BEFORE THE HONORABLE TRIBUNAL
ESTABLISHED PURSUANT TO CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

METALCLAD CORPORATION
CLAIMANT

VS.

THE UNITED MEXICAN STATES
RESPONDENT

CASE No. ARB(AF)/97/1

REPLY

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PART I

INTRODUCTORY MATTERS

CHAPTER 1
PRELIMINARY CLERICAL CONCERNS AND CLARIFICATIONS

Topical Arrangement of Sections

Section 1 Entities Comprised Within the Investment

1. In its Memorial, Claimant referred the Tribunal to a chart[1] depicting certain corporate relationships among the entities owned by Metalclad. It stated in that same endnote that "[f]or ease of description, 'Claimant,' 'Company' or 'Metalclad' also refers to COTERIN, or Eco-systemas, or ECOPSA, or all of them."[2]

2. Within the meaning of Article 1117, Claimant owns or controls the above-referenced entities and the entity known as "Eco-Metalclad." Taken together those entities represent Claimant's investment for purposes of the NAFTA. To the extent that this was unclear in the Memorial, Claimant hereby amends its claim to include each of said companies.

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1 Memorial, Ex 1.
2 Memorial, Endnote 3.

Chapter 1

Section 2 Elaboration and Amendment of the Claim

3. Claimant's discovery of new facts and clarification of facts supporting its existing Claim give rise in this Reply to amplifications of matters merely broached in the Memorial. In Claimant's understanding, the elaboration of facts and theories to be found in this Reply merely support the existing claim, rather than form new claims; they relate to the same investment and chain of events.

4. Semantical questions may nonetheless arise in defining claims. For the sake of clarity, to the extent any of the bases of recovery propounded herein is deemed to constitute, therefore, a new claim or an amended claim, Claimant hereby requests the Tribunal to accept the same within the authority granted by the Additional Facility Rules, Article 48.

Section 3 Respondent's Request for Relief and Issue Mischaracterization; Claimant's Costs

5. Respondent offers the view that "Claimant has intentionally filed a claim that lacks any plausible legal or factual basis," and accuses Claimant of various forms of abuse of the arbitral process.[3] As more fully set forth in this Reply, the reasonable reliance alleged by Claimant and discounted by Respondent is demonstrable; so, too, is the interference of which Claimant complains.

6. Respondent begs an essential question when it avers that Claimant "was fully aware of the *requirement* to obtain a local construction permit."[4] Viewed in the light most favorable to Respondent, whether that permit was obligatory remains perfectly

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[3] Counter-Memorial, para. 939.

[4] *Id.* (emphasis added).

unclear, a conclusion which adds to Claimant's conviction that its investment failed to receive fair and equitable treatment.

7. In relation to the proofs adduced in the Memorial, if Respondent implies that Claimant faces obstacles in the collection of proofs, that is readily conceded by Claimant, as it must be by any arbitral party who faces a host state in a dispute best illuminated by materials in the exclusive control of that state.

8. These hurdles have been compounded by Respondent's sometimes empty assurances of cooperation in the discovery process. Thus, Respondent's plea that Claimant ought not to be allowed to exploit the lack of litigation disciplines which Respondent attributes to arbitration[5] is ironical given Respondent's failure to timely supply many documents upon which it materially relies. This failing is all the more stark when one considers the considerable resources Respondent has brought to bear in this case.[6]

9. Respondent also decries accusations which it regards as outrageous. In Claimant's submission, Respondent's sense of outrage should be directed inwardly; the bad faith encountered by Claimant was appreciable. Contrary to Respondent's interpretation of the Memorial, however, Claimant's allegations of corruption are directed only to a small minority of the individuals with whom it interacted in relation to its investment. Claimant holds that the more befitting opprobrium is that which attaches to Respondent for the serial defamation of Claimant it has sponsored.

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5 *Id.*, para. 154.

6 In making ready its Counter-Memorial, Respondent requested and received promptly from Claimant, at Claimant's expense, a large quantity of documents. Given the considerable number of lawyers and experts arrayed against Claimant, it strikes one as curious and unfortunate that Respondent was not able to respond seasonably to Claimant's repeated entreatments.

10. Given the foregoing, and the matters to be substantiated herein, Claimant will request that its costs, including attorneys' fees and executive time, be reimbursed by Respondent. It follows, that Respondent also should bear its own costs of arbitration.

Section 4 Organization of this Reply

11. This submission is arranged in 18 consecutively numbered Chapters divided into three Parts. Part I contains in Chapter 2 a synopsis of Claimant's position and schedule of issues presented, and in Chapter 3 a survey of matters deemed by Claimant to be common ground. In Part II, Respondent's factual allegations, sometimes in their legal context, are discussed (Chapters 5-7). Claimant's reply to Respondent's legal analysis is contained in Part III, which comprises Chapters 8-18. Claimant's admissions and denials are contained in Appendix 1 hereto.

CHAPTER 2

OVERVIEW OF REPLY AND SYNOPSIS OF CLAIMANT'S ARGUMENT

Topical Arrangement of Sections

Section 1 **Synopsis of Claimant's Argument**
Section 2 **Illuminating Questions**

Section 1 Synopsis of Claimant's Argument

A. IN BRIEF

12. Instant case arises from an investment which was made in anticipation of NAFTA and expressly covered therein, but which was emasculated by a lack of NAFTA discipline at the state and local levels, made worse by deficient coordination among state and federal organs and a legal system in which, despite NAFTA, predictability, transparency and fairness were replaced by an arcane admixture of political, social, economic and personal influences. It is also a case characterized by governmental acts and omissions that have combined to permanently impair the Claimant's rights of ownership, thus implicating NAFTA's expropriation provisions and the many precedents relevant thereto. Finally, it is a case in which the Respondent has gone to extraordinary lengths in an attempt to sully the Claimant, presumably to direct attention away from itself.

B. THE MAIN POINTS

13. Claimant's investment was inaugurated in 1993 and includes a number of Mexican entities established to help resolve the waste disposal crisis facing Mexico and to generate a reasonable return on its capital investment. Claimant's investment was prompted in part by the guarantees set forth in NAFTA and, based on a natural

construction of that text, it was entitled to expect that the legal regimes to which it would be subject (federal, state and local) would be characterized by transparency, and fair and equitable treatment, and that its investment would receive full protection and security; Claimant was also entitled to expect that it would be treated no less favorably than national enterprises and that in the event its property interests were substantially and non-ephemerally impaired by legal acts attributable to Respondent, compensation at the investment's fair market value would be paid.

14. That Claimant was insufficiently experienced, financially incapacitated, provocative, daring and corrupt are falsehoods offered by Respondent directly or by insinuation. They are confuted by the facts confirmed by numerous declarations, Respondent's acquiescence, Respondent's continuing relationship with Claimant and the deficient credibility of those assembled by Respondent to give evidence. The manifest purpose of the train of accusations leveled by Respondent is to divert attention from its own acts.

15. In particular, the facts and strong inferences which Respondent would prefer to ignore include: the robust endorsement given to the project by federal authorities and a number of respected NGO's on technical and other grounds; the technical and geophysical suitability of the site chosen and the facility; the advice of federal representatives which minimized the importance of the municipal construction permit now relied upon by Respondent; the pattern of interaction between state and federal actors that revealed an investor caught among State organs and constituent polities working at cross purposes from each other; the Respondent's legal regime that, to the extent it can be deciphered, establishes the primacy to federal authorities in matters related to hazardous waste; and purposeful acts and omissions by state officials, starting in 1993 and continuing to this day, which reflect bad faith.

16. The jurisdiction of the Tribunal is not as confined as alleged by Respondent, given both the NAFTA's ordinary meaning and strong policies related to the administration of justice; the Tribunal may consider acts occurring after those giving rise to the claim where those acts are related to the same claim or investment. To not compensate Claimant in this case would result in unjust enrichment; regardless, the injunction against operations at the landfill and the state's ecological preserve decree have worked an indirect taking of Claimant's investment, creating a duty in Respondent to compensate Claimant at the fair market value of its investment, which should be valued as a going concern. Claimant is also entitled to its legal and executive costs and pre-award and post-award interest.

Section 2 Illuminating Questions

17. During the course of this Reply, Claimant raises several questions bearing upon the plausibility of Respondent's central thesis. Among these are the following:

1] Why would Claimant promote the near-certain alienation of the Governor, and the influential figure Dr. Pedro Medellin, by concealing from them its plans for La Pedrera until after exercising its option?

2] Why would Claimant press forward with construction in the face of a municipal closure order unless it had reasonable cause to believe that it was entitled to do so?

3] If a municipal construction permit were an essential juridical element in the lawful operation of La Pedrera, what accounts for the many occasions upon which federal authorities could have directly so indicated to Claimant but did not?

4] If the Municipality is so clearly entitled to the last word in matters related to hazardous waste, why was an *amparo* process

brought by the Municipality and why has it occupied the Mexican courts for so long? Similarly, on what basis is the federal government defending the amparo? In particular, how can Respondent refer in that litigation to Claimant's right as a vested one and still appear to make the contrary argument in this arbitration?

5] If the federal authorities' determinations in relation to *hazardous* waste were subject to municipality and local community approval, why did federal representatives purport to fix in the *Convenio de Concertacion* the benefits to be received by the Municipality?

6] If Metalclad were as corrupt, unskilled, impecunious and daring as Respondent maintains, why would quality firms such as BFI and several others form alliances and contract with Metalclad? And why would Respondent continue to welcome Claimant's landfill projects within its territory including the Aguascalientes project currently under construction?

7] If the state's Ecology Law does not impact Claimant's investment, what explains the newspaper accounts attributing the opposite conclusion to both Governor Sanchez Unzueta and Dr. Pedro Medellin?

CHAPTER 3

APPARENT COMMON GROUND

Topical Arrangement of Sections

Section 1 Scope and Object of This Chapter

18. This Chapter identifies factual propositions—some general, some specific—that Claimant believes to be uncontroversial. The Chapter's aim is to clarify the issues; additionally, it will introduce matters upon which the disputing Parties apparently do not fully agree. The survey which follows in this Chapter is not exhaustive.

Section 2 The United Mexican States In General and the State of San Luis Potosi In Particular Have a Significant Hazardous Waste Problem Typified By Clandestine Dumps

19. The INE and PROFEPA release entitled *Agreement for the Environmental Remediation of Guadalcazar*[7] is designed to inform the public about the *Convenio* more fully discussed below. That notice states:

> It is estimated that our country generates 14,500 tons of hazardous waste per day, which is equivalent of close to 5 million tons a year. The existent infrastructure in the country for the adequate handling of hazardous waste, including its final deposition in controlled landfill, only covers 11% of total hazardous waste generated in the country. [In San Luis Potosi alone] 36 thousand tons of hazardous waste are generated each year and these are [deposited] at the present time in 30 clandestine dumpsites.[8]

20. According to revised INE estimates, 8 million tons of hazardous waste are generated annually within Respondent's territory.[9]

Section 3 Respondent Is A Party to the Basel Convention

21. The Basel Convention,[10] which Respondent has ratified,[11] requires, *inter alia*, that:

> Each Party shall take appropriate measures to:

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7 Declaration of Federal Attorney General for the Environment Azuela, Annex 2, Vol. I, Tab C., Ex. 10.

8 *Id.*, third page. Declaration of Secretary Julia Carabias, *Id.* at Tab A, Ex. 1 (same press release).

9 INE Website.

10 28 I.L.M. 649 (1989).

11 Signature: March 22, 1989; Ratification: February 2, 1991, according to UNEP Website.

> (a) Ensure that the generation of hazardous wastes and other wastes within it is reduced to a minimum, taking into account social, technological and economic aspects;
>
> (b) Ensure the availability of adequate disposal facilities, for the environmentally sound management of hazardous wastes and other wastes, that shall be located, to the extent possible, within it, whatever the place of their disposal;
>
> (c) Ensure that persons involved in the management of hazardous wastes or other wastes within it take such steps as are necessary to prevent pollution due to hazardous wastes and other wastes arising from such management and, if such pollution occurs, to minimize the consequences thereof for human health and environment;[12]

22. Claimant finds recognition of these obligations in the words of Secretary Carabias, who remarks:

> The results of the independent environmental audit confirmed that the site was suitable....These results, along with our obligation to implement an environmental infrastructure and the country's need to have hazardous waste generated by industry, were in line with the position the Secretary would adopt with respect to La Pedrera.[13]

Section 4 The General Ecology Law [LGEEPA] of 1988[14] and Regulations Thereunder Distribute Powers in Relation to Waste Management Issues

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[12] Basel Convention on the Control of Hazardous Wastes and Their Disposal (1989), Art. 4(2) (in pertinent part), *reprinted in* 28 I.L.M. 657 (1989). *See generally*, P. Sands, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 504-06 (Vol. I: 1995)

[13] Declaration of Secretary Carabias, *supra*, para. 15.

[14] The General Ecology Law of 1988.

Chapter 3

23. The Powers of the Federation under Article 5 of the 1988 Law extend to:

> I. Formulation and implementation of the national environmental policy;...
> ./...
> V. The promulgation of Official Mexican Norms and their enforcement in matters set forth in [the] Law;
>
> VI. The regulation and control of activities considered to be highly hazardous, and of the generation, handling and final disposal of hazardous materials and wastes for the environment of ecosystems, as well as for the preservation of natural resources, in accordance with [the] Law, other applicable ordinances and their regulatory provisions;

24. Article 7 of the 1988 Law attributes the following powers to the states "in accordance with [its] provisions and local laws" on the subject:

> ./...
> II. The application of environmental policy instruments set forth in local laws on the subject, as well as the preservation and restoration of ecological equilibrium and environmental protection carried out on properties and zones of State jurisdiction, in matters that are not expressly attributed to the Federation.
> ./...
> XVI. Evaluation of the environmental impact of works or activities which are not expressly set aside for the Federation by this [the 1988] Law...

