No. L002904
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

RE SECTIONS 30, 31 AND 42 OF THE *COMMERCIAL ARBITRATION ACT,* R.S.B.C. 1996, c.55
OR, IN THE ALTERNATIVE,
SECTION 34 OF THE *INTERNATIONAL COMMERCIAL ARBITRATION ACT,* R.S.B.C. 1996, C. 233

AND

IN THE MATTER OF AN ARBITRATION PURSUANT TO CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT ("NAFTA") BETWEEN METALCLAD CORPORATION AND THE UNITED MEXICAN STATES, ICSID ADDITIONAL FACILITY CASE NO. ARB(AF)/97/1

B E T W E E N:

THE UNITED MEXICAN STATES

PETITIONER

AND:

METALCLAD CORPORATION

RESPONDENT

OUTLINE OF ARGUMENT OF INTERVENOR ATTORNEY GENERAL OF CANADA

ATTORNEY GENERAL OF CANADA
Department of Justice
Civil Litigation Section
East Memorial Building
284 Wellington Street, 2nd Floor
Ottawa, Ontario K1A 0H8

Solicitor for the Intervenor, Attorney General of Canada

Joseph de Pencier — **Counsel**

Department of Foreign Affairs and International Trade
Trade Law Division
Lester B. Pearson Building
Tower C, Seventh Floor
125 Sussex Drive
Ottawa, Ontario K1A 0G2

Meg Kinnear — **Counsel**

BORDEN LADNER GERVAIS LLP
Lawyers- Patent & Trade Mark Agents
1200-200 Burrard Street
Vancouver, B.C. V7X 1T2

Solicitors for the Petitioner

Patrick G. Foy, Q.C. — **Counsel**

THOMAS & PARTNERS
Barristers and Solicitors
Suite 226 - 2211 West 4th Avenue
Vancouver, B.C. V6K 4S2

Solicitors for the Petitioner

J. Christopher Thomas — **Counsel**

FASKEN MARINEAU DuMOULIN LLP
2100-1075 West Georgia Street
Vancouver B.C. V6E 3G2

Solicitor for the Respondent

D. Geoffrey Cowper, Q.C.
Henri C.A. Alvarez — **Counsel**

FARRIS, VAUGHAN, WILLS & MURPHY
2600-700 West Georgia Street
Vancouver, B.C. V7Y 1B3

Solicitors for the Intervenor, La Procureure générale du Québec, on behalf of the Province of Québec

Jack Giles, Q.C. — **Counsel**

Outline of Argument of Intervenor Attorney General of Canada

I. Introduction

1. This is a petition by the United Mexican States to set aside an Award of the North American Free Trade Agreement ("NAFTA") Chapter Eleven Tribunal dated August 30, 2000 ("Award").

2. By order of this Court on January 31, 2001, the Attorney General of Canada was granted leave to intervene. The Attorney General sought leave to intervene because Canada is a Party to the NAFTA.[1] As one of the three Parties to the Agreement, Canada has a systemic interest in the interpretation of the NAFTA. The Attorney General sought leave to intervene because this is a case of first impression: the first occasion that a Canadian (or any other) court has considered a Chapter Eleven award. She also sought leave to intervene to submit that:

   - Chapter Eleven disputes are not private commercial arbitration, which should be reflected in the choice of standard of review;

   - the Court should take the "pragmatic and functional approach" of the Supreme Court of Canada to determining the proper standard of review; and

   - the Award is contrary to the NAFTA, for reasons advanced in the Amended Petition of the United Mexican States ("Amended Petition").

3. No inference of any kind should be drawn by the Court from the Attorney General of Canada's decision to address only certain issues arising from the Award and from the Amended Petition in this matter.

II. NAFTA Chapter Eleven Investor-State Disputes are not Private Commercial Arbitrations

Introduction

4. The first threshold question before the Court is the choice of British Columbia arbitration statute governing the Petition. This is a matter of British Columbia law and the Attorney General of Canada takes no position on the question.

5. Underlying this choice, however, is a fundamental issue: the proper characterisation of NAFTA Chapter Eleven arbitration. These arbitrations not typical private international commercial arbitrations. Rather, they are inherently of a public nature, dealing with public

[1] Canada exercised its right under NAFTA Article 1128 and made a written submission to the Tribunal on a question of interpretation of the NAFTA: Award, ¶24.

measures. This has wide-ranging implications for the interpretation of Chapter Eleven law and procedure.

6. Mexico submits that a Chapter Eleven arbitration is not a "commercial arbitration" as one between parties with privity of contract relating to a particular commercial arrangement or project. Mexico says that it was not in a "commercial" relationship with Metalclad:

> "146. ...the relationship between Metalclad and Mexico arising from the provisions of NAFTA Chapter Eleven is not a commercial arbitration agreement. The NAFTA is a treaty. The arbitration relationship arises in this case out of allegations of violation of Section A of Chapter Eleven which are restricted to legislative or administrative acts, the acts of the Municipality and the Federal government's "tolerance" of those acts, taken in relation to issues of public health and environmental concerns, not in a commercial capacity."
>
> **Petitioner's Outline of Argument, Part V (Whether this Court's Jurisdiction is Governed by the *Commercial Arbitration Act* or the *International Commercial Arbitration Act*: ¶119-154)**

7. The Attorney General of Canada agrees that Chapter Eleven disputes are not private commercial arbitrations. An examination of the NAFTA architecture and of arbitral proceedings under Chapter Eleven demonstrates that Chapter Eleven arbitration contrasts with private commercial arbitration in at least the five following ways.

