Original filed October 27, 2000
Amended pursuant to Rule 24(1)(a)
of the Supreme Court Rules

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

BETWEEN:

THE UNITED MEXICAN STATES

PETITIONER

AND:

METALCLAD CORPORATION

RESPONDENT

AMENDED PETITION TO THE COURT

THIS IS THE PETITION OF:

The United Mexican States
c/o Borden Ladner Gervais LLP
Barristers & Solicitors
1200 Waterfront Centre
200 Burrard Street
P.O. Box 48600
Vancouver, BC V7X 1T2

ON NOTICE TO:

Metalclad Corporation
c/o Law Offices of Clyde C. Pearce
Suite 201
1418 South Main Street
Salinas, California 93908
United States of America

Let all persons whose interests may be affected by the order sought TAKE NOTICE that the Petitioner applies to court for the relief set out in this petition.

IF YOU WISH TO BE HEARD at the hearing of the petition or wish to be notified of any further proceedings, YOU MUST GIVE NOTICE of your intention by filing a form entitled "Appearance" in the above registry of this court within the Time for Appearance and YOU MUST ALSO DELIVER a copy of the "Appearance" to the Petitioner's address for delivery, which is set out in this petition.

YOU OR YOUR SOLICITOR may file the "Appearance". You may obtain a form of "Appearance" at the registry.

IF YOU FAIL to file the "Appearance" within the proper Time for Appearance, the Petitioner may continue this application without further notice.

TIME FOR APPEARANCE

Where this Petition is served on a person in British Columbia, the time for appearance by that person is 7 days from the service (not including the day of service).

Where this petition is served on a person outside British Columbia, the time for appearance by that person after service, is 21 days in the case of a person residing anywhere within Canada, 28 days in the case of a person residing in the United States of America, and 42 days in the case of a person residing elsewhere.

[or, where the time for appearance has been set by order of the court, within that time.]

ENDORSEMENT OF PETITION

If you wish to receive notice of the time and date of hearing or to respond to the petition, you must respond by delivering to the petitioner, within 6 clear days after you have entered an appearance,

(a) an outline in Form 125,

(b) 2 copies of each affidavit, not already in the court file, on which you intend to rely at the hearing, and

(c) one copy of any material in the court file on which you intend to rely at the hearing and that is not referred to in the petitioner's outline.

NOTE: THIS PETITION IS SUBJECT TO RULE 65, THE VANCOUVER CHAMBERS PILOT PROJECT RULE.

IF YOU DO NOT RESPOND AS REQUIRED BY THAT RULE, YOU WILL NOT BE GIVEN NOTICE OF THE HEARING AND THE HEARING MAY PROCEED WITHOUT YOU.

(1) The address of the registry is:

800 Smithe Street
Vancouver, BC

(2) The ADDRESS FOR DELIVERY is:
Borden Ladner Gervais LLP
1200 Waterfront Centre
200 Burrard Street
P.O. Box 48600
Vancouver, BC V7X 1T2
Attention: Patrick G. Foy, Q.C.
Fax number for delivery (if any): None

(3)

The names and office addresses of the Petitioner's solicitors are:
Borden Ladner Gervais LLP
1200 Waterfront Centre
200 Burrard Street
P.O. Box 48600
Vancouver, BC V7X 1T2
Attention: Patrick G. Foy, Q.C.

Thomas & Partners
Suite 226
2211 West 4th Avenue
Vancouver, BC V6K 4S2
Attention: J. Christopher Thomas

The Petitioner applies to this Court for:

(a) an Order setting aside ^ the award made on August 30, 2000, in Vancouver, British Columbia, in ICSID Additional Facility Case No. ARB(AF)/97/1 (the "Award") between Metalclad Corporation and the United Mexican States concerning a dispute arising under Chapter Eleven of the North American Free Trade Agreement ("NAFTA") pursuant to s. 30 of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (the "*Act*");

(b) alternatively, an Order for leave to appeal to the Supreme Court of British Columbia from the Award, pursuant to s. 31 of the *Act*, and, if leave is granted, an Order that the Award be set aside ^;

(c) an Order that the recognition or enforcement of the Award be suspended pending the hearing of this Petition;

(d) costs; and

(e) such further and other Orders as this Court may deem just.