25. Article 8 ascribes to municipalities, *inter alia*, the power "in accordance with the provisions of this [the 1988] Law and local laws" to apply:

> [L]egal provisions in matters of prevention and control of the effects on the environment caused by generation, transportation, storage, handling treatment and final

> disposal of solid and industrial wastes which are not considered hazardous, in accordance with the provisions of Article 137 of this [the 1988] Law.

Section 5 When Metalclad Purchased COTERIN, La Pedrera Needed Remediation; Metalclad Was Willing to Remediate but, as a Matter of Federal Policy, as not Required to do so Before Commencing Operations.

26. In his declaration, Attorney General for the Environment Azuela explains why, on balance, federal authorities deemed it appropriate to permit Metalclad to operate the facility while curing the environmental problem[15] inherited from its predecessors, the Aldretts:

> [T]he practical exigencies in this case weighed in favor of allowing COTERIN (now under new ownership) to remediate the site while concurrently operating the hazardous wastes facility in compliance with the applicable environmental regulations. In this matter, it is important to emphasize that, given the violations incurred by the first company responsible for the facility (the Aldrett family) [the installation was closed]. However, when this Attorney General's office became aware that Metalclad acquired the majority of shares in COTERIN, and had the intention of assuming both the respective responsibilities to carry out the necessary remedial works and the appropriate operation of the facility, it was decided, based on the applicable legal requirements at the national level, to find the method of resolving this

[15] The press release announcing the *Convenio* refers to 20,500 tons of hazardous waste. Carabias Declaration, *supra*, Ex. 1.

problematic situation and to support the program for the appropriate management of hazardous wastes.[16]

Section 6 Federal Authorities, Apparently Without Exception, Regarded Claimant's Project as Technically Sufficient, Safe and Feasible; They Sought and Received Confirmation of Their Own Findings

27. In a statement supplied by Respondent, Federal Attorney General for the Environment Azuela explained that:

> [F]rom our perspective, the site met the federal regulatory requirements, the new facility provided a needed operation for the disposal of hazardous waste, and there was a commitment by the company to remediate the site. I have repeatedly expressed the opinion that the site met with both the legal and technical federal requirements and I continue to maintain this position.[17]

28. Similarly, Secretary for the Environment Julia Carabias Lillo states in her declaration that:

> Our final position was not made until the end of 1995, with the conclusion of the audit review, when SEMARNAP was convinced that the site was technically suitable for the operation of a controlled hazardous waste facility.[18]

29. In the same statement, Secretary Carabias refers to COTERIN as a company "that had the authorization required by the federal

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16 Azuela Declaration, *supra*, para. 48.

17 Counter-Memorial, Annex 2, Vol. I, Tab C, para. 4.

18 Carabias Declaration, *supra*, Tab A, para. 8.

legislation for the establishment of a controlled facility." She elaborates as follows:

> The National Institute of Ecology (INE) had reviewed all the company's plans and project's and had decided that due to its characteristics, the site was suitable for the establishment and operation of a hazardous waste facility, and the technology and the design which the company proposed to use met all the requirements of the existing federal Mexican legislation. It was in this way that in 1993, INE granted the approval for the Environmental Impact Risk Study and the final authorization for the establishment and operation of the facility ./...

The results of the independent environmental audit [concluded in late 1995] confirmed that the site was suitable.[19]

30. Secretary Carabias recalls that further efforts were undertaken to confirm and share the federal authorities' conclusions:

> We wanted to carry out the process at a faster pace and we were assured, once again, that the review and technical solution to the problem was appropriate.
>
> The experts invited were carefully selected to ensure that their ability and reputation were a guarantee for both the Secretary and for the public opinion....Within this rubric, technical personnel and advisors of the State of San Luis Potosi and the Municipality of Guadalcazar were included. In other words, we carried out an extensive information process from the results of the audit.[20]

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[19] *Id.*, paras. 14-15.

[20] Declaration of Secretary Carabias, *supra*, para. 16. Attorney General Azuela, in his declaration, at paras. 19-23, details these meetings, and recounts at para. 22:

31. By contrast certain state officers (most notably Dr. Pedro Medellin) and two NGOs have, at various times, questioned the safeness of La Pedrera as a hazardous landfill site.[21] In the case of Greenpeace, the opposition was directed, according to Attorney General Azuela, to all landfills and not specifically to La Pedrera's attributes.[22]

32. Claimant, as more fully presented below, regards the federal findings as compelling and the opposing views to be poorly supported.

> As a result of the meetings outlined, the Geological Institute of UNAM, the Engineering Institute of UNAM, the College of Civil Engineers of Mexico, the National Water Commission and the National Commission on Nuclear Security and Protection, were of the opinion that the site in which the facility is located is suitable for the establishment of this type of environmental infrastructure...

The Counter-Memorial excerpts briefly the findings of the various experts at page 165-66, n 442.

[21] Dr. Medellin states in his declaration at para. 71 that he "was never fully convinced of the advisability of the project." Counter-Memorial, Annex 2, Vol. II, Tab B. He cites, as at least part of his technical basis, the views given him in July 1993 by Mr. Joel Milan. *Id.*, para. 36.

[22] "Simply put, Greenpeace is opposed to all hazardous waste facilities, with the conviction that they only discourage...the total elimination of waste which cannot be reused or recycled." Azuela Declaration, *supra*, para. 46. He further recalls at para. 47 that:

> ...Greenpeace went so far as to file a criminal complaint against the officials of the then SEDUE involved in issuing the permits for the transfer station (Rene Altamirano and Sergio Reyes Lujan) and against me for my alleged participation in the concealment of criminal acts. I thought it was ironic, to say the least[.]

Section 7 Greenpeace and Certain Local NGO's Opposed the Project; Some Residents of the Townships Within the General Proximity of La Pedrera Also Opposed It

33. The active opposition of Greenpeace to the project is conceded by Claimant and apparently acknowledged by Respondent, one of whose federal officials observed: "... I believe that the local community would have eventually accepted the project if Greenpeace had not become so actively involved in opposing it."[23] Claimant does not accept, however, that the legal cause of its property loss was Greenpeace's opposition. It was in Claimant's view a source of pressure which influenced, to varying degrees, all three levels of Respondent's government. Among other things, Greenpeace filed a criminal complaint against various federal officials including Attorney General Azuela and Messrs. Altamirano and Reyes Lujan of SEDUE.[24]

34. Although there is agreement that, despite Metalclad's efforts, some opposition to the landfill could be found among the general populous of Guadalcazar Municipality, Respondent and Claimant sharply disagree upon the extent to which this was true and probably upon the related question of which community is the relevant one for these purposes. El Huizache is the village that is relatively near to the site (4.5 km away). The town of Guadalcazar, by contrast, is approximately 59 kilometers from the site and separated from it by topographical features which Claimant regards as prominent. The site is described by federal authorities as being located in a "rural zone."[25]

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[23] Declaration of Azuela, Annex 2, Vol. I, Tab C, para. 49.

[24] *Id.*, para. 47.

[25] Environmental Audit Executive Summary, March 1995 (concerning on-site audit activities undertaken between January 23 and February 25, 1995) Counter-Memorial, Ex. 98 at 2.

35. Respondent and Claimant agree that the Aldretts' activities at the site attracted criticism. Claimant holds that much of the opposition and apprehension engendered by the site stems from that pre-Metalclad period.

Section 8 Activities at the Site Were Influenced by a Series of Official Acts and Related Developments Which Included Federal and State Permits and Authorizations, Agreements with the Investor and Closure Orders.

A. Acts Which Preceded Metalclad's Ownership of COTERIN

SEDUE Closure Order

36. On September 25, 1991 SEDUE temporarily[26] closed the transfer station owned by COTERIN in light of environmental infractions. These included Mr. Aldrett's inability to provide certain documentation, unauthorized waste accumulations and the apparent acceptance of new waste in a manner inconsistent with COTERIN's permit. COTERIN was ordered to stop construction and to refrain from receiving any new waste "until the competent [division] of [that] Secretariat of State resolve[d] [how] [to] proceed".[27] The SEDUE closure order was unaffected by whether COTERIN held a municipal construction permit.

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[26] Mr. Aldrett referred to the closure as temporary in his September 30 and December 2, 1991 requests to have it lifted. Azuela Declaration, *supra*, Ex. 1. That characterization is also used in various official documents.

[27] Redaction of Minute No. 240170319, Azuela Declaration, *supra*, Ex. 1.

Chapter 3

INE Permit Authorizing Construction

37. On January 27, 1993 COTERIN received approval of its site-specific Environmental Impact Statement (referred to by Claimant as a federal construction permit). In operative part, Mr. Alamirano's six-page memorandum of confirmation provides:

> [H]aving analyzed the information that was submitted, this Direction considers that the project is appropriate under the terms that were stated./...the tasks leading to the construction and operation of an Industrial Waste Technical Landfill, which will consist of the transport, stabilization and/or neutralization and final disposition of wastes with a capacity of 100 tons per day or 36,500 tons per year./...
>
> [COTERIN] shall conclude the construction of the project within one year....which may be extended at the discretion of this Secretariat.[28]

The construction authorization, which by its terms was subject to renewal annually, was renewed on April 22, 1994.[29] The process leading to the issuance of this permit did not entail either verification of, or an obligation to procure, a local construction permit.

38. Respondent, however, cites language in the above-quoted authorization which it regards as alerting Claimant to the legal necessity of a municipal construction permit.[30] As more fully

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[28] Memorial, Vol. II, Ex. 6. Azuela Declaration, *supra*, Ex. 5 (Respondent's redaction).

[29] Exhibit 57 hereto.

[30] Respondent translates the provision in question as follows:

> This authorization is issued without prejudice to the holder's need to apply for and obtain other authorizations, concessions, licenses, permits or such, that are necessary to conduct the

explained below, Claimant holds that the clause relied upon is pro-forma, generic, vague and truistic.

State Land Use Permit

39. State law, on the other hand, stated that a municipal construction permit should be in place before a land use permit issued if certain conditions obtained.[31] The construction permit in place was that provided by the federal government. Both the Governor and the State Congress considered the land use permit application. In granting the land use permit it appears that they either: (1) considered the conditions involving a municipal construction permit and found them inapplicable; or (2) recognizing the primary authority of the federal government in matters of hazardous waste, and noting the INE authorization for construction, determined the municipal construction permit unnecessary. The issuance of the land use permit in disregard of the absence of a local construction permit underscores the inefficacy of the municipal construction permit as the *sine qua non* to operating the landfill.[32]

40. On May 11, 1993 COTERIN received a site-specific state land use permit.[33] That instrument recounted the documentation supporting COTERIN's application and noted the existence of an

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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.

Azuela Declaration, *supra*, Ex. 5.

31 Codigo Urbano y Ecologico del Estado de San Luis Potosi (Urban and Ecological Code of The State of San Luis Potosi), Article 61, fraction II requires a municipal construction permit for "works that generate significant impact in their area of influence and environment,...and...the risks that may be caused."

32 *See* Memorial, Vol. I, Ex. 34, Executive Summary ¶9; *Id.*, Declaration of Humberto C. Rodarte.

33 Memorial, Ex 7.

approved "temporary transfer station of industrial wastes, as an antecedent to the technical landfill requested."[34] It required that a reforestation and buffer zone be maintained and stated that construction "must adapt to the specifications and technical requirements that the corresponding authorities indicate."[35] The permitting authority did not deem the municipal construction permit necessary or to be applicable in this case, and the process leading to the permit was not influenced by whether any local permits had been sought.

Federal Operating Permit

41. On August 10, 1993 COTERIN received a site-specific federal operating permit.[36] As with the federal (construction) permit of January 27, 1993, the operation permit is signed by Arq. Rene Altimirano Perez. It sets forth thirty-seven paragraphs of instruction treating, *inter alia*, the design and construction of complementary works and the requirements that must be followed in the design, construction and operation of the confinement cells; in relation to these and other issues it provides cross-references to the relevant federal norms with which COTERIN must comply. It does not refer to local construction permits.

B. Acts and Events Occurring After Metalclad Purchased COTERIN

42. In September of 1993, Claimant exercised its option to purchase COTERIN. Claimant states that, in May 1994, it hired local workers and began construction at the site; it did so, it maintains, on the strength of a verbal understanding with state officials reached on or

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[34] *Id.*, second page.
[35] *Id.*, third page.
[36] Memorial, Vol. II, Ex. 8.

about April 22, 1994, evidenced, Claimant avers, by contemporaneous correspondence.[37]

A Committee of UASLP Professors Commenced a Study

43. A committee[38] was formed and held its first meeting in January 1994; it was composed of UASLP faculty members who agreed to collaborate with Metalclad representatives and the company GYMSA to pursue a technical investigation of La Pedrera. When inaugurated, it was headed by Dr. Roberto Leyva Ramos, Dean of the UASLP School of Chemical Sciences. Minutes dated February 3, 1994 defined the group's initial objectives as follows:

> Metalclad Corporation, together with the investigators from the UASLP, will define the technical studies and indispensable activities to be done in order to complement and generate the necessary regional information for the characterization of the physical surroundings of the site called "La Pedrera," Municipality of Guadalcazar, S.L.P. This will allow them to evaluate if the physical characteristics of the site are adequate for the construction of a controlled hazardous waste landfill, or, in its case, if the engineering project could remediate the natural disadvantages of the physical surroundings of the site.[39]

In December 1995, taking into account a study made by GYMSA the committee proposed further tests.[40]

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37 Exhibit 33 hereto.

38 Respondent objects to the nomenclature "Commission" for the UASLP body referred to here. It presumably does not deny that this entity functioned and produced findings.

