column and over  
35 the page. And then the next column is the  
36 convention. Some of the rules that are in the  
37 additional facility rules are actually in the  
38 ICSID Convention.

39 And then you don't need to worry about the  
40 administrative and financial regulations or the  
41 institutional rules of the centre, but go over to  
42 "AR," the title "AR" at the top of the column.

43 Those are the arbitration rules under the ICSID.  
44 And then right beside the AR column is  
45 UNCITRAL. And this is a reference to the UNCITRAL  
46 arbitration rules of 1976.  
47 Now, My Lord, you only have to look at this

Charest Reporting Inc. (604) 669-6449

1 table to see that the additional facility  
2 arbitration rules down the left-hand column,  
3 almost every single rule has a concordant rule in  
4 either the ICSID Convention or in the ICSID  
5 Convention arbitration rules. And I -- I say this  
6 is -- this is quite good empirical evidence of the  
7 similarity of the two systems. It doesn't -- it  
8 shouldn't surprise anyone. The additional  
9 facility is derived from the ICSID Convention.

10 But what is also striking about this table is  
11 the posity of overlap between the UNCITRAL rules  
12 in the fourth -- in the fifth column and the  
13 additional facility rules. You'll see very few of  
14 the UNCITRAL rules reflected in the additional  
15 facility rules.

16 So I take this as a very good indication  
17 that, no, we're -- we don't say the ICSID  
18 Convention governs. We say the ICSID Convention  
19 as interpreted by annul -- annulment committees is  
20 the best source of an indication of how this Court  
21 should approach arbitral rules which are derived  
22 from the convention and from the convention's  
23 arbitrations rules themselves. And you can see  
24 from this table that they're far more closely  
25 related -- related to that instrument than they  
26 are the UNCITRAL approach to arbitration.

27 THE COURT: And -- and in your submissions, if I  
28 recall correctly, you quoted the provision from  
29 the additional facility rules and then you also  
30 quoted the provision from ICSID.

31 MR. THOMAS: Yes.

32 THE COURT: And they're quite similar.

33 MR. THOMAS: Yes. Now, the -- the rules are not by  
34 the same number.

35 THE COURT: No.

36 MR. THOMAS: But the rule -- I believe it's Rule 49(2)  
37 of the ICSID -- of the ICSID Convention  
38 arbitration rules, or the convention rather,  
39 relates to Article 53 of the additional facility  
40 rules. It's certainly -- it's pointed out and  
41 discussed by the commentators that we referred to  
42 earlier in the week -- or earlier last week.

43        So in our submission, with the greatest of  
44        respect, the -- what has happened in the ICSID  
45        convention is of -- of great importance to the --  
46        this Court's approach to the interpretation of  
47        these arbitration rules.

Charest Reporting Inc. (604) 669-6449

1           And we say that as shown by the annulment  
2 committees and as shown by authoritative  
3 commentators such as the drafter of the rules,  
4 Dr. Broches, that the requirement to deal with  
5 every question submitted to the tribunal is a  
6 fundamental rule of procedure for investor-State  
7 arbitration. And it's intended to protect parties  
8 from arbitrary decisions. This is a point that  
9 Dr. Broches has made.

10           So we say that there is -- where you have  
11 a -- a -- a -- a case of first impression before  
12 this Court, and no Court anywhere has ever looked  
13 at the interpretation of the additional facility  
14 rules, this makes sense to examine. We don't say  
15 it's binding. We don't say that it's  
16 dispositive. We say that it's a good source of  
17 analyzing the importance of the rule that we say  
18 was repeatedly neglected by the tribunal below.

19           Our third reason for emphasizing this point  
20 is -- and I'll be very quick about this because  
21 we've made it before -- this is not one-off  
22 private arbitration. We have concerns about the  
23 informal precedential value of the awards. We  
24 have concerns about the exposure of the NAFTA  
25 parties to international responsibility for  
26 governmental acts. We have concern about the  
27 public purse and claims that are being advanced  
28 against the State. And of course there are these  
29 questions of accountability that are being raised  
30 about the operation of this particular chapter of  
31 the NAFTA.

32           So to suggest, as my friends have, that the  
33 policy considerations that were developed for this  
34 hands-off approach to judicial review of private  
35 international commercial arbitration should govern  
36 the judicial review of this type of arbitration,  
37 in our respect -- respectful submission makes no  
38 sense at all.

39           And so we stand by our observation that if  
40 you were to apply the general approach that  
41 Mustill and Boyd suggest in the excerpt that I  
42 quoted to you last week, having regard to the

43 peculiar dynamics of this particular form of  
44 arbitration, it makes little sense to apply the  
45 peculiar dynamics of private international  
46 commercial arbitration in judicial review of  
47 that.

Charest Reporting Inc. (604) 669-6449

1           Now, the -- I think it was really a  
2 subsidiary point, but the second point that I -- I  
3 think is appropriate to respond to in respect of  
4 this issue is the suggestion that Section 27 of  
5 the Commercial Arbitration Act deals with this  
6 issue, and in my respectful submission it  
7 doesn't. And the reason for that is that Section  
8 27 contemplates that the party applies to the  
9 arbitration panel requesting that it make an  
10 additional award with respect to the claims  
11 presented in the proceeding.

12           Well, Mexico didn't present a claim in the  
13 proceeding below. Mexico was answering claims.  
14 And it is a reversal of the statutory scheme, if I  
15 can suggest here, to suggest that the respondent  
16 who makes no claims in the proceeding below should  
17 invoke Section 27 of the act to request that some  
18 claim be addressed by the arbitrator. It makes no  
19 sense.

20           In addition, with respect to Section 33,  
21 which is the section of the Commercial Arbitration  
22 Act which permits a party to go back to the  
23 tribunal for additional reasons, I had addressed  
24 this before, and I just remind the Court that  
25 the -- again, at the ICSID level there is a -- the  
26 same rule, you may go back to the tribunal. But  
27 as the Amco annulment committee made clear, and  
28 this is -- I'll just remind you it's tab 4,  
29 paragraphs 35 to 37, there is no need for a party  
30 to go back to the tribunal for supplementary  
31 reasons if the request is to undo what has been  
32 done already by the tribunal.

33           This is not a question of supplementary  
34 reasons. This is a question of saying there are  
35 very large parts of the Mexican defence, both  
36 factual and legal, that are neither adverted to  
37 nor addressed by this award. But to do so would  
38 be of course to contradict the reasons that are  
39 addressed in what the United States itself has  
40 called fairly sparse reasons.

41           Now, we see that this can amount to arbitral  
42 error under Section 30 of the Commercial

43 Arbitration Act. And if we're governed by the  
44 International Commercial Arbitration Act, then  
45 Section 34(2)(a)(v) is the provision which gives  
46 jurisdiction to the Court to address this problem,  
47 and that is the jurisdiction to intervene where

Charest Reporting Inc. (604) 669-6449



1 the arbitration was not in accordance with the  
2 parties' agreement.

3 As I mentioned, the international authorities  
4 are clear that this is a fundamental procedural  
5 rule. It's not something which in the private  
6 domestic commercial arbitration sense stops. It's  
7 not as if the arbitral process stops as in private  
8 international commercial arbitration and the award  
9 is something different. It's considered to be  
10 part and parcel to the arbitral process itself.

11 Now, I don't think there's anything that has  
12 to be said more about that line of argument from  
13 Metalclad.

14 I'd like to turn to public policy.

15 Mr. Cowper did not spend much time on the issue in  
16 his oral presentation, but Metalclad has addressed  
17 public policy issues in its outline, and I think  
18 it's appropriate for us to respond to them.

19 First, I have not seen in the outline an  
20 attempt to say that Metalclad did not misrepresent  
21 its expenditures. I see it as being treated as a  
22 situation where this was raised before the  
23 tribunal. It was a matter of proof, therefore  
24 this is something which ought not to concern the  
25 Court.

26 But I'd like you to turn, if you would, to  
27 paragraph 124 of the award where the tribunal  
28 deals with the question of damages. And you'll  
29 see that the tribunal describes Mexico's  
30 objections to the 20.4 million as challenging the  
31 correctness. They use the terms:

32  
33 "Mexico challenges the correctness of  
34 this..."

35  
36 Figure.

37 That's not an accurate statement of the  
38 Mexican position. Mexico challenged the veracity  
39 of the representation made by the expert and by  
40 the claimant in the pleadings in the expert  
41 report. And the -- the vast bulk of the  
42 cross-examination at the hearing was concerned not

43 only with the initial misrepresentations, but the  
44 chief financial officer's attempt to patch up and  
45 explain what had been done and clarify what had  
46 been done by using in some instances exhibits  
47 which were doctored.

Charest Reporting Inc. (604) 669-6449

1           This was covered in great detail by our  
2 expert's report. And this was a fundamental  
3 objection. This was not a question of -- of  
4 taking issue with the correctness of calculations  
5 there. We said they came in and misrepresented  
6 what they said they spent on this particular asset  
7 which is the subject of this arbitration.

8           Now, what Mr. Cowper seems to be saying is  
9 that there's no need for judicial intervention on  
10 public policy grounds if the claimant was caught  
11 in the proceeding below and the tribunal heard  
12 that evidence. And so he says that European Gas  
13 is distinguishable because European Gas deals with  
14 the situation where after the initial arbitral  
15 award this fresh evidence was discovered.