The Petitioner seeks relief pursuant to ss. 30, 31 and 42 of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55^, or, in the alternative, s. 34 of the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, and s. 10 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253; Rules 1(5), 10, 57 and 65 of the *Rules of Court*; and the inherent jurisdiction of this Court.

At the hearing of this Petition will be read:

(a) the Affidavit of Carol Ann Simpson, a copy of which is served herewith;

(b) the pleadings, exhibits and proceedings in the Arbitration; and

(c) such other material as counsel may advise and as the Court may permit.

STATEMENT OF FACTS

The facts upon which this Petition is based are as follows:

A. The Parties

1. The Petitioner, the United Mexican States ("Mexico" or "the Federal Government"), is a party to the North American Free Trade Agreement ("NAFTA").

2. The Respondent, Metalclad Corporation ("Metalclad"), is a company incorporated pursuant to the laws of Delaware. Metalclad wholly owns Eco-Metalclad Corporation ("ECO"), a company incorporated pursuant to the laws of Utah. ECO, in turn, wholly owns Ecosistemas Nacionales, S.A. de C.V. ("ECONSA"), a company incorporated pursuant to the laws of Mexico and Confinamiento Tecnico de Residuos Industriales, S.A. de C.V. ("COTERIN"), a company incorporated pursuant to the laws of Mexico. A reference herein to Metalclad includes references to ECO, ECONSA and COTERIN, as the case may be.

B. The Hazardous Waste Transfer Station and Landfill in La Pedrera

3. In or about 1990 and 1991, COTERIN operated a hazardous waste transfer station (the "Transfer Station") at La Pedrera, Mexico. At the time, COTERIN was owned by Mexican nationals, not Metalclad.

4. La Pedrera is located in the Municipality of Guadalcazar (the "Municipality"), within the State of San Luis Potosi ("SLP"), Mexico. The Municipality is situated in an impoverished and remote area of SLP. It does not possess a developed administrative infrastructure and has limited resources. The Municipality has 40 employees, 2 jailers, 2 police officers and one station wagon.

5. Eight hundred people live within ten kilometers of COTERIN's site, which are approximately 70 kilometers by road and 25 kilometers directly from the town of Guadalcazar.

6. The operation of the Transfer Station was authorized by the Federal Government in 1990.

7. Rather than transfer the hazardous waste as authorized, COTERIN dumped 55,000 barrels of hazardous waste received at the Transfer Station onto the ground without separation or treatment. The dumping was strongly opposed by local residents, their elected leaders and those of neighbouring municipalities and others. The Federal Government ordered the Transfer Station to be closed eleven months after it opened. The Transfer Station remained subject to this Federal shut-down order from September 26, 1991 until February 2, 1996.

8. In 1992, the Municipality appointed an ecology official (a "*Regidor*") to address the contamination at the Transfer Station.

9. By 1993, COTERIN had received the following permits relating to a hazardous waste landfill (the "Landfill") at La Pedrera:

(a) on January 27, 1993, the National Ecological Institute ("INE"), an agency of the federal Secretariat of the Mexican Environment, National Resources and Fishing ("SEMARNAP") approved COTERIN's Environmental Impact study of a Landfill with an annual capacity of 36,500 tonnes. Clause 10 of this permit provided:

> This authorization is issued without prejudice to the holder's need to apply for an obtain other authorizations, concessions, licenses, permits or such, that are necessary to conduct the works as a result of this authorization, or its operation or other stage of the project, pursuant to other laws and regulations that shall be applied by the Secretariat of Social Development and/or by other federal, state or municipal authorities.

(b) On August 10, 1993, SEMARNAP granted a federal permit to Metalclad authorizing it to ^ operate the Landfill; provided that it complied with the provisions contained in the *Ley General del Equilibrio Ecologico y la Proteccion al Ambiente* and its *Regulations on Hazardous Waste Matters*, and the standards applicable to the authorized activities;

(c) on May 11, 1993, SLP granted a land use permit to Metalclad relating to the Landfill. The permit states on its face that it does not authorize the construction or authorization of the Landfill.

10. In 1991 and 1992, the Municipality declined COTERIN's application for a permit to construct the Landfill. On December 5, 1995, as noted below, a second municipal construction permit application, made by COTERIN, when owned by Metalclad, was denied. No permit was ever granted by the Municipality authorizing COTERIN to construct the Landfill.