39 Minutes of February 3, 1994 Technical Meeting, UASLP-Metalclad, Ex. 27 hereto, second page.

40 Executive Synthesis of the Evaluation Meeting Regarding "La Pedrera," December 18, 1995, Ex. 28 hereto.

A Federal Environmental Audit, to Last Several Months, Was Begun

44. In May 1994, PROFEPA approved Claimant's request for an environmental audit of the La Pedrera site.[41] It involved federal field work at and around La Pedrera which began in December of 1994.[42]

At the Request of Claimant's Entity, Closure Seals Affecting the Site Were Lifted

45. By letters dated July 14 and 22, 1994, Ing. Ariel Miranda on behalf of COTERIN requested Ing. Jose Luis Medina Garcia of PROFEPA (SLP) to "lift [the] closure seals with the subsequent revocation of the total temporary closure," which had been imposed on La Pedrera in September of 1991.[43] Within days thereafter, Mr. Ramiro Zaragoza replaced Mr. Medina as the SLP PROFEPA representative.[44]

46. On August 30, 1994, having made a site visit on August 16, 1994, PROFEPA resolved to suspend the closure seals. It did so to enable COTERIN to undertake certain remedial work;[45] COTERIN had already done some work.[46] The same resolution contemplated that the site would be comprehensively audited at COTERIN's expense. On September 6, 1994, the closure seals of the facility's gates were physically removed to facilitate the audit.[47]

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41 Convenio Press Release, *supra*, Carabias Declaration, Annex 2, Vol. I, Tab A, Ex. 1.

42 Azuela Declaration, Annex 2, Vol. I, Tab C, para. 9. The field work ended in late March 1995. *Id.*

43 Declaration of Ramiro Zaragoza, Annex 2, Vol. I., Tab D, Exs. 3 and 4.

44 *Id.*, para. 7.

45 Under the 1991 closure order, maintenance and reforestation activities were already exempted.

46 Counter-Memorial at 128-29, para. 430 and Ex. 83.

47 Counter-Memorial, para. 431.

The Municipality Purported to Close the Site

47. On October 26, 1994, representatives of the Town Council of Guadalcazar, by delivery of a handwritten note, demanded that all construction at the site cease, for want of a municipal construction permit; COTERIN made an application for permit soon thereafter. Activity at the site was halted for about one week, although a reply to COTERIN's application was not given until approximately thirteen months later.

Further INE Authorizations Were Issued

48. On Jan 31, 1995, though no municipal construction permit had been granted, INE authorized specific further work to be done at the landfill. The confirming instrument sanctioned:

> [C]onstruction of the final disposition cell for hazardous waste, as well as the complementary works consisting in the administration building, treatment unit, road system, laboratory, dressing rooms, maintenance, temporary storage, evaporation lagoon and fuel station.[48]

49. No reference is made therein to any municipal permits.

The Federal Environmental Audit Was Concluded; An "Audit of the Audit" Was Then Undertaken

50. In late March 1995, the federal audit (commenced by PROFEPA in May 1994) was concluded.[49] Then began a process which Respondent refers to as an "audit of the audit," in which the audit results were explained to, and scrutinized by, a select group of independent agencies and experts. The thinking behind the

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[48] *See* Memorial, Vol. II, Ex. 21.

[49] Carabias Declaration, *supra*, Ex. 1.

additional layer of examination was explained by Environmental Attorney General Azuela as follows:

> Secretary Julia Carabias and I decided that the only way to handle the controversy generated around La Pedrera was to be as open and transparent as possible. We were convinced that the experts in the area should review the audit results, and that the auditors should analyze the results of the audit with those experts and that non-governmental organizations opposed to the project, such as Greenpeace, should be invited to participate in this review process. This is exactly what we did.[50]

A series of meetings among auditors and experts occurred in June and July of 1994 pursuant to the above-referenced program of review. The process led to written expert submissions which were strongly in favor of the site's technical and environmental aptness.[51]

A Convenio de Concertacion Was Agreed Between Claimant and Federal Authorities to Implement the Audit Results

51. On November 24, 1995, federal authorities (INE, SEMARNAP and PROFEPA) and COTERIN, after the federal audit noted above, entered into an agreement which Respondent refers to as the *Convenio de Concertacion* (*Convenio*).[52]

52. The *Convenio's* preambular declarations note the INE's authority to "authorize the establishment and operation of installation dedicated to the handling and disposition of hazardous waste," the fact of the audit, the submission of the Claimant's Action Plan (which includes a remediation component), the fact of

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[50] Azuela Declaration, *supra*, para. 18.

[51] *Id.*, collected in Ex. 9; excerpted in Counter-Memorial at 165, para. 553, n442.

[52] Counter-Memorial at 174, para. 572.

the federal permit "to operate a hazardous waste controlled landfill in La Pedrera, Municipality of Guadalcazar" and the corresponding state land-use permit of May 11, 1993.[53]

53. The *Convenio's* main body contains twenty four clauses which, *inter alia*, define the term of the agreement as five years, and state that in the first three years "remediation and the commercial operation will take place simultaneously." Among its other terms is that oversight is to be given by the Federal Attorney's Office and that certain procedures will be followed by the Company to facilitate the oversight. The *Convenio* also provides that customers tendering intra-state waste are to receive a discount on treatment and disposition services, that hiring will be generally be from within Guadalcazar, that weekly medical services are to be provided to residents of Guadalcazar, that a royalty based upon volume of waste processed will be dedicated to social work within the Municipality as directed by the City Council thereof. The agreement also provides that COTERIN will render technical assistance and consultation to the federal authorities regarding "the matters of remediation of contaminated sites and hazardous wastes." The dispute resolution clause designates federal tribunals applying federal law in the Federal District as the exclusive forum and applicable law.

54. No mention is made of municipal permits of any kind.[54]

A Complete Lifting of the Closure Seals

55. On February 2, 1996, the closure seals that had been partially

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[53] Memorial, Vol. II, Ex. 2.

[54] *Id.*

lifted on August 30, 1994 were fully removed by PROFEPA (SLP).[55] The action was explained in a document[56] that:

> 1] summarized the results of the environmental audit concluded in March 1995 and noted that an agreed Action Plan (which included a Remediation Plan) had resulted from the audit;
>
> 2] noted that work had been authorized under the partial lifting of August 30, 1994 but that the Action Plan submitted by COTERIN as a result of the audit included "technical preventive and corrective measures that [were] more detailed than the ones that were ordered [in the resolution of] August 30, 1994";[57] and
>
> 3] recorded that the *Convenio de Concertacion* of November 24, 1995 had been concluded.

56. In leading to its dispositive paragraphs it also noted:

> In view of the [audit results and action plan] it is urgent to carry out the remedy action of the landfill facilities on the terms and conditions established in this instrument./...
>
> [T]he handling and proper disposition of the hazardous waste in the old cell[s] as well as the polluted soil requires the operation of a new cell.[58]
>
> [I]n order for the company [COTERIN] to be in a position to fully and strictly comply with the [*Convenio*]

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55 Azuela Declaration, *supra*, para. 6 and Ex. 2 thereto; Counter-Memorial at 185, para. 592.

56 Azuela Declaration, *supra*, Ex. 2.

57 *Id.*, Point F.

58 *Id.*, Points F & G.

> it is necessary to lift the total temporary closure decreed on September 25, 1991.[59]

57. On February 8, 1996, the INE expanded COTERIN's operating capacity ten fold to 360,000 tons per annum.[60]

58. That authorization notes that under LGEEPA:

> [I]t is up to the federation to authorize the construction and operation of the installations for the treatment of hazardous waste.[61]

59. The authorization also issues various operation instructions, contained in thirteen paragraphs, related, *inter alia*, to:

1] preventive measures appropriate to containerization and the avoidance of spillage;

2] compliance with certain LGEEPA Regulations and others related to the transportation and temporary storage of hazardous waste;

and contained a general mandate requiring that:

> [d]uring the stage of operation of the landfill, it [COTERIN] should strictly adhere to what is established in the Official Mexican Norms for the Environment.[62]

60. No mention is made in the document of one or more municipal permits.

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59 *Id.*, Point J.
60 *See* Memorial, Vol II, Ex. 30.
61 *Id.*, first page.
62 *Id.*, second page.

The Municipality Brought An Administrative Action

61. On December 15, 1995 the Municipality filed an administrative complaint prompted by the *Convenio de Concertacion.*[63] On December 27, 1995, Secretary Carabias of SEMARNAP dismissed the complaint on procedural grounds related to the Municipality's lack of standing and untimely action.[64]

The Municipality's Amparo Resulted in an Injunction

62. On February 6, 1996 a federal judge granted an interim injunction disallowing COTERIN from pursuing the commercial operations contemplated under its *Convenio* with PROFEPA.[65] What more the order provided is a matter of debate between the parties hereto; as more fully treated elsewhere in this Reply, the disagreement relates to Respondent's translation of the order.

63. The order closes, in the translated excerpt provided by Respondent, with the qualification "until the final and definitive decision is provided to the responsible party."[66] A permanent injunction replaced the above order on February 23, 1996;[67] various judicial proceedings followed.

Section 9 There Came to Exist a Belief on the Part of Certain Municipal and State Officials that Metalclad, Via COTERIN, Had Become Involved in Local Politics

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63 *See* Counter-Memorial, para. 584 *et seq.*

64 *See* SEMARNAP Dismissal Notice of December 25, 1995 (Summary Only) Counter-Memorial, Ex. 124.

65 Counter-Memorial, Ex. 126.

66 *Id.*

67 *Id.* at 189, para. 603. Claimant's understanding, replicated in its Memorial, is that remediation of the site was permitted but not mandated under the order, a matter to which Claimant returns below.

64. Respondent counts as one of Claimant's missteps that Claimant chose to become involved in local politics, mentioning in particular the campaign for the municipal presidency.[68] The same concern is reflected in the texts produced in its negotiations with the Municipality. Claimant denies that it participated in active support of a candidate or more generally in local politics either through COTERIN or directly. Claimant, nonetheless, acknowledges that officials with whom it dealt requested that it refrain from exerting any influence upon the success or failure of particular candidates.

65. Claimant speculates that, although the belief that it was politically active in Guadalcazar is fallacious, that misunderstanding nonetheless illustrates some of the influences at work within the Municipality and explains why some may have approached Claimant with reserve and distrust.

66. As developed in later chapters, Claimant finds illuminating Respondent's admission that a quintessentially political factor may have influenced treatment of Claimant's investment. Similarly, it will question why Claimant was wrong to seek assistance through diplomatic channels—another supposed *faux pas* enumerated by Respondent.[69]

Section 10 The La Pedrera Project Raised Issues of State Autonomy; Ultimately, The Municipality Sued SEMARNAP

67. Questions of jurisdictional delimitation, of the desirability and present extent of decentralization, and of state autonomy were raised by the La Pedrera project. The respective activities of the

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[68] *Id.* at 244, para. 851 (f).

[69] *Id.* at 244 para. 85 (m).

federal, state and municipal authorities gave rise to various discussions among the three levels of government. Claimant and Respondent may disagree upon the degree to which these interactions should be characterized as contentious and productive of contradictory views. Respondent's submissions provide the following examples of the attitudes, comments and accounts, which Claimant suggests demonstrate a measure of tension:

A. THE WORDS OF FEDERAL OFFICIALS

> Moreover, I believe that it is useful for this Tribunal to know that the relation with Pedro Medellin in this case was very difficult. This is so principally because, in my opinion, he never accepted the intervention of the federal government in matters he considered to be within the state government's sphere of jurisdiction. This was consistent with his position with respect to decentralization.[70]

> Moreover, it was clear to me that the Governor was in a difficult and unusual position. For many years, Mr. Salvador Nava was the leader of the opposition political party in San Luis Potosi. He was an advocate of state autonomy and, until his death in 1991, he headed the movement for the decentralization of federal power....[Governor Sanchez Unzueta's] election as governor was a surprise to political analysts and was attributed, to some extent, to the fact that he was married to Mr. Nava's daughter and was therefore, close to the Navista movement which, to a great extent, provided his support.[71]

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[70] Federal Attorney General for the Environment Azuela Declaration, Counter-Memorial, Annex Two, Vol 1., Tab C, para. 37.

[71] *Id.*, para. 34.

B. THE WORDS OF STATE OFFICIALS

68. Governor Sanchez Unzueta has circulated the following view:

> It is within the legal powers which are constitutionally guaranteed under Mexico's federal system that the free Municipality of Guadalcazar has enforced its laws. It shall continue to do so, regardless of pressures of political or any other nature, whether from the Federal Government, State Government of from foreign jurisdictions.[72]

C. THE MUNICIPALITY'S AMPARO

69. The Respondent recalls in its Counter-Memorial that:

> Eventually, in the autumn of 1995, PROFEPA, INE, and COTERIN negotiated a *Convenio de Concertacion*. PROFEPA agreed that so far as the federal government was concerned the site could be operated and the commercial operation could coincide with the remediation of buried waste...
>
> [T]he perception of the state and municipal governments was that was there was a risk that the federal government was attempting to [bind the local government]. There ensued a series of legal skirmishes as the Municipality and Greenpeace sought to prevent PROFEPA from implementing the *Convenio de Concertacion*.[73]

70. Secretary Carabias' sense of the same matter is as follows:

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[72] Letter of December 10, 1995 from Governor Sanchez to U.S. Senator Paul Simon, Memorial, Vol. II, Ex. 26.

[73] Counter-Memorial at 224, paras. 761-762.