16           We do not read that case so narrowly. We say  
17 that this tribunal in oral proceedings and in the  
18 post-hearing submission, and in fact in the  
19 rejoinder and the counter-memorial, going all the  
20 way back to our first pleading, was put squarely  
21 on notice that this claimant had falsely  
22 misrepresented central factual predicates of its  
23 claim. The construction costs on the one hand,  
24 the filing of the expert's report that said they  
25 did not know about the -- about the municipal  
26 permit. So we said that the experts -- experts  
27 had been used to perpetrate a fraud on the  
28 tribunal, that this claimant was misleading the  
29 tribunal.

30           Now, in our respectful submission, Mexico was  
31 entitled to have the tribunal's views on this  
32 question. It was not a question, as Mr. Cowper  
33 suggested, that was weakly argued and abandoned  
34 later on. Ten pages of the post-hearing  
35 submission were devoted to the proposition that at  
36 public international law a State is under the duty  
37 of utmost good faith to advance a claim. This is  
38 settled law. And we said if a State is under that  
39 duty, a private party that steps into the shoes of  
40 the State to enforce international obligations is  
41 likewise subject to that duty.

42           Now, if the tribunal said Mexico has made

43 this argument, we disagree. There is no duty of  
44 good faith upon a claimant. I have no complaint  
45 for that particular part of Article 53. They've  
46 addressed the issue. They've dealt with the  
47 issue. They've rejected my argument. This award

Charest Reporting Inc. (604) 669-6449

1 is silent on that issue.

2 Similarly, in our rejoinder, at the hearing,  
3 and in the post-hearing submission, Mexico devoted  
4 considerable time to the relationship between the  
5 former senior Mexican environmental official,  
6 Rodarte, and Metalclad. We said that he was in an  
7 improper relationship with Metalclad. And we said  
8 that there had been bribes paid to him through his  
9 wife. This was not a white poker chip. There's  
10 two payments of \$20,000 in total. And there's the  
11 issuance of 30,000 shares of Metalclad stock in  
12 February of 1993 after the issuance of a federal  
13 permit to Metalclad for a -- one of their other  
14 projects.

15 Now, our expert valued that at -- they  
16 were -- they're restricted shares, we agree with  
17 that. They couldn't be freely traded at that  
18 time. But had they been looked at in regard to  
19 their market price, it was a -- it was -- about  
20 \$150,000 was what those shares were worth if  
21 traded. The tribunal turned a blind eye to that.

22 And we say that rewarding a NAFTA claimant  
23 who engaged in these sorts of acts is contrary to  
24 the public policy of British Columbia.

25 In this respect, My Lord, I point out that  
26 European Gas is relevant to this consideration in  
27 one other way. When we began this proceeding we  
28 were operating on the assumption that Metalclad  
29 would take the position that it's not appropriate  
30 to look at the record at all, that the Court would  
31 be confined to the award. Of course, it has not  
32 done so itself.

33 But European Gas makes it clear that not only  
34 may the Court look at the record where it's  
35 alleged that there's a breach of public policy, it  
36 may substitute its own views for the views of the  
37 tribunal below.

38 Now, I'm going to turn to this discussion in  
39 the -- in the Metalclad outline about the Rodarte  
40 relationship. I notice that Mr. Cowper didn't  
41 spend any time on that.

42 But before I do that, I do want to respond to

43 one point that he made, which is that Mexico -- he  
44 said that Mexico took the position below that his  
45 client should not be able to trifle with the  
46 NAFTA. And -- and I say with the greatest of  
47 respect, that's not a fair characterization of

Charest Reporting Inc. (604) 669-6449

1 Mexico's position.

2 What Mexico argued below was that there is  
3 this duty of good faith. And we don't object to  
4 the idea that Metalclad could advance a Chapter 11  
5 claim. We said that if it advances a Chapter 11  
6 claim, then it should do so honestly and  
7 forthrightly, and we say it didn't do so.

8 Now, Mr. Foy has touched on this this  
9 morning, and I'll just repeat just one -- one  
10 point here. Mr. Cowper is -- is correct that the  
11 arbitral process in the additional facility rules  
12 is continental in flavour in the sense that there  
13 is a -- a substantial emphasis placed upon the  
14 written phase of the proceeding. And the idea of  
15 the written phase is that all of the  
16 contemporaneous documents which pertain to the  
17 issues in dispute, together with the written  
18 testimony of the various witnesses, is gathered  
19 and then filed along with the legal argument of  
20 the parties. So that is continental in -- in its  
21 flavour.

22 But the -- the proceeding, the oral  
23 proceeding is very much influenced by the common  
24 law. And I would submit that it was certainly the  
25 understanding of both sides that the confrontation  
26 of witnesses was an important element of the -- of  
27 the oral phase.

28 Now, at page -- at paragraph 436 of the  
29 outline, you'll -- you know that there were these  
30 allegations. Mr. -- Mr. Cowper has alleged, as  
31 indicated, there were allegations made by  
32 Metalclad about improper acts on the -- behalf  
33 of -- on the -- on the other side, on the Mexican  
34 side.

35 At paragraph 436 of their outline, Metalclad  
36 states that it told the tribunal at the hearing  
37 that it would be unable to prove its allegations  
38 of corruption. And I don't believe that that's an  
39 accurate statement of what happened at the  
40 tribunal. What happened at the tribunal is that  
41 it did not attempt to prove its allegations of  
42 corruption.

43       And Mr. Foy pointed out to you before,  
44       My Lord, that there were at least five witnesses  
45       that gave witness statements from the government  
46       of Mexico's side that Metalclad required to attend  
47       to the proceeding. And serious allegations of

Charest Reporting Inc. (604) 669-6449



1 misconduct and illegality had been made by  
2 Metalclad against all five of those witnesses.  
3 When they arrived in Washington, D.C. and spent  
4 some time at the hearing, three of them were  
5 excused. So they were never confronted by  
6 Metalclad with respect to the very serious  
7 allegations that they had made.

8 Mr. Rodarte, in his first witness statement,  
9 alleged that Metalclad's former legal counsel  
10 suggested bribing the governor. So Mexico's  
11 former legal counsel responded to -- or  
12 Metalclad's former legal counsel responded to that  
13 allegation and denied it hotly, to use  
14 Mr. Cowper's term. He was called to testify. He  
15 was excused.

16 The governor was alleged to be corrupt. He  
17 was called to testify. He did testify. He did  
18 not have any allegations of bribery put to him.

19 Dr. Medellin was alleged to be corrupt. It  
20 was alleged by Metalclad in the written -- written  
21 phase that bribes were funneled to him through his  
22 wife. Dr. Medellin filed a witness statement  
23 showing that his wife was terminally ill and died  
24 in the material period. He also filed his income  
25 tax statements and his statement of assets in an  
26 attempt to rebut this allegation and defend his  
27 name. He testified. He wasn't challenged. He  
28 wasn't confronted by Metalclad.

29 Now, Mexico did confront the Metalclad  
30 witnesses on its allegations. And we took them  
31 through these in detail in the cross-examination.

32 Now, what happens now? Not having confronted  
33 these witnesses at the hearing, now we come back,  
34 and we have Metalclad asserting to this Court that  
35 it has the moral certainty that there is  
36 corruption involved. It didn't take the  
37 opportunity below to confront these witnesses. It  
38 says now though that it couldn't -- it couldn't  
39 prove it and had the moral certainty. And what it  
40 does is it attempts to use the witness statement  
41 of Ambassador James Jones, former Ambassador James  
42 Jones, to in a sense validate its position.

43 Well, I'm going to suggest to you, My Lord,  
44 that Ambassador James Jones as an ambassador had  
45 very little personal knowledge of what happened in  
46 Guadalcazar and San Luis Potosi, and I'll take you  
47 to some evidence of that in a minute.

Charest Reporting Inc. (604) 669-6449

1           Ambassador Jones was -- his involvement in  
2 this file was at the instance of Metalclad  
3 pressing the Mexican federal government to open up  
4 this facility over the objections of the local  
5 citizens and the municipal council.

6           Now, if you'd turn to tab 13 of the  
7 supplementary binder here, My Lord, Metalclad  
8 filed a witness statement from a United States  
9 Department of Commerce official by the name of  
10 Kevin Brennan. And Mr. Brennan was the embassy  
11 official who was responsible for this file.

12           Now, he filed a witness statement. And  
13 Mexico intended to call him for  
14 cross-examination. The U.S. Commerce Department  
15 refused to allow him to be cross-examined. What  
16 it allowed Mexico to do was to interview him by  
17 telephone. And so this letter is a transcription  
18 of the interview that was held with Mr. Brennan.  
19 And in the first page you'll see a variety of  
20 people who witnessed the telephone call.

21           Now, if you'd just turn, My Lord, to  
22 paragraph 13, this may explain why the  
23 United States government was so supportive of  
24 Mexico. Paragraph 13 says:

25  
26           "You stated that at your first meeting..."

27  
28           This is reference to Mr. Brennan's  
29 interview.

30  
31           "...you were informed that the previous  
32 Mexican owners had contaminated the  
33 La Pedrera site. You recall that  
34 Mr. Kesler informed you that Metalclad's  
35 intention was to first completely remediate  
36 the site before accepting new waste. You  
37 believe that this was further repeated to  
38 the ambassador in several meetings."

39  
40           Now, to be fair to Metalclad, at the hearing  
41 one of Metalclad's witnesses, Mr. Neveau,  
42 testified that Mr. Brennan was wrong on this

43 point. He -- he said that Mr. Brennan was not  
44 correct. This is what Mr. Brennan's recollection  
45 of the remediation question was. And at number  
46 14:  
47

Charest Reporting Inc. (604) 669-6449

1 "You stated that in 1994 it was your  
2 understanding that there was no local  
3 opposition to the site. You stated that  
4 Metalclad did not raise this with you at  
5 the outset of your dealings with it. You  
6 believed the local opposition did not arise  
7 until much later."