I. Chapter Eleven sets out Treaty Obligations Between States

8. The NAFTA is an international agreement between three State Parties. Investors of NAFTA Parties have the extraordinary and limited right to seek damages for a Party's alleged breach of a Chapter Eleven obligation. But investors are not parties to the NAFTA. The obligations under the NAFTA are owed by the three State parties to each other. There is no privity between NAFTA investors and the Parties to the Agreement. As was summarised by the NAFTA Chapter Eleven Tribunal in *S.D. Myers, Inc. v. Government of Canada*:

> "8. The Tribunal considers that, whatever may be the position in private consensual arbitrations between commercial parties, it has not been established that any *general principle* [emphasis in original] of confidentiality exists in an arbitration such as is currently before this Tribunal. The main argument in favour of confidentiality is founded on a supposed implied term in an arbitration agreement. *The present arbitration is taking place pursuant to a provision of an international treaty, not pursuant to an arbitration agreement between the disputing parties*.
>
> "9. *There is no direct contractual link between the disputing parties in the present*

case, and there is no arbitration agreement between them." (emphasis added)[2]

9. One practical consequence of Chapter Eleven arbitration being treaty-based is that other provisions of the treaty apply to the very matters that are subject to arbitration. For example, Article 1131 authorises the three NAFTA Parties, through the Free Trade Commission (the Parties' trade ministers acting in concert), to make interpretations of a provision of the NAFTA that bind individual Chapter Eleven tribunals. Moreover, a NAFTA Party may use the NAFTA Chapter Twenty State-to-State dispute settlement procedures to challenge the same alleged breaches of Chapter Eleven obligations as an investor, regardless of whether the investor has brought its own challenge under Chapter Eleven: NAFTA Article 2004.

II. Parties other than Disputing Parties Participate in Chapter Eleven Arbitration

10. Chapter Eleven proceedings are not limited to the disputing parties as are private commercial arbitrations. Because they are not contractual disputes but challenges to government "measures" with wider implications, these challenges are by definition of interest to all three NAFTA Parties. The NAFTA specifically provides that Chapter Eleven proceedings are open to the Parties as well as the disputing parties:

- Article 1127 requires the disputing NAFTA Party to deliver to the other Parties written notice that a claim has been submitted for arbitration and "copies of all pleadings filed in the arbitration."

- Article 1128 provides that the other Parties can "make submissions to a Tribunal on a question of interpretation of this Agreement."

- Article 1129 requires the disputing Party to provide the other Parties with copies of the evidence and of written arguments before the Tribunal, on request.

III. Aspects of Chapter Eleven Arbitration are Public

11. Chapter Eleven arbitrations are also recognised to be of interest potentially to any member of the public at large. NAFTA Articles 1126(1) and (13) provide for the filing of certain arbitral documents on a public register. Article 1137(4) and Annex 1137.4 spell out rules for the publication of awards. It is Canada's practice in Chapter Eleven cases against it to make public all tribunal awards, whether on procedure or the merits.

12. Consistent with these provisions, Chapter Eleven has no general rule prohibiting publicity or disclosure relating to arbitral proceedings. Subject to particular requirements for confidential hearings, and the usual legal principles for the protection of confidential information, neither

[2] Procedural Order No. 16, May 13, 2000 **(Tab 1)**.

do any of the three arbitration regimes under which a Chapter Eleven challenge may be submitted.[3]

13. This has been recognised by Chapter Eleven Tribunals, as the Procedural Order in *S.D. Myers, Inc. v. Government of Canada* cited in paragraph 8, above, attests. In the *Metalclad* case, the Tribunal refused Mexico's request for a formal order that the proceedings were confidential. The Tribunal recognised that disputing parties have a positive duty to comply with domestic laws requiring the disclosure of information. In denying Mexico's request, the Tribunal stated:

> "9. There remains nonetheless a question as to whether there exists any general principle of confidentiality that would operate to prohibit public discussion of the arbitration proceedings by either party. *Neither the NAFTA nor the ICSID (Additional Facility) contain any express restriction on the freedom of the parties in this respect.* Though it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such a limitation, each of them is still free to speak publicly of the arbitration. *It may be observed that no such limitation is written into such major arbitral texts as the UNCITRAL Rules or the draft Articles of Arbitration adopted by the International Law Commission.* Indeed, as has been pointed out by the Claimant in its comments, under United States security laws, *the Claimant, as a public company traded on a public stock exchange in the United States, is under a positive duty to provide certain information about its activities to its shareholders*, especially regarding its involvement in a process the outcome of which could perhaps significantly affect its share value."[4] (emphasis added)

14. The NAFTA Chapter Eleven Tribunal in *Loewen Group Inc. v. United States*[5] also took note that the disputing parties are not subject to a general rule of confidentiality and distinguished between arbitrations between private parties and those involving a government Party:

> "In the case of an arbitration under NAFTA, particularly an arbitration to which a Government is a party, it is not to be supposed that, in the absence of express provision, the Convention or the Rules and Regulations impose a general obligation on the parties the effect of which would be to preclude a Government

---

[3] As provided for in Article 1120(1): the ICSID Convention; the Additional Facilities Rules of the ICSID; and the UNCITRAL Arbitration Rules.

[4] *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/01, interim decision of October 27, 1997) **(Tab 2)**.

[5] ICSID Case No. ARB(AF)/98/3, interim decision of September 28, 1999 **(Tab 3)**.

(or the other party) from discussing the case in public, thereby depriving the public of knowledge and information concerning government and public affairs."

IV. Non-Party Participation has been Permitted in a Chapter Eleven Arbitration

15. The NAFTA Chapter Eleven Tribunal in *Methanex Corporation v. United States of America* issued a procedural award on January 15, 2001, finding that it had the authority to receive *amicus* briefs from non-parties (although the Tribunal deferred on whether to actually receive briefs from the four non-governmental organisations that petitioned it). The Tribunal concluded that there is discretion under Article 15(1) of the UNCITRAL Arbitration Rules to receive written submissions from non-party third persons that "does not necessarily offend the philosophy of international arbitration *involving states and non-state parties*." (emphasis added). The Tribunal continued at page 22:

> "There is an undoubtedly public interest in this arbitration. *The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater public importance that a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions.* There is also a broader argument, as suggested by the Respondent and by Canada: the Chapter Eleven arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive *amicus* submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm." (emphasis added)

V. Private International Commercial Arbitration is Dealt with Elsewhere in the NAFTA

16. The NAFTA distinguishes between Chapter Eleven arbitration and private commercial arbitration in other ways. Article 1136(7) provides that a claim submitted to arbitration under Section B of Chapter Eleven "shall be considered to arise out of a commercial relationship or transaction" for the purposes of Article I of the New York Convention and Article I of the Inter-American Convention. This provision is necessary because disputes involving the legislative acts or jurisdiction of a State are not "commercial."[6] The NAFTA also addresses the "settlement of international commercial disputes between private parties in the free trade area" in special provisions in Article 2022 and Annex 2001.2(8). They encourage commercial

[6] David P. Stewart, "National Enforcement of Arbital Awards Under Treaties and Conventions", *International Arbitration in the 21st Century* (Lillich and Brower Editors) (Transnational, 1993), at 195. **(Tab 4)** Similarly, the federal *Commercial Arbitration Act*, R.S. 1985, c. 17 (2nd Supp.), deems the expression "commercial arbitration" to include a Chapter Eleven claim. This provision would not be necessary if Chapter Eleven arbitrations were already "commercial". **(Tab 5)**

arbitration and other means of alternative dispute resolution to address private commercial disputes.