> Unfortunately, with the signing of the agreement, our differences in perspective with the Governor of San Luis Potosi were significantly emphasized. This was a political risk which originated in our position and which regrettably materialized.[74]

71. Attorney General for the Environment Azuela suggests in like fashion:

> [T]he Governor and his advisors were not pleased that the Federal Government had given the authorizations for La Pedrera before the local government had considered the issue.[75]

72. These kinds of issues surfaced in relation to La Pedrera as early as 1991. According to a declaration supplied by Respondent, the issuance to Mr. Aldrett of a federal permit for the transfer station, led to exchanges. Former Municipal President Avila Perez recalls:

> [The Governor told] me he had not been previously notified, because the person in charge of this type of authorization[] was the [SEDUE] deputy-delegate....I asked [the deputy delegate] why he issued a permit for a Transfer Station, without first consulting with the Municipality and the community. He told me that it was a Federal Government authorization and that he was not required to ask for my opinion nor the population's opinion in order to issue a permit.[76]

Section 11 Municipal Construction Permits Were Applied For and Denied, Once Before and Once During Metalclad's Ownership of COTERIN

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[74] Carabias Declaration, Annex Two, Vol. I, Tab A, para. 19.
[75] Counter-Memorial, Annex 2, Vol. I, Tab C, para. 35.
[76] *Id.*, Tab A at 2, para. 6.

73. It is a matter of corporate record that COTERIN, while owned by Mr. Salvador Aldrett, sought a municipal construction permit from the Municipality of Guadalcazar. That permit was denied on September 21, 1991.[77] On November 15, 1994, after being purchased by Metalclad, COTERIN again applied for a Municipal construction permit. That application was prompted by the Municipality, which announced that the site could not in its view be developed further in the absence of a said permit. That application was declined on December 5, 1995.

74. The submissions of Claimant and Respondent appear to disagree as to whether the Municipality's failure to issue a construction permit should, under the circumstances, have precluded Claimant from acting upon its agreement with federal authorities and the state permit it held.

Section 12 An Acuerdo was Formed with the Municipality in January 1997

75. Claimant and Respondent agree that there was formed during January of 1997 an agreement between the Municipality of Guadalcazar (signed by Municipal President Ramos but prepared by Leonel Serrato) and COTERIN (represented by Mr. Gustavo Carvajal). Mr. Serrato and Mr. Carvajal rely upon different texts and have different recollections of the surrounding events.[78] The principal points of disagreement in the two accounts relate to whether the company would be permitted to commercially operate as a hazardous waste facility while remediating the transfer station[79]

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[77] Counter-Memorial, at 54, para. 194.

[78] *See* Memorial, Vol. I, Declarations of Gustavo Carvajal, and Ex. 3 hereto; and, of Mr. Leonel Serrato at Counter-Memorial, Annex 2, Vol. IV, Tab F.

[79] Mr. Serrato's account was that the Municipality agreed only "that the company had to remediate the [transfer station] first, before the Municipal

and whether the agreement contemplated the issuance (or waiver) of the disputed construction permit.[80] Both texts relied upon characterize the agreement as non-binding.

Government could consider whether to authorize [commercial, hazardous waste] operations." Serrato Declaration, *supra*, paras. 14 and 17. Mr. Carvajal insists that a remediate-first term was for the company wholly unacceptable and was not an agreed term. July 1998 Carvajal Declaration, Ex. 3 hereto, paras. 14 and 17. Mr. Serrato apparently concedes that under the agreement commercial operations could occur during remediation, provided that they were limited to *non-hazardous* waste. Serrato Declaration, *supra*, paras. 26-29. Mr. Carvajal replies that the limitation to non-hazardous waste was a mistake found in a signed draft, but was jointly corrected on January 9, 1997. Carvajal Declaration, Ex. 3 hereto, para. 29.

[80] Mr. Serrato suggests that only authorization to remediate would be afforded and Mr. Carvajal reiterates that the construction permit was to be dropped as an issue, noting that no remediation authorization is found in the governing law, making Mr. Serrato's counter therefore somewhat curious. *See* respectively paras. 24 of Serrato and Carvajal declarations, Ex. 3 hereto, *supra*; Ex. 52 hereto; and Carvajal Declaration, Memorial, Vol. I, Attachment, fifteenth page.

CHAPTER 4

GENERAL OBSERVATIONS CONCERNING RESPONDENT'S COUNTER-MEMORIAL

Topical Arrangement of Sections

Section 1 **Respondent's Hearsay**
Section 2 **Loss of Citizenship**
Section 3 **Misleading Translations**
Section 4 **Respondent's Post-Hoc Disparagement**
Section 5 **Pre-NAFTA Owners Emphasized**
Section 6 **Respondent's Experts**

Section 1 Many of Respondent's Declarants Offer Hearsay

76. Respondent remarks that there is hearsay within Claimant's Memorial.[81] Nonetheless, Respondent correctly notes that the hearsay rule, like other rules of evidence, does not carry its full force in international arbitration. In fact, that has been true for some time.

77. In 1939, Dr. Durward Sandifer wrote of the practice of international tribunals:

> The question of the admission and evaluation of hearsay evidence in the strictly technical sense of that term in Anglo American Law does not appear to have been discussed in the adjudicated international cases. Civil law procedure, generally speaking, contains no rules relating to hearsay evidence. Witnesses are permitted to testify freely, the evidential value of the testimony to be determined by the judge....Generally speaking, there are no rules in inter- national judicial procedure against the

[81] Counter-Memorial at 41, para. 154 *et seq.*

> admission of hearsay evidence, that is, evidence not based on personal observation.[82]

78. Messrs. Redfern and Hunter reflect upon contemporary practice as follows:

> [I]nternational tribunals of experienced arbitrators, whether they are from common law or civil law countries, tend to concentrate on establishing the facts necessary for the determination of the issues between the parties, and are extremely reluctant to be limited by any restrictive rules of evidence that might frustrate them from achieving this goal.[83]

79. One reason for the relaxation in evidentiary rules in international arbitration is that there is no jury to protect from unreliable accounts. The relaxed approach of tribunals to the hearsay rule in particular reflects also its dilution in domestic fora, characterized by expanding categories of statutory hearsay exceptions and non-hearsay designations.[84] While there may be good reasons to distinguish hearsay from first-hand accounts in a given setting,[85] ultimately the test is one of reliability; a seasoned international tribunal such as that empaneled in this case hardly needs reminding to consider the ultimate source of the data tendered.

80. Tribunals also recognize that the limited discovery of arbitration combined with a Claimant's often-limited access to pertinent, first-

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[82] D. Sandifer, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 256-57 (1939).

[83] A. Redfern & M. Hunter, INTERNATIONAL COMMERCIAL ARBITRATION 329 (2d. ed. 1991).

[84] *See, e.g.*, Federal Rules of Evidence, art. VIII (as amended July 9, 1995).

[85] In general, hearsay cannot be suitably tested by cross-examination, the demeanor of its true sponsor remains undisclosed, and its accuracy suffers because it is filtered through a second person.

hand information warrant a liberal, realistic approach to Claimant's burden of producing competent proofs.[86]

81. Notwithstanding Respondent's apparent disdain for hearsay,[87] its own proffers are punctuated with such declarations.[88] Among the dozens of instances to be found therein, those purporting to convey the views of "the community" are perhaps the most objectionable on evidentiary grounds. Invariably, that collective (nowhere defined) is portrayed as opposing the landfill, thus begging a question which Respondent insists is pivotal.[89]

Section 2 Respondent's Declarants are Placed in a Position That Exerts a Compromising Influence Upon Them

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[86] *See* H. Holtzmann, *Fact-Finding By the Iran-United States Claims Tribunal*, in FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS, 101, 111-12 (R. Lillich ed. 1990) (noting Claims Tribunal reliance upon press reports and quotations therein).

[87] Respondent suggests that the evidence of Mr. Kesler should be rejected completely, for *inter alia*, his use of the first person plural. *Id.* at para. 157. The excessive sanction recommended by Respondent is remarkable given that Mr. Kesler will no doubt be present at the hearing so that the Tribunal will be able to clarify any questions it has as to the basis upon which he testifies.

[88] Thus, one finds within the Counter-Memorial: "Stevens Amaro told me that...COTERIN and Metalclad] offered him a contract..." Sanchez Declaration, Annex Two, Vol. II, Tab A, at 14; "It is my understanding that the previous day, the United States Embassy in Mexico called Dr. Pedro Medellin to ask him what sort of security arrangement existed for the Ambassador's attendance." Nunez Declaration, Annex 2, Vol. IV, Tab C at 2, para 8; "I am informed that Dr. Ortega was very annoyed...." Azuela Declaration, Annex Two, Vol. IV, Tab F, para. 16.

[89] *See, e.g.*, Serrato Declaration, *supra*, para. 20 ("With concern to the operation, it was clear that the community did not want the landfill to operate.")

82. The Political Constitution of the United Mexican States at Article 37[90] provides in relevant part:

> /...
>
> B. Mexican citizenship is forfeited:
>
> /...
>
> V. By aiding a foreigner or a foreign country, against the Nation, in any diplomatic claim or before an international tribunal[.][91]

83. Mexican counsel informs Claimant that the current vitality of this provision is unclear. Claimant assumes that Respondent would agree that the above-quoted provision is inconsistent with Respondent's obligation to participate in good faith in these and other NAFTA arbitral proceedings. Yet, the provision remains part of the Constitution — despite the fact that on March 20, 1997, Congress amended Article 37 to allow dual nationality for Mexicans. That Congressional scrutiny led to neither repeal nor amendment of this section, in Claimant's view, cannot be easily ignored.

84. Rather consistently, certain of Respondent's declarants have produced statements greatly at variance with the firm, first-hand, recollections of Claimant's own witnesses. Claimant regrets having to speculate that Article 37 has produced a measure of apprehension among some of Respondent's affiants. Claimant suggests that it has the potential to cast a still broader shadow over the proceedings.

Section 3 In Respondent's Translations, It Often Offers Texts Which Are Incomplete and Some of Respondent's Renderings Are Misleading

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[90] Part of Chapter IV: Mexican Citizens.

[91] *Instituto Federal Electoral*, courtesy translation.

Chapter 4

85. Through the correspondence related to this case and perhaps through its own efforts to fact-find, the Tribunal is aware of the incomplete and missing translations associated with the Counter-Memorial. Claimant has been disadvantaged by that practice and by what it has come to regard as a high incidence of untrustworthy renderings proffered by Respondent. One example must suffice, though Claimant identifies in its accompanying Admissions and Denials further instances and will endeavor to provide a more complete list at the Tribunal's request.

A. AMPARO—PROVISIONAL RELIEF

86. Based upon the English redaction of the court's order provided by Respondent,[92] the injunction not only precluded commercial operations at the site but also had a mandatory component. Specifically, it is said to have provided:

> 1] [That COTERIN] "must remediate the deficiencies identified by the environmental audit at its facilities with respect to the hazardous waste landfill and the hazardous waste storage in three confinement cells."
>
> 2] That "[t]hese preventive and corrective measures must be undertaken in the terms and conditions set out by [the office of Attorney General for the Environment] in order to comply with the environmental regulations;" and
>
> 3] That "[t]he company must provide all the information related to the fulfillment of the preventive and corrective environmental actions requested by the environmental audit, under the terms of the [*Convenio*]."[93]

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[92] Counter-Memorial, Declaration of Attorney General Azuela, *supra*, Ex. 12.

[93] *Id.* The court's order *as rendered by Respondent* in essence requires specific performance of COTERIN's obligations under the *Convenio* while

87. The sense that the court directed that COTERIN "must" remediate in the interim is simply not supported by the Spanish original. In pertinent part, a better translation is:

> In accordance with and pursuant to article 17 of the *Ley de Amparo*, a provisional injunction is decreed regarding the noted actions, to have such effects that the status of matters is maintained in the present situation, meaning, no initiation of commercial operations by the company named "Confinamiento Técnico de Residuos Industriales, S.A. de C.V." located in the land "La Pedrera," Municipality of Guadalcazar, S.L.P. The above-mentioned company is not precluded under the supervision of the General Attorney's Environmental Office from performing the necessary works needed to mend the detected deficiencies in the installations of the mentioned company when the environmental audit was practiced, related to the recycling and confinement of the hazardous waste deposited in the three cells of the station of the aforementioned company, preventive and corrective measures that must be performed in the time limit, under terms and conditions determined by the General Attorney's Environmental Office, for compliance with environmental legislation or from acting to prevent or respond to environmental contingencies and emergencies, given that the company is obligated to give the General Attorney's Environmental Office the information related to the compliance of preventive and corrective actions resulting from the environmental audit and in the terms granted in the "Convenio de Concertacion," until the parties are served the final and definitive decision taken in regards with the definitive suspension."

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suspending or extinguishing its rights under that agreement.

88. This distinction is significant; Respondent's mistranslation gives the erroneous impression that the court required COTERIN to remediate, while enjoining it from operating. Given the necessity of *in situ* remediation, such a mandate would be impossible. In addition, such a mandate would violate the *Convenio*. The erroneous text would support the proposition that federal authorities lacked the power to formulate a fact-sensitive solution to the problems created by La Pedrera's former beneficial owners. It also implies that any inaction by Claimant following the order has been in direct contradiction to the court's instructions; such open defiance would constitute contempt of court in many legal systems.

Section 4 Respondent Attempts to Obscure the Central Issues by Belatedly Visiting Claimant's Expertise, Its Financing Arrangements and by Submitting Extensive Post-Hoc Disparagement of the Policies and Ethics of Claimant's Officers.

A. IN GENERAL

89. Set forth in certain of Respondent's allegations are the assertions that Claimant at relevant times during its several-year relationship with Respondent was without sufficient expertise and financial health to implement the disputed project. Various unlawful and unethical acts are also alleged by Respondent. The substance of these positions is taken up below in Chapter 5. In addition to the initial comments offered below, Claimant would here only invite the Tribunal to consider the space devoted to these themes by Respondent in contrast to Respondent's studied effort to de-emphasize the legal position which it ultimately must summon.[94]

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[94] *Viz.*, that Claimant, *inter alia*: was fairly and equitably treated, was afforded full protection and security, was treated no less favorably than national businesses, was, despite the above-mentioned guarantees,

B. CLAIMANT'S EXPERTISE AND FUNDING

90. The tactic employed by Respondent, to attack with hindsight an investor's know-how and wealth, is not original to it.[95] While Respondent is quick to emphasize Claimant's duty of due diligence, it nevertheless overlooks its own like duty.