8

9 15:

10

11 "In response to the question were you aware  
12 that this was a new business venture for  
13 Metalclad, you responded that it was your  
14 understanding that Metalclad had been in  
15 the toxic waste remediation business for  
16 some time."

17

18 Now, I can tell you, My Lord, that Mr. Kesler  
19 admitted under cross-examination, and he could not  
20 run from this one, Metalclad had never sited a  
21 hazardous waste landfill, never operated a  
22 hazardous waste landfill, it had never constructed  
23 one before. It had a small industrial insulation  
24 business and asbestos abatement business in  
25 California. The Mexican hazardous waste business  
26 was an entirely new business initiative for  
27 Metalclad.

28 Now, when -- and what happened -- and this is  
29 why Met -- Metalclad's previous disclosures to its  
30 shareholders in its previous announcements were  
31 adverted to by Mexico, because it went into  
32 Mexico, it announced Eco Administracion in  
33 November of 1991. It was going to build a  
34 hazardous waste incinerator in San Luis Potosi.  
35 Nothing ever happened there. They bought the  
36 land, but they abandoned the project.

37 They then announced they would do one in  
38 Veracruz, another incinerator. They never did  
39 anything on that.

40 They did one -- they then announced  
41 Tamaulipas. This was all done in the space of  
42 four months, they made these three announcements

43 of hazardous waste incinerators, none of which was  
44 ever built.

45 Then they came upon the landfill through  
46 Mr. Rodarte. A landfill is much, much cheaper to  
47 construct than a hazardous waste incinerator.

Charest Reporting Inc. (604) 669-6449

1 There's absolutely no comparison in the cost of  
2 building the facilities.

3 And we made the suggestion to the tribunal  
4 that if you looked at the history of this  
5 company's announcements and activities in Mexico,  
6 that it -- it pursued this when they were warned,  
7 and they admitted, Mr. Neveau admitted, that in  
8 January of 1994 the State said you should go to  
9 another site in the State, this has too many  
10 problems associated with it. But they've made so  
11 many announcements to the investing public that  
12 they proceeded with this investment and proceeded  
13 to construct.

14 And what happened is that in the summer of  
15 1994, when Mr. Neveau had -- when they've already  
16 had objections raised by the municipality, when  
17 Mr. Neveau has been -- has been contacted by  
18 counsel and -- and recommended that they apply for  
19 the permit, Mr. Neveau is saying don't apply for  
20 the permit, they're enlisting the assistance of  
21 the United States embassy to force a top-down  
22 solution to this problem.

23 We laid all this evidence out. It was an  
24 important part of the Mexican case, because it  
25 explained the pressure that was being placed to  
26 resolve this politically. And we -- we also  
27 pointed out to the tribunal that what was being  
28 told to the embassy was not what was going on on  
29 the ground.

30 Now, in this proceeding now what they're  
31 saying is that Ambassador Jones validated their  
32 conduct because there had been information  
33 provided to Ambassador Jones about alle --  
34 allegations of breaches of the United States  
35 Foreign Corrupt Practices Act.

36 It's true. Governor Sanchez Unzeuta  
37 transmitted to the ambassador documents which --  
38 which related to his view and the view of  
39 Metalclad's former legal counsel that Mr. Kesler  
40 wanted to bribe the governor by paying him  
41 \$1 million. And that information was passed on to  
42 the United States ambassador.

43       The information about Rodarte was never put  
44       before the United States embassy, because  
45       it wasn't discovered until after two rounds of  
46       pleadings in this proceeding. After Metalclad  
47       filed its reply, it was discovered by Mexico.

Charest Reporting Inc. (604) 669-6449



1           So the suggestion in these pleadings that the  
2 United States government validated what had  
3 happened and said there was no -- no evidence for  
4 a breach of the Foreign Corrupt Practices Act is  
5 misleading, because the evidence that was  
6 discovered was never put to the United States  
7 government when Ambassador Jones was there.

8           If you look at paragraph 21 of Mr. Brennan's  
9 interview:

10  
11           "In response to the question did you ever  
12 inquire of Metalclad whether it had engaged  
13 in bribery or any other irregular activity  
14 such as making payments to federal  
15 officials in connection with the issuance  
16 of federal permits, you stated that you put  
17 the question directly to Mr. Kesler and he  
18 told me flatly they had not made any  
19 payments to federal officials and that he  
20 was fully aware of the Foreign Corrupt  
21 Practices Act and that Metalclad would  
22 never violate it."

23  
24           Well, at the time that Mr. Brennan put this  
25 to Mr. Kesler they had signed the stock exchange  
26 agreement with Lucia Ratner. Two days later a  
27 federal permit was issued which triggered the  
28 payment of 30,000 shares to -- to Lucia Ratner,  
29 Mr. Rodarte's wife. So I guess technically Mr. --  
30 Mr. Kesler, when he says he didn't pay the federal  
31 official, I guess that's right. They paid his  
32 wife.

33           He then testifies -- or doesn't testify, he  
34 confirms that they -- that Ambassador Jones at  
35 paragraph 29:

36  
37           "...did forward Governor Sanchez Unzeuta  
38 materials pertaining to allegations against  
39 Metalclad to the Department of Justice, but  
40 included a commentary authorized by you..."  
41 Mr. Brennan "...and reviewed by the  
42 ambassador which stated that in your

43 opinion there was no basis for an  
44 investigation."  
45  
46 Then the next point, paragraph 30:  
47

Charest Reporting Inc. (604) 669-6449

1 "You confirmed that you were aware prior  
2 to the writing of your October 2nd, 1996  
3 file note..."

4  
5 There's a file note on the status of the  
6 Metalclad situation.

7  
8 "...that Metalclad alleged that a Mexican  
9 company, RIMSA, was bribing Mexican  
10 officials in order to fulmen opposition to  
11 Metalclad's landfill project."

12  
13 I'll say parenthetically, My Lord, that RIMSA  
14 figured prominently in the first round of written  
15 pleadings. RIMSA was never once mentioned at the  
16 hearing in connection with alleged bribery or  
17 trying to fulmen opposition. It was only ever  
18 adverted to in the entire hearing for two weeks in  
19 relation to its landfill capacity for damages, yet  
20 that was the central part of its initial case.

21 31:

22  
23 "You confirm that at some point you became  
24 aware the U.S. Corporacion Chemical Waste  
25 Management controlled RIMSA. You confirmed  
26 further that the embassy did not forward  
27 any such allegations or documents relating  
28 thereto to the Department of Justice  
29 concerning any potential violations of the  
30 Foreign Corrupt Practices Act by Chem  
31 Waste. You stated I guess I was waiting  
32 for more documentation. You stated that  
33 Mr. Kesler said about RIMSA Chem Waste  
34 [sic] did not constitute enough and that he  
35 was waiting for more. You stated that  
36 during the time you served at the embassy,  
37 you departed in January of 1999, you did  
38 not receive any more evidence linking RIMSA  
39 to the governor. You do not know whether  
40 anyone else at the embassy received such  
41 documents. You stated that you considered  
42 the RIMSA issue a work in progress that was

43 put aside when Metalclad resorted to the  
44 NAFTA arbitration process."  
45  
46  
47 Now, I -- I suggested to you before that the

Charest Reporting Inc. (604) 669-6449

1 United States embassy didn't really understand  
2 what was going on on the ground. Look at  
3 paragraph 40.  
4

5 "You stated that you were unaware that in  
6 1990/91 while under Mexican ownership  
7 COTERIN had been...applied for and had been  
8 denied a municipal permit to construct a  
9 hazardous waste landfill at La Pedrera."  
10

11 Now, I note in the square brackets Mr. Pearce  
12 was on this call, this is Metalclad's counsel. He  
13 objected to this question saying that this fact  
14 was in dispute.

15 In fact, it was an admitted fact in the  
16 reply. As Mr. Foy has pointed out, it was  
17 admitted that as a matter of corporate record  
18 COTERIN had applied for and had been denied the  
19 permit.  
20

21 "And in response to the question did  
22 Metalclad claim to have been taken by  
23 surprise by the municipal permit issue, you  
24 replied yes. You confirmed your  
25 recollection was the way that Metalclad put  
26 it was this municipality never issued  
27 permits."  
28

29 MR. COWPER: Never issued permits, did he say?

30 MR. THOMAS: Yes, that's correct.

31 Now, as we got closer to the hearing,  
32 My Lord, the United States sent a letter which you  
33 should be aware of. It's at tab 12. And the  
34 United States became aware that former Ambassador  
35 Jones had filed a witness statement. And I'll  
36 read the paragraph:  
37

38 "It has come to the attention of the  
39 United States government that in the course  
40 of these arbitral proceedings the Metalclad  
41 Corporation has submitted to the tribunal a  
42 declaration signed by James R. Jones, a

43 former U.S. ambassador to Mexico.  
44 "On behalf of the United States  
45 government I am writing to inform you that  
46 the United States government did not review  
47 the statements contained in Mr. Jones's

Charest Reporting Inc. (604) 669-6449

1 declaration before it was signed, nor did  
2 the United States government authorize  
3 Mr. Jones to sign the declaration.

4 "The statements in Mr. Jones's  
5 declaration can only represent his personal  
6 views and should not be construed as  
7 expressing a position of the United States  
8 government on the issues before the  
9 arbitral tribunal."