III. Taking the "Pragmatic and Functional Approach" to Determining the Standard of Review

17. The proper standard of review is a second threshold issue. Mexico argues that the standard of review depends on which British Columbia arbitration statute applies and on which of the Tribunal's errors is being examined:

- Under section 30 of the *Commercial Arbitration Act*, which provides for setting aside of an award for an "arbitral error" that is "exceeding the arbitrator's jurisdiction", the courts have held the correctness standard of review applies to interpretations of provisions limiting a tribunal's powers.

  Petitioner's Outline of Argument, ¶155-156, 202-231, Part IX (Excess of Jurisdiction in the Treatment of Article 1105: ¶238-302), and Part X (Excess of Jurisdiction in the Treatment of Article 1110: ¶303-319)

- Under section 31 of the *Commercial Arbitration Act*, where leave is granted to appeal on a point of law, the courts have held that the correctness standard of review applies to pure questions of law while the reasonableness *simpliciter* standard applies to questions of law involving acting without any evidence or upon a view of the facts which could reasonably be entertained.

  Petitioner's Outline of Argument, ¶158-160, 202-232 and Part XIV (Errors of law in Interpretation of Articles 1105 and 1110: ¶523-591)

- Under section 34(2)(a)(iv) of the *International Commercial Arbitration Act* ("…arbitral award deals with a dispute not contemplated by not falling within the terms of the submission to arbitration, or it contains decisions beyond the scope of the submission to arbitration…"), the Court must examine whether the Tribunal considered an issue not properly before it on a standard of correctness. Moreover, a patently unreasonable decision can give rise to a loss of jurisdiction.

  Petitioner's Outline of Argument, ¶168, 202-230, and 234-235

- Under section 34(2)(a)(v) of the *International Commercial Arbitration Act* ("…the arbitral procedure was not in accordance with the agreement of the parties…"), a failure by the arbitral tribunal is reviewable on a standard of correctness.

Petitioner's Outline of Argument, ¶168, 202-239, 236 and Part XIII (The Tribunal's Failure to Address all Questions which, had they been Addressed, could have Changed the Decision's Outcome: ¶471-522)

- Under section 34(2)(b)(ii) of the *International Commercial Arbitration Act* ("the arbitral award is in conflict with public policy in British Columbia") if it is argued that the result is irrationality, then it is necessary to establish patently unreasonable error to permit setting aside to preserve "public policy", but this standard is not required where "corruption and similar serious cases are concerned."

Petitioner's Outline of Argument, ¶168, 202-230, 237 and Part XII (The Tribunal's Failure to Address the Evidence of Improper Acts: ¶438-471)

18. Since the Attorney General of Canada takes no position on which arbitration statute applies, she will not make submissions on each of these five possibilities. However, the Attorney General does say that there appear to be two basic approaches this Court could take to determine that standard. The first would be to apply the lines of authority that have developed under the *Commercial Arbitration Act* and the *International Commercial Arbitration Act* concerning review of decisions of commercial arbitrators. The second would be to take the "pragmatic and functional approach" to review of subordinate bodies developed in the jurisprudence of the Supreme Court of Canada.

19. The Attorney General says that because NAFTA Chapter Eleven challenges are not private commercial arbitration, the "pragmatic and functional approach" is the more appropriate in determining the standard of review for Chapter Eleven tribunals.

I. Standard of Review of Decisions of Private Commercial Arbitrators

20. The leading case in British Columbia is *Quintette Coal Ltd. v. Nippon Steel Corp.*[7] The petitioner applied under s. 34(2) of the *International Commercial Arbitration Act* to set aside the arbitral award on the ground that the arbitration board only had jurisdiction to fix a base price as at 1st April 1987, and that in fixing a series of base prices for the fifteen quarters after that date, the board acted beyond its mandate. The petitioner relied on the Court's jurisdiction under s. 34(2)(a)(iv) that the award "contain decisions on matters beyond the scope of the submission to arbitration". The Court upheld the arbitral award giving considerable

[7] (1990), 50 B.C.L.R. (2d) 207 (B.C.C.A.), leave to appeal refused by S.C.C. on 13 December 1990, ibid., *xxviii.* **(Tab 6)**

deference to the arbitral tribunal, concluding (at 216-7):

> "…courts should exercise restraint in reviewing arbitration awards in the international arena. The views expressed by those courts, in my view, are substantially the same as the `consensus´ referred to in the preamble to our International Act, and thus reflect the purpose of this Act.
> …
> "It is important to parties to future.. (international commercial) arbitrations and to the integrity of the process itself that the court express its views on the degree of deference to be accorded the decision of the arbitrators. The reasons advanced in the cases discussed above for restraint in the exercise of judicial review are highly persuasive. The 'concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes' spoken of by Blackmun J. are as compelling in this jurisdiction as they are in the United States or elsewhere. It is meet therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia. This is the standard to be followed in this case".[8]

21. Decisions in Ontario under its equivalent to the *International Commercial Arbitration Act* are to the same effect.[9]

22. Decisions under the *Commercial Arbitration Act* also demonstrate considerable judicial deference. For example, the decision of the British Columbia Court of Appeal in *Student Assn. of B.C. Institute of Technology v. B.C. Institute of Technology.*[10]

II. The "Pragmatic and Functional Approach" to the Standard of Review of Subordinate Bodies

23. The authorities concerning private commercial arbitrations (whether international or domestic) are not helpful because NAFTA Chapter Eleven arbitration is "public" rather than "private commercial" in nature. The private commercial arbitration cases involve parties bound by contract in narrow commercial disputes dealing essentially with private law issues.