91. The facts and inferences upon which Respondent now relies were readily available to it from its earliest contact with Claimant and continued to be accessible as the project progressed; the high degree of disclosure required by U.S. law and consequent availability of information would have made Respondent's inquiry relatively effortless. It can reasonably be assumed that Respondent undertook such an investigation. Yet, it expressed no serious misgivings at those earlier, more apropos junctures and continues presently to deal with Claimant in other projects. Claimant contends that Respondent's acquiescence in this regard is palpable and that Respondent should be estopped from raising these matters before the Tribunal. As will be demonstrated in Chapter 5, the matters raised by Respondent have been exaggerated and distorted in the Counter-Memorial.

C. CLAIMANT'S SUPPOSED CORRUPTION

92. Respondent's pretext for sponsoring its wide-ranging defamation of Claimant's officers apparently is that the otherwise substandard treatment which Claimant received is, as a matter of legal causation, attributable to Claimant's own desperate and

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required upon pain of forfeiture to procure a municipal construction permit (antecedent federal and state approvals notwithstanding) and was subjected to no compensable property interference through the combination of the state's ecology law and a sustained court injunction.

95 *See, e.g., Pyramids Arbitration* ICSID Case No. ARB/84/3, *reprinted in* 106 I.L.R. 589, para. 113 *et seq.* (1997) (strategy unsuccessful).

unscrupulous deeds. Presumably, if Claimant's officers are shown to have acted dishonestly, then it can be moreover asserted that their accounts generally should be discredited.

93. Viewed in light of the reputation for integrity enjoyed by Metalclad's management in the United States and abroad, Respondent's allegations are stupefying. Claimant submits that when the Tribunal concludes its fact-finding, it will treat these allegations in accord with the tendency observed in other tribunals:

> It can be said with some certainty...that the more startling the proposition that a party seeks to prove, the more rigorous the arbitral tribunal will be in requiring the proposition to be fully established.[96]

Section 5 Respondent Further Diverts Attention from the Central Issues by Emphasizing COTERIN's Operations Under Its Previous, Pre-NAFTA Owners.

A. IN GENERAL

94. Among the themes that have received pride of place in Respondent's submissions are that the former owners of COTERIN were not in compliance with the law and that the tangible result of their activities was a site in need of remediation. Given that both propositions are matters of common ground, Claimant finds this emphasis somewhat excessive.

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[96] Redfern & Hunter, *supra*, at 328.

B. ALDRETTS' OPERATIONS DISTINGUISHED

95. An indiscriminate blending of the operations at Aldretts' transfer station with the regime set in place by Metalclad is a characteristic feature of certain of the declarations procured by Respondent and is evident to some extent in the Counter-Memorial, which devotes numerous paragraphs to pre-Metalclad matters. Because Claimant has questioned the degree and genuineness of community opposition to the landfill (outside of two NGO's), Respondent is entitled to prove that pre-Metalclad operations met with disapproval. Yet, to the extent that characterizations of COTERIN's operations fail to distinguish between the activities of the Aldretts and those of Metalclad, they are misleading. Federal authorities in particular were greatly influenced by the change in ownership.[97]

96. The need for remediation was a conspicuous premise of Metalclad's earliest plans. It featured prominently in the collaboration struck between Claimant and federal authorities and in the understandings reached between state authorities and Metalclad. In management's view, that the project would eliminate the unprocessed material remaining at the site was a positive by-product of the La Pedrera site; in addition to jobs and various forms of community outreach would come a tangible improvement in the environment.

97. The misdemeanors[98] chargeable to COTERIN—the entity—were not committed by its present beneficial owners. Indeed, the assumption of ownership by Metalclad was one factor leading federal officials to accept the undertakings set forth in the *Convenio de Concertacion*. Thus, while, the pre-Metalclad situation

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97 *See* Azuela Declaration, Annex Two, Vol. I, Tab C, para.48.

98 The characterization of the pre-Metalclad infractions at the site as misdemeanors is that of Respondent's own declarant. *Id.*

explains in part the project's attractiveness to the federal authorities, it cannot be fairly used to intimate that Claimant caused the problem or to suggest that Metalclad in any way subscribes to substandard or careless approaches to the handling of hazardous waste. In fact, Claimant's submissions will establish that quite the opposite is true.

Section 6 Respondent's Experts Deserve Only Limited Influence; Claimant's Experts Are to be Preferred

A. In General

98. Claimant's experts, in attachments to the Reply, provide detailed responses to the methods and findings of the Respondent's experts. Claimant here only offers some broad observations which anticipate the reports of its experts. In general it can be said that the flaws which reduce the value of Respondent's expert proffers fall under the following heads.

Unwarranted Comparisons Between U.S. Law, Practice And Policy And That Of Mexico

99. The U.S. and Mexican regulatory regimes and the development imperatives to which they are linked are decades apart. The political elements driving the neighboring regimes are fully dissimilar. Claimant finds it ironic that Respondent's experts make ample use of the U.S. experience in opining on Claimant's project but Respondent impliedly wishes not to be held to American standards of transparency and predictability when defending its regulatory regime.

Faulty Factual Predicates And Methods Inappropriate To The Task

100. AAA's detailed study of Mr. Butler's report produced many examples of this phenomenon. He, for example, limits his valuation to COTERIN's assets, as opposed to those of Claimant's entire enterprise. His methods will be called into question by the AAA Report provided herewith, whose preparers are under the impression that Mr. Butler never understood their initial report, for his refutations of it are often non-sequiturs.

B. MS. MARCIA WILLIAMS IS TYPICAL OF RESPONDENT'S EXPERTS

101. Ms. Williams' submissions are often unhelpful to the Tribunal for several reasons.

Lack of Mexican Regulatory Experience and Faulty Comparisons to the United States

102. Based upon her report, and of her own admission, Ms. Williams' experience with Mexican environmental matters is negligible. Her background is almost entirely that of a civil servant whose service, while no doubt distinguished, was amassed largely while at the U.S. EPA. It is not surprising therefore that for support she cites almost exclusively American regulations, studies and examples.

103. Ms. Williams' insights about developments and policies in other countries in general, and Mexico in particular, are garnered from an undisclosed number of conferences and what appears to be

rather limited reading.[99] With due respect to Ms. Williams, Claimant suggests that she is not qualified to do more than react—from an American perspective and in broad outline—to the Mexican regulatory schema involved in this case; that is essentially what she does in her expertise.[100]

104. Ms. Williams' mandate is nowhere disclosed. The general information Ms. Williams offers about the Mexican system throughout is often speculative and unsupported. Moreover, the reader is challenged to distinguish among when she is attempting to address Mexican law and policy, when she is recounting the American position and when she seeks to portray federal structures in the abstract, a commingling[101] that results, Claimant suggests,

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[99] Expert Report of Marcia Williams, Annex 3, Vol. I. Within the 78 footnotes accompanying Ms. William's Report, many of which contain multiple entries, are cited about 10 sources (some repeatedly) on Mexican law, environmental policy and Claimant's project. Of these, 4 are letters to public officials, one is a primer provided to Claimant by ICF Kaiser, one is an undated comparative regulation piece by a center, one is a report by the National Institute of Ecology, one is an internal document prepared by Claimant's entity Eco-Administration, S. A. Two Mexican regulatory norms are also mentioned.

[100] *See. e.g*, Williams Report, *supra*, para. 70 (emphasis added):

> *It appears* that the political dynamics in Mexico are no different than in the United States or other countries. Despite the federal government's support for the La Pedrera project, *the state and local government appears [sic]* to have sought a mechanism to address a local political issue: whether the La Pedrera area should be used for hazardous waste disposal.

[101] One of many examples of this is found at paragraphs 38 and 39 of her report. *Id.* In the former she relies on a sketch entitled *Preliminary Overview of the Mexican Regulatory Process* (August 1992) (provided to Metalclad by ICF Kaiser) for the proposition—not disputed by Claimant—that it may be necessary to the operations in Mexico under certain circumstances to obtain local permits. In the following paragraph, however, she makes a general comparison of state and federal project

from the faulty premise that the various systems are interchangeable. Ultimately, much of the commentary she derives from the abstract parallels she draws appears to be better addressed to future Mexican policy makers than to the Tribunal.[102]

105. Prima facie, it is fallacious to treat as comparable Mexico and the United States, whether in relation to their regulatory systems, waste infrastructures or development needs. The American system, as distinct from the comparatively new environmental regime to its south, has already permitted approximately 2,000 hazardous waste facilities, according to Ms. Williams' own estimate.[103] Ms. Williams' acknowledges the vast dissimilarities between the two systems,

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criteria but fails to state whether she is discussing the American, the Canadian or the Mexican system. As such it is misleading. Again, if she is opining upon the Mexican system, she is not qualified to do so.

[102] For example, she insists that:

> [t]here are approximately 2,000 permitted hazardous waste facilities in the United States...The number of permit applications that have been submitted in the United States, in my estimate, is several times this number. Accordingly, there is an unparalleled wealth of knowledge of the permitting process that can be drawn from the U.S. experience.

Id. at 3, para. 26.

Elsewhere, having conceded that the two regulatory regimes may be as much as twenty years apart, Ms. Williams observes:

> Yet the fundamental regulatory structure of the U.S. and Mexican programs are quite similar. Consequently, many of the issues associated with hazardous waste facility siting that have occurred in the United States over the last twenty years...are the same issues Mexico now faces.

Id. at 4, para. 27.

[103] William's Report, *supra*, para. 26. In Mexico, the two extant landfills are exceeded at least ten-fold by the number of clandestine dumps. Moreover, the industrial development that Mexico wishes to pursue, of its own admission, must rely upon hazardous waste landfills. *See* Declaration of Carabias, *supra*, Ex. 1.

likening in certain respects Mexico's present regulatory program to that of the United States "fifteen to twenty years ago."[104]

106. Ms. Williams finds it difficult to offer directly relevant analysis; the issue in instant case is not the kinds of problems Claimant could face in the United States, but what actually happened in San Luis Potosi. Even, when presumably remaining within her field of expertise, Ms. Williams equivocates. She states for example:

> I am most familiar with the U.S. waste facility standards and from my review of the technology to be employed by Metalclad it appears to meet the U.S. standards applicable to municipal waste landfills... but it is unclear whether it meets all of the standards for hazardous waste landfills[105]

107. Ms. Williams then suggests that the answer to the question she poses doesn't matter because her point relates to perceptions.[106] The implication that Metalclad was imposing, perhaps by some slight of hand, inferior technology upon San Luis Potosi is at odds with the unwavering view taken by the Mexican federal authorities who had, unlike Ms. Williams, made more than a cursory study of the project.

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[104] William's Report, Annex Two, Vol. I, Tab C, para. 27. Claimant is acutely aware of the lack of maturity in the regulatory mechanisms affecting its investment. As Claimant will address throughout this Reply, Mexico's permitting process was embryonic and opaque; at the local level in particular it offered neither Claimant nor itself established precedents to follow. In place of a fixed, transparent regime, an admixture of forces were allowed to operate. Moreover, the media through which Claimant should have been able to address the public's legitimate concerns were, by U.S. standards, largely unavailable to Claimant as a consequence of political machinations to be further described below.

[105] *Id.*, para 86.

[106] *Id.*, para. 88.

108. In sum, Ms. Williams' presentation, at least as it relates to Mexico and specifically to La Pedrera, provides to the Tribunal less illuminating detail than the Tribunal's own study of the record will supply. Accordingly, though presumably well-versed in American regulatory policy, Ms. Williams cannot be said to be an expert[107] for purposes of the issues upon which the case turns.[108]

Ms. Williams Does Shed Some Light

109. At numerous junctures Ms. Williams nonetheless makes observations with which the Claimant must agree. She observes for example that in the United States federal and state governments can preempt local government agencies' power to address siting issues.[109] This basic premise, found to varying degrees in other federations, informed Claimant in its due diligence; it made highly plausible the representations of federal officials, a topic to which the Claimant returns. She also proves insightful when she speculates that "the state and local government appears to have sought a mechanism to address a local political issue."[110] The ill-suited mechanism chosen, as Claimant will demonstrate, was the municipal construction permit.

110. Ms. Williams also reminds the Tribunal of the ENSCO settlement in Arizona (summarized at Williams Report 29-30) in

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[107] In the common law tradition, an expert is one who can *assist* the trier of fact by presenting insights that the trier cannot itself garner from the evidence presented. *See* Federal Rules of Evidence (as amended July 9, 1995), Rule 702. It is on this limited basis that the one who meets the qualifications of an expert is entitled to offer opinion testimony.

[108] We are not told whether Ms. Williams has participated in Mexican environmental projects. Indeed, there is no basis upon which to conclude that Ms. Williams has ever visited Mexico.

[109] Williams Report, *supra*, para. 68.

[110] *Id.*, para. 70.

which that state agreed to pay ENSCO $44 million to terminate its contract to build a hazardous waste management site initially sponsored by the state, but which encountered lively opposition from activists. Not unlike the instant case, in ENSCO there was company reliance on governmental permits and representations. Arizona responded to the political opposition by paying ENSCO for its rights in the project. The Arizona case finds an international analogue in the *Pyramids* arbitrations, to receive further attention in Chapter 15.

PART II

RESPONSE TO THE COUNTER-MEMORIAL'S FACTUAL ASSERTIONS

CHAPTER 5

ALLEGED UNETHICAL AND ILLEGAL CONDUCT ON THE PART OF CLAIMANT OR ITS AGENTS

Topical Arrangement of Sections

Section 1 Respondent's Goal—To Divert Attention and Taint Claimant

111. Respondent has endeavored in its Counter-Memorial to portray Claimant, and in particular its executive officers, as unethical. The purpose apparently is to create doubts about the credibility of Claimant's proffers and to explain the behavior of various persons whose conduct is chargeable to the Respondent.[111] The following

[111] Respondent's lawyers have used some of the same allegations to influence the statements of certain of its principal declarants, who were invited to

paragraphs address the cardinal instances in which Respondent has employed this stratagem.