11. No separate operating permit was ever applied for or granted by the Municipality authorizing COTERIN to operate the Landfill as a hazardous waste landfill. As noted below, the Municipality was prepared to authorize COTERIN to operate the Landfill as a non-hazardous industrial waste landfill.

C. **Metalclad's Acquisition of COTERIN**

12. On April 23, 1993, Metalclad entered into an option agreement (the "Option Agreement") to purchase COTERIN, and the permits it held.

13. The record indicates that, before Metalclad entered into the Option Agreement:

(a) Metalclad was aware that COTERIN had applied for a Municipal construction permit with respect to the Landfill in 1991 and 1992, and had referred to the

applicable statutory provisions, and that the Municipality had denied the application;

(b) Metalclad was aware of a resolution of the Municipality dated January 20, 1992, indicating that the Municipality considered that it had the authority, when considering a construction permit application, to review the project's impact on the local environment, health and safety concerns, previous unauthorized conduct of the applicant, and the social interests of the Municipality;

(c) ECO, Metalclad's subsidiary, had applied for and obtained municipal permits in anticipation of constructing a hazardous waste incinerator at either Matehuala, SLP or Santa Maria del Rio, SLP in April, 1990, and September, 1992, respectively;

(d) Metalclad and COTERIN had received legal advice that a Municipal permit was required before construction and operation of the Landfill could lawfully be commenced; and

(e) Metalclad amended the Option Agreement to contain a provision stating that the outstanding USD$1.5 million of the USD$2 million purchase price would be payable only if:

(i) the Municipal permit was issued to COTERIN; or

(ii) COTERIN obtained a definitive judgment in a writ of *amparo* (a Mexican domestic legal remedy) that it could legally proceed with the construction of the Landfill in the absence of a Municipal permit.

14. On September 19, 1993, Metalclad exercised its option under the Option Agreement and acquired COTERIN, notwithstanding that no Municipal permit had been issued authorizing the Landfill, and that no *amparo* proceedings had been commenced.

15. By letter dated September 16, 1993, three days before it exercised the option to purchase COTERIN, a Metalclad officer acknowledged in writing that the company's local counsel had advised that a "municipal manifest" may be required and that the Municipal President was opposed to the landfill project.

D. Metalclad's Construction of the Landfill and the Denial of the Municipal Permit

Construction of the Landfill

16. After acquiring COTERIN, Metalclad publicized its plans to construct the Landfill. Metalclad claimed that, if it was permitted to ^ operate the Landfill, it would remediate the contamination created by COTERIN. To that end, Metalclad caused advertisements to be placed in local newspapers stating:

> [w]e recognize that a serious danger exists in the event that the facility, approved by the Federal Government, cannot be operated given the number of containers existing on the site may reach up to 120,000 in number representing close to 30,000 tons of dangerous and toxic waste deposited only in ditches which do not meet the construction standards and are only covered with dirt, without complying with the minimum safety conditions and standards and which may pose a great danger to the health of the inhabitants of the communities. Given this grave danger, METALCLAD CORPORATION is ready to treat and confine their wastes investing the amount of $5,000,000 to meet these ends thereby avoiding further damage that, at this moment, is already posed to the detriment of the environment. . .

17. In January, 1994, Metalclad advertised publicly that its construction of the Landfill would "comply with all of the requirements that the State Coordination of Ecology requests in order to observe any . . . municipal requirements".

18. On May 26, 1994, SLP noted in a letter to Metalclad that any decision to open the Landfill for commercial operation would depend upon:

(a) convincing SLP and Municipal authorities that the facility could operate with high safety standards; and

(b) the community accepting its operation, such acceptance being assessed jointly by SLP, the Municipality, and Metalclad.

19. In May, 1994, Metalclad commenced construction activities at the Landfill.

20. Metalclad did not hold a Municipal permit when it commenced construction of the Landfill. The record indicates that Metalclad had received legal advice outlining the procedure for applying for a Municipal permit, as well as the means by which the Municipality's jurisdiction to issue the permit could be challenged. The record also indicates that Metalclad decided to ignore the requirement for the Municipal permit rather than submit an application and thereby draw attention to its absence.

21. On June 6, 1994, the Municipality ordered Metalclad to cease construction of the Landfill due to the absence of a Municipal permit to do so.

22. On October 26, 1994, the Municipality again ordered Metalclad to cease constructing the Landfill due to the absence of a Municipal permit to do so.

23. On November 9, 1994, the Federal Government informed Metalclad that it must obtain construction permits "from the municipal and State authorities in accordance to their respective jurisdiction". This direction was repeated on November 14, 1994.

24. On November 15, 1994, although it did not yet have a Municipal permit, Metalclad resumed construction of the Landfill. Metalclad applied for a Municipal permit.

25. While the Municipality was considering its application for a permit, Metalclad accelerated construction of the Landfill, completing it by March, 1995.

Public Opposition

26. At all material times, there were demonstrations of significant public opposition to the construction of the Landfill, just as there was public opposition to the ongoing contamination from the Transfer Station commencing in 1990.

27. When Metalclad attempted to hold a facility tour in March, 1995, demonstrators blockaded the Landfill. The demonstrators dispersed after several hours.

Second Denial of the Municipal Permit Application

28. On December 5, 1995, the Municipality denied COTERIN's November 1994 application for a construction permit for the Landfill. The Municipality noted, *inter alia*, that

(a) it had denied similar applications by COTERIN in 1991 and 1992;

(b) Metalclad had actually commenced construction of the Landfill prior to receiving a Municipal permit;

(c) the contamination from COTERIN's operation of the Transfer Station had been remediated;

(d) there was local opposition to the construction and operation of the Landfill; and

(e) there were concerns regarding the environmental impact of the Landfill.

Metalclad's Appeals from the Denial of the Municipal Permit

29. In April, 1996, the Municipality refused COTERIN's petition that it reconsider its rejection of Metalclad's permit application.

30. Metalclad, through COTERIN, ^ filed an *amparo* before a Federal Court against the Municipality's decision ^, but its application was dismissed because of a failure to exhaust its administrative remedies by proceeding to the State Administrative Tribunal, as required by Mexican law.

31. Metalclad ^ then appealed to the Mexican Supreme Court, but abandoned that appeal on October 31, 1996, in favour of negotiating directly with the Municipality. This appeal was never reactivated, nor did Metalclad reactivate its application for a municipal permit.

Negotiations Between Metalclad and the Municipality

32. Metalclad negotiated with the Municipality in 1996 and early 1997. The Governor of SLP and the Ambassador of the United States to Mexico facilitated those negotiations.

33. The negotiations between Metalclad and the Municipality culminated in the *Acuerdo de Entendimiento* (Agreement of Understanding) on January 8, 1997, which set forth the framework for future public consultations and negotiations regarding the Landfill, and permitted its operation as a non-hazardous industrial waste landfill in the meantime. The full and precise terms of the *Acuerdo de Entendimiento* will be referred to at the hearing of this Petition.

34. Public consultations and negotiations did not proceed further and, instead, Metalclad pursued the NAFTA arbitration proceeding.

Federal Government's Representations to Metalclad

35. At various stages throughout the negotiation of the Option Agreement, the acquisition of COTERIN, and the construction of the Landfill, Metalclad asserts that it was informed by representatives of the Federal Government that:

(a) no permits from the Municipality were required in order to construct and operate the Landfill; or

(b) the Municipality would issue any necessary permit as a matter of course; and

(c) Metalclad should simply apply for the Municipal permit in order to foster positive relations with the Municipality.

36. The representatives of the Federal Government who were alleged to have made the representations referenced in paragraph ^ 35 signed witness statements specifically denying making the statements attributed to them by Metalclad. The contemporaneous federal permits and the correspondence did not support the assertion.

Municipal Permits in Mexican Domestic Law,

37. Various constitutional and legislative provisions were engaged by the Municipality's refusal to grant a permit to Metalclad. The full and precise terms of the following documents will be referred to at the hearing of this Petition:

(a) the *Constitution* of Mexico;

(b) the federal *Ecological Balance and Environmental Protection Act*;

(c) the *Ecological and Urban Code of the State of San Luis Potosi*;

(d) the *Municipal Organic Act of the State of San Luis Potosi*;

(e) the *Environmental Protection Act of the State of San Luis Potosi*; and

(f) the *Treasury Act for the Municipalities of the State of San Luis Potosi*.

38. Mexico presented two expert reports on Mexican law. The first report was prepared by former Justices of the Mexican Supreme Court: Dr. Ulises Schmill Ordonez (the former Chief Justice), Lic. Carlos de Silva Nava and a scholar, Dr. José Ramon Cossio Diaz. The second report was prepared by the Institute of Legal Research of the National Autonomous University of Mexico.

39. The expert reports filed by Mexico indicated that a Municipal permit was required for the lawful construction and operation of the Landfill, and that the Municipality was entitled to review the project's impact on the local environment, health and safety concerns, previous unauthorized conduct of the applicant, and the social interests of the Municipality as evidenced by residents' opposition.

40. Metalclad filed two expert reports signed by David Eaton, a 1994 graduate of the University of Arizona and an LL.M. candidate at the ITESM in Monterrey, Mexico, and two of his colleagues at the ITESM.

E. The *Convenio* and the *Amparo* Proceedings

The Convenio

41. As noted above, the Federal Government ordered the Transfer Station shut-down on September 26, 1991. On August 30, 1994, the Federal Government prohibited Metalclad from introducing any type of hazardous waste to the Landfill or Transfer Station until an audit of the contamination had been completed, and remediation works were carried out. This direction was repeated on November 14, 1994.

42. On November 25, 1995, after the audit process was completed, Metalclad and the Federal Government (acting through the INE and PROFEPA, both sub-agencies of the federal environmental agency SEMARNAP) entered into an agreement (the "*Convenio*") pursuant to which Metalclad would, *inter alia*:

(a) complete a site remediation plan for the Site, monitored by an appointed Technical-Scientific Committee and a Citizen Supervision Committee;

(b) conduct remediation simultaneously with commercial operation of the Landfill for three years;

(c) be permitted to operate the Landfill for renewable five-year terms;

(d) designate 34 hectares of the Site as a buffer zone for the conservation of endemic species, including cacti;

(e) contribute to the Municipality two pesos per ton of hazardous waste it received;

(f) process hazardous waste generated within SLP at a 10% discount;

(g) provide to the residents of the Municipality one day per week of free medical advice;

(h) employ residents of the Municipality to perform manual labour, and give preference to them for technical training;

(i) consult with government authorities on the remediation of hazardous waste sites; and

(j) provide two publicly-accessible courses annually regarding the management of hazardous waste.

43. Representatives of SLP and the Municipality were not involved in the negotiations that resulted in the *Convenio*.

44. The full terms of the *Convenio* will be referred to at the hearing of this Petition.

The Municipality's Amparo Proceeding

45. After it rejected Metalclad's application for a Municipal permit, the Municipality filed an administrative complaint with SEMARNAP challenging the authority of the *Convenio* and its provision permitting simultaneous remediation and operation of the Landfill. The Municipality argued that this was contrary to the Federal Government's order on August 30, 1994 and November 14, 1994, which stipulated that remediation must be completed before any new waste was introduced to the Landfill.

46. SEMARNAP denied the Municipality's complaint.

47. On January 31, 1996, the Municipality filed an *amparo* proceeding in a Federal Court, challenging the legality of the *Convenio*. Metalclad was granted standing in the action.

48. On February 6, 1996, the Court granted the Municipality's application for an injunction and Metalclad was enjoined from operating the Landfill.

49. On May 18, 1999, the *amparo* proceeding was dismissed, and the injunction was dissolved.

F. <u>The Ecological Decree</u>

50. On September 20, 1997, the Governor of SLP issued an Ecological Decree declaring that 188,758 hectares within the Real de Guadalcazar, which included the Landfill, would be preserved as an ecological preserve. The primary focus of the Ecological Decree

was to protect a species of cacti in the area. The full terms of the Decree will be referred to at the hearing of the Petition.

G. The Arbitration Hearing

Structure of Chapter Eleven, NAFTA and the Arbitration Hearing

51. Chapter Eleven of NAFTA permits an investor of one of the Parties to NAFTA (a "Party") to claim relief directly from another Party in several specified circumstances. The full terms of NAFTA will be referred to at the hearing of this Petition.

52. The arbitration hearing was conducted pursuant to the International Centre for Settlement of Investment Disputes ("ICSID") Arbitration (Additional Facility) Rules (the "Rules"). The full terms of the Rules will be referred to at the hearing of this Petition.

Course of the Arbitration Hearing

53. On October 2, 1996, Metalclad delivered to Mexico a Notice of Intent to Submit a Claim to Arbitration, pursuant to Article 1119 of NAFTA.

54. Metalclad commenced proceedings under Chapter Eleven of NAFTA by filing a Notice of Claim with the ICSID Secretariat on January 2, 1997. The Notice of Claim sought relief from Mexico for various "measures" allegedly taken by the Federal Government, the state of San Luis Potosi or the Municipality in relation to the Landfill.

55. On January 13, 1997, the Secretary-General of ICSID accepted Metalclad's application for access to the Additional Facility of ICSID and issued a Certificate of Registration of the Notice of Claim.

56. On May 19, 1997, the arbitral tribunal that would consider Metalclad's Notice of Claim (the "Tribunal") was deemed by the Secretary-General of ICSID to have been constituted and the arbitration proceedings were deemed to have begun.

57. The arbitral tribunal constituted to consider Metalclad's Notice of Claim (the "Tribunal") was comprised of:

(a) Professor Sir Elihu Lauterpacht, Q.C., C.B.E. (President);

(b) Benjamin R. Civiletti; and

(c) José Luis Siqueiros.

58. Pursuant to the Rules, the Tribunal determined on July 15, 1997 that the place of the arbitration shall be Vancouver, British Columbia, Canada. Mexico and Metalclad accepted that determination.

59. Between October 14, 1997 and May 3, 1999, the parties filed and exchanged numerous written submissions.

60. As permitted by NAFTA, Her Majesty the Queen in Right of Canada ("Canada") filed a written submission with the Tribunal on July 28, 1999. The United States of America filed a written submission with the Tribunal on November 9, 1999.

61. A hearing was conducted by the Tribunal in Washington, District of Columbia, United States of America, between August 30, 1999 and September 9, 1999. Representatives of Canada and the United States of America attended the hearing.

62. Mexico and Metalclad filed and exchanged post-hearing written submissions on November 9, 1999.

63. The full particulars of the written submissions filed and exchanged by Mexico, Metalclad, Canada, and the United States of America during the arbitration will be referred to at the hearing of this Petition.

64. Although the list of "measures" Metalclad claimed were at issue was fluid throughout the arbitration proceedings, three "measures" remained impugned at the conclusion of the arbitration:

(a) the Municipality's December, 1995 denial of Metalclad's application for a Municipal construction permit for the Landfill;

(b) the February, 1996 injunction obtained in the *amparo* proceedings initiated by the Municipality against SEMARNAP challenging the *Convenio*; and

(c) the Ecological Decree issued by SLP in September, 1997 (Mexico objected to the Tribunal's jurisdiction to consider this event, given that it post-dated the Notice of Claim filed by Metalclad).

H. The Award

65. On August 30, 2000, the Tribunal delivered its Award.

66. In the course of its Award, the Tribunal recited various allegations and assertions by Metalclad but did not make express findings of fact.

NAFTA Article 1105: Fair and Equitable Treatment

67. The Tribunal found that Metalclad's investment was not accorded fair and equitable treatment in accordance with international law such that Mexico violated NAFTA Article 1105(1). In reaching this conclusion the Tribunal based its decision on findings of lack of "transparency" of municipal law and "improper" permit denial by the Municipality.

68. The Tribunal held that:

(a) Metalclad was led to believe by federal officials that it did not require a permit from the Municipality in order to construct and operate the landfill;

(b) when any Party to NAFTA becomes aware of any scope for misunderstanding or confusion as to the relevant legal requirements for initiating, completing and successfully operating investments, that Party has a "duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws". There should be "no room for doubt or uncertainty on such matters";

(c) the "absence of a clear rule as to the requirement or not of a municipal construction permit, as well as the absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit, amounts to a failure on the part of Mexico to ensure the transparency required by NAFTA";

(d) even if a permit from the Municipality was required, a permit application could only be denied for reasons relating to the physical construction or defects of the structure and the denial of a permit by the Municipality by reference to environmental considerations was outside its jurisdiction and therefore improper; and

(e) the "totality of the circumstances", including the denial of the permit by the Municipality, the Municipality's administrative complaint to SEMARNAP challenging the *Convenio* and the subsequent *amparo* proceeding and injunction, indicated that Metalclad was not treated fairly and justly in accordance with Article 1105 of the NAFTA.

NAFTA Article 1110: Expropriation

69. In accepting Metalclad's claim that Mexico had expropriated Metalclad's investment, and had taken a measure tantamount to expropriation, the Tribunal held that:

(a) "expropriation" under NAFTA includes "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";

(b) two theories of expropriation were presented, namely,

(i) Mexico's toleration of the conduct of the Municipality in the denial of the "right to operate the landfill" was a measure "tantamount to expropriation", and

(ii) the Municipality's denial of the permit, without any basis in the proposed physical construction, together with federal representations, and the Municipality's actions against the *Convenio*, and the absence of a timely or orderly denial, amounted to an "indirect expropriation";

(c) although not of "controlling importance", the Ecological Decree barred forever the use of the landfill and was therefore a further ground for a finding of expropriation.

70. As a remedy, the Tribunal ordered that:

(a) Mexico shall pay the value of Metalclad's investment, less certain deductions, including an allowance for the costs of remediation, which will be borne by Mexico;

(b) upon receiving payment from Mexico, COTERIN must relinquish all claim, title and interest in the Transfer Station and Landfill;

(c) interest shall be payable by Mexico at the rate of 6% per annum, compounded annually, running from the date on which the Municipality refused to grant to Metalclad the permit to construct and operate the Landfill. Upon the expiry of 45 days from the date of the Award, interest on the unpaid amount shall accumulate at the rate of 6% per annum, compounded monthly;

(d) it was "equitable in this matter for each party to bear its own costs and fees, as well as half the advance payments made to ICSID".

71. The Tribunal ordered Mexico to pay to Metalclad the amount of US$16,685,000.00.

72. The full terms of the Award will be referred to at the hearing of this Petition.

Arbitral Error and Grounds of Appeal

(a) The Tribunal committed arbitral error by exceeding its powers including:

(i) 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 when it only had jurisdiction to consider alleged breaches of Chapter Eleven and then legislating new transparency obligations not agreed to by the Parties; and

(ii) 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, arrogating to itself powers to decide issues of Mexican domestic law as if it were a Mexican domestic court.^

(b) The Tribunal erred in its interpretation of Articles 1105 and 1110 of the NAFTA.

(c) The Tribunal erred in its interpretation of Mexican domestic law as to the scope of the Municipality's permitting jurisdiction.

(d) The Tribunal failed to address all of the issues presented to it for resolution and failed to state the reasons on which the Award was based as required by Article 53 of the Arbitration (Additional Facility) Rules.

(e) The Tribunal erred in law by reason of the Tribunal's failure to have regard to relevant evidence including:

(i) the fact of prior contamination of the site and how that prior contamination:

(A) motivated the Municipality to deny the construction permit application;

(B) motivated the Municipality to initiate legal proceedings in the Mexican courts to challenge the *Convenio*;

(C) motivated the March 1995 demonstration, which demonstration was by private citizens and NGOs whose acts are not attributable to the Mexican State, and the issue of non-attributability itself;

(ii) Metalclad's actual knowledge of the Municipality's asserted permitting authority;

(iii) the existence and relevance at international law of the domestic legal remedies available to Metalclad and their abandonment of those remedies in favour of a negotiated settlement with the Municipality, including the significance of the Municipality's agreement to the use of the site as an industrial non-hazardous waste landfill.^

(f) Such further and other grounds as counsel may advise.

73. The result of the Arbitration is important to the parties and justifies intervention by the Court. The determination of the interpretation of the relevant provisions of the NAFTA is an issue of general importance.

74. Alternatively, the Tribunal acted in excess of jurisdiction by addressing questions not submitted to it, failed to provide an award in accordance with the procedural agreements of the parties and the Award conflicts with public policy.

DATED: October 27, 2000

Patrick G. Foy, Q.C.
(BORDEN LADNER GERVAIS LLP)
Solicitor for the Petitioner

"J. C. Thomas"

J. Christopher Thomas
(THOMAS & PARTNERS)
Solicitor for the Petitioner