CHAPTER 6

THE TECHNICAL AND SCIENTIFIC SUITABILITY OF LA PEDRERA, THE QUESTION OF ALTERNATIVE SITES, THE HAZARDOUS NON-HAZARDOUS DISTINCTION, AND LOCAL OPPOSITION

Topical Arrangement of Sections

Section 1 Introduction

175. An important aspect of the present case is the relative appropriateness of La Pedrera in terms of multiple objective, science-based criteria; these characteristics motivated Metalclad to proceed and the federal authorities to support the project. Indeed, it must be concluded that organs of Respondent most clearly empowered to assess the issue have conceded that La Pedrera was fully suitable in terms of geo-hydrology and related matters. Claimant maintains also that those in a position to influence local apprehensions, if actually reviewing the data, could not reasonably entertain doubts about the project's scientific aptness.

176. By November 24, 1995 (the date of the *Convenio de Concertacion*), Claimant's project had been the subject of an

extensive battery of studies—not by one body of experts but by several, both academic and governmental. These have been introduced in the Memorial, touched *en passant* in the Common Ground portion of this Reply and have been summarized in the Counter-Memorial's narrative and attachments. Accordingly, they will not be fully rehearsed here. The Counter-Memorial's diffuse treatment of the subject and certain intimations of Respondent's declarants nevertheless warrant a reply.

177. Also treated in this chapter, for convenience, are the contents of certain supposed understandings concerning alternate sites and limitations upon the kinds of waste to be treated at La Pedrera (the hazardous/non-hazardous question) and the question of local opposition. Respondent's Counter-Memorial takes dubious positions concerning both of these issues.

Section 2 Early Doubts Were Not Well-Founded

178. Dr. Pedro Medellin[200] explains to the Tribunal that he formed doubts about the geo-hydrological appropriateness of La Pedrera when reviewing the data supporting INE's grant of an operating permit to COTERIN, which occurred on August 10, 1993. He states further that these misgivings gave rise to a meeting with federal officials and his letter to Mr. Reyes Lujan of November 30, 1993.[201] Later in that proffer he states, however, that he "could not totally discount the possibility that La Pedrera could work," but that because technological solutions cannot be fully trusted, "the geology of the site becomes a very important factor when considering the long-term implications of a hazardous waste landfill."[202]

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[200] Medellin Declaration, *supra*, para. 47 *et. seq.*

[201] *Id.*, Ex. 5.

[202] *Id.*, para. 53.

179. Dr. Medellin is a chemical engineer.[203] In formulating his view of the project, he understandably therefore relied upon the conclusions of others presumably more expert than he in matters of geo-hydrology.[204] Specifically, he accords a presumption of validity to the Aleman study, but claims to have depended primarily upon his "advisors' strong disapproval of the studies submitted in support of the environmental impact statement" and a UASLP study "defining more than thirty suitable sites" other than La Pedrera for a hazardous landfill.[205]

The Study of Sites—Dr. Medellin Has Misspoken

180. In his declaration Dr. Medellin states in forming his doubts about La Pedrera that he:

> [took] into account that the UASLP found that the area where La Pedrera is located was unsuitable for the establishment of a hazardous waste landfill.[206]

181. The above-quoted representation is misleading and confusing on two grounds and is disingenuous on a third basis. First, the reference to the UASLP study is ambiguous, given that a subsequent UASLP body functioned under a mandate more germane to the issue Dr. Medellin is addressing; that investigation is one which Dr. Medellin and the former Governor wish to de-emphasize, presumably because by supporting the

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[203] His faculty appointment was as Professor of Chemistry. *Id.*, paras. 2-4. His graduate work was in chemical engineering. *Id.* The title of his doctoral dissertation was: *Removal of Sulphur Dioxide and Nitrogen Oxides From Flue Gases in Radial-Flow Fixed Beds.*

[204] This is not to suggest that Dr. Medellin lacks a general understanding of environmental issues.

[205] Medellin Declaration, Annex Two, Vol. II, Tab B, paras. 50, 35.

[206] *Id.*, para. 48.

site's aptness, it further relegates them to a minority view, one now virtually devoid of expert support.

182. Second, the survey of possible sites to which he refers in fact does not address La Pedrera—not directly, not by inference. Dr. Medellin therefore misleads himself and the Tribunal.[207]

183. Third, it should be noted that if the study had disparaged La Pedrera, it would have proven to be without influence, for the state in fact issued a site-specific land used permit, supported by several UASLP professors' conclusions; Claimant is informed that Professor Pedro Medellin was among the UASLP advisors to whom the state authorities looked.[208]

The Humara Analysis Exposes Multiple Flaws in the Aleman Report; Aleman Also Has Conflicts of Interest

184. Dr. Medellin responds to the Humara study by noting that his advisors found it inconclusive, though he casts a favorable light on Aleman's work by reporting that Aleman had experience and a good reputation; he thus was presumably capable of performing "a geology study of the La Pedrera area."[209] Claimant suggests that the more illuminating observation by Dr. Medellin is his characterization of Aleman's mandate. He rightfully notes:

> The "Aleman Study" was prepared at the request of the Guadalcazar Municipal President who was apparently seeking scientific support for his belief that the site was not suitable.[210]

Correspondence delineating Aleman's mission confirms that the result the commissioning authority sought was made abundantly

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207 *Id.*, para. 35.
208 *See* Ex. 58 hereto.
209 Medellin Declaration, *supra*, para. 50.
210 *Id.*

clear to Aleman. By letter dated May 6, 1991[211] Municipal President Salomon Avila instructed Ing. Aleman as follows:

> [W]e respectfully request your valuable collaboration to perform the Geological and Geo-hydrological studies, in order to determine the reality *about the harmful effects that the industrial landfill located at La Pedrera in this Municipality could have at present and in the future* and on this region's ecology.
>
> This request responds to the State Congress' petition to submit evidence, and for that reason *the municipality of Guadalcazar trusts that based on your report, the contaminating effects that this industrial landfill cause may be demonstrated.*

185. It appears, based upon Aleman's questionable methodologies and conclusions, that he either took his mandate to require expedited treatment, or aggressive advocacy, or both. Mr. Humara concludes that, *inter alia*, the study was completed too quickly to have involved extensive field work, that it failed to take account of existing studies and was contradicted by them, and that it involved putative tests which simply could not have been performed in the manner described.[212]

186. The Aleman study not only strains credulity but must be viewed in light of Mr. Aleman's close relationship with Mr. Hector Vargas, of RIMSA.[213]In Mr. Aleman's declaration it is stated:

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[211] Counter-Memorial, Ex. 32.

[212] Memorial, Vol. II, Ex. 14. It speaks volumes that the federal authorities were apprized of and presumably studied Mr. Aleman's work only to disregard his findings based upon their own.

[213] *See* Memorial, Vol. II, Ex. 13; Declaration of Sergio Aleman Gonzalez, Counter-Memorial, Annex Two, Vol. IV, Tab A, para. 7.