Section 2 The Firing of Mr. de la Garza (The Alleged Suggestion to Bribe)

112. In its Counter-Memorial,[112] Respondent offers as credible Mr. de la Garza's account of the circumstances surrounding his departure from Metalclad's employ. According to de la Garza, on April 28, 1995, Grant Kesler (motivated by financial pressures) proposed that — through de la Garza — Governor Sanchez Unzueta be paid $1,000,000 (one million U.S. dollars) in exchange for the authorizations necessary to operate the landfill. While Attorney General Azuela suggests that such allegations often surface,[113] Claimant attaches the utmost seriousness to these charges and emphatically denies them. Moreover, it holds that to sponsor such allegations is both inflammatory and dishonorable in the extreme.

113. That de la Garza's assertions are concocted is the natural and correct inference to draw from the correspondence surrounding the events in question. Preceding by one day de la Garza's letter to the Governor dated April 29, 1995[114] is the letter of termination sent to him by Claimant. It sets forth the need to have counsel who can make itself available predictably and promptly. De la Garza's inattentiveness to Claimant's affairs simply was inconsistent with Claimant's needs; further, under the circumstances, it gave rise to serious doubts about de la Garza's loyalties.

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comment on Claimant's purported misdeeds. *See, e.g.* Azuela Declaration, Annex Two, Vol. I, Tab C, paras. 15-17.

[112] Para. 523 *et seq.*

[113] Azuela Declaration, *supra*, para. 36. ("These types of allegations are not rare in Mexico when controversies, such as the one before us, arise.")

[114] Counter-Memorial, Ex. 101.

114. In response to the documentation demonstrating the true impetus behind de la Garza's April 29 missive, de la Garza suggests that Mr. Kesler back-dated the letter to appear to be antecedent to April 29. Respondent thus suggests that Mr. Kesler has tampered with evidence submitted to the Tribunal, an allegation which — if true — is a grave matter indeed. De la Garza's account, however, is once again refuted by the relevant correspondence. Claimant has attached, as an exhibit hereto,[115] the original duplicate of the letter of termination, which bears the time stamp administered by de la Garza's own offices. The Tribunal will note that the document was received at 4 p.m. on April 28, 1995.

115. Mr. de la Garza's portrayal is also facially incredible. American CEOs are keenly aware of the Foreign Corrupt Practices Act, which even as amended clearly embraces the conduct alleged by de la Garza.[116] Given Mr. Kesler's law training and business experience — even if he were corrupt — he would be unlikely to take the risk implied in such a flagrant, sophomoric violation of the Act.[117] That Mr. Kesler would have trusted Mr. de la Garza with such an assignment is equally improbable.

116. By contrast, if the literature concerning Mexico is to be credited, a preponderance of anecdotal data suggests that the solicitation of bribes and similar inducements alleged by Claimant

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[115] *See* Exhibit 15-3 hereto.

[116] *See generally*, J. Impert, *A Program for Compliance with the Foreign Corrupt Practices Act and Foreign Law Restrictions on the Use of Sales Agents*. 24 Int'l Law. 1009 (1990).

[117] There is also the obvious irony and contradiction created by de la Garza's version of events: At a time when, according to Respondent, Claimant was facing imminent financial peril, it was willing to lavish $1 million on a course of action not certain to succeed but certain to expose Mr. Kesler to career-ending, federal penalties.

are all too plausible.[118] Thus, the World Bank noted in its 1994 study of Mexico:

> The discretionary power given to agencies and ministries in the granting of licenses and permits for the operation of business also has created an environment in which corruption can exist...Despite deregulation, there are still frequent allegations that bribery and pay-offs—the "mordita"—are necessary for favorable treatment by various agencies of some state and local governments.[119]

Elsewhere that report observes:

> Although the Federal Government appears to have made significant progress toward meeting President Salinas' goal of eliminating corruption, the same success has not been made by all state and local governments.[120]

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[118] *See generally,* A. Oppenheimer, BORDERING ON CHAOS (1996).

[119] World Bank, *Mexico Country Economic Memorandum* 106 (1994) (*World Bank Study*). Claimant does not suggest that the majority of Mexican officials with whom it has interacted are corrupt; most were honest. It does submit, however, that matters of public record and its own victimization in relation to the project in dispute confirm a regrettably high incidence of unethical practices and expectations.

Cf. M. Sheridan, *Mexico Fights Drug War on Its Own Terms,* L.A. Times, Mar. 26, 1998, at A1, A20 ("[S]ome analysts wonder whether the corruption goes so deep that uprooting it would destabilize the political system"); E. Buscaglia, *Stark Picture of Justice*, Fin. Times, Mar. 21, 1995 at 12 ("In Mexico...the judiciary faces enormous delays in dealing with cases and corruption related to organized crime...[but the new administration is responding]...."); J. Rice, *Mexican Police Academy: Bribery 101*, Orange Co. Reg., May 7, 1998, at 1 (Mexican sociologists' two year study confirmed bribe-taking and extortion practices by many Mexican police).

[120] *World Bank Study, supra,* at 106.

Finally, de la Garza's approach to the Governor and disclosure of details concerning his advice to a former client speaks volumes about Mr. de la Garza's ethics in general. He presumably composed his fable to reflect positively on himself, yet by the standards of many legal systems, his disclosures would be shocking. His subsequent favorable treatment by Governor Sanchez Unzueta suggests that de la Garza accomplished his immediate mission.[121] It is not surprising that the World Bank reports:

> Many of the constraints on private sector development in Mexico have been reinforced by the legal community itself. Deficiencies in the system of legal education and training *and a dearth in appropriate standards of professional ethics*, have left legal practitioners complacent and unprepared to meet the challenge of their business clients competing in a global economy.[122]

Similarly, after noting a series of "fundamental deficiencies" which affect the quality of legal education, the study notes:

> Once a student earns the undergraduate degree in law in Mexico, the license to practice comes automatically upon filing the appropriate documents with state and federal agencies. *There is no mandatory (or voluntary) national, state or local bar examination. The practice of law in Mexico is simply not regulated. Mexican lawyers are not subject to: any specific regulation of professional practices; any mandatory code of professional responsibility; disciplinary sanctions such as disbarments, resignations in lieu of disciplinary action, suspension, public or private reprimands for*

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[121] Mr. de la Garza, while still receiving a retainer from Metalclad, was appointed as an Electoral Judge.

[122] *World Bank Study, supra*, at 111 *(emphasis added)*.

> *misconduct, etc.; or minimum continuing legal education requirements.*[123]

Nevertheless, Mr. de la Garza crows to this Tribunal that "[o]n October 28, 1965 I passed by bar exam...."[124] He states further that he made misrepresentations to the Governor about Claimant's experience and technology not learning until later these claims "could never be substantiated with proof."[125] Mr. de la Garza pridefully admits his close relationship to the Governor. During the late fall of 1994, a time of critical tension between Metalclad and the Governor, de la Garza received from "Governor Horacio Sanchez Unzueta...the position of State Judge for Electoral Irregularities."[126] He accepted "given that such a nomination was an honour...."[127] Mr. de la Garza self-servingly disclaims, "I am certain that the reasons for my appointment were never linked to my position as Metalclad's lawyer."[128]

117. De la Garza swears "that at no time nor under any circumstances did I ever reveal confidential information on Metalclad to Governor Sanchez Unzueta."[129] Yet he sent the former Governor a letter on April 29 stating that a "conflict over ethics" led

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[123] *Id.* at 111-112.

[124] Counter-Memorial, Annex Two, Vol. IV, Tab G, para. 1.

[125] *Id.*, para. 7 x), p. 5. These are peculiar admissions for one who proclaims his honesty—he misrepresented facts to the Governor—and didn't know basic information about his client—with whom he claims an on-going representation.

[126] Id., para. vi), at 11.

[127] *Id.*

[128] *Id.*, para viii), 13. The Tribunal will recall that Mr. de la Garza also swears that he had no relationship with the Governor until he went to Sanchez as the lawyer for Metalclad.

[129] *Id.*

to a termination of representation.[130] And then, in a second letter, he provides the Governor more details "in strict confidentiality".[131]

118. Even the limited extent to which Mexican law addresses lawyers' conduct, reproaches such conduct:

> An attorney who divulges secrets of his client or provides documents or other information to the other side that are harmful to his client's interests shall be liable for all damages and losses caused, in addition to sanctions provided by the Penal Code.[132]

Section 3 The Services of Grant Thornton, LLP

119. Respondent contends that Metalclad's decision to decline further services from Grant Thornton was telling. Respondent intimates that Metalclad sought to give retribution or to suppress disclosure of the company's supposed ill-health. The Respondent presumably does so in an attempt to underscore a negative remark to be found in Grant Thornton's last report. In fact, Metalclad ended the relationship because of an opportunity to retain a widely recognized, internationally respected accounting firm, at no additional cost to Metalclad. Among other reasons, the prestige and global presence of Arthur Andersen was more consistent with Metalclad's international fund-raising program.

120. Grant Thornton alleges no impropriety in its letter of May 6, 1996 to the SEC.[133] Rather, it agrees with the following representations:

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[130] Sanchez Declaration, Annex Two, Vol. II, Tab A, Ex. 25.

[131] *Id.*

[132] Mexican Civil Code, Article 2590.

[133] Letter of May 6, 1996 from Grant Thornton LLP to Securities and Exchange Commission regarding Form 8-K/A3 Report dated March 25, 1996, Exhibit 30 hereto.

> [Metalclad Corporation]...dismissed its former principal accountants, Grant Thornton LLP, effective March 25, 1996.
>
> During the two most recent fiscal years of [Metalclad] and each subsequent interim period preceding March 25, 1996, *there were no disagreements with the former accountants on any matter of accounting principles or practices, financial statement disclosure or auditing scope or procedure or any reportable events.*[134]

It thus seems obvious that the implications urged by Respondent are chimerical rather than factual.

Section 4 Claimant's Financing and Alleged Securities Fraud

1. RESPONDENT'S ALLEGATIONS

121. Respondent charges, in effect, that Claimant was a highly leveraged entity whose debt burden encouraged desperate acts. The apparent intent of these submissions is to demonstrate a reason why Claimant would pursue the otherwise unlikely course which Respondent outlines in its Counter-Memorial, one which allegedly included precipitous and unwise acts, concealment, political meddling and various forms of corruption. In addition, Respondent avows that Claimant has manipulated the markets by issuing materially false press releases in an effort to drive its stock prices up, in part so that so-called "insiders" could redeem their holdings at inflated prices.

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[134] *Id.* (emphasis added).

2. WHAT CLAIMANT'S LENDERS STATE

122. The C.V.D loan to which Respondent refers in noting Claimant's supposed default is explained in the Declaration of Mr. Roy Zanatta.[135] He relates that the objective of the arrangement from the lender's perspective was to take advantage of the market value increase expected when Metalclad finally surmounted the political hurdles erected at the state level. C.V.D would do so by virtue of the warrants attached to the loan. The loan was granted with the intention of converting the balance to stock at the optimal time. This confidence in the progress of the Company was rewarded; in February of 1996 the balance of the outstanding loans was converted when the stock's price was above the warrant's price. As noted by Mr. Zanatta, irrespective of C.V.D.'s effective rate of return, Metalclad's debt burden was prime plus 7%, not 45.5%, the rate derived by Mr. Dages (who misleads the Tribunal by equating the warrant holder's rate of return with the debt burden carried by Claimant).[136]

123. The prime-plus-seven formula is hardly usurious or onerous under the circumstances and the arrangement in general reflects good business planning on the parts of lender and borrower alike. The default referred to by Respondent is notional —a technical matter that was of no concern to the lender.

3. THE ABSENCE OF SECURITIES VIOLATIONS

124. There can be little doubt the non-lawyers assigned to opine upon the legality of Claimant's securities practices suffer by comparison to Mr. Grant Kesler. His Declaration[137] is that of an

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[135] Exhibit 25 hereto.

[136] *See Id.*, paras. 6-7.

[137] Ex. 15 hereto.

specialist whose extensive involvement in securities transactions has left him nonetheless able to truthfully assert that:

> At no time during my career, spanning almost 28 years, as a financial or securities principal of a registered and licensed broker dealer, nor at any time while I have been the [CEO] of Metalclad have I ever been the subject of a complaint or investigation by the SEC, NASD, NASDAQ, SIPC or any state or foreign regulatory authority.[138]

125. Moreover, in an industry known for its litigiousness, "no shareholder, no institutional investor, no broker dealer and no regulatory authority of any kind has ever filed so much as a formal complaint against the Company, let alone a legal action...."[139] These are not the kinds of claims that market manipulators ordinarily can make, given the excessive scrutiny and disclosure associated with the U.S. securities markets. Nonetheless, Respondent casts about, apparently in the hopes that the Tribunal will delve into matters apparently thought inconsequential by the SEC and by the many private parties whose search for a good securities action (with its potential for statutory attorneys fees and other attractions) is thorough and relentless.

126. Typical of the false alarms raised by Respondent is its depiction of the share redemptions undertaken by Messrs. Kesler, Neveau and Guerra. What Respondent has adroitly failed to provide is context. It is in fact the case that the share sales were accomplished in a manner designed to protect the market from any negative effects and the proceeds were used by the principals to retire the debt incurred taking an ownership position in the

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[138] *Id., supra,* para. 25.
[139] *Id., supra,* para. 27.

company. Regardless, the amount of remuneration received by Metalclad's management was hardly out of step with industry standards.[140]

Section 5 Alleged Subversion of the State Permitting Process

127. Respondent submits to the Tribunal, supported by the hearsay declaration of Governor Sanchez Unzueta, that in an attempt to influence the process which led to the granting of the state land use permit, Metalclad offered to the issuing authority a contract entitling that authority (Leopoldo Stevens Amaro) to perform works in relation to the La Pedrera site, works for which he was not qualified.[141] The Tribunal will recall that the permit in question was issued on May 11, 1993.

128. In contrast to the Governor's provocative recollection of what Stevens Amaro told him (which hearsay the Governor published to Ambassador Jones) is the first-hand account of Mr. Michael Tuckett.[142] With assurance, he fixes the events apparently referred to by the Governor as occurring in the spring of 1994, not one year earlier. Stevens Amaro had left office. Eco-Metalclad was indeed interviewing a number of contractors in San Luis Potosi, and thus asked Stevens if he wanted to participate in some of the works relative to the site. He declined, but in the process he had been given a form contract — as had other contractors — to consider as a basis for further discussions.[143]

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[140] *Id.*, para. 29 *et. seq.*

[141] Sanchez Declaration, Annex Two, Vol. II, Tab A, at 13-14.

[142] Declaration of Mike Tuckett, Ex. 24 hereto, paras. 18-21.

[143] *Id.*

129. Curiously, unlike the form tendered as part of the Governor's statement, that which was left with Stevens Amaro had not been completed. That is, sometime after the form came into Steven's custody, the name of his firm was added in the appropriate blank in a contrasting type-face, inviting one to speculate.[144] In any event, the actual timing of the events in question is inconsistent with the scenario mooted by the Governor, who can be said to have again been reckless in his efforts to discredit Metalclad.[145]

Section 6 Alleged Attempt to Influence Dr. Ortega

130. Much has been made by Respondent of Metalclad's invitation to Dr. Ortega to accept a position on its board and of Metalclad's subsequent listing of Dr. Ortega as a board member, though he had declined to accept the post. Claimant finds itself in complete agreement with Secretary Julia Carabias when she declares that for the company to have attempted to influence Dr. Ortega's objectivity in relation to the Radian audit would have been an unethical act.[146] Metalclad's motives were not, however, nefarious, though it can certainly be said that it suffered from a lapse in internal communications.

131. The matter is well documented by Respondent's own attachments. There occurred a vacancy on the Metalclad board. The nature of Metalclad's Mexican operations made Dr. Ortega an obvious choice in light of his education, expertise and reputation for integrity. The sense of preliminary discussions had with Dr. Ortega

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[144] Exhibit 31 hereto. This observation is supported by the font differences apparent on the face of the completed form.

[145] For another example of many, *See* Section 9, *infra*, and Chapter 11, Section 3.

[146] Carabias Declaration, Annex Two, Vol. I, Tab A, para. 7.

was communicated to those preparing the SEC filing in question, in more certain terms than was warranted. The error was corrected at Metalclad's earliest opportunity. With much regret for any embarrassment caused Dr. Ortega, Mr. Kesler explained these events to Dr. Ortega by letter dated December 2, 1997. There he explained:

> Apparently, Dan Neveau had discussions with you in July and August, 1994 about your serving on the Metalclad Board of Directors. The Board approved your election in July, 1994. It was reported by Dan to our counsel that you would, in fact, be serving and he so reported in an August 15, 1994 SEC filing. However, your service as a Board member was subject to your acceptance.
>
> In September, 1994 you made it crystal clear in a letter to Dan that you would not serve so long as your company intended to do work for Metalclad subsidiaries in Mexico, and Dan agreed. Another director, Douglas Land, was then elected to fill the existing vacancy on the Board.
>
> Subsequent SEC filings indicated that Mr. Land was the new director. No filing, other than the annual report filed in August, 1994, referred to you as a director. I can, therefore, confirm the following:
>
> 1. You were never duly acting as a director of Metalclad.
> 2. You never attended or participated in a Board meeting as a Board member.
> 3. You never received compensation in any form for services as a director.

4. All appropriate corrections with the SEC have been made and the event is deemed to be not material.
. No further corrective action is required.[147]

132. Respondent concedes that neither the misfiling nor the invitation influenced the audit. What it fails to report was that there were mechanisms in place to ensure that no artificial optimism could find its way into Dr. Ortega's work. As Ing. Mario Salgado explains in his interview with Claimant's counsel,[148] PROFEPA appointed his company to be the audit supervisor in respect of COTERIN's La Pedrera project. Under the oversight regime (not mentioned by Respondent's declarants) the independent supervising company was to ensure that Dr. Ortega's methods and results, including his Final Report were correct in myriad ways. Contrary to the views expressed by Ms. Carabias and Mr. Azuela, the appointment of Mr. Ortega to the Metalclad Board—had it occurred—would not have precluded Ortega from performing the audit; the supervisor company guarantees that PROFEPA's standards have been met and that a reliable result has occurred. Ing. Salgado notes also the added measure of control performed by "autoaudits," which occur under LGEEPA. Mr. Salgado identifies his role as inspector for a RIMSA audit conducted by Ing. Efrain Rosales of SICSA Company.[149] Mr. Rosales is known to be associated with RIMSA.[150]

133. Given the reactions of Ms. Carabias and Mr. Azuela—prompted they concede by the briefings of Respondent's counsel—Claimant speculates that they have been misinformed or

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147 Declaration of Jose Antonio Ortega Rivero, Annex 2, Vol. IV, Tab E, Ex. 8.

148 Exhibit 21 hereto.

149 *Id.*

150 Declaration of Javier Guerra, Ex. 11 hereto.

have for other reasons confused the respective roles of Dr. Ortega and Ing. Salgado.

Section 7 Alleged Misrepresentation of Experience and Expertise

134. A central theme in Respondent's effort to diminish Claimant is that Metalclad misrepresented its experience in relation to landfill construction and operation.

135. The belated, post hoc, character of Respondent's dissatisfaction with Metalclad's background has been noted elsewhere as has the point that little prevented the Respondent, if genuinely concerned, from performing seasonably the kind of sub-atomic investigation it has undertaken in preparing its Counter-Memorial.[151]

136. Several further remarks are offered in reply. First, contrary to what Respondent posits, Claimant's insulation and asbestos abatement work has not been insignificant. In his declaration,[152] Mr. Leland Sweetser informs the Tribunal that Metalclad was incorporated in 1933 and since then has undertaken projects in various parts of the world, while retaining the Metalclad name. Its operations as a licensed environmental contractor have been substantial. Mr. Sweetser states:

> Based upon my own personal knowledge, Metalclad Corporation has, over the years of its operations,

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151 *See* Chapter 4, Section 4.

152 Exhibit 22 hereto. Mr. Sweetser purchased Metalclad in 1967 and has been an officer and board member of the company; he remains involved with company matters.

> accomplished well in excess of a billion dollars of work as an environmental contractor.[153]

Metalclad's reputation for safety, he confirms, is supported by its record with the relevant regulatory bodies overseeing its activities through the years.

137. Second, to consider exclusively Metalclad's experience in relation to projects of the kind overlooks the firms with which Metalclad was to collaborate. These are internationally known enterprises who—after careful study—had no reservations in affiliating with Metalclad. On the contrary, thorough investigation of Metalclad only inspired great confidence.

138. Mr. Paul Mitchener, whose declaration Claimant attaches,[154] has a favorable view of Metalclad based upon the due diligence he performed as an officer of Browning Ferris International (BFI) from July 1995 to March 1996. That investigation led to a joint venture — between BFI and Metalclad's subsidiary Quimica Omega. Mr. Mitchener makes several important points about Metalclad and the La Pedrera project. Among them:

> 1] BFI found Metalclad to be unfailingly competent and ethical and deserving of its high reputation.
>
> 2] La Pedrera was a fully appropriate site for a hazardous waste landfill and the construction completed there meets or exceeds all Mexican, U.S. and European standards for hazardous waste management.

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[153] *Id.*, para. 9.
[154] Exhibit 17 hereto.

139. Third, notwithstanding all that it came to know about Metalclad in the course of these proceedings and before, Respondent has welcomed Metalclad to participate further in the nation's environmental program.[155] As more fully described in Chapter 7, on March 31, 1997, Metalclad's entity ECOSISTEMAS was inducted by SEMARNAP into the CIMARI Program.[156]

Section 8 Alleged Surreptitious Construction Under the Pretext of Maintenance and Remediation.

A. RESPONDENT'S ALLEGATIONS

140. Repeatedly, Respondent has accused Claimant of performing clandestine construction operations at the site under authorizations or circumstances which Respondent suggests were employed as pretexts by the Claimant.

141. Claimant has confirmed that it commenced construction on May 27, 1994,[157] and that it paused briefly beginning October 26, 1994 when served with the Municipality's handwritten order to cease construction activities at the site, before resuming under the advice of Mr. de la Cruz Nogueda.[158] It is common ground that the federal closure lifted on September 6, 1994 by order of PROFEPA to facilitate a "comprehensive environmental audit."[159]

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155 In February, 1998 Metalclad announced construction at its Aguascalientes site where it is to construct an industrial landfill facility. With construction well under way, the facility is expected to open in October 1998.

156 Letter of March 31, 1997 from Ing. Jorge Sanchez Gomez, Ex. 11-1 hereto.

157 Memorial, Vol. I., para. 68.

158 *Id.*, paras. 80-81; Declaration of Ariel Miranda, Ex. 16 hereto, para 29.

159 Counter-Memorial, para. 430 d).

142. Concerning the pre-audit period, Respondent submits:

> The Claimant did not inform federal, state or municipal authorities that it would commence construction on May 16, 1994. Rather, the Claimant represented to the federal authorities that all work being carried out at the site from September 1993 until at least September, 1994 was necessary maintenance or remedial work, not new construction of new works.[160]

143. Elsewhere it avers:

> During July and August 1994, COTERIN carried out certain construction at the La Pedrera site under the guise of performing necessary maintenance work.[161]

144. In paragraphs 423, 457 and 461 of its Counter-Memorial, Respondent addresses the "audit-related construction" by suggesting that Claimant, beginning in September of 1994, performed "substantial earth moving and building construction"[162] in a manner, it is implied, designed to mislead the federal authorities and the local people. It alleges specifically that "Claimant saw the audit as a means of launching construction work at the site"[163] explaining further that:

> "[R]emoval of the closure seals from the gates of the La Pedrera site made it possible for COTERIN to bring

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[160] *Id.* Annex One, para. 68(a). *See also Id.*, para. 80 ("The Claimant misrepresented the nature of its activity at the site from May until the autumn of 1994.").

[161] Counter-Memorial, Annex One, para. 80.

[162] *Id.*, para 458.

[163] *Id.*, para. 423.

construction materials and equipment onto the site in preparation for construction of the landfill facility."[164]

B. CLAIMANT'S RESPONSE IN GENERAL

145. To these charges, Claimant must remark first that there is an aroma of convenience in Respondent's account. The Tribunal will appreciate that without some explanation for how there emerged a completed landfill, Respondent's related arguments seem all the more hollow. In particular, the project's federal *imprimatur* will be difficult to deny and state and local officials will find it challenging to discount their acquiescence in the progress that led to substantial completion of the facility. Regardless, as developed below, the facts are that—except for a period of self-restraint requested by federal authorities—activities at the site were robust, open, and well-appreciated by various constituencies within the community.

146. Claimant suggests further that there are grounds for being confused by Respondent's submissions on this point. Respondent's apparent hypothesis—that Claimant's improvements of the site were illicit—seems to be undercut by Respondent's repeated concession that Claimant held "the necessary federal authorizations" to perform the construction activities[165] and its open recognition that "[t]he closure order had not prevented COTERIN from carrying out 'preventative civil construction work' necessary for the safe maintenance of the site...."[166]

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[164] Counter-Memorial, Annex One, para. 79.

[165] Counter-Memorial, para. 457. *See also* Annex One at para. 80 ("INE had already authorized construction of the landfill facility.")

[166] *Id.*, Annex One, para 79.

C. CONSPICUOUSNESS OF CLAIMANT'S OPERATIONS

147. Respondent's theory rests upon believing that Metalclad, who courted the federal officials assiduously, deceived those officials about constructing the landfill; and did so when the company—by Respondent's own admission—had all the federal and state permits necessary to construct the landfill.[167] In essence, Respondent submits that the company deceptively plotted to get a federal audit, and then used that audit as a means to have the closure seals lifted. With that done, Metalclad without detection brought into the landfill grounds heavy earth-moving equipment, workers, supplies, materials, and any number of vendors in large trucks.

148. An examination of the facts exposes the improbability of Respondent's view:

149. Grant Kesler wrote to Pedro Medellin on April 25th and, among other things, said to him, "[W]e will initiate, at the latest by the 16th day of May of 1994, the relative works for the remediation of the site, (here is where Respondent ends its quotation in its Counter-Memorial), *including the construction of a controlled landfill and complementary works of the same.*"[168]

150. Later in the same letter, Kesler pointed out that the remediation will be carried out "in situ"; and, upon completion — estimated to occur in September 1994 — the company "will carry out the hazardous waste landfill, so that Metalclad can be financially compensated for the remediation."[169]

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167 *See* Counter-Memorial, para. 457.

168 Letter from Grant Kesler to Dr. Pedro Medellin Milan, April 25, 1994, Ex.33 hereto (emphasis added).

169 *Id.*

151. In June 1994, Dan Neveau wrote to municipal president, Juan Carrera, outlining a number of considerations regarding the site at La Pedrera. Among them was the recognition of carrying out the remediation along "with the operation of the landfill during and after the remediation process."[170]

152. On July 18, 1994, Ariel Miranda sent a memorandum to Ing. Jose Luis Medina of the PROFEPA delegation in San Luis Potosi, setting forth the works carried out at the site since September 9, 1993, (the date Metalclad acquired COTERIN), to the present.[171]

153. After receiving Miranda's letter, PROFEPA made an on-site visit. Miranda responded to that site inspection on August 9th, 1994, in a letter to Ramiro Zaragoza. Miranda pointed out the several construction projects necessary to prevent damage to the site.[172]

154. A site inspection conducted by PROFEPA on August 16, 1994, produced an "Inspection Order" the same day. The Order pointed out that works done were performed without the seals having been lifted.[173]

155. On August 19, 1994, Ariel Miranda answered PROFEPA's summons that issued as a result of the inspection on the 16th. He

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170 Letter from Dan Neveau to C. Juan Carrera Mendoza, June 13, 1994, Ex. 34 hereto at 2, para.1.