---

[8] See also: *Food Services of America Inc. v. Pan Pacific Specialties Ltd.* (1997), 32 B.C.L.R. (3d) 225 at 229 (B.C.S.C). **(Tab 7)**

[9] *Schreter v. Gasmac Inc.* (1992), 89 D.L.R. (4th) 365 (Ont. G.D.) **(Tab 8)**; *Corporacion Transnacional de Inversiones v. STET International* (1999), 45 O.R. (3d) 183 (S.C.), aff'd 49 O.R. (3d) 414 (C.A.) **(Tab 9)**; *Automatic Systems Inc. v. Bracknell Corp.* (1994), 18 O.R. (3d) 257 at 264 (C.A.) **(Tab 10)**; *NetSys Technology Group AB v. Open Text Corp.* (1999), 1Bus.L.R. (3d) 307 (Ont.S.C) **(Tab 11)**.

[10] [2000] B.C.J. No. 155 and [2000] B.C.J. No. 1873 (Vancouver Registry No. CA025500) **(Tab 12)**.

24. The "pragmatic and functional approach" of the Supreme Court of Canada to determining the standard of review in matters of public law is the more appropriate approach for Chapter Eleven tribunals. The leading cases are canvassed in the Petitioner's Outline of Argument at ¶202-222. In determining the standard of review, this approach considers factors such as the presence of a privative clause, the relative expertise of the tribunal, as compared to the Court, the nature of the decision made, i.e., whether it is a question of law or a question of fact and whether the decision to be made is "polycentric", involving a consideration of often-conflicting and multi-facetted issues. More deference will be accorded, for example, where there is a privative clause and where the tribunal is an expert decision-maker.

25. The NAFTA architecture indicates that the awards of Chapter Eleven tribunals about public measures are not supposed to be worthy of judicial deference and not supposed to be protected by a high standard of review. NAFTA Chapter Eleven Tribunals do not exhibit the features of a specialised or expert administrative tribunal. Chapter Eleven tribunals are currently appointed *ad hoc* and for single cases. There is no Chapter Eleven secretariat or in-house specialists or other institutional hallmark of expertise or special authority. This contrasts with the standing secretariat of the World Trade Organization supporting its dispute settlement panels, or the staff supporting permanent domestic administrative boards and tribunals.

26. Chapter Eleven tribunals are not protected by a privative clause. While NAFTA Article 1136(1) provides that they "shall have no binding force *except* between the disputing parties and in respect of the particular case" (emphasis added), the same article goes on to specifically allow for awards to be revised and annulled or to be set aside (NAFTA Article 1136(2)). Moreover, Tribunals can also be subject to binding interpretations of provisions of the NAFTA by the Commission (of the Parties' trade ministers): NAFTA Article 1131(2).

27. Chapter Eleven tribunals *only* have the power to make an award of monetary damages or restitution: NAFTA Article 1135. They cannot strike down the impugned measure or issue any form of injunctive, declaratory or other extraordinary relief: NAFTA Article 1121. A Chapter Eleven tribunal's authority to order interim measures of protection is likewise limited: NAFTA Article 1134.

28. Domestic administrative tribunals displaying very different characteristics than Chapter Eleven tribunals are afforded deference. In *National Corn Growers Assn. v. Canada (Import Tribunal)*[11] the threshold issue was the standard of review governing the Canadian Import Tribunal in the exercise of its jurisdiction under s. 42 of the *Special Import Measures Act*. It was recognised that in exercising that jurisdiction, the Tribunal might have regard to the General Agreement on Trade and Tariffs ("GATT"). Both the majority and the concurring judgment of Dickson C.J. and Wilson and Lamer JJ. concluded that considerable deference -- the standard of patent unreasonableness -- should be given to the Tribunal's interpretations of its Act. The latter judgment noted:

[11] [1990] 2 S.C.R. 1324 **(Tab 13)**

"More precisely, it seems to me that it is for the Tribunal, staffed by *experts familiar with the intricacies of international trade relations* who are in the business of dealing with a large volume of trade related cases, to decide what documents may or may not be of assistance in interpreting the Act. While my colleague's discussion of the documents that a court may refer to in interpreting legislation may well be sound, we are not faced with an appeal from an ordinary court's decision. Instead, we are dealing with a statutory tribunal's interpretation of its own constitutive legislation. If the legislature wishes to place limits on the range of documents that the Tribunal may refer to, then it is for the legislature to do so. In the meantime, courts should not get into the business of assessing what documents a statutory tribunal may consult." (at 1348-9) (emphasis added).

29. More recently, in *M.N.R. (Customs and Excise) v. Schrader Automotive Inc.*,[12] the standard of review of reasonableness was applied to a decision of the Canadian International Trade Tribunal interpreting and applying a classification under the *Customs Tariff Act*.

30. Given the characteristics of NAFTA Chapter Eleven dispute settlement, and applying the pragmatic and functional approach, it is clear that in interpreting NAFTA, Chapter Eleven tribunals should not attract extensive judicial deference and should not be protected by a high standard of judicial review.

IV. The Attorney General of Canada's Position on the "Bases for Relief" Advanced by Mexico

I. Imposing So-called Transparency Obligations

31. Mexico submits that the Tribunal exceeded its jurisdiction by linking its findings of breach of Article 1105 and Article 1110 of the NAFTA to alleged breaches of the transparency objectives and provisions set forth in other parts of the NAFTA. The Tribunal only had jurisdiction in this case to consider alleged breaches of Section A of Chapter Eleven. But its Award effectively imposed new transparency obligations not agreed to by the Parties. The Tribunal had no jurisdiction to add to the obligations negotiated by the Parties.

Award, ¶76, 99, 104

Amended Petition, ¶72(a)(i) and Petitioner's Outline of Argument, ¶46(a) and (b), 242-272 and 303-319

32. This is the Tribunal's most egregious error. The Award shows a complete disregard for the NAFTA architecture and for the carefully constrained authority of arbitral tribunals. The Tribunal's approach renders the scope and application of NAFTA Chapter Eleven obligations

[12] (1999), 240 N.R. 381 (F.C.A.) **(Tab 14)**

uncertain. Tribunals are supposed to apply and not to rewrite the Agreement. The Tribunal's error has considerable potential to cause uncertainty in the interpretation of NAFTA obligations generally.