10

11 This is signed by the senior legal advisor of  
12 the Department of State in Washington.

13 As I've mentioned to you, Mr. Brennan was  
14 pre -- precluded from attending for  
15 cross-examination. We were not able to  
16 cross-examine him, but we considered that there  
17 was sufficient evidence in his statement which was  
18 put before the tribunal to show that the key case  
19 officer in the United States embassy was  
20 uninformed about the true facts of this particular  
21 investment.

22 And I direct you to this evidence because it  
23 was -- we did not find it necessary to  
24 cross-examine Mr. Jones. We thought that it would  
25 be inappropriate to embarrass him when -- when he  
26 was relying upon the advice of his officials who  
27 in turn had relied upon the advice of Mr. Kesler.

28 Now, I'm going to spend just a few minutes on  
29 the Rodarte relationship.

30 I note, My Lord, that when you read the  
31 section of the outline, this is paragraphs 442 to  
32 451 of Metalclad's outline, with the exception of  
33 one reference to Mr. Kesler's cross-examination,  
34 there's not any reference to the record evidence.  
35 And I -- and I take this to be Metalclad's  
36 writing. I do not take it to be my friend's or  
37 Mr. -- or Professor Coe for that matter. I take  
38 it to be the client here.

39 At paragraph 315, for the first time in the  
40 entire proceeding Metalclad has linked Rodarte's  
41 wife directly to COTERIN. This is completely  
42 inconsistent with the underlying cor -- underlying

43 corporate documents. Tabs 32 and 33 of Volume 2  
44 of the selected extracts that I took you through  
45 before indicate that she was a shareholder of Eco  
46 Administracion, which -- and then exchanged her  
47 shares in Eco for shares of Metalclad stock in

Charest Reporting Inc. (604) 669-6449



1 these cash payments. That was done in February of  
2 1993.

3 Mr. Kesler admitted under cross-examination  
4 that he was aware at the time that he signed the  
5 agreement with Mrs. Rat -- Mrs. Rodarte that she  
6 was the wife of a senior federal environmental  
7 official. Two days later a federal permit was  
8 issued and she became entitled to 30,000 shares of  
9 Metalclad stock.

10 I -- I -- although this connection between  
11 Rodarte's wife and COTERIN is repeated at  
12 paragraph 450(a) of this outline, it -- it's -- it  
13 cannot be correct, because to our knowledge this  
14 was never the case in the underlying documents on  
15 the record.

16 If it is true that she was a minority  
17 shareholder of COTERIN and we were unaware of  
18 that, that ties Rodarte's corruption even more  
19 closely to the investment which was the subject of  
20 this arbitration. At paragraph 443 it states:

21  
22 "In 1991 Rodarte while an employee of the  
23 Mexican federal government acted as a  
24 consultant to Eco Administracion."  
25

26 This, My Lord, is a revelation to Mexico.  
27 There is no record evidence in the proceeding  
28 below that -- that Rodarte acted as a consultant  
29 to Eco Administracion. No Mexican witness, no  
30 Metalclad witness testified either in writing or  
31 at the hearing that he was a consultant to Eco  
32 Administracion. And it -- moreover, it's  
33 implausible. If he was a consultant while being a  
34 full-time federal official in San Luis Potosi, why  
35 did he receive his remuneration through shares  
36 issued to his wife?

37 In addition to being incompatible with his  
38 duties at the time as -- being a full-time  
39 government official, this is a very uncommon form  
40 of payment in our submission.

41 Paragraph 443 continues to discuss this idea  
42 of the retainer of Rodarte by Eco, no record

43 evidence of that.  
44 At page -- at paragraph 443 they say that  
45 Mexico did not adduce any evidence at the hearing  
46 demonstrating that any Mexican law had been  
47 breached by Rodarte. Well, I suppose that's

Charest Reporting Inc. (604) 669-6449

1 technically correct, because we adduced evidence  
2 in our rejoinder that Rodarte was acting  
3 inconsistently with the Mexican law that dealt  
4 with federal employees. And that's -- there's no  
5 need to go to it, but it's at the rejoinder,  
6 paragraphs 150 to 178, particularly footnote 158.  
7 It's -- so paragraphs 150 to 178, particularly  
8 footnote 158 which discusses the federal law  
9 prohibiting consultancies such as the one now  
10 being described.

11 In paragraph 444 it's said -- it's stated  
12 that in response -- in its response to  
13 Metalclad -- Mexico's allegations against Rodarte,  
14 Metalclad adduced evidence that it had never  
15 received any type of benefit from the consultation  
16 relationship between Eco and Rodarte.

17 Mexico is unaware of any record evidence in  
18 the proceeding below that Metalclad had never  
19 received any type of benefit from the consultation  
20 relationship between Eco and Rodarte. If that's  
21 true, it actually underscores the impropriety of  
22 the relationship between his wife and Eco  
23 Administracion and then Metalclad. If they're not  
24 getting any benefits, why did they get 30,000  
25 shares of stock and \$20,000 in cash?

26 At paragraph 446 it is stated in the -- the  
27 sentence they talk about the swap of shares, and  
28 they say:

29  
30 "Under the terms of the share exchange  
31 agreement all..."

32  
33 That's emphasized.

34  
35 "...shareholders of Metalclad would  
36 receive cash and shares."

37  
38 That's not true. All shareholders of  
39 Metalclad did not receive payments of cash and  
40 shares upon the attainment of permits. Metalclad  
41 was a publicly traded company in the  
42 United States. There's no evidence on the record

43 below that all Metalclad shareholders were getting  
44 cash and shares when federal permits were being  
45 issued in Mexico.

46 And to the extent that Ratner is linked with  
47 the other shareholders of Eco, we adduced

Charest Reporting Inc. (604) 669-6449

1 evidence -- and if you look at tab 14 of our  
2 materials that we've just handed up to you,  
3 My Lord, where we showed that if you compare Lucia  
4 Ratner to another shareholder of Eco, Jaime de la  
5 Fuente, he had 1,700 shares in Eco, but he also  
6 had 2,150 shares of Descontaminadora and 1,550  
7 shares of Eliminacion. Ratner had 400 shares of  
8 Eco, none in the other two companies.

9 Yet if you look at the terms of her  
10 agreement, which we went through before, when  
11 federal permits, environmental permits were issued  
12 to any of those companies or a company known as a  
13 Schedule 3 company, and we don't know what that  
14 is, she became entitled to payments of cash and  
15 shares.

16 And I put it to Mr. Kesler that, like, why  
17 were they wasting corporate resources for  
18 remunerating her for developments relating to  
19 companies that she had no shareholding interest in  
20 which she -- that was conveyed to them? And his  
21 response was she was being treated like everyone  
22 else. She wasn't. She was in a different  
23 position from everyone else.

24 Paragraph 447:

25  
26 "Mexico has asserted that Rodarte received  
27 an improper commission arising out of the  
28 acquisition of COTERIN by Metalclad. While  
29 Metalclad was aware that Rodarte asserted  
30 that he had an agreement with Eco, it was  
31 ultimately determined by Metalclad that no  
32 such agreement existed. As a result, no  
33 commission was ever paid by Metalclad or  
34 Eco to Rodarte."

35  
36 This doesn't accurately reflect the evidence  
37 in three respects. Mexico did not assert that  
38 Rodarte received an improper commission. Mexico  
39 asserted at paragraph 162 of its rejoinder that  
40 Rodarte negotiated an improper commission to  
41 arrange the sale of COTERIN to Metalclad. We had  
42 no evidence as to whether or not the commission

43 was ever paid.  
44 The second and third sentences of this  
45 paragraph I just read to you are misleading. It  
46 was not a -- Mr. Kesler did not testify under  
47 cross-examination that it was ultimately

Charest Reporting Inc. (604) 669-6449

1 determined by Metalclad that no such agreement  
2 existed. What he testified at -- about was -- and  
3 this is at -- I'll just read you it, it's at tab  
4 10 of Volume 3 -- or, sorry, Volume 2 -- I think  
5 it's -- sorry. I'll have to check that. It's --  
6 it's in the materials I've already provided to  
7 you, but I'll read you the quote, My Lord:

8  
9 "Q. And in fact Metalclad agreed to  
10 protect that commission when Mr. Rodarte  
11 went to work for Metalclad subsequently,  
12 correct?

13 A. Yeah. He asked us will you support  
14 and protect my right. And we said if you  
15 have an agreement, we'll support and  
16 protect that, because we also have a  
17 relationship with Aldrett where we can use  
18 influence to protect your position. Yes,  
19 we will.

20 Q. Did he disclose to you that he had a  
21 commission arranged with Mr. Aldrett at the  
22 time that he introduced you to the  
23 investment opportunity?

24 A. Quite the contrary. Mr. Aldrett  
25 claimed that he had no agreement with  
26 Mr. Rodarte. So for us to then promise to  
27 protect Rodarte, we kind of knew it was an  
28 empty promise, because it was all dependent  
29 upon whether or not there was an agreement,  
30 and one said there was and one said there  
31 wasn't."

32  
33 Now, there's two contemp -- contemporaneous  
34 documents that are inconsistent with that. At tab  
35 20 they clearly negotiated an agreement. This is  
36 the first version, this is August the 4th, 1994.  
37 It's a letter from Chairman of the Board Dan  
38 Neveau to Humberto Rodarte. It sets out in point  
39 form the terms of the relationship between the two  
40 parties. You'll see last line in the bullet  
41 points:  
42

43 "La Pedrera/COTERIN comm."  
44  
45 THE COURT: Sorry, I'm not with you.  
46 MR. THOMAS: Sorry. Tab 20 of the new -- of the  
47 Volume 3 I gave you, My Lord.