171 Letter from Ariel Miranda, Eco-Administracion to Ing. Jose Luis Medina Garcia, in charge of the state delegation of Profepa, re: Memo No. PFPA-0584-357/94 657, July 18, 1994, Ex.35 hereto.

172 Letter from Ariel Miranda to Lic. Ramiro Zaragoza Garcia, state delegate for PROFEPA, August 9, 1994, Ex. 36 hereto.

173 Inspection Order PFPA-0719-0466/94, Inspection Number 24017-0527, Ex. 37 hereto.

identified the applicable Mexican Official Norms, and the works done in compliance therewith.[174]

156. PROFEPA disposed of the matter in a Resolution from SEDUE, August 30th.[175] PROFEPA acknowledged that the construction of a bridge and other works on the cells, had not been authorized prior to the work—although PROFEPA did receive prior notification. Nevertheless, the overriding legal obligations of the company to comply with the Official Mexican Normatives, the General Law of Ecology, and applicable regulations superseded in importance the comparatively minor violation.[176]

157. In the same Resolution, PROFEPA "lifted the seals" for purposes of this construction work—and for any other similar works that might be required—and for the federal audit that the company had voluntarily requested.[177] Although Respondent has characterized the company's actions as akin to violating the seven seals of the Apocalypse, PROFEPA found an "evident absence of fraudulent conduct," and proceeded to "absolve the company called [COTERIN]...[from] the present irregularity."[178]

158. A few days later, on September 6th, 1994, PROFEPA lifted the closure seals in an official order.[179]

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174 Letter to Ramiro Zaragoza Garcia from Ariel Miranda, August 19, 1994, Ex. 38 hereto.

175 Memo No. PFPA-04/883/055/94, File No. 024, August 30, 1994, Ex. 39 hereto.

176 *Id.*

177 *Id.*

178 *Id.*

179 Memo No. 240170545, Order To Lift The Closure Seals, No. PFPA-SLP-02-0880-546/94, Ex. 40 hereto.

159. Only five days prior to the order to lift the seals, PROFEPA's leader, Lic. Miguel Limon Rojas, issued a press release lauding the "recent agreement celebrated between the Government of...San Luis Potosi and the company Metalclad...for the restoration of the land, *construction and operation* of a controlled landfill...in the zone known as 'La Pedrera'."[180]

160. At the press conference, held in the offices of PROFEPA, were Ambassador James Jones, Jose Luis Calderon Bartheneuf, Sub-Procurator of PROFEPA, Dr. Pedro Medellin Milan, and Daniel Neveau.[181]

161. PROFEPA assured that for its part it "will supervise the activities that will develop at this site... [and] [t]he company acquired the landfill...after obtaining the correspondent permits from the environmental authorities and in coordination with the Federation and the Government of the state it has been verified the true compliance to the legislation in the matter...."[182]

162. On November 9th, 1994, Mr. Zaragoza of PROFEPA responded to a request from Mr. Miranda on September 20th, for permission to construct an evaporation lagoon, a solidification tank, neutralization area, temporary storage, solids storage and laboratory, as "part of the conditions to effect the Environmental Audit and the possible remediation of the site derived from this audit." In response,

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[180] Federal Attorney's Office for the Protection of the Environment, BULLETIN, Press, Radio, Television, Mexico, D.F., September 1, 1994, Ex. 41 hereto.

[181] *Id.*

[182] *Id.*

Zaragoza wrote that PROFEPA had no objections to the company going forward with those works.[183]

163. In December 1994, PROFEPA, published an Executive Summary of the Environmental Audit prepared by Radian, the company approved by PROFEPA to conduct the environmental audit requested by Metalclad.[184]

164. The Executive Summary informs that the transfer station includes "an access road to the site, perimeter fence, access door and sentry box, offices and infirmary, internal access roads, three cells of temporary confinement, emergency area, tree nursery...[and] [a] landfill of hazardous waste is right now under construction, 80% finished."[185] The fact of construction on the landfill was no surprise to PROFEPA.

165. Ariel Miranda sent regular monthly and quarterly reports to SEMARNAP of the construction activity. In the quarterly report submitted on January 30, 1995, Miranda identified 17 construction activities and gave in detail the progress of the works.[186] Miranda lists works done in the following areas: evaporation cell; remediation cell; maintenance building; solidification tank; neutralization area;

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183 Subdivision of Normativity Verification and Environmental Audit, PFPA-SLP-02-1275-748/94, November 9, 1994, Re: Authorization of Civil Works, Ex. 42 hereto.

184 Federal Attorney's Office for the Protection of the Environment: Executive Summary, Environmental Audit to the: Transfer Station of Hazardous Waste Located in the Site "La Pedrera", Guadalcazar, San Luis Potosi, December 1994, Ex. 43 hereto.

185 *Id.*, third page.

186 Quarterly Report of the Works Advancement to Lic. Francisco Giner de los Rios, General Director of the Environmental Normativity of the National Ecological Institute, SEMARNAP, from Ariel Miranda, January 30, 1995, Ex. 44 hereto.

> established in those fractions, *subject to, what the federal laws and those [laws] of each State determine, coordinating the activities of the municipalities with local and federal authorities.*[419]

342. Analogous authority from Mexico's Supreme Court of Justice also supports the position that municipal powers are qualified and subject to subordinating federal acts. In *President of the United Mexican States v. Ayuntamiento of the Municipality of Guadalajara,*[420] the Court observed that matters not expressly reserved to the federal government by the Mexican Constitution could nonetheless be given with primacy by Congressional lawmakers to federal authorities.

343. The *Guadalajara* case concerned the effects of a law passed by Congress under article 73, fraction XXIII of the Constitution; the Congressional measure in question, intended to protect banking, was held to be within powers reserved to the Federation through the General Law Coordinating Matters of Public Safety, though protection of the banking system is nowhere specifically earmarked in the Constitution as a federal prerogative.

344. In instant case, there exists a law, LGEEPA,[421] passed by Congress to address with specificity matters related to hazardous waste, under a grant to be found in article 73, fraction XXIX-G of the Mexican Constitution.[422] The law expressly gives to the

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[419] CONSTITUTIONAL MEXICAN LAW 897 (1985)(emphasis added).

[420] Constitutional Controversy 56/96 (June 16, 1997) (unanimous).

[421] *Ley General del Equilibrio Ecologico Y Proteccion al Ambient* (General Law for Ecological Equilibrium and Environmental Protection).

[422] Which provides in pertinent part:

> The Congress has the power: ...To expedite laws that establish the concurrence of the Federal Government, the governments of

temporary storage area; fuel area; truck cleaning area; solid storage; truck driver's building; truck scale; laboratory; change house; administration building; guard house; exterior work; and, workers' residence. Miranda noted that making the report complied with a directive from INE granting the company the right to construct a "controlled landfill in the Municipality of Guadalcazar."[187]

166. On February 10th and March 31, 1995, Miranda sent monthly reports to Giner reporting on the progress of construction of the landfill. As with the quarterly report, and all other reports, copies were sent to the heads of INE, PROFEPA, other federal authorities, and to the delegate of PROFEPA in San Luis Potosi.[188]

167. Ariel Miranda, who was continually at the landfill site during the construction period, testifies that from May 1994 to April 1995 several state congressmen visited the landfill.[189] He states that Gerado Limon, Antonio Herran, Emilio de Jesus Ramirez, and Juan Raul Acosta were among those state congressmen who not only visited La Pedrera, but also visited two landfills in the U.S. (In fact, they told Miranda that they thought the La Pedrera project was better than the two U.S. sites.)[190] Miranda also tells of several other groups who visited the landfill during that period, including: the Red Cross Ladies, the Directors of the SLP College of Lawyers, and representatives of SLP industries.[191] A usual observation by these

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187 *Id.*

188 Letters from Ariel Miranda to Lic. Francisco Giner de los Rios, General Director of Environmental Normativity of the National Institute of Ecological Institute, SEMARNAP, dated February 10, and March 31, 1995, respectively. *See* Ex. 4-3 and 4-4 hereto.

189 Memorial, Vol. I, Declaration of Ariel Miranda, second page.

190 *Id.*

191 *Id.*, second and third pages.

people was that the landfill was very different from what the State government was showing in the newspapers.[192]

168. The Tribunal will recall that from the permitting of the transfer station before the time that Metalclad was involved in the project, it was intended that a controlled hazardous waste landfill would be the end product.[193] Once the company officers received a solid declaration of support from Pedro Medellin in Newport Beach, beginning construction was the next step. After the national elections concluded, PROFEPA gave its public endorsement of the state-Metalclad agreement. And construction moved forward apace. The Government of Mexico was, after all, in favor of the project. It had proven the site technically appropriate. The need to address Mexico's overwhelming hazardous waste problem rested heavily upon SEMARNAP. Secretary Carabias declared, "Next year we will have 30 hazardous waste landfills like the one in Guadalcazar,"because "it is necessary to provide sites where waste that has otherwise been abandoned for 50 years in rivers and ditches in a clandestine manner" be handled.[194]

169. Even in an area as remote as La Pedrera, it would be impossible to carry out construction in secret. After all, local contractors were doing the project, supported by scores of local residents doing the labor. Local vendors provided supplies and materials. Government officials, citizen groups, and association representatives visited the site during the months of construction.[195] Official reports were filed. An audit was on-going. GYMSA engaged in tests and studies for the UASLP committee. PROFEPA inspections were made. And a full

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192 *Id.*, third page.

193 *See* Counter-Memorial, Declaration of Rene Altamirano Perez, Annex 2, Vol. I, Tab F, Ex. 1.

194 Memorial Notes; *El Nacional*, July 31, 1995

195 Declaration of Francisco Castillo, Ex. 4 hereto.

exoneration for unauthorized maintenance works was given by PROFEPA. The works were open and notorious for all to see. The company proudly showed its project to all those who came to see the landfill.

170. The canard of surreptitious construction invented by the United Mexican States lacks bases in fact, logic, and believability.

Section 9 The Supposed Advertising of Services in the United States

171. In reference to Governor Sanchez Unzueta's sense of the events giving rise to this arbitration, Respondent replicates without qualification his contention that Claimant was "advertising its services" in the United States, citing an article in *Chemical Marketing Reporter* of December 1993.[196] It could not be Respondent's position that Metalclad was preparing to import waste, an unlawful act; rather it seems that state and local officials wished to isolate some act of provocation by Claimant which would help justify the treatment received by Claimant's enterprise. Regardless, the characterization of the article as "advertising" is misleading. The piece cited by the Governor, upon even modest inspection, is not an advertisement; it is a news story about the company.[197]

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[196] *See* Sanchez Declaration, Annex Two, Vol. II, Tab A, at 5-6; Counter-Memorial, paras. 344, 346.

[197] This is clear even from the January 8, 1994 *El Pulso* article Ex. 10 to Sanchez Declaration] said by the Governor to have caused a public outcry. Somewhat more suitable to the rubric "advertising" is a brochure which enjoyed a limited distribution during a Mexico City trade show in which Metalclad participated. *See* letter of Grant Kesler to Governor Sanchez, Counter-Memorial, Annex 2, Vol. II, Tab A, Ex. 13.

172. The various references to the supposed advertising of Claimant when viewed in light of the attachments offered in support are both not compelling and confused; what seems to be the case is that a shred of truth has been emboldened by pure speculation, rumor and a willingness to believe ill of Claimant. Claimant believes in this regard that Dr. Medellin's choice of words is revealing. He explains:

> Based[A]fter Mr. Reyes Lujan's visit, an advertisement that *we thought* Metalclad had published in the United States was brought to my attention. The advertisement announced the operation of an incinerator *in Santa Maria del Rio*.[198]

It is apparent that he was referring to the notice distributed *in Spanish* at the Mexico City trade show concerning a different location and that by the time of his declaration he realized this was not U.S. advertising. One then is entitled to ask how Respondent can legitimately present to the Tribunal the declaration of Governor Sanchez, who iterates and reiterates versions of his recollection that:

> Pedro Medellin showed me an advertisement that Metalclad was distributing in the United States offering their services in the Municipality of Guadalcazar.[199]

173. It is obviously important to the Governor that he appear to have been pressed into his negative posture on the landfill by events chargeable to Claimant and the results thereof. He is once again careless, however, in seizing upon something that is verifiably false.

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[198] Medellin Declaration, Annex Two, Vol. II, Tab B, para 44, Ex. 3.

[199] Governor Sanchez propounds two phrasings of this misstatement at page 5 of his declaration.

Section 10 The Supposed Presidential Closure of the Transfer Station

174. Treated here for convenience is a separate averment that adds to the patchwork of inaccuracies which Respondent offers as fact. Claimant presumes that Respondent reconstructs pertinent history carelessly and not intentionally. But the result, nevertheless, misleads this Tribunal. Illustrative is paragraph 237 of the Counter-Memorial wherein Respondent asserts: "On April 29, 1992, during a presidential visit to Nunez, in the Municipality of Guadalcazar, President Salinas publicly declared his political decision to permanently close the La Pedrera transfer station [evidence?][sic]". The bracketed question is well put. Respondent provides no evidence. In fact, President Salinas did not so publicly declare. But Respondent leaves the unfounded assertion in its factual pronouncements.