33. The Attorney General of Canada agrees with and adopts Mexico's submissions and adds two points. First, the Tribunal has elevated one purpose of the NAFTA above others by creating a new transparency obligation. This imbalance is clearly contrary to proper rules for interpreting international treaties and contrary to the intent of the Parties to this treaty. Second, by importing transparency requirements into Article 1105, the Tribunal interprets the article as an omnibus provision encompassing other NAFTA obligations, rather than having discrete content of its own. The Tribunal's approach renders uncertain the scope and application of NAFTA Chapter Eleven.

A. Balancing the Purposes of the NAFTA – Text and Object

34. NAFTA does not adopt unique rules of interpretation. NAFTA is interpreted according to the customary rules of international law governing treaty interpretation. The rules of international law governing treaty interpretation are specifically made applicable to disputes under Chapter Eleven of NAFTA by Article 1131(1):

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

35. NAFTA Article 102(2) expressly adopts the rules of international law governing treaty interpretation:

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

36. The applicable rules of international law relevant to the interpretation and application of international treaties are set out in the *Vienna Convention*, which is accepted as part of customary international law.[13] The fundamental rule is set out in Article 31(1):

---

[13] *United States – Standards for Reformulated and Conventional Gasoline*, May 20, 1996, WT/DS2/AB/R (WTO Appellate Body) pp. 17-18 **(Tab 15)**; *Japan – Taxes on Alcoholic Beverages*, October 4, 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (WTO Appellate Body) pp. 11-13 **(Tab 16)**. Article 31 of the *Vienna Convention* provides:

> "**Article 31: General rule of interpretation**
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[14]

37. Article 32 of the *Vienna Convention* allows recourse to supplementary means of interpretation only if the application of the rules in Article 31 result in an interpretation which is ambiguous or obscure, or leads to a manifestly absurd or unreasonable conclusion. The NAFTA is not to be construed either broadly or restrictively: the notions of broad or restrictive interpretation have been replaced by the rules in Articles 31 and 32 of the *Vienna Convention*.[15] In short, Chapter Eleven tribunals must give the relevant provisions of NAFTA their ordinary meaning in their context and in light of the object and purpose of NAFTA as a whole, in accordance with the fundamental rule of interpretation in Article 31 of the *Vienna Convention.*

38. Article 31 of the *Vienna Convention* also mandates interpretation of a treaty in accordance with the object and purpose of the treaty. This requires examination of the treaty in light of the entirety of the agreement, including its Preamble and objectives.[16] While object and purpose is one of the elements to be considered in interpreting a treaty, interpretation must be based above all on the text of the treaty. The object and purpose of the treaty cannot support an interpretation that is at variance with the text.

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.

A special meaning shall be given to a term if it is established that the parties so intended."

14 NAFTA tribunals have recognised the *Vienna Convention* as the appropriate rules of treaty interpretation. For example, the NAFTA Panel *In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products* recognised that Articles 31 and 32 of the *Vienna Convention* are "generally accepted as reflecting customary international law." (1997), 1 T.T.R. (2d) 975 (NAFTA Arbitral Panel) para. 119 **(Tab 17)**

15 *Ethyl Corporation v. Canada*, Award on Jurisdiction. (June 24, 1998) (NAFTA – UNCITRAL Panel), para. 55 **(Tab 18)**.

16 *In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products,* (1996), 1.T.T.R. (2d) 975 (NAFTA Arbitral Panel), para. 122 **(Tab 17)**.

39. Sinclair, in his treatise *The Vienna Convention on the Law of Treaties,* states:

> "… reference to the object and purpose of the treaty is, as it were, a secondary or ancillary purpose in the application of the general rule on interpretation. The initial search is for the 'ordinary meaning' to be given to the terms of the treaty in their 'context'; it is *in the light of* the object and purpose of the treaty that the initial and preliminary conclusion must be tested and either confirmed or modified."[17] (emphasis in original)

40. The objective of increasing investment opportunities is but one goal of the NAFTA. That objective cannot be isolated to interpret the NAFTA in a way that makes the rights of investors absolute. Nor does that one objective support novel interpretations of obligations that are at variance with the NAFTA text. The effect of this Award is to do both.

41. The proper approach is illustrated by the NAFTA Chapter Twenty Panel *In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*.[18] It attached importance to the "trade liberalization background" of NAFTA and stated that any interpretation of the Agreement must promote the NAFTA's objectives as a whole.

42. In this case, a tribunal interpreting Chapter Eleven provisions must consider the Preamble of the NAFTA *as a whole*.[19] As Article 31(2) of the *Vienna Convention* notes, preambular statements are important to determine the object and purpose of the agreement.

43. With respect to investment, the Preamble to the NAFTA provides that the Parties have resolved to:

> "**ENSURE** a predictable commercial framework for business planning and investment"

Among its other fourteen statements, the Preamble also declares that the Parties have resolved to do this "in a manner consistent with environmental protection and conservation". It goes on to provide that the Parties are resolved to:

> "**PROMOTE** sustainable development
> and to:

---

[17] Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2d ed. (Manchester: Manchester University Press, 1984), p. 130 **(Tab 19)**

[18] (1996), 1 T.T.R. (2d) 975 (NAFTA Arbitral Panel), para. 122 **(Tab 17)**.

[19] This is also a well-established practice for WTO Panels and the WTO Appellate Body to rely on the preamble or objectives provision of an agreement to interpret the meaning of a provision of the agreement. For example, *United States - Standards for Reformulated and Conventional Gasoline*, April 29, 1996, WT/DS2/AB/R, at page 30 [hereinafter *Reformulated Gasoline*] **(Annex 20)**. See also I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edition (Manchester: Manchester University Press, 1984) at pages 127-128 **(Tab 19)**.

STRENGTHEN the development and enforcement of environmental laws and regulations"

44. While no preambular statement is to be given precedence, these statements show that the environment was a key consideration of the Parties to the NAFTA[20]. The Parties intended to ensure a predictable commercial framework for business planning and investment but only in a manner consistent with environmental protection and conservation and while strengthening the development and enforcement of environmental laws and regulations and promoting sustainable development.