Charest Reporting Inc. (604) 669-6449



1 THE COURT: Of the supplementary?  
2 MR. THOMAS: Supplementary tab 20.  
3 THE COURT: Do I have -- what I have under tab 20 is a  
4 letter from the Department of Commerce.  
5 MR. THOMAS: Oh, I'm sorry. It's in the wrong form.  
6 I've -- I've got a record of it. I'll pass up to  
7 you. It's -- it should be in there. Perhaps it's  
8 just my mistake.  
9 THE COURT: It's under tab 19.  
10 MR. THOMAS: Okay. So --  
11 THE COURT: I think tab 19 and 20 probably got --  
12 MR. THOMAS: Mixed up. Thank you.  
13 THE COURT: -- transposed. Um-hum.  
14 MR. THOMAS: So here we have in the -- in the bullets  
15 that go down, you see in the bottom of the  
16 indentated -- indented bullets:  
17  
18 "La Pedrera/COTERIN commission.  
19 By agreement and protection of Aldrett  
20 arrangement \$25,000 or equivalent stock at  
21 H.R..."  
22  
23 I take that to be Humberto Rodarte's:  
24  
25 "...choice in 60 days from date."  
26  
27 And then in the last line -- second-to-last  
28 line of the page:  
29  
30 "This summary is our agreement and  
31 understanding."  
32  
33 And, My Lord, there -- this is later on  
34 included in another agreement which is at tab 40  
35 of Volume 2. And you may recall that when I took  
36 you through this evidence before, I took you to  
37 a document done in January of 1996 where there's a  
38 recital by Mr. Rodarte that he acted as -- he  
39 acted on behalf of the vendors of COTERIN in  
40 arranging the sale of COTERIN to Metalclad. So he  
41 recites that in the recitals part of the  
42 agreement.

43       The sixth clause of that agreement is  
44   entitled "Payment of Commission."  
45  
46       "Metalclad agrees that in the event in the  
47   future it owes some amount to the sellers

Charest Reporting Inc. (604) 669-6449

1 of the shares of COTERIN, which debt is  
2 payable and requires to be paid to said  
3 sellers and is not subject to set-off or  
4 withholding by Metalclad due to some legal  
5 cost, Metalclad will pay out of such amount  
6 owed and payable as mentioned above 5  
7 percent to the consultant until..." such  
8 time "...until...until the total sum paid  
9 to the consultant pursuant to this clause  
10 amounts to U.S. \$100,000."  
11

12 So he's now of course a consultant because  
13 according to his evidence he's been working for  
14 Metalclad in the open since sometime in the summer  
15 of 1993. And he -- at this time he's leaving  
16 Metalclad and he's being considered a consultant  
17 for the purposes of that.

18 He was not, and there is no record evidence  
19 that he was, a consultant back in 1991/92. But  
20 here is evidence, contemporary documentary  
21 evidence, which shows that whether Metalclad  
22 agreed to pay the commission or not or whether  
23 Metalclad paid the commission, it agreed to pay  
24 the commission. And there's two separate pieces  
25 of contemporaneous documents put before the  
26 tribunal on this evidence -- on this relationship.

27 So then when I go to paragraph 441 of the  
28 outline, we have another implicit finding of the  
29 tribunal described by Metalclad where it states:

30  
31 "The tribunal's finding of good faith,  
32 implicitly rejecting Mexico's allegations,  
33 was a finding of fact based upon a review  
34 of the whole of the evidence and the  
35 weighing of the credibility of the various  
36 witnesses who gave testimony on this  
37 issue. For example, U.S. Ambassador to  
38 Mexico James Jones testified in writing  
39 that American authorities had investigated  
40 allegations of corrupt foreign practices  
41 against Metalclad and had determined that  
42 the allegations had no merit. As a result,

43 while the evidence did not support Mexico's  
44 allegations of corrupt foreign practices,  
45 even if Mexico's assertion that the  
46 tribunal made an incorrect finding of fact  
47 on this point is correct, such an error..."

Charest Reporting Inc. (604) 669-6449

1

2 Et cetera, et cetera.

3

4 Well, notice the term -- the language "as a  
5 result," the implication being that this evidence  
6 that I've just taken you through is what  
7 Ambassador Jones took and referred to the  
8 Department of Justice. He didn't have it because  
9 it wasn't discovered for two years after.

9

10 Now, Mr. Cowper said that \$10,000 to  
11 Mrs. Ratner was a white poker chip, and we don't  
12 share his view with respect to public policy. It  
13 was larger, first of all. But we don't see  
14 Rodarte's role in this proceeding as being  
15 minimal. He was the only federal official who  
16 testified as to these assurances being given.

16

17 Metalclad itself has shown in its outline  
18 that his evidence -- they consider his evidence to  
19 have been important to the tribunal's findings,  
20 because they cite his evidence as supporting the  
21 award at paragraphs 291, 299, 302 and 314 of the  
22 award -- of -- of their outline. So on four  
23 separate occasions they're saying that his  
24 evidence was supportive of these findings.

24

25 We actually directed the tribunal to other  
26 evidence relating to Mr. Rodarte in addition to  
27 all of this. And you'll recall the March 10th,  
28 1995 demonstration. It was a very telling witness  
29 statement put in by Metalclad which we directed  
30 the tribunal to. And it was a declaration of a --  
31 a man by the name of Anthony Talmantez,  
32 T-A-L-M-A-N-T-E-Z. And he was at the  
33 demonstration. He was a Metalclad contractor.  
34 And he says at paragraph 6:

34

35

36 "The demonstrators began yelling for  
37 Humberto Rodarte who had been inside one of  
38 the buses. They looked extremely unhappy  
39 and were insistent that they speak to him  
40 immediately. They were accusing him of  
41 taking kickbacks and selling out to the  
42 Americans."

42

43           And we refer to this at paragraphs -- at  
44           paragraph 334 of the rejoinder and following. And  
45           I would say, My Lord, that the local people may  
46           have been poor and uneducated but they were no  
47           fools. This man was a man who was representing

Charest Reporting Inc. (604) 669-6449

1 Metalclad, the man who was responsible in the  
2 first place for this contamination from the  
3 federal perspective, and the local people  
4 understood very well what his situation was.

5 Now, I'll just make one final note. I -- I  
6 have to record an objection to Mr. Cowper's  
7 characterization of -- of Leonel Ramos's  
8 testimony. Leo Ramos is the -- was the municipal  
9 president of Guadalcazar. Mr. Cowper did not have  
10 an opportunity to attend the hearing, and he  
11 didn't observe Mr. Ramos's demeanor.

12 I just want you to understand that this was  
13 in the -- this -- this hearing was held in the --  
14 the executive committee boardroom of the World  
15 Bank in Washington, D.C. The table is about 50  
16 feet long. Mr. Ramos is a -- is a -- not a  
17 well-educated man. He -- and he came into this  
18 hearing. And I think for any witness it would be  
19 an intimidating experience.

20 He was being cross-examined in English with  
21 Spanish translation, having the questions repeated  
22 to him in Spanish, and testifying in Spanish. The  
23 English transcript, I'm told by people who speak  
24 better -- much better Spanish than I do, does not  
25 do justice to the testimony, because this is a  
26 translation of what was said in Spanish. I think  
27 it's unfair, with the greatest of respect, to  
28 characterize Mr. Ramos's testimony in the way in  
29 which it was done yesterday.

30 But I will point out one other thing about  
31 witnesses, and that is: Mr. Kesler and  
32 Mr. Dabbene, the chief financial officer and  
33 the -- the chief executive officer and the chief  
34 financial officer, gave them -- were -- had  
35 negotiated employment agreements which gave  
36 themselves contingencies for the successful  
37 outcome of this case. This came out in  
38 cross-examination.

39 We also discovered -- we caught two of  
40 Metalclad's witnesses, Mr. Dabbene and Mr. Neveau,  
41 being coached. They were excluded. They were  
42 witnesses as to fact who were excluded from the

43 proceeding. It was obvious that Mr. Dabbene had  
44 been coached. And he admitted it under  
45 cross-examination. Mr. Neveau was caught out.  
46 And the president said to him when did you discuss  
47 this with Mr. Kesler? By that time Mr. Neveau

Charest Reporting Inc. (604) 669-6449



1 said, oh, well, some months ago. Well, the issue  
2 that he was caught out on had arisen three days  
3 previously or four days previously in the hearing.

4 There was a conflict in their testimony  
5 relating to the way in which they had terminated  
6 the services of their local lawyers. And there  
7 had been a dispute in the proceeding as to who  
8 fired who. Mr. Kesler under oath testified that  
9 Mr. Neveau was wrong in his written witness  
10 statement. And when Mr. Neveau was -- was  
11 cross-examined it was put to him: Did you know  
12 that Mr. Kesler disavowed your testimony? And he  
13 said yes. So he had obviously been coached on  
14 this key point at the time about who -- how the  
15 whole termination of the local lawyers related.

16 And it was an important issue at the time  
17 because it related to whether the lawyers fired  
18 the client for wanting to bribe the governor or  
19 whether the client fired the lawyers for wanting  
20 to bribe the governor. And they contradicted each  
21 other. And then Mr. Kesler went and spoke to  
22 Mr. Neveau. And I say that is clearly evident  
23 from the cross-examination transcript.

24 We say, My Lord, that among the many other  
25 issues that weren't addressed in this arbitral  
26 award that this issue had -- this issue should  
27 have been addressed by the tribunal. It was put  
28 to the tribunal at the hearing. It was put to the  
29 tribunal in post-hearing submissions, and we have  
30 a right to know what the tribunal's views are. We  
31 have a right to know whether it's prepared to  
32 accept the evidence of someone who has an improper  
33 relationship with the claimant. We have a right  
34 to know its view about the propriety of -- of  
35 compensating Metalclad for bribes. And we have a  
36 right to know about the misrepresentations that  
37 were made by this claimant.

38 As I said to you before, if this is the  
39 standard of conduct that is acceptable for  
40 claimants in Chapter 11 cases, it's open season on  
41 the NAFTA parties. And I say that's not what the  
42 parties contemplated. It's not what tribunals

43 should be -- should be tolerating. And because  
44 this tribunal manifestly failed to deal with the  
45 issues, we look to this Court to exercise  
46 corrective jurisdiction under the public policy  
47 rubric of the applicable statutes.

Charest Reporting Inc. (604) 669-6449

1 And that concludes my submissions, My Lord.

2 THE COURT: Thank you, Mr. Thomas.

3 I'll take the afternoon break now before we  
4 hear some reply from Mr. Cowper.

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

7

8 (AFTERNOON RECESS)

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

10 (PROCEEDINGS RESUMED AT 3:17 P.M.)

11

12 THE COURT: Perhaps I misinterpreted Mr. Thomas's --

13 MR. FOY: You did, My Lord.

14 Mr. Thomas took you to page -- to the --  
15 almost to the end of the outline, and I just  
16 wanted to add two points and then I'll -- or a few  
17 points and I'll close.

18 The first point is to take you to -- or to  
19 refer you to an authority with respect to the  
20 proposition that where there is a good-faith  
21 obligation on a party that an attempt to be  
22 purposely misleading in a claim disentitles the  
23 claimant to recover at all. And this is sole --  
24 solely by way of analogy, My Lord. The -- in the  
25 insurance context you'll be aware that there are  
26 situations in which a claimant owes a duty of good  
27 faith.

28 And at tab 1 of the authorities we've --  
29 refer -- of the supplementary authorities we've  
30 referred to a decision of the British Columbia  
31 Court of Appeal in which the proposition in that  
32 context, the common law proposition, is set out.  
33 And I'll just quickly read it at page 13, that --  
34 where Mr. Justice Macfarlane is quoting from a --  
35 an English decision of respectable vintage which  
36 says:

37

38 "The law is that a person who has made such  
39 a fraudulent claim could not be permitted  
40 to recover at all. The contract of  
41 insurance is one of perfect good faith on  
42 both sides."

43  
44  
45  
46  
47

And then it goes on to the -- it carries on  
elaborating that proposition. And over on page  
14:

Charest Reporting Inc. (604) 669-6449

1 "If there is a willful falsehood and fraud  
2 in the claim, the insured forfeits all  
3 claim whatever upon the policy."  
4

5 So Mexico argued that as a matter of law  
6 the -- that investors owe the same good faith in  
7 the advancement of this type of claim as is owed  
8 by a State. And by way of analogy to a  
9 proposition familiar to this Court, if that's  
10 correct in law, then that can have the result of  
11 forfeiting the claim.

12 Before I take you to the final section of our  
13 outline, the remedies available to this Court, I'd  
14 like to reply to Metalclad's final oration before  
15 closing its case.

16 Counsel for Metalclad argued that this was an  
17 investor taking advantage of an opportunity to  
18 call the State to account in circumstances where,  
19 absent the NAFTA, it was alleged the State was  
20 previously unaccountable. That was how this claim  
21 was characterized. And I say that that is not a  
22 fair characterization.

23 Metalclad's complaint, the gravamen of its  
24 complaint, was an ultra vires act against the  
25 municipality. That was an act entirely within the  
26 power of Metalclad to call the State to account in  
27 the domestic courts on an issue of Mexican  
28 domestic law.

29 Counsel for Metalclad asked you to imagine  
30 what the U.S. State Department would say if  
31 Metalclad asked the United States to espouse this  
32 claim. And I think that question could be asked  
33 at two levels, the first level -- or at two points  
34 in time. First, they could ask when -- right  
35 after the municipal permit denial. And I would  
36 suspect that the answer would be, well, you have a  
37 claim for an ultra vires complaint, have you gone  
38 to the Mexican courts? Go there and find out what  
39 the answer to this domestic issue is.

40 They could also ask that question after they  
41 had this award and say -- imagine the  
42 circumstances in which they go to the State

43 Department and say I have an award -- an award in  
44 the form of an opinion from three -- three eminent  
45 international lawyers, and it's in these terms,  
46 and we know -- and would you espouse a Chapter 11  
47 NAFTA claim?

Charest Reporting Inc. (604) 669-6449

1           We know from the position of the  
2 United States that their view is that opinion was  
3 wrongly decided. And I would note that the U.S.  
4 espouses the claims of U.S. nationals where  
5 appropriate on a -- an ongoing basis in the WTO.  
6 And the growing docket of the WTO dispute  
7 settlement body is -- is evidence of that.

8           The last page of the submission deals with  
9 the remedies available to this Court. We have not  
10 there set out any logical pathway for  
11 Your Lordship, but you've had -- you have our  
12 points in detail. The remedy that -- what we have  
13 set out are -- are the remedies that are available  
14 under the different statutes. The remedy we seek  
15 is an order setting aside the award.

16           Before closing, I would like to correct a  
17 misstatement that I made on the first day of these  
18 hearings and apologize to my colleague  
19 Mr. Perezcano. I said there were 26 States in  
20 Mexico. There are 31 States and 1 federal  
21 district.

22 THE COURT: Thank you, Mr. Foy.

23 MR. COWPER: Thank you, My Lord.

24           There are essentially two matters I need to  
25 deal with, and that is the -- exercising the  
26 privilege, and I under -- I appreciate it to be a  
27 privilege of sur-reply. And also --

28 THE COURT: Very few lawyers do appreciate that it's a  
29 privilege.

30 MR. COWPER: Well, thank you.

31           I also need to deal with the, I guess, three  
32 statements of position handed up by my friends  
33 this morning which you haven't heard me on at  
34 all.

35           I'm going to be very concise with respect to  
36 sur-reply, both because I think it's appropriate,  
37 and also Your Lordship has heard a great deal from  
38 everybody on this. I'm only going to concentrate  
39 on points in which I think my friend has made a  
40 point for the first time in his reply that you  
41 haven't heard me on.

42           I do want to say this though, one of the

43 themes of my friend's reply is that there's much  
44 agreement between us. I think I've lost count at  
45 about eight or nine. With respect to my friend,  
46 we remain in disagreement largely in this case,  
47 and I'm sorry that that is so.

Charest Reporting Inc. (604) 669-6449



1           It will of cos -- of course have to go to  
2 Your Lordship to determine what the correct view  
3 of the matters are. But I do not in respect of my  
4 friend's points of agreement he set out in his  
5 reply agree that he has either characterized our  
6 position or our arguments.

7           The next brief point I would like to make is  
8 that my friend submitted to you that with respect  
9 to the question of 1121 that there was no finding  
10 in the tribunal with respect to the interpretation  
11 of 1121 and that we had accepted that. I  
12 interpret the award as making both a -- a finding  
13 of 1121 and recording a concession.

14          You have heard both my friend and I on this  
15 point. I would ask you to read the transcript  
16 references I've given you. I do not believe my  
17 friend dealt with, either in his chief or reply,  
18 the transcript of the exchange between counsel and  
19 the tribunal.

20          My friend in his submission in reply said  
21 that you heard the words I think he said twice  
22 "local remedies" for the first time when I came  
23 to the very end of my argument. I started my  
24 submission on local remedies on Friday afternoon.  
25 I've looked at the transcript. I believe it  
26 appears as well extensively on Monday and  
27 Tuesday.

28          I -- I -- I simply say that Your Lordship  
29 ought to read that transcript, in fact if you  
30 disregard both of my friend's views on this and  
31 simply read the exchange between Mr. Thomas and  
32 the tribunal, I think it's manifestly clear that  
33 that was his submission as to local remedies based  
34 on an interpretation of 205.

35          So in reply, my friend says we were mistaken,  
36 it's an interpretation of 205. In the exchange  
37 between the tribunal and Mr. Thomas it is  
38 absolutely in my submission clear as clear could  
39 be that he was taking an interpretation of 205 to  
40 require exhaustion of local remedies as to  
41 municipalities only, which position was later  
42 withdrawn.

43 My friend in his reply stated that we had  
44 argued and urged upon you a duty of insurance to  
45 bring about an obligation of outcome or that that  
46 was the effect of the tribunal. And I simply --  
47 and I -- and I think he suggested that there was

Charest Reporting Inc. (604) 669-6449

1 some kind of agreement about that. I -- with  
2 respect, we construed and we argued that the  
3 tribunal in fact found that Metalclad had a lawful  
4 right to operate the facility as it sought to do  
5 so, that it was not complaining about the failure  
6 to obtain an outcome but rather failing in the  
7 ultimate case complaining about an unlawful  
8 exercise of authority.

9 I would ask -- my friend took you to  
10 paragraph 105 in his reply as it relates to the  
11 tribunal's finding concerning that authority. I'd  
12 ask you to look on to paragraph 106, over to the  
13 very next page; the tribunal refers to the  
14 municipality's authority over physical  
15 construction.

16 With respect to my friend's construction in  
17 his reply of annex 1120.1 and his urging upon you  
18 the interpretation that, properly interpreted, it  
19 is open to a party, he said, in Mexican law to  
20 seek violation of NAFTA itself, and that was the  
21 justification for 1120.1 I believe, or 1121.1, I  
22 simply ask you to note that that was the  
23 dissenting view of the dissenter in the Waste  
24 Management case. The majority view was to the  
25 contrary.

26 With respect to my friend's dealing with the  
27 various reply points on "commercial," I -- Mr.  
28 Alvarez has insisted that I tell you that he does  
29 not agree that my friend has stated his argument  
30 correctly.

31 I think of greater help to Your Lordship, and  
32 I just ask you when you come to this point, when  
33 you refer to our arguments, to look at the  
34 arguments and the sections which concern the  
35 submission respecting the relationship created by  
36 NAFTA itself as to the creation of an investment  
37 relationship and investment dispute and rights  
38 respecting an investment, and then to turn to both  
39 of my friend's principal and reply arguments and  
40 to ascertain whether there is any effective or any  
41 answer to those submissions.

42 My friend at -- in his reply referred to the

43 counter-memorial at paragraph 860. And he  
44 indicated that contrary to our reading that  
45 sentence ought to have emphasis on the term  
46 "authority."  
47 Do you recall it says --

Charest Reporting Inc. (604) 669-6449

1 THE COURT: Right, interpreting --

2 MR. COWPER: -- there is no authority?

3 THE COURT: Yes.

4 MR. COWPER: And fair enough, I -- I want to be fair  
5 to my friend, I would ask Your Lordship, and I  
6 pulled out actually the counter-memorial when he  
7 made that -- I invite you to read the entire  
8 section, which is actually only three or four  
9 pages long, but you can read it from paragraphs  
10 834 to 841 which concerns Mexico's position on  
11 this point before the tribunal. I say reading  
12 that entire section, it's very clear it was taken  
13 as a point of interpretation and not jurisdiction,  
14 and that the word "authority" was not used to mean  
15 jurisdiction but rather whether or not it was  
16 proper and whether or not there was any case  
17 authority or any justification for utilizing the  
18 objectives of the treaty or the rules relating to  
19 transparency in -- regarding what was fair or  
20 equitable.

21 I would also ask you to note that in that  
22 section my friend in his reply dealt with  
23 F.A. Mann. And I think, if I heard him correctly,  
24 and I didn't hear all of his submissions on  
25 F.A. Mann, he essentially said those -- those  
26 observations of F.A. Mann are completely out of  
27 the discussion and debate if you understand  
28 international law.

29 My friend in -- before the tribunal relied  
30 upon and quoted the position we rely upon in  
31 F.A. Mann in their memorial at 8 -- I believe 837,  
32 and footnote the very passage relied upon by  
33 Metalclad in this case.

34 My friend in reply suggested that -- and he  
35 cites additional cases arising out of Canadian  
36 jurisprudence respecting international law,  
37 including the secession reference. And he  
38 characterized my submissions to you as patronizing  
39 as they relate to the Court's ability and  
40 jurisdiction over questions of international law.

41 I really have only two points. I was not  
42 endeavouring to be patronizing but rather seeking

43 as respectfully as I can to properly have regard  
44 to what I see to be the statutory intent and  
45 purpose of the international commercial act as it  
46 applies to this case.

47 Secondly, in the passage my friend puts in

Charest Reporting Inc. (604) 669-6449

1 his reply, there is the very telling and important  
2 observation of the Court, that is the Supreme  
3 Court of Canada, that it was international law  
4 when it arises, in the words of the decision:

5  
6 "...to determine the rights and  
7 obligations of some actor within the  
8 Canadian legal system."  
9

10 Those are from the very point he quotes.  
11 That is, international law arises to determine the  
12 rights and obligations of some actor within the  
13 Canadian legal system.

14 In our submission of course this isn't a case  
15 involving the rights and obligations of an actor  
16 within the Canadian legal system. It's the  
17 exercise of your jurisdiction under the relevant  
18 act having regard to a tribunal that determined  
19 the rights and obligations under NAFTA.

20 Now, with respect to my friend's submission  
21 on the Convenio, he referred to the Convenio and  
22 he referred to a statement about permits in  
23 relation to the Convenio. I just ask you, when  
24 you turn to the Convenio, I believe it's accurate  
25 to say that the Convenio itself makes no reference  
26 to municipal permits.

27 With respect to the point of the \$1,200 a  
28 tonne, that's my error, I've made a number here,  
29 and my friend has perhaps been less telling about  
30 that. I -- I think I indicated to Your Lordship  
31 that was a number that I was given that I  
32 incorrectly understood. I believe in fact that  
33 the reference in the expert reports is \$120 a  
34 tonne as opposed to \$15 a tonne.

35 The point is actually made with exactly the  
36 same force, and I gave you the reference to the  
37 report. The returns from hazardous waste are 10  
38 times per weight what they are for other waste, if  
39 not greater.

40 With respect to the table that my friend  
41 handed up to you comparing the ICSID Convention  
42 and the additional facility rules, the rules

43 respecting reasons are similar, but the annulment  
44 committee provisions are not applicable to the  
45 additional facility rules. And the failure to  
46 give reasons is not a ground for annulment. There  
47 is no parallel in our submission on that issue.

Charest Reporting Inc. (604) 669-6449



1 I'm sorry, failure to consider every question is  
2 not a ground for annulment.

3 Now, with respect to my friend Mr. Thomas's  
4 submissions in reply, I'll try to be very brief.

5 This is an issue of public policy. And let  
6 me start with an error. And my friend caught me  
7 out with an error, and was not gracious enough to  
8 ask me about it.

9 Our submission as it relates to the share  
10 swap was directly referable to the share swap  
11 referred to in my friend's submissions, it was not  
12 a share swap with COTERIN, and I apologize to the  
13 Court for suggesting that. There is no share swap  
14 involving COTERIN. And my friend's reference to  
15 that, with respect, is more confusing than  
16 helpful.

17 The share swap involved the Eco company as  
18 set out in the record. The point being made in  
19 the viva voce evidence was it predated Metalclad's  
20 control. It was something committed to all of the  
21 previous shareholders, and my friend's own  
22 submission accepted this. And if you go to my  
23 friend's transcript, he said when he introduced  
24 this point that the agreement predated Metalclad's  
25 control. And my submission was that my friend  
26 cannot elevate that payment into an issue of  
27 public policy on those facts. It's not capable of  
28 being done.

29 Now, let me though make a second point, which  
30 is: My friend's very excited comments this  
31 afternoon were extensively gone into before the  
32 tribunal primarily for the purpose of having the  
33 tribunal determine credibility adversely to  
34 Metalclad, both as it related to specific  
35 witnesses and as to the credibility of the case as  
36 a whole.

37 With great respect to my friend, it is in my  
38 submission wildly inappropriate in this forum to  
39 repeat those arguments under the posture of  
40 raising a public policy ground on the basis of an  
41 authority such as the European Gas Turbine case  
42 where the party moving in that case introduced

43 fresh evidence not before the tribunal and  
44 established that a fraud had been conducted on the  
45 tribunal, not on the evidence before them but on  
46 evidence that was unavailable to them.  
47 I say with respect that my friend's treatment

Charest Reporting Inc. (604) 669-6449

1 of the payments is ahistorical and an unfair  
2 treatment of the evidence. And if Your Lordship  
3 feels that our submissions as to whether they meet  
4 the threshold of requiring to be inquired into  
5 will have to have regard to the submissions and  
6 evidence as a whole, which in my submission  
7 justified the tribunal not concluding anything  
8 with respect to those matters as raising any issue  
9 of public policy -- because it wasn't an issue of  
10 public policy for the tribunal. It was an issue  
11 of credibility of the claim as a whole and  
12 Metalclad's position on factual matters. And the  
13 tribunal found in at least three or four different  
14 cases that Metalclad had proceeded with good faith  
15 in one form or another, one use of terms or  
16 another.

17 Now, with respect to the positions taken, and  
18 there are many other points my friends have made,  
19 but I will not try Your Lordship's patience on a  
20 sur-reply in addressing them, I do wish to say a  
21 few words respecting the statement of pleadings  
22 advanced by the United States in the two matters  
23 handed up yesterday and today.

24 Now, firstly -- and of course my friend  
25 indicated that he was merely adopting them as his  
26 own submission and then proceeded to tell  
27 Your Lordship how important it was to note the  
28 position of the three States to the treaty and  
29 their position in relation to this award, which  
30 was of course the very basis of my objection to  
31 referring to them in the first place. But I want  
32 to come back to the significance of the fact that  
33 States have taken a position in relation to this  
34 award in other tribunals in a moment, just to  
35 close.

36 I do want to ask you to have regard firstly  
37 to the fact that in the American's submission they  
38 make it clear that their objection is only if the  
39 award is interpreted as not applying international  
40 law. And our submission is that the tribunal  
41 applied international law in this case within the  
42 meaning of Chapter 14 and 1105. And further, that

43 in order for my friend to succeed, he has to go  
44 beyond that and successfully attack both findings  
45 under 1110.

46 With respect to the interpretation of the  
47 award, I leave that to Your Lordship. I won't try

Charest Reporting Inc. (604) 669-6449

1 your patience any further with that.

2 With respect to the Methanex counter-memorial  
3 though, one of the things which Your Lordship  
4 ought to note is that in the Methanex  
5 counter-memorial, which is at page 9 and  
6 following, Methanex refers to Schwartzenger and  
7 Venvelde as additional international lawyers --

8 Do you have page 9?

9 THE COURT: Yes. I see 9.

10 MR. COWPER: Yes.

11 THE COURT: You're referring to at the top -- near the  
12 top, yes.

13 MR. COWPER: -- as -- as having a very different view  
14 of fair and equitable treatment than which has  
15 been presented to you by Mexico as orthodox in  
16 this case. So here are two additional  
17 international lawyers saying that the fair and  
18 equitable treatment standard is more than what my  
19 friend would have you accept as being orthodox.

20 Secondly, Methanex quotes from the American  
21 position in the ELSI case, which my friend relies  
22 on heavily in this case, at page 11, in which the  
23 American position -- and of course the Americans  
24 were the complainants in the ELSI case, took a far  
25 broader view of the content of customary  
26 international law as it related to arbitrary  
27 measures.

28 And you'll recall that the ELSI case applied  
29 a different formulation in internat -- in -- in  
30 treaties than this one. It applied a formulation  
31 of arbitrary, and there was another -- arbitrary  
32 or discriminatory measures, that's it, at the top  
33 of page 11. It didn't have the fair and equitable  
34 standard before it. But even so, the American  
35 position in that case was that arbitrary or  
36 discriminatory required a more broad and liberal  
37 interpretation than Italy was maintaining.

38 And so I say with respect to the sovereign  
39 United States of America, its position as to those  
40 matters has to have regard to the fact that they  
41 have urged on tribunals far more liberal standards  
42 of conduct, if you will, or liberal restrictions

43 on sovereign conduct than my friend would take  
44 from the submission in the Methanex case.  
45 Now, with respect to the Pope & Talbot case  
46 and its note with respect to Myers, I make this  
47 point very briefly, and that is: With respect to

Charest Reporting Inc. (604) 669-6449

1 the case before Your Lordship as presented by us,  
2 we say that the tribunal in this case did not find  
3 a breach of a provision of the treaty outside  
4 Chapter 11 and then use that breach as the  
5 mathematical and direct foundation for a breach of  
6 1105. And therefore we would not disagree for the  
7 purposes of this case with a submission made in  
8 relation to the Pope & Talbot or other case  
9 concerning the Myers decision.

10 However, you'll recall that the dissent on  
11 that point, which was Mr. Chiasson, who said don't  
12 use the breach elsewhere to make 1105, but he was  
13 quite comfortable in characterizing the conduct of  
14 Canada in that case as being very close to the  
15 line under 1105 having no regard to the other  
16 provisions of the treaty.

17 And of course it's our submission that the  
18 facts in this case had to be determined by the  
19 tribunal as whether they fell on this side of the  
20 line or far over the line. And it's our  
21 submission on the correctness standard they were  
22 far over the line of acceptable treatment by a  
23 State under international law adhering to the  
24 obligation to extend fair and equitable treatment  
25 to investors. I do want to -- and those are  
26 essentially my points with respect to those  
27 statements.

28 I do want to though address my friend's  
29 urging upon you deference to the positions taken  
30 by the governments as he has now marshalled them  
31 in support of his submission. And I do say this,  
32 and that is: With respect, that both the tribunal  
33 and this Court sit in the tradition which  
34 commenced with the act of settlement 300 years  
35 ago, independent decision-makers, an independent  
36 judiciary, independent of the executive, having  
37 regard to the terms of the law and applying it to  
38 determine the rights of the citizens. And I say  
39 with respect the fact that there are three  
40 executives who urge upon you not to apply the law  
41 as it has been found by the tribunal ought not to  
42 in any way influence your application of the

43 proper legal standards and the proper statutory  
44 jurisdiction in this case.  
45 THE COURT: You needn't worry yourself in that regard,  
46 because if the three of them are all concerned,  
47 they can amend the agreement.

Charest Reporting Inc. (604) 669-6449



1 MR. COWPER: Thank you, My Lord.

2 MR. FOY: My Lord, I have no -- no further  
3 submissions, but I think it appropriate on behalf  
4 of the government of Mexico to thank counsel for  
5 Metalclad for the -- who have co-operated  
6 procedurally and who have worked very hard to  
7 allow us all to put the important substantive  
8 issues before this Court in a timely manner.

9 I think as well on behalf of all counsel I'd  
10 like to thank our reporter, Mr. Lee; our -- our  
11 registrar, Mr. Kong; and our unobtrusive observer,  
12 Mr. Nelson, for assisting us efficiently in  
13 managing these hearings.

14 THE COURT: Thank you, Mr. Foy.

15 If we could deal with some housekeeping  
16 issues.

17 Mr. Cowper, I don't know if you were given a  
18 copy of the letter, had an opportunity to read it,  
19 from Ms. Vogel.

20 Just to let counsel know, my view is that the  
21 authorities which you've provided belong to you,  
22 counsel. The tradition in the court is once we're  
23 finished that we do destroy them because counsel  
24 don't usually want to have them back. But the  
25 decision of whether I accede to the request of  
26 Ms. Vogel or not is within the control of each of  
27 you with respect to your -- your materials that  
28 you have filed on behalf of your clients.

29 MR. COWPER: My client doesn't have any particular  
30 concern or objection to distributing materials  
31 that are before the Court.

32 I would say that my experience has been that  
33 adjudicators, either arbitrators or judges, ought  
34 to feel free to note, amend, highlight or  
35 otherwise the authorities. And I do find that  
36 other people getting those in hand sometimes read  
37 more into those than otherwise. And I wouldn't  
38 want Your Lordship to feel somehow that those are  
39 public documents. We've given them to the -- to  
40 the Court for your use and -- and really have no  
41 regard to their ultimate use.

42 But we don't object and certainly don't

43 object to them eventually becoming public, but I  
44 would certainly not want the authorities which are  
45 used by Your Lordship and -- and noted or amended  
46 or highlighted to -- to be distributed  
47 afterwards. I think that's --

Charest Reporting Inc. (604) 669-6449

1 THE COURT: Well, I -- I have highlighted some  
2 portions. It's not my practice to make notes,  
3 either during the course of the hearing -- I might  
4 make a one-word note sometimes -- or as I'm  
5 reading them. I don't make a practice of making  
6 notes on them. So I don't think that -- that  
7 that's a concern.

8 MR. COWPER: That's fine. I thought it might be so.  
9 That's --

10 THE COURT: Yes. The -- the most -- I hate to have my  
11 secretary do this, I don't think I will, is I go  
12 through and have my secretary photocopy everything  
13 that had yellow on it, because I did use a  
14 highlighter, and it wouldn't -- wouldn't show up  
15 on the photocopying. But I don't think the fact  
16 that I had marked in yellow where counsel have  
17 read a passage to me is of any significance.

18 Mr. Foy, do you have any --

19 MR. FOY: Nothing to add, My Lord.

20 THE COURT: Very well then. I will, when I have  
21 concluded, provide the briefs of authority to  
22 Ms. Vogel.

23 The other voluminous number -- or amount of  
24 materials which you provided me which have been  
25 sitting over there for the entire two weeks, and  
26 I've not had the necessity to have regard to the  
27 record. You -- you provided me with the  
28 extracts. It may well be that during my  
29 deliberations in reaching my decision I will have  
30 to go to the record, and -- and I'll be retaining  
31 it for that purpose.

32 However, once I'm finished with it, I would  
33 have no further need of it. And I -- it would  
34 seem to me that -- that there could be potential  
35 need in the future --

36 Mr. Foy, you have provided it --

37 MR. FOY: Yes. We -- the record I -- I had -- I had  
38 thought, perhaps wrongly, that the letter related  
39 to the authorities. The record is something  
40 that --

41 THE COURT: Oh, no, no. I'm finished with the  
42 letter.

43 MR. FOY: Oh.  
44 THE COURT: The letter did only relate to the  
45 authorities.  
46 MR. FOY: Yes.  
47 THE COURT: I'm now turning to the record.

Charest Reporting Inc. (604) 669-6449

1 MR. FOY: Thank you, My Lord.  
2 MR. COWPER: I think the practice is to simply keep  
3 the record in -- in the Supreme Court until such  
4 time as any of the parties apply to have it --  
5 THE COURT: That's not -- that's not my practice,  
6 Mr. Cowper. My practice is once I've finished  
7 with it, I'm going to give it back.  
8 MR. COWPER: No. I understand once Your Lordship is  
9 finished with it.  
10 THE COURT: Yes.  
11 MR. COWPER: But I'm saying you can give -- you give  
12 it back to the parties, but I think --  
13 THE COURT: Yes.  
14 MR. COWPER: -- we can -- we can then -- my friend and  
15 I can at that point, having received  
16 Your Lordship's judgment, decide what ought to be  
17 done with them. I have an interest in respect of  
18 a clean copy of the record, as does he, and we can  
19 deal with that. He provided it with my agreement  
20 to the Court, and I'm sure my friend and I can  
21 agree what to do with it.  
22 THE COURT: Yes. So then I -- it is my intention to  
23 return it. And again, I'm not a marker, and I  
24 won't mark up any of the records. So if it's --  
25 if it's used or -- or needed for higher purposes,  
26 it -- it will be available in clean form.  
27 The -- the final point was just to give you  
28 some indication of what you can expect in terms of  
29 the timing of my decision. I'd like to be  
30 relatively prompt in -- in issuing my decisions.  
31 Something like this is going to take a -- a  
32 considerable period of time. I -- I would  
33 estimate, just roughly speaking, that it will  
34 probably be about two months.  
35 MR. COWPER: Thank you, My Lord. I appreciate your  
36 patience.  
37 THE COURT: Thank you, counsel.  
38 THE REGISTRAR: Order in chambers. Chambers is  
39 adjourned.  
40  
41 (PROCEEDINGS ADJOURNED AT 3:54 P.M.)  
42

43 Charest Reporting Inc.  
44 Certified Realtime Court Reporters  
45 Vancouver, British Columbia  
46  
47

Charest Reporting Inc. (604) 669-6449