> When Mr. Hector Vargas found out, from the miners, that I was a geologist and that I do expert work in mining, he requested me to advise him on several mines that he had. Therefore, I affirm that our only and exclusive relation is limited to mining. I do not know of other activity or activities carry out [sic] by him for other companies. *It was through Greenpeace that, in the beginning of 1995, he informed me that the validity of my study was being questioned, due to the fact that Mr. Hector Vargas had been the godfather of my son "Sergio Aleman Hernandez" and because he was the owner of the RIMSA company, METALCLAD's main competitor.*[214]

187. The foregoing establishes that Mr. Aleman was both an employee of Hector Vargas[215] and that their relationship was sufficiently close that Mr. Aleman asked Mr. Vargas to be his son's godfather and Mr. Vargas consented to so act. The above quotation moreover raises a number of troubling questions. Among them are:

1] Why was Mr. Vargas, owner of RIMSA, so interested in, and well apprized of, the relative esteem with which the Aleman report was held?

2] How is it that Mr. Aleman is so closely affiliated with Greenpeace that he receives messages through that organization?

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[214] Aleman Declaration, *supra*, 5, para. 7 (emphasis added).

[215] In his letter of May 25, 1995 to Antonio Azuela, Mr. Aleman also refers to real property concerning which both he and Mr. Vargas have had interests; it seems that Mr. Vargas had (and may still have) the mining rights and Mr. Aleman owned (or owns) the remaining rights, which he got through inheritance. *Id.*, Ex. 3. In that letter he does not deny that Mr. Vargas is the godfather of his son.

3] How has Mr. Vargas, owner of RIMSA, come to use Greenpeace as a conduit for messages to Mr. Aleman and how is it that his confidence in this mode of communication has proven to be well-placed?

4] Are Messrs. Aleman and Vargas members or supporters of Greenpeace or both?

Subsequent Studies Have Confirmed Seminal Investigations

188. The audit, and the "audit of the audit" were designed in part to put to rest questions about La Pedrera's geological attributes and related questions pertaining to underground hydrology. The results of these investigations should be deemed to have soundly answered any lingering concerns.

189. The consonance of those findings with certain early tests noted by Mr. Humara is striking; they too contradict the expansive aquifer thesis put forth by Mr. Aleman. Mr. Humara cites, for example, the 1973 perforation at 346 meters made near La Pedrera by the Ministry of Water Resources,[216] which discovered "dense and compact limestones, with very little permeability and without a water level."[217] Roughly two decades later, after participating in the audit of the audit, the National Water Commission concluded:

> [W]e have not found water in the region at 350 meters beneath the surface...50% of the water is absorbed in the first meter and eventually evaporates...there is no possibility of contamination of the regional water deposits found below 350 meters under normal precipitation and drainage conditions....From the geo-hydrological

[216] Memorial, Vol. II, Ex. 14, second page.
[217] *Id.*

> perspective the site is suitable for a hazardous waste landfill provided it is constructed in the manner prescribed by the applicable technical standards and under the supervision of appointed experts.[218]

Section 3 The Question of Alternative Sites: Respondent Proffers Misrepresentations

190. The statements given by Dr. Medellin and former Governor Sanchez Unzueta share the common theme that much of their cooperation, encouragement and acquiescence in relation to Metalclad was predicated upon Metalclad's project operating somewhere other than La Pedrera. This credo is applied, in particular, to the question of the mandate of the committee of university professors formed in early 1994. Governor Sanchez Unzueta, for instance, declares for the Tribunal's consideration:

> As a result of my recommendation to Metalclad that they find an alternate site with the assistance of the UASLP researchers—from a list of more than 30 sites that had been preliminarily identified as suitable by previous studies.[sic] On April 25, 1994....[219]

191. The representation that the Committee's *raison d'etre* was to find an alternative site, to serve in La Pedrera's place, is a half-truth belied by that Committee's own minutes and by the very documents referred to by the Governor in his statement. In particular, minutes

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[218] Report of July 20, 1995 by Mr. Ruben Chavez Guillen, in charge of groundwater, *excerpted in* Declaration of Antonio Azuela, Annex Two, Vol. II, Tab B, Ex. 9 (summary provided by Respondent).

[219] Sanchez Declaration, *supra*, at 7. The Governor's statement then quotes an April 25, 1994 statement by Grant Kesler said to be attached as Exhibit 15 to the declaration, but in fact is not found there. *Id.* at 7-8.

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."*[220]

The *aide memoire* generated by the February 3, 1994 convening of the Committee further explains that alternative sites were to be examined merely to establish a default location.

> [t]he need to have Metalclad support an activity program, oriented to increment the level of technical knowledge, regarding some of the sites proposed in the study done by the School of Engineers in March of 1993, called "Selection of probable sites for the installation of a landfill of controlled hazardous industrial waste." *This is an alternative for the location of the landfill in the case the medio-physical conditions of "La Pedrera" could represent a real danger* to the environment (or sub-terrain water) even with an excellent engineering project.[221]

192. It is readily apparent from the foregoing that La Pedrera was the cardinal site to be verified, and that the study of other sites was done to provide a substitute should La Pedrera prove unsuitable. The contingency plan reflected the groundwater concerns raised by the Aleman study, which were later conclusively addressed by further geo-hydrological field work. It also advanced the Governor's goal of

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[220] Ex. 27 hereto (emphasis added).

[221] *Id.*, at fourth page, F.

identifying additional sites capable of addressing both the clandestine dump problem and the inevitable need to produce industrial waste within the state.

Consistent with this well understood approach was Grant Kesler's letter dated April 6, 1994 to the Governor, the stated purpose of which was to provide for Governor Sanchez Unzueta an update. In pertinent part it states:

> Under the direction of Lic. Luis Manuel Abella Armella a commission was formed *to study the site of "la Pedrera" and determine if it is safe and adequate*. The following people were invited to participate in this committee:....[222]

193. Similarly, the May 31, 1994 press release issued by Metalclad cited by the Governor at page 8 of his declaration refers clearly to locating *additional* sites (not locations to serve in lieu of La Pedrera).[223] That release states in part:

> [t]he state will cooperate with Metalclad in locating *additional sites for facilities in San Luis Potosi for future use*, in accordance with the Governor's economic development plan, thus creating an environment for expansion of economic development in a way that fully protects the environment.[224]

194. The former Governor's confected testimony dissolves in the light of the evidence: the Claimant always agreed to remediate in

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[222] Letter of April 6, 1994 from Grant Kesler to Governor Sanchez Unzueta, Ex. 45 hereto. Among those listed as invitees was Pedro Medellin.

[223] Sanchez Declaration, *supra*, Ex. 15 (although erroneously cited in his statement as Ex. 17).

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

conjunction with its right to operate—just as it agreed in the *Convenio*. The UASLP Committee set about to determine the technical adequacy of La Pedrera, not to find a site in lieu of it.

Section 4 The Supposed Agreement On Limiting Operations To Non-Hazardous Waste

195. As noted in Chapter 3, Section 12, Respondent suggests that the Municipality was prepared to allow the operation of a non-hazardous waste landfill at La Pedrera during remediation and that such a limitation had been agreed to by Claimant's representatives.[225] To this assertion Claimant replies by mentioning three points:

> 1] The Claimant's position was not flexible on the character of waste it had been authorized to process and made clear its unwillingness to agree to such a term; it similarly would not accept a remediate-first approach.[226]
>
> 2] The text upon which Respondent relies was not the final draft agreed to by the parties; it was corrected on the very issue under discussion because Claimant insisted that it not be limited to non-hazardous waste operations.[227]
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> 3] To have accepted such a limitation would have been contrary to the Convenio and to the strong federal position, which was informed by the government's keen awareness of the critical hazardous waste problem with which it was faced.