45. The Parties also saw it important to note in the Preamble of the NAFTA that they were resolved to "**PRESERVE** their flexibility to safeguard the public welfare". This was an important consideration to the Parties at the time of the conclusion of the NAFTA and continues to be of crucial importance to the Parties. The Chapter Eleven obligations should in no way be read to unduly restrict the Parties' ability to legislate for the public good as, for example, where the environment or the health of their citizens is concerned.

46. The importance the NAFTA Parties attached to environmental considerations must be taken into account when interpreting the scope of Chapter Eleven and the obligations under it. By failing to take the objects and the preamble of the NAFTA as a whole, the Tribunal had scant regard for such considerations.

B. Recognising the Distinct Reason for and Content of Article 1105

---

[20] In its report on the case of *United States –Import Prohibition of Certain Shrimp and Shrimp Products,* 12 October 1998, WT/DS58/AB/R (Appellate Body) **(Tab 21)** in interpreting the rights and obligations of the WTO members under the *General Agreement of Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187 ("GATT"), the Appellate Body took the Preamble of GATT into account and noted: "the preamble attached to the GATT shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy." At para. 129. Clearly, this was also the case for the NAFTA.

The fact that NAFTA provisions should be read to give proper consideration to environmental issues is reinforced by the existence and provisions of the *North American Agreement on Environmental Cooperation* (the "NAAEC"). The *Vienna Convention* (Article 31:2(b)) provides that other agreements that were made in connection with the conclusion of the Agreement are to be considered as part of the context. The NAAEC was negotiated in connection with the conclusion of the NAFTA to reflect the Parties' insistence that trade liberalisation go hand in hand with environmental protection. The conclusion of the NAAEC was a condition to the ratification by the U.S. and Canada of the NAFTA. See P.M. Johnson and A. Beaulieu, *The Environment and the NAFTA: Understanding and Implementing the New Continental* Law (Island Press, 1996) **(Tab 22)**. The NAAEC entered into force immediately after the entry into force of the NAFTA. All three NAFTA countries are Parties to that agreement. The Preamble of the NAAEC reconfirms "the importance of the environmental goals and objectives of the NAFTA, including enhanced levels of environmental protection". Article 3 of the NAAEC recognises the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities.

47. The Attorney General of Canada agrees with Mexico that Article 1105 does not include other distinct NAFTA obligations.

48. As Mexico notes in its discussion of the earlier Chapter Eleven award in *Azinian v. The United Mexican States*, that Tribunal held that the minimum standard of treatment guaranteed by NAFTA Article 1105 is not a catch-all for every grievance that a foreign investor may raise against a NAFTA Party.[21] The international minimum standard of treatment is particular and it is focused. It is a defined concept at customary international law. Article 1105 expressly adopts the minimum standard of treatment as defined by international law.

49. International decisions confirm that a State's conduct falls below this standard where its treatment of non-nationals amounts to an outrage, to wilful neglect of duty or to an insufficiency of governmental action that every reasonable and impartial person would recognise as insufficient. A State's conduct will also fall below the minimum standard when it is determined that there has been a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process or a failure to provide guarantees which are generally considered indispensable to the proper administration of justice.

50. Cases decided by the United States-Mexico Claims Commission have been described as "the backbone of our evidence in support of the international standard."[22] That Commission of the 1920's concerned events occurring during a series of rebellions in Mexico. Mexico refers to the *Neer* case. Other decisions of that Tribunal are also instructive on the proper content of the international minimum standard of treatment.

51. In *Faulkner*,[23] the Commission found a breach of the international minimum standard where an American citizen was arrested while waiting for transportation, brought to a police station, searched without being advised of the charges against him, imprisoned in appalling conditions for a month and then released on the basis there was no sufficient evidence against him. In *Chattin*,[24] a breach of the international minimum standard was established where the Commission found there was a lack of proper investigation, grave irregularities in court proceedings, undue delay in commencing court proceedings and an intentionally severe

---

[21] Petitioner's Outline of Argument, ¶251-252.

[22] A.H. Roth, *The Minimum Standard of International Law Applied to Aliens* (1949) (Geneva: University of Geneva Thesis) at 95 **(Tab 23)**

[23] *United States (Faulkner)* v. *United Mexican States* (1927), 21 A.J.I.L. 349 (Mexico-U.S. General Claims Commission) **(Tab 24)**.

[24] *United States (Chattin)* v. *United Mexican States* (1928), 22 A.J.I.L. 677 (Mexico-US General Claims Commission) **(Tab 25)**.

sentence was imposed. In *Roberts*,[25] an American citizen was arbitrarily and illegally arrested, then detained for 19 months before being given a hearing. The jail in which he was kept had no sanitary accommodation, 30 or 40 men to a room and no opportunity for physical exercise. A breach of the international minimum standard was found in these circumstances. In *Way*,[26] the minimum standard of treatment was breached where Way was arrested without knowing the charge against him and suffered "gross mistreatment" while in custody.

52. Other international bodies have applied the *Neer* approach, referring to it as the "standard habitually practised among civilised nations"[27] or even "general principles of law."[28]

53. For example, in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*[29], the United States argued that Iran's failure to protect private American citizens (as opposed to the diplomatic staff) from being taken hostage violated Article II(4) of the Treaty of Amity which provided that "nationals…shall receive the most constant protection and security within the territories of the other High Contracting Party." The International Court of Justice, agreeing with the United States, held that Iran's failure to prevent the militants from taking illegal actions did constitute a violation of "most constant protection and security". In *AMCO*[30] on the urging of a business adversary of the investor, the armed forces of the Government of Indonesia took full ownership and control of a hotel owned by an American citizen while the government regulatory body in charge of investment revoked his investment licence – without any warning or notice. The courts of Indonesia upheld these actions. Again, in these egregious circumstances, where the consequences were "heavy" and "irremediable", a breach of the minimum standard was found.

54. A government's failure to provide proper protection to an investor's property from interference by individuals or groups was the subject of a claim in *Asian Agricultural Products, Ltd v. Sri Lanka*.[31] The claimant argued that the destruction of its property during a battle between government forces and guerrillas was a denial of "full protection and security" guaranteed by the BIT between Sri Lanka and the United Kingdom. The arbitrators

---

[25] *United States (Roberts)* v. *United Mexican States,* [1926] Op. Of. Com. 77. (Mexico-US General Claims Commission) **(Tab 26)**.

[26] *United States (Way)* v. *United Mexican States* (1929) 23 A.J.I.L. 466 (Mexico-U.S. General Claims Commission) **(Tab 27)**.

[27] *France (J. Chevreau) v. Great Britain* (1931), 27 A.J.I.L. 153 (Tribunal) **(Tab 28)**.

[28] *Amco Asia Corp. v. Indonesia* (1984), 24 I.L.M. 1022 (ICSID Tribunal) at 1032)) **(Tab 29)**.

[29] *Case Concerning United States Diplomatic and Consular Staff in Tehran*, [1979] I.C.J. 3 **(Tab 30)** .

[30] AMCO*, supra*. **(Tab 29)**

[31] *Asian Agricultural Products Ltd.* v. *Republic of Sri Lanka* (1991), 30 I.L.M. 577 (ICSID Tribunal) ("*AAPL*") **(Tab 31)**.

rejected the notion that "full protection and security" turned government into a guarantor or insurer of a foreign investment. Rather, the claimant was required to prove causation for its claim to succeed. The Tribunal therefore refused to impose strict liability on a government.

55. However, the Arbitral Tribunal found Sri Lanka responsible on the basis of principles of international law. The Arbitral Tribunal obviously viewed the obligation to provide "full protection and security" as being part of the minimum international law standard when they held:

> "Once failure to provide "full protection and security" has been proven (under Article 2.(2) of the Sri Lanka/U.K. Treaty or under a similar provision existing in other Bilateral Investment Treaties extending the same standard to nationals of a third State), the host State's responsibility is established, and compensation is due according to the general international law rules and standards previously developed with regard to the State's failure to comply with its "due diligence" obligation under the *minimum standard* of customary international law." (emphasis in original)[32]

56. In *American Manufacturing & Trading Inc. v. Zaire*[33] an ICSID tribunal found the minimum standard was breached when Zairian government forces combating guerrillas looted and destroyed an American investment, then refused to pay any compensation for the loss. Zaire admitted to the looting but argued that the "fair and equitable treatment" and "protection and security" clauses in the BIT had not been breached because Zaire had not treated the investment any differently than other investments.

57. The arbitrators disagreed, holding that the comparative standards of national treatment and MFN operated independently of the international minimum standard. They concluded that the conduct was contrary to the requirement that the investment be granted "fair and equitable treatment" and "protection and security" not less than "that recognised by international laws". The tribunal described the international minimum standard as "an objective obligation which must not be inferior to the minimum standard of vigilance and of care required by international law."[34]

58. International tribunals that have applied or commented on the minimum standard have held that a breach may only be found where the facts are extreme and government conduct is egregious. The Award is clearly unsupported by and wholly inconsistent with international decisions by elevating Metalclad's grievances to this level.

---

[32] *AAPL*, *Ibid*, para 67 **(Tab 31)**.

[33] *American Manufacturing & Trading* v. *Republic of Zaire*, (1997) 36 I.L.M. 1531 (ICSID Tribunal)) **(Tab 32)**.

[34] *Ibid.*, at 1549) **(Tab 32)**.

59. International scholars agree. They comment that the failure to comply with the international law standard will occur only in circumstances where conduct is egregious.

60. For example, Brierly states that "misconduct must be extremely gross."[35] Roth, who devotes an entire section to the subject in his treatise on the minimum standard, concludes that:

> "…where faithful application of the local law has been established, responsibility can only be incurred when it is evident that the minimum requirements of international law have been left unsatisfied, that the very law itself fails to provide those sanctions of justice which the law of nations prescribes in the treatment of aliens.[36]

61. The procedural rights cited by Roth are "freedom of access to court, the right to fair, non-discriminatory and unbiased hearing, [and] the right to a just decision rendered in full compliance with the laws of the State within a reasonable time."[37]

62. Von Glahn has described denial of justice as failure on the part of authorities to observe due process of law in the prosecution and punishment of the alien offender. Broadly interpreted, this would include matters such as denial of access to local courts, inefficiency in the performance of police and judicial processes or an obviously unfair treatment of a judicial decision. In so far as courts are concerned, international responsibility of the state would arise if the judicial acts in question had been incompatible with international law, or represented a denial of justice in a strict sense (no access to courts, undue delay and so on) or created an obvious injustice – if, for instance, the acts were flagrant, were the work of the highest court in the land and were done in bad faith and with intent to discriminate.[38]

II. Mis-interpretation of NAFTA 1105

63. Mexico submits that the Tribunal also erred in law in its interpretation and application of Article 1105 by finding that the international minimum standard of treatment imposes a duty on central governments to remove all doubt and uncertainty in the relevant legal requirements applicable to investors.

Award, ¶76

---

[35] J. Brierly, *The Law of Nations*, 6th ed. (Oxford: Clarendon Press, 1963) at 276 – 287 **(Tab 33)**.

[36] A. Roth, *The Minimum Standard of International Law Applied to Aliens*, *supra* at 184-5 **(Tab 23)**.

[37] *Ibid.* **(Tab23)**.

[38] G. von Glahn, *Law Among Nations: An Introduction to Public International Law*, 4th ed. (New York: MacMillan Publishing Co. Inc. 1981) at 240 **(Tab 34)**.

Amended Petition, ¶72(b) and Petitioner's Outline or Argument, ¶47(a), Part XIV (Errors of Law in Interpretation of Articles 1105 and 1110: ¶523-544).

64. The Attorney General of Canada agrees with and adopts Mexico's submissions.

III. Mis-interpretation of NAFTA 1110

65. Mexico submits that the Tribunal exceeded its jurisdiction by "arrogat[ing] to itself a wider jurisdiction" -- by holding that Article 1110 applies to interference with property rights -- than granted by Article 1110

Award, ¶103-107, 112

Amended Petition, ¶72(b) and Petitioner's Outline or Argument, Part X (The Excess of Jurisdiction in the Treatment of Article 1110: ¶303-319)

66. Mexico also submits that the Tribunal erred in law in its interpretation and application of Article 1110 by finding that expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental *interference* with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State

Award, ¶103-107, 112

Amended Petition, ¶72(b) and Petitioner's Outline of Argument, ¶47(b) Part XIV (Errors of Law in Interpretation of Articles 1105 and 1110: ¶545-591

67. The Attorney General of Canada agrees with Mexico that the Tribunal in these facts failed to distinguish between mere interference, which is not compensable, and indirect expropriation, which is. The Attorney General places particular reliance on the analysis of awards of two NAFTA Chapter Eleven tribunals in claims against Canada (*S.D. Myers, Inc. v. Government of Canada*[39] and *Pope & Talbot, Inc. v. Government of Canada*), both rejecting claims of expropriation, and on the Article 1128 Submission of the United States to the *Metalclad* Tribunal, all of which are reviewed in detail in the Petitioner's Outline of Argument.

[39] The Attorney General of Canada has filed an application in the Federal Court -- Trial Division to set aside the award in *S.D. Myers, Inc. v. Government of Canada*, on other grounds: *Attorney General of Canada v. S.D. Myers, Inc.*, F.C.T.D. No.: T-225-01 **(Tab 35)**.

IV. Mis-interpretation of Domestic Law

68. Mexico submits that the Tribunal exceeded its jurisdiction by applying Article 1105 and Article 1110 in such a fashion as to equate an alleged violation of domestic law with a violation of international law, ignoring Mexican judicial decisions and deciding issues of Mexican domestic law as if it were a Mexican domestic court of appeal.

Award, ¶77-107

Amended Petition, ¶72(a)(ii) and (c) and Petitioner's Outline of Argument, ¶46 (c), 274-302

69. The Attorney General of Canada agrees with and adopts Mexico's submissions. The Tribunal misunderstood its role by making findings of domestic law for which it had neither expertise nor authority.

70. NAFTA Article 1131(1) provides that: "A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." This is entirely consistent with the traditional role of an international panel: examining whether the parties to the dispute have complied with international law, specific or general. To decide whether there has been a breach of international law, a tribunal will frequently be required to "examine", "interpret", "investigate" or "take judicial notice of" domestic legislation. If a tribunal does so in accordance with its mandate to decide on whether there has been a breach of international law, that examination or interpretation is consistent with international law and practice.[40]

71. It is also clear that in order to apply, or rule on, domestic law, an international tribunal would require explicit jurisdiction to do so. This might be provided by a special agreement, or where international law designates a system of domestic law as the applicable law. It is only in these very circumscribed situations that the "application" of domestic law by international tribunals is accepted: because there is clear jurisdiction. An international tribunal cannot overrule the decisions of domestic tribunals, or act as some form of appellate body from domestic courts. The jurisdiction of international tribunals relates to international law. NAFTA Chapter Eleven respects this division of responsibility.[41]

72. The difficulty with this Award is that the Tribunal makes findings that concern Mexican law. These findings are poorly connected, or not at all, to the NAFTA obligations which are within the Tribunal's jurisdiction. For example, ¶86 and 97 of the Award conclude that the denial of a municipal construction permit was "improper", seemingly according to Mexican domestic

---

[40] Ian Brownlie, ***Principles of Public International Law (4th ed)***, pp. 41-42 **(Tab 36)**.

[41] ***Lighthouses*** case, PCIJ, Series, A/B, no. 62, pp 19-23, and see also the ICSID Convention ***Serbian Loans*** case, (1929) PCIJ Reports, p. 46. **(Tab 37)**

law (due to the discussion of aspects of federal versus municipal authority). There is no mention of NAFTA or any other international obligations. Similarly, ¶105 and 106 of the Award contain strongly stated conclusions about the domestic legality of federal and municipal actions. While ¶107 of the Award concludes that "[t]hese measures, taken together with…amount to an indirect expropriation", this bald assertion, unsupported by any analysis, rests entirely on the specific findings about domestic legality.[42]

73. It therefore appears that the Tribunal exceeded its jurisdiction by making findings that Mexico and the municipality acted contrary to domestic law, and by holding that such contraventions are automatically violations of NAFTA obligations. A Chapter Eleven tribunal has no authority to do so.

V. Failure to Consider Relevant Evidence

74. Mexico submits that the Tribunal exceeded its jurisdiction by making patently unreasonable findings by failing to have regard to relevant evidence.

Amended Petition, ¶72(e) and Petitioner's Outline of Argument, ¶46 (d), and Part XI (The Tribunal's Failure to Have Regard to Relevant Evidence: ¶320-437)

75. While the Attorney General of Canada takes no position on the particular facts of the case, she agrees with and adopts Mexico's submissions on the need for Tribunals to make determinations based on all of the relevant evidence before them.

76. This issue is of systemic importance for Canada. NAFTA Chapter Eleven tribunals review complaints about public "measures", not private contracts. Tribunals bear a solemn responsibility to review, to understand and to summarise in their awards all of the relevant evidence.

VI. Failure to Address all Questions Before it

77. Mexico submits that the Tribunal exceeded its jurisdiction by failing to address all of the questions presented to it for resolution, in particular questions relating to Metalclad's *bona fides* and improper acts, as required by Article 53 of the ICSID (Additional Facility) Arbitration Rules.

Amended Petition, ¶72(d) and Petitioner's Outline of Argument, ¶46(e), Part XII (The Tribunal's Failure to Address the Evidence of Improper Acts: ¶438-471) and Part XIII

[42] On the contrary, ¶88 concludes that "the absence of a clear rule as to the requirement or not of a municipal construction permit", and "the absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit" were contrary to NAFTA transparency requirements.

(The Tribunal's Failure to Address all Questions which, had they been Addressed, Could have Changed the Decision's Outcome: ¶472-522)

78. NAFTA Chapter Eleven claims against Canada can be submitted according to the ICSID (Additional Facilities) Arbitration Rules. Canada's systemic interest is similar to that on the issue of failure to consider relevant evidence. The Attorney General of Canada agrees with and adopts Mexico's submissions.

All of which is respectfully submitted this 16th day of February 2001

(Signed) Joseph de Pencier
Joseph de Pencier
Department of Justice
Civil Litigation Section
East Memorial Building
284 Wellington Street, 2nd Floor
Ottawa, Ontario
K1A 0H8

Tel: (613) 957-4838
Fax: (613) 954-1920
joseph.depencier@justice.gc.ca

Counsel for the Attorney General of Canada