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[225] *See* Counter-Memorial at 225, para. 767.
[226] *See* Declaration of Gustavo Carvajal, Ex. 3 hereto.
[227] *Id.*, paras. 26-29.

Chapter 6

Section 5 The Question of Local Opposition

A. IN GENERAL

196. Claimant has produced signatures and written testimonials attesting to local support for the landfill.[228] While Respondent concedes that there was support for the facility, it relegates this group to a few persons hoping to receive employment. The premise that notorious opposition to the landfill should have been known to Claimant has been offered by Respondent as established. From it, the Respondent wishes the Tribunal to infer that the Claimant was unreasonable in deciding upon La Pedrera and that by forging ahead Claimant must be assumed to have taken the risk that the landfill would not gain sufficient popularity, a supposed prerequisite to operation.[229]

197. In reply, Claimant contests the extent of opposition in the villages near the landfill, the communities more likely to be affected, and is unwilling to concede that the region at large was[230] against the facility. Claimant concedes that from an early juncture there was considerable misinformation circulated about the project, presumably by entities who would not benefit from its operation. Neither Respondent nor Claimant, however, can claim to have

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228 *See, e.g.*, interview with Mrs. Agustina Armijo Bautista, Ex. 1 hereto.

229 *See* Counter-Memorial at 253, para. 895.

230 The past tense is appropriate because the filing of the arbitration may have changed the public perception of Metalclad, given that its claim may be taken to reflect poorly upon the Municipality or its people; one could not be certain that a poll taken in 1998 would mirror the views of the local citizens during the relevant period. The arbitration has been mentioned in several local news accounts, and local authorities and figures including former Governor Sanchez Unzueta have had occasion to comment upon Metalclad without fear of rebuttal.

perfectly reliable statistical information.[231] In the absence of such data there is a risk that a vocal and well-organized minority (such as Greenpeace) may give the false impression that vigorous opposition was widespread. A true picture may be further obscured by press reports that tended to emphasize the controversial side of the project.[232] In any event, Claimant suggests that as a *legal* matter, the true extent of opposition is not a pivotal issue in this case and that the mere fact of dissenting views itself is not determinative.

B. LOCAL OPPOSITION AND CLAIMANT'S DILIGENCE

198. The notion that Claimant acted improvidently, inexplicably[233] buying the "biggest problem in the state" (in the words of Dr. Medellin)[234] has been promoted by many of Respondent's declarants. It is implied in this connection that the Claimant should have been discouraged by the problems encountered by the Aldretts and alleged deeply rooted community sentiments which, according to Respondent, should have been apparent to Metalclad.

199. What is more accurate, Claimant holds, is that its due diligence apprehended a number of negative but reasonable views related to the landfill, and proceeded in light thereof. Some, including Humberto Rodarte who closed the transfer station, were against the premature use made of the site by the Aldretts, and against the

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231 For Respondent's's general allegations that the landfill was opposed, *see* Counter-Memorial, paras. 669, 895 (c) and 903.

232 A number of favorable press reports and those critical of the Governor and the opposition were also in the mix.

233 Respondent sponsors the theory that the rashness it attributes to Claimant was motivated by a desire to report progress to investors.

234 Medellin Declaration, *supra*, Counter-Memorial at 17, para. 84.

unremedied status quo.[235] Many among this group had, however, formed no view on the quite different question whether a modern facility that met or exceeded U.S. and European standards for safety would be acceptable, assuming the related geo-hydrology were thoroughly assessed.

200. Claimant believes it was entitled to prove its case to the undecided (even the skeptical ones) and, because of the qualitatively superior project it was offering, to change the minds of even the most entrenched opponents.[236] It should not be taken for granted that Claimant failed to do so despite the Counter-Memorial's repeated intimation of this as a fact.

201. Certainly, there was—and still is—another contingent who could not be persuaded to support the landfill under any circumstances. Knowing that there is always some opposition to a new landfill, Claimant never intended to garner unanimous support among the citizenry arguably affected. If unanimity were the test, no landfill would operate, at least not while Greenpeace maintained its present no-landfill platform and present level of advocacy.[237]

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[235] COTERIN under the Aldrett's management had accepted waste which the site was not yet permitted to receive.

[236] In matters of the environment Claimant agrees that a degree of apprehension and conservatism is warranted. The technologies it employed at La Pedrera demonstrate that Claimant was taking a long view and refusing to cut corners. Its self interest would cause it to do no less; the Metalclad name has been respected since 1933 and its management had made lasting commitments to participate in Mexico's environmental program, as evidenced by its current activities there.

[237] In Claimant's view Greenpeace is unreasonable in not tailoring its policies to the development needs of the state in question. Ironically, adoption of its no-landfill position in Mexico would result in burgeoning numbers of clandestine dumps. Yet, in places, Respondent's declarant suggests that Greenpeace was advising the Municipality, apparently enjoying a quasi-

202. Claimant maintains that it was reasonable to proceed knowing that it would not convince all constituencies, but believing it could persuade those willing to investigate the facts. Moreover, it was encouraged to do so by federal officials who, given the facts, believed in the project. Indeed, the fact that these officials did not act to dissuade Metalclad suggests that the insurmountability of the forces arrayed against the landfill was not as apparent as Respondent now insists.

C. *ARGUENDO*, IF MANY WERE OPPOSED

203. Authorities support Claimant's position that even if a significant percentage of the Municipality's residents were against operation of the landfill, Claimant is entitled to recover under the facts of this case. In *ELSI*,[238] all five members of the Chamber agreed that ordinarily an order of requisition the effects of which are sufficiently sustained will constitute compensable interference with property.[239] That assessment was unaffected by the fact that the requisitioning official was motivated by genuine concern in the community about the impending loss of jobs and related matters.[240]

204. In the *Pyramids Arbitrations*,[241] the genesis of Egypt's decision to cancel the project was the public outcry occasioned by the *potential* presence of artifacts in the project area that later proved to

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official status.

238 Case concerning Elettronica Sicula S.p.A. (ELSI), Judgment of July 20, 1989, [1989] I.C. J. Rep. 14.

239 [1989] I.C.J. Rep., para 70.

240 The investor was held entitled to compensation in Italian courts for certain consequences of the requisition order.

241 Southern Pacific Properties (Middle East) Ltd v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, 106 I.L.R. 501 (1997); ICC Arb. No YD/AS No 3493, 68 I.L.R 435 (1991) (annulled for want of jurisdiction).

be based in fact.[242] Both the ICC and ICSID tribunals ruled on the merits that the investor was entitled to compensation.

[242] The ICSID tribunal explained:

> In late 1977, the Pyramids Oasis Project began to encounter political opposition in Egypt and it became the subject of a parliamentary inquiry. *Opponents of the project claimed that it posed a threat to undiscovered antiquities.*

The presence of antiquities was confirmed in the western part of the Al Giza Pyramids region. 106 I.L.R. at 604, paras. 62 and 63 (emphasis added).

CHAPTER 7

THE INFLUENCE AND REALITY OF FEDERAL OPERATIONS

Topical Arrangement of Sections

Section 1 The Federal *Modus Operandi* — A Definite Mission, But Far Less Certainty than Now Implied

The Federal Mission

205. Under Mexico's 1988 Law for the protection of the environment, federal authorities are given a broad mandate to address national ecological issues. After the Act's passage, few problems became as immediately apparent as the unmanaged, illicit disposal of hazardous waste, a dilemma made more complicated by the nation's undeniable need to pursue industrial activity. Federal policy makers could not have but attached a high priority and sense of urgency to the hazardous waste issue. That they did so is amply demonstrated by the documentation generated by the La Pedrera question. Thus, one finds a 1991 affirmation of SEDUE policy, directed to the President's offices:

> It is important to mention that SEDUE...has a great interest in promoting the establishment of hazardous waste facilities which fulfill the environmental regulations and it is particularly necessary to have these types of controlled hazardous waste facilities given that it serves

> the industry in the central and western part of the Republic.[243]

206. The letter makes this observation after detailing the positive traits characterizing the La Pedera site, such as compliance with "all the geohydrological characteristics and location requirements."[244] The obligation to take advantage of the site's natural suitability and the willingness of private developers to assist in this effort have been prevalent elements within federal policy statements.[245]

A Learn-by-Doing Methodology

207. Despite the current willingness of Federal officials to dispense the wisdom of hindsight,[246] at critical junctures throughout Claimant's implementation of its business plan federal officials proceeded on an *ad hoc* basis, attempting to navigate both political and legal currents. The Respondent's own submissions demonstrate this reality, which Claimant came to discover belatedly.

208. In the testimony generated in proceedings against him

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[243] Letter of August 5, 1991 from Sergio Reyes Lujan to Dr. Jorge Valdes Castellanos, Chief of the Department for the Presidency of the Republic, Counter-Memorial, Ex. 34.

[244] *Id.*

[245] As Secretary Carabias states in her declaration:.

> [T]he 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.*

Counter-Memorial, Annex Two, Vol. I, Tab A, para. 15.

[246] *See, e.g.*, Carabias Declaration, *Id.*

and others, for example, Mr. Altamirano explained that, despite his earnestness, in matters related to La Pedrera, federal practice was characterized by questions of first impression. He states:

> Everything that I undertook which may relate to the supposed acts that the claim refers to were carried out, as I understood them, within the exercise of my explicit or implicit authority with which I acted. *One needs to take into account that this area of work and law is totally new in Mexico... This was before these problems regarding ecological phenomena and its preservation were raised day after day, this meant that de facto situations, those not written or even foreseen arose. That is to say we went along learning, understanding and resolving on the road of infinite situations that in deed and right could never have been imagined.*[247]

209. The candid appraisal of Secretary Carabias in her depiction of the *Convenio* process is also instructive. She declares:

> 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.*[248]

210. Similarly, as apology for the Municipality's *amparo* proceedings (precipitated by the *Convenio de Concertacion*), Respondent with puzzling detachment pronounces *ex cathedra*:

> There was a genuine issue whether, in allowing Metalclad to simultaneously operate and remediate, the federal

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[247] Declaration of Rene Altamirano Perez, Annex 2, Vol. I, Tab F, Ex. 11.

[248] Carabias' Declaration, *supra*, para 19.

> authorities had acted consistently with PROFEPA's August 30, 1994 resolution in which it decided that COTERIN could not receive any new waste at the site until after the site was remediated.[249]

211. This admission illustrates well the legal environment in which Claimant was expected to formulate compliant behavior. If Claimant was required to know better than federal authorities the dictates of federal law, certainly all pretense of due process and a rational legal system evaporates. Even in such a curious regulatory domain, reminiscent of "Alice in Wonderland," one ought to be justified in believing that the later in time prevails between inconsistent policies at the same level of government. More fundamentally, the premise that there was a clash between the two federal initiatives is dubious, and in any event, is not readily apparent. Having led Claimant through the looking glass, Respondent is responsible for the consequences of the adventure.

Section 2 There are Indications that the Federal Operational Style Contributed to Suspicion and Resentment on the Parts of Local Officials, NGO's and Private Citizens

212. Claimant submits that strained relations between local and federal authorities—which have ultimately led to *amparo* proceedings of great longevity—were fueled by a *de facto* federal policy which initially discouraged consultation and collaboration with local officials and residents.

213. The *amparo* proceedings themselves are the best evidence that communications among the levels of government were episodic,

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[249] Counter-Memorial at 241, para. 840.

belated and ineffectual. There are, however, numerous other indications of this phenomenon, which Claimant believes had the by-product of fomenting distrust among the NGO's and certain local citizens.[250] It helped create an atmosphere in which rumors having no basis in fact could thrive,[251] and in which persons who would not benefit from the opening of the landfill could exploit the absence of coordination.

214. Former Municipal President Avila Perez, for example, was embarrassed by arresting persons for activities at the site only to be informed that he should release them with apologies. He had not been informed of the issuance of the relevant federal permit because the Governor himself had been apprised only after the fact.[252] Not dissimilar is the appraisal that:

> [T]he Governor and his advisors were not pleased that the Federal Government had given authorizations for the La Pedrera site before local government had considered the issue.[253]

Indeed, two days following formation of the *Convenio de Concertacion*, Governor Sanchez Unzueta declared to the

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[250] Indeed, Respondent's assessment of the *amparo* was that:
> "...the perception of the state and municipal governments was that there was a risk that the federal government was attempting to [bind the local government]."

Counter-Memorial at 224, para. 762.

[251] *See. e.g.*, Declaration of Pedro Medellin, wherein it is recalled that, based upon a rumor, he visited the site only to find no violations of the kind alleged. Annex Two, Vol. II, Tab B, para. 51.

[252] Declaration Avila, Annex Two, Vol. II, Tab A, at 2.

[253] Declaration of Azuela, Annex Two, Vol. II, Tab C, para 35.

Potosinians "[t]he state authorities know nothing about the terms of the signed agreement."[254]

215. One indication of what had gone before was the audit of the audit, corresponding press releases and related consultations leading to the *Convenio*; in hopes of dissuading those who would attack the federal initiative, uncharacteristic disclosure was the emphasis of the new-found federal approach.[255] That this was a significant change in approach is apparent in the account of Secretary Carabias who recalls:

> [I]n other words, we carried out an extensive information process from the results of the audit. *This time, in an open and transparent manner.*[256]

216. What is remarkable, however, is the present disavowal by federal authorities—despite their unequivocal mission statements—of any coordinating function. The bulk of the essential initiatives are now said to have rested with Claimant. According to the policies promoted before the Tribunal by Respondent, in spite of the superior knowledge and information presumably reposed with the federal authorities,[257] it was for Claimant to have recognized that

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[254] Counter-Memorial, Ex.121.

[255] As Attorney General for the Environment Azuela recalls:

> 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.

Declaration of Azuela, Counter-Memorial, Annex 2, para. 18.

[256] Carabias Declaration, *supra*, para. 16.

[257] The Tribunal will recall that it was federal authorities who closed the transfer station after performing investigations at the urging of local residents. The associated correspondence suggests that they did so reluctantly in light of the site's hydro-geological attributes and potential for solving the significant waste problem. *See* Counter-Memorial, Ex. 34;

political opposition[258] to the site would be nearly impossible to overcome, it was for Claimant to have won the trust of the local skeptics and radical NGOs, and it was for Claimant to fund all initiatives designed to accomplish the foregoing while substantiating beyond all doubt and with obsessive duplication the site's scientific readiness.

Section 3 The Federal Government Has Changed Its Approach in Light of Guadalcazar

217. As noted earlier, one of the unlikely aspects of the regime now defended by Respondent is the order in which approvals were to be procured. If at the time they were issuing permits to Metalclad federal authorities genuinely believed that a municipality may impose substantive conditions upon the installation of a hazardous landfill, why would the investor not be instructed to obtain those permits first, before spending substantial sums to support the federal process? Claimant observes that the federal approach taken with respect to it was far more consistent with federal primacy and with a collateral, perfunctory role for municipal authorities than with the reverse scenario; it had faith in federal primacy based upon this impression and the confirmatory other data highlighted throughout this Reply.

Azuela Declaration, *supra*, para. 7 The surrounding correspondence strongly suggests that the site's problems were not regarded as endemic or insoluble; and Claimant was so informed.

[258] Given the copious documentation demonstrating federal enthusiasm for the project, Respondent is particularly disingenous in suggesting now that the Claimant precipitously acted and ignored readily apparent opposition. If the negative image of the site was, as Respondent avers, notorious and endemic, why would federal authorities grant permit upon permit and showcase the project as they did?

218. Claimant finds it nonetheless illuminating that federal authorities have now amended their guidelines to require *first* the successful completion of local processes.[259] If Claimant had enjoyed this quality of unambiguous guidance, it would likely have been spared the internecine skirmishes that, looking back, compromised its project from the beginning.

Section 4 The Regime Promoted By Federal Authorities

219. In her letter of February 18, 1994 to Mr. Fernando Bejarano of Greenpeace,[260] Ms. Julia Carabias after noting that COTERIN had duly received federal permits added the following paragraph:

> It is important to point out that this is a federal authorization to be applied to said project, but the start-up is [the] decision of the State Government, who is responsible to grant the use of land authorization.

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[259] Thus SEMARNAP's 1997 invitation to prospective participants in environmental projects states:

> The specific proposals of the promoters, which will be evaluated by the National Institute of Ecology, *must be supported by the Government of the State where the project will be developed, through an agreement signed between the State Government and the promoter.*
>
> For the evaluation of the proposals of the promoters, *once the requisites and the approvals of the State and Municipal Governments and of the promoters*, a three parties commission will be formed, including the three levels of a Government, to coordinate and verify the compliance of the logistics of the Program, as well as with the federal, state and municipal laws the regulations.

Ex. 51 hereto (emphasis added).

[260] Ex. 46 hereto.

220. Consistent with the view conveyed to Claimant, no mention is made of the municipal permitting machinery, only the state land use permit which Claimant had already acquired. Further, despite what Ms. Carabias proposes, there is little rebuttal of Claimant's account in the text she relies upon from the *El National* of November 25, 1995, in which the *Convenio* is explained.[261] The portion she excerpts states:

> [I]t is important to clarify that the federal authorizations are a necessary requirement but are not sufficient for the operation of a hazardous waste facility. The company needs to comply with State legislation on the matter whose interpretation and application rests exclusively in the local authorities.[262]

Again the reference to "State legislation" discloses a disinclination to specifically refer to municipal permitting processes, even though over one year earlier the municipal permit demand had been made by the Municipality. If this was supposed to be an endorsement of the Municipality's position, it was a decidedly oblique one. Moreover, the *Convenio* itself makes no reference to state or municipal regulation, apart from reciting that COTERIN had received the state land-use permit. This, no doubt, is why Ms. Carabias refers to the newspaper account rather than to the text of the *Convenio*. The latter ultimately is the controlling document, not a press release composed for a general readership containing some with political views hostile to the federal government and its La Pedrera initiative.

Elsewhere Ms. Carabias stresses:

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[261] Excerpted in Carabias Declaration, *supra*, para. 18.

[262] *Id.*

> [I]t is important to clarify that the company never made me aware of the fact that some time before, the municipal authority had already rejected the license for the construction of the facility.[263]

221. She refers to the application of Mr. Aldrett. This caveat, developed in hindsight, suggests first that the opposition to the landfill was not as conspicuous as Respondent now asserts and second, that if it was — so that Ms. Carabias was aware of dissenting views — the association between the municipal permit and landfill opposition was not made by Ms. Carabias. Perhaps the question was not briefed in the federal *dossier* on the project. Regardless, she thought it not important enough to investigate; Claimant's entities concealed nothing from her.[264]

222. What is more likely is that, whenever the federal authorities encountered the project's detractors (the kind of opposition common to most landfill projects), they assumed reason would prevail over concerns largely tied to the Aldrett's former infractions or attributable to radical and inflexible NGO positions. Attorney General Azuela still believes: "that the local community would have eventually accepted the project if Greenpeace had not become so actively involved in opposing it."[265] That the community could be educated was indeed the message that federal authorities impressed upon Claimant's representatives. The actions of the federal authorities in publishing the audit results demonstrates this supposition.

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[263] *Id.*

[264] Ms. Carabias, of course, fails to state that she never inquired about the status of the construction permit. Nor should she have, given the non-essential status attributed by federal authorities to such permits in matters related to hazardous waste.

[265] Azuela Declaration, *supra*, para. 49.

223. Further, to this day, the gravity of the problems created by Metalclad's predecessors has been placed in perspective by federal officials (Mr. Azuela refers to the infractions as environmental misdemeanors).[266] The sense created during the critical phases of the project was that, given the site's well documented aptness and the quality of the facility contemplated by Claimant, the need for remediation did not discount simultaneous commercial operations.[267]

224. Two further aspects of Mr. Azuela's declaration are revealing. First, while he thinks it curious that local federal officials would have dispensed advice about the municipal construction permit, he does not deny that such advice was sought and given; he speculates only that it would be ill-advised and hence implausible that such counsel would be offered, for such a recommendation would certainly be relied upon by those seeking authoritative instructions. Second, he makes one of Claimant's main points elegantly when he reasons:

> It is difficult to maintain the belief that an investor would risk their resources in a scenario [in which federal officials merely made casual statements about federal primacy].[268]

225. Claimant agrees with Mr. Azuela; Claimant's behavior would be astonishing in the absence of good reasons to proceed in the manner it did. Either Claimant's acts were uncharacteristically brazen and foolish in the extreme or they were encouraged by more than casual conjecture on the part of federal officials; the latter hypothesis is the accurate one and is confirmed by correspondence detailing Claimant's due diligence and studied approach to both state and federal authorities.

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266 *Id.*, para. 48.
267 *Id.*
268 *Id.*, para. 43.

226. Finally, Claimant finds it significant that the *Convenio* agreed to between COTERIN and the Respondent, purported to fix and allocate the Municipality's entitlement to various benefits to be bestowed by the Company,[269] and did so, explains Mr. Azuela, after a process not involving state officials.[270] If as Respondent urges, federal authority does not eclipse municipal prerogatives—even in matters of hazardous waste—it is unlikely that federal authorities would feel competent to speak for the Municipality in fixing the package of perquisites redounding to the local polity.

227. Moreover, if the Municipality could subsequently raise its own requirements and demands, confusion and contradiction would surely result. If that is truly the Mexican system, its potential for abuse and unpredictability ought to rank it well below an international minimum standard for foreign investment regimes.

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269 *See* Carabias Declaration, *supra*, Ex. 1 (Social Commitments of the Company).

270 Azuela Declaration, *supra*, para 24.

PART III

REPLY TO RESPONDENT'S LEGAL ANALYSIS

CHAPTER 8

SOURCES OF LAW AND ELEMENTS OF INTERPRETATION

Topical Arrangement of Sections

Section 1 NAFTA Authorizes the Application of International Law Principles

228. Under the heading "Applicable Law" NAFTA Article 1131(1) provides:

> A Tribunal established under this Section [B—Settlement of Disputes] shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

229. The above-quoted article functions as the parties' designation of applicable law and can be reconciled with the Additional Facility Rules accordingly.[271] The mandate to consider applicable rules of

[271] Additional Facility Rules Article 55(1) states in pertinent part: "The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute."

international law implicates the classic sources of that system, generally thought to be authoritatively listed in Article 38 of the I.C.J. Statute, *viz.* treaties, custom and general principles of law recognized by developed legal systems.[272] Among arbitral tribunals, the third source—general principles—has often been relied upon, both for procedural principles[273] and for substantive guidance.[274] To Article 38's *travaux preparatoires* suggests that "the general

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[272] Article 38 of the Statute of the International Court of Justice, catalogs the law-making processes ("sources") of international law as follows:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
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> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law.
>
> c. the general principles of law recognized by civilized nations;
>
> d. ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[273] *See. e.g.*, Phillips Petroleum v. Iran, *et al.*, Award No. 425-39-2 (29 June 1989), *reprinted in* 21 Iran-U.S. C.T.R. 79 at paras. 198-97 ("[T]he doctrine of preclusion....is available as a 'general principle of law' which the Tribunal is authorized to consider...[and] has been used to bar a party's contradictory and self-serving jurisdictional statements, as well as substantive claims concerning sovereignty, rights under treaties, and rights in contract and property.") *See generally* D. Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence*, 33 Brit. Y.B. Int'l L. 176 (1957).

[274] *See e.g.*, Isaiah v. Bank Mellat, Award No. 35-219-2 (30 Mar. 1983), *reprinted in* 2 Iran-U.S.C.T.R 232, 235 (applying the unjust enrichment theory to be found among many nations' laws).

principles of law ... may be deduced in proper cases from general principles accepted by nations in *foro domestico*."[275]

230. An explicit incorporation of international law is also found in Article 1105(1), which requires the Respondent to afford Claimant—at a minimum—"treatment in accordance with international law" including (but not limited to) "fair and equitable treatment and full protection and security." Similarly, Article 1110 codifies the classic elements found in the customary international law of expropriation, while resolving by clear treatment a number of related issues. As will be iterated below, Respondent has fallen below the standards set by Articles 1105 and 1110 as informed by international law.

Section 2 Respondent Correctly Observes That The NAFTA Must be Construed in Light of Its Objects and Purposes and in a Manner Not Leading to Absurd Results but Largely Ignores NAFTA'S Objects and Purposes

A. RESPONDENT'S PRE-NAFTA REGIME

231. Claimant admits, in retrospect, that the commentaries referring to the legal and political regime affecting foreign investment in

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[275] G. Finch, THE SOURCES OF MODERN INTERNATIONAL LAW, 97 (1937) (noting also that international law has developed many principles by drawing upon private law analogies). *Accord*, L. Henkin, *International Law: Politics and Values*, 40 (1995) ("prevailing view is that [Article 38's] reference is to principles common to the domestic law of developed legal systems and that such a principle may be ... applied by an international tribunal, even if has not been legislated by treaty or become customary law ....") (Footnote omitted.)

Mexico contemporaneous to NAFTA's effective dates are replete with cautionary notes. A July 1994 *Financial Times* article, for example, refers to the weakness of Mexico's legal system as "an important constraint to private sector development," citing specifically the "unclear legal environment" and the vulnerability of small businesses in particular to "arbitrary legal decisions."[276]

232. Claimant maintains that such admonitions, nevertheless, give insight to what the drafters of NAFTA were attempting to accomplish in insisting upon fair and equitable treatment for investments and in requiring the Respondent to meet standards set by international law. Certainly, Claimant was entitled to rely upon Respondent's undertakings in this regard, even though it was among the earlier beneficiaries of those obligations. This is particularly true given that Mexico was not timid in exploiting such exemptions as were available to it under NAFTA.

B. NAFTA'S OBJECTS AND PURPOSES

233. The Respondent has urged the Tribunal to consider NAFTA's objects and purposes, but curiously, it neither provides nor examines the relevant treaty text in its Legal Submissions.[277] To reiterate that which is found in Claimant's Memorial, in pertinent part NAFTA's Preamble and Objectives Article provide:

> The Government of the United States of America....and the Government of the United Mexican States, resolved *to:...ENSURE a predictable commercial framework for business planning and investment;...* HAVE AGREED as follows:

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[276] Damian Fraser, *The New Economic Order: Mexican Legal System Puts Progress in Fetters*, Fin. Times, Friday, July 15, 1994, p. 4.

[277] Counter-Memorial at 226 *et seq.*

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Article 102: Objectives

> 1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, *including* national treatment, most-favored-nation treatment and *transparency*, are to: ....
>
> ./...
>
> (c) *increase substantially investment opportunities* in the territories of the Parties; [*and*]...
>
> ./...
>
> (e) *create effective procedures for* the *implementation and application of this Agreement*, for its joint administration *and for the resolution of disputes*;...
>
> 2. The Parties shall *interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1* and in accordance with applicable rules of international law.[278]

C. SUPPORTING LEGISLATION AND RELATED *TRAVAUX* FURTHER EXPLAIN RESPONDENT'S NAFTA UNDERTAKINGS

234. In addition to NAFTA's stated objectives are other texts which bear upon the correct interpretation of the NAFTA, and in turn upon Claimant's reasonable expectations. Mexico's Foreign Investment

[278] [Emphasis added.] Customary principles codified in the Vienna Convention on the Law of Treaties require Respondent to interpret and observe NAFTA in good faith. *See generally* T. Elias, THE MODERN LAW OF TREATIES 43-44 (1974).

Act of 1993,[279] for example, came into effect on December 28, 1993, preceding the NAFTA by only four days.[280]

235. President Salinas, in the official statement sent by him to the Mexican Congress[281] explained the bill as follows:

> *The purpose* of this bill for a foreign Investment Act *is to establish a new legal framework which*, in full compliance with the Constitution, promotes competitiveness in the country, *provides legal certainty to foreign investment in Mexico and establishes clear rules to channel international capital to productive activities.*[282]

The bill was part of a package of measures sent to the Congress with the express intention of revising then-existing law to comport with the NAFTA.[283] Given the foregoing, and the language of the NAFTA itself, Respondent is disingenuous in suggesting that transparency and predictability are not goals of NAFTA's investment chapter.[284]

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279 *Reprinted in* 33 I.L.M. 210 (1994).

280 *See* J. Vargas, *Introductory Note*, *Id.* at 207.

281 *Id.*, citing Exposicion de Motivos, Presidential residence of "Los Pinos," Mexico City, November 24, 1993, Doc. 011/LV/93 P.O. (Ano III).

282 *Translated by* Vargas, *supra*, at 208 (emphasis added).

283 *Id.*

284 *See* Counter-Memorial at 246, para. 860 ("[T]here is no authority for interpreting fair and equitable treatment to extend to transparency and predictability requirements"); *see also* footnote 572 to that paragraph (transparency and predictability are "addressed in Chapter 18" of the NAFTA.)

D. General Implications of NAFTA's Stated Objectives and Article 105

236. The foregoing provisions suggest that NAFTA's text, and the obligations of Respondent under it, should be construed in a manner that promotes investment, security of investment, predictability, and transparency within investment regimes. Noting that other tribunals have been influenced by analogous considerations,[285] Claimant submits that a construction is to be preferred which:

1] Places the risks of, and blame for, regulatory ambiguity upon the host Party, the entity in the best position to apprise others of the problem and to remedy it;

2] Upholds the investor's treaty protections, and its reasonable expectations,[286] despite suggestions that those are somehow dependent upon the vagaries of federal-state relations and local politics;

3] Accepts NAFTA's references to "international law" to include the protections accorded through such time-honored general principles as the abhorrence of unjust enrichment, the doctrines of estoppel and acquiescence available to temper duplicity, and related principles well-known to international tribunals; and

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[285] *See, e.g.*, Kuwait v. American Independent Oil Co. (*Aminoil*), 21 I.L.M. 976 (1982). In *Aminoil*, the distinguished tribunal prefaced its approach to quantification of damages by suggesting that "there is no room for rules of compensation that would make a nonsense of foreign investment" and that the result must be "calculated on a basis such as to warrant the upkeep of a flow of investment in the future." *Id.* at paras. 146, 147.

[286] *Cf. Aminoil*, 21 I.L.M. at paras. 148-49 (reasonable expectations of the parties relevant in fixing compensation).

4] Implements NAFTA's dispute resolution provisions in a manner that affords the fullest examination of an investor's claim by eschewing artificial limitations on the Tribunal's competence.

237. These themes are more fully discussed throughout the following paragraphs.

CHAPTER 9

THE TRIBUNAL'S JURISDICTION

Topical Arrangement of Sections
Section 1 Respondent's Thesis; Retroactivity Oversimplified
Section 2 Misconstruction of Articles 1119 and 1120
Section 3 Claim Eligibility; The Six-Month Rule

Section 1 Respondent's Delimitation of the Tribunal's Jurisdiction Requires Qualification

A. THE TRIBUNAL'S COMPETENCE *RATIONE TEMPORIS* — RESPONDENT'S THESIS

238. Respondent combines the general rule of non-retroactivity of treaties[287] and a construction of NAFTA Articles 1119 and 1120 to conclude that it "cannot be held responsible internationally for events that occurred prior to [January 1, 1994]"[288] nor, as part of instant Claim, for "[a]ny act or omission occurring after April 2, 1996 (the date established by Article 1120)...."[289] Respondent concludes that events falling without this temporal window "are "[s]trictly speaking...legally irrelevant."[290]

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[287] Counter-Memorial, para. 779 *et seq.*
[288] *Id.*, paras. 784, 792.
[289] *Id.*, para. 790.
[290] *Id.*, para 791.

B. RESPONDENT OVERSIMPLIFIES THE NON-RETROACTIVITY RULE AND REACHES OVER-BROAD CONCLUSIONS

239. Claimant suggests that—far from being "legally irrelevant"—the pre-ratification acts and omissions of Respondent have a direct bearing on Respondent's international responsibility. This holds true in several respects.

240. First, admissible claims may be founded upon a sequence of events or pattern of behavior that commenced before ratification but continued after NAFTA's entry into force.[291] In instant case, at numerous junctures throughout the life of its increasing investment commitment, Claimant relied upon the representations and acquiescence of Mexico's state and federal governments, some of which occurred before January 1, 1994. The unjustness of Mexico's enrichment (more fully discussed below) and the reasonableness of Claimant's trust in that government's assurances (also detailed below) are best appreciated by reference to the entire relationship between Claimant and Respondent's federal organs. Similarly, the disparagement of Claimant and its project by state officials, and related behavior by persons whose acts are attributable to Respondent, began before NAFTA was ratified but continued well after it took full effect.

241. Second, though taking full effect on January 1, 1994, NAFTA created obligations among its signatories prior to that date. The Vienna Convention on the Law of Treaties, Article 18, states:

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[291] *See, e.g., De Becker Case*, 2 Y.B.E.C.H.R. 214 (1958-59)(Belgium unsuccessfully argued inadmissibility *ratione temporis* of applicant's claim; violation of ECHR was a continuing one).

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> a] it has signed the treaty or has exchanged instruments of ratification, acceptance or approval...; or
> b] it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty....[292]

The three NAFTA parties initialed the treaty text, thus expressing consent to be bound on, October 7, 1992.[293]

242. Third, as Respondent correctly notes, according to NAFTA's Note 39, because Claimant's investment existed at the time NAFTA entered into force, it is entitled to invoke the protections of Chapter Eleven. Claimant suggests that, given Note 39, it would be an artificial and unnecessary limitation to preclude the Tribunal from considering the representations, expectations, and juridical framework that surrounded Claimant's decision to go forward with its investment.[294]

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[292] The associated I.L.C. Commentary confirms:

> That an obligation of good faith to refrain from acts calculated to frustrate the object of the treaty attaches to a State which has signed a treaty subject to ratification appears to be generally accepted.

[1966] Y.B.I.L.C., II, at 202.

[293] J. Sequeiros, *NAFTA Institutional Arrangements and Dispute Settlement Procedures*, Cal. Western Int'l L.J. 383 (1993).

[294] At paragraph 784 of its Counter-Memorial, Respondent states that it "cannot be held responsible internationally for events that occurred prior to [NAFTA's] entry into force." Taken literally, the statement posits a blanket exemption from general international law protections surrounding aliens and their property and thus disregards *lex lata* which predates NAFTA.

Section 2 Respondent's Implausible Interpretation of Articles 1119 and 1120.

A. THE RELEVANT TEXT

243. Article 1119 (Notice of Intent to Submit a Claim to Arbitration) provides:

> The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, which notice shall specify:
>
> a) the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise;
>
> b) the provisions of the Agreement alleged to have been breached and any other relevant provisions;
>
> c) the issues and the factual basis for the claim; and
>
> d) the relief sought and the approximate amount of damages claimed.

Article 1120 (Submission of a Claim to Arbitration) states:

> 1. Except as provided in Annex 1120.1, *and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:*
> ./...
> 2. the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention;

./...

2. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.

B. RESPONDENT'S MISAPPLICATION OF THE TEXT AND RESULTING APRIL 2, 1996 LIMITATION

244. Claimant agrees that the Tribunal is not formed to offer advisory opinions, as would be the case if a claimant could bring an action to address prospective breaches of the NAFTA.[295] It does not follow, however, that the Tribunal's jurisdiction is necessarily "confined to acts or omissions occurring before the date six months prior to [the date Claimant filed its Notice of Intent to Submit a Claim to Arbitration.]"[296]

245. Nowhere does Article 1119 invite the reader to borrow the six-month rule of Article 1120. Rather, taken together the two Articles contemplate a sequence which provides the host State an opportunity to avoid arbitration by addressing the investor's grievance. The notice requirement of Article 1119 and its general content requirement are merely designed to facilitate non-arbitral processing of the dispute during the three month period by giving the host State sufficient detail with which to consider its options. The clear language of Article 1120 points to the birth of a claim ("events giving rise to a claim") and not to a claim's full life.

246. Consideration must also be given to the limitations on bringing claims in Articles 1116 and 1117. Each article states that

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[295] *Cf.* Counter-Memorial, para. 789.

[296] *Id.* at 790. In this case, October 2, 1996.

> [a]n investor may not make a claim [on behalf of itself for an enterprise] if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

The language used here by the drafters,—"first acquired or should have first acquired, knowledge" of the claim and damage—fits nicely with the "giving rise to" threshold in Article 1120.

247. An interpretation of Articles 1119 and 1120 that is more tenable than that suggested by Respondent can be illustrated by a hypothetical case of *de jure* expropriation. If on January 1, NAFTA Party (P) notifies Investor that its factory belongs to P, effective immediately, and that no compensation will be paid, a claim arises. Under Article 1120, Investor must wait until July 1 (six months from the date of the decree) to submit its claim to arbitration. Under Article 1119, no later than 90 days before July 1, Investor must notify P of its intention to file a claim. This requirement would be fulfilled by giving such notice on April 1, referring in it to the decree of January 1 and NAFTA Article 1110 (Expropriation and Compensation).

248. The conundrum created by the "rule" propounded by Respondent is apparent under the above hypothetical. Notice was given on April 1; under Respondent's construction, the Tribunal's consideration would be confined to matters existing no later than three months *prior to the decree* of expropriation (*i.e.*, six months prior to the date upon which the Notice to Submit a Claim was given).[297] That is the kind of manifestly absurd interpretation that Respondent itself counsels against.[298]

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[297] *See* Counter-Memorial, para. 790.

[298] *Id.*, para. 776.

249. Given the foregoing, it is an unnatural interpretation of Article 1119 which tethers the Tribunal's jurisdiction to facts that existed at a point six months before the filing of Notice of Intent.[299] Article 1119 simply requires that "at least 90 days before" the investor submits its claim it apprise the Party in question of its intent to do so. As its title states, it is a "Notice of Intent."

Section 3 The Relationship Between Article 1120's Six-Month Requirement and Events Occurring After Those Giving Rise to the Initial Claim

250. Respondent suggests that Claimant may not base its claim on acts or omissions that occurred after a date set by reference to Article 1120's six month provision. In the preceding subsection, it was explained that Respondent's designation of April 2, 1996 resulted from an artificial reading of Articles 1119 and 1120. A related question of some importance in this case is whether Article 1120 is intended to delimit the Tribunal's jurisdiction with respect to contemporaneous and post-Notice events.

251. Claimant maintains that rather than circumscribing definitively the Tribunal's jurisdiction *ratione temporis*, the six-month rule merely sets forth an initial rule of claim eligibility designed to foster exhaustion of pre-arbitral methods of dispute resolution. Indeed,

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[299] It is also an interpretation which discourages an investor from promptly availing of its right to arbitration. If an investor may not rely upon acts or omissions occurring after a date linked somehow to its Notice of Arbitration, it would be forced by case development concerns to delay the giving of notice in cases such as the present one in which it perceives the chain of NAFTA violations to be a continuing one. Moreover, ironically, if delaying its Notice of Arbitration too long, the investor may be accused of having acquiesced or otherwise relinquished its right to complain.

Article 1118 instructs that "the disputing parties should first seek to consult and negotiate a settlement." Thus, Article 1120 should not prevent Claimant from alleging, by way of an amended claim, contemporaneous and later-occurring breaches of NAFTA that pertain to the same investment.

252. Several policies related to the administration of justice support this view. First, as to post-Notice breaches of the treaty, Respondent's contrary rule would substantially deprive a private party of redress concerning a period during which a State might be most inclined to disregard its treaty obligations, *i.e.* after the private party has invoked the mechanism designed to highlight and adjudicate the host State's culpability.

253. Second, causing a Claimant to forego or defer the airing of subsequent, related breaches would be inconsistent with NAFTA's stated aim of creating "effective procedures...for the resolution of disputes."[300] In particular:

1] It would create serious inefficiencies by requiring a Claimant to bring related actions *seriatim* and would inevitably make the application of *res judicata* principles to the resulting award impracticable, and fraught with peril for the investor;[301]

2] Such a delimitation would often work injustice because claimants will frequently choose, for financial and other reasons, not to start a fresh NAFTA action. Consequently, post-Notice acts of

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300 NAFTA, Article 102(1)(e).

301 Because the contemporaneous and subsequent occurrences upon which an investor would be prohibited from relying in the first arbitration may later appear *prima facie* to be part of the same claim, a subsequent tribunal might conclude that they had, by the doctrines of bar and merger, been subsumed within the earlier claim and hence lost.

retribution by a host State would regularly go unaddressed; investment ultimately would be discouraged, thus thwarting the fundamental objective of NAFTA;

3] Under Respondent's construction, the Tribunal would be unable to consider acts of bad faith occurring during the arbitration. Such acts by a Respondent—which at a minimum would ordinarily bear upon costs, credibility, and burdens of proof—may in certain circumstances constitute a denial of justice, an otherwise cognizable breach of the Respondent's NAFTA obligations.[302]

254. Third, the view urged by Claimant is consistent with the tendency among ICSID Tribunals to view their jurisdiction broadly[303] and with prevailing practice in relation to claim amendment, which reflects in the main a liberal stance. Indeed, each of the three rule texts designated by Article 1120 allows for

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[302] *See generally* S. Schwebel, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS Ch. 2 (1987).

[303] *See* G. Delaume, *ICSID Arbitration*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 28-30 (J. Lew. ed, 1987); C. Lamm, *Jurisdiction of the International Centre for Settlement of Investment Disputes*, 6 ICSID Rev.462, 473 (1991)("Thus ICSID tribunals have moved from a somewhat rigid, narrow approach regarding jurisdiction and national sovereignty to a less stringent one enabling the Centre to resolve a greater number of investment disputes.").

amendment of claims.[304] Further, as Judge Howard Holtzmann explains:

> [T]ribunals should be flexible in permitting amendments after the case has begun. This is desirable because experience shows that as parties and their lawyers study their cases in greater depth while preparing their presentations, they may discern factors that require modification of their early pleadings. In recognition of this practical reality, international rules typically include

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[304] *See* ICSID Arbitration Rules, Rule 40(1)(2) (additional and ancillary claims not later than in Reply); ICSID Additional Facility Rules, Rule 48 (additional and ancillary claims not later than in Reply); UNCITRAL Rules, Article 20 (amendment and supplementation of claims subject to tribunal control to prevent delay and prejudice).

The analogy suggested by Respondent [Counter-Memorial at 229 n.544] in referring to the ICC Rules is imperfect. First, it should be noted that Terms of Reference is usually crafted in draft form by the tribunal; this may occur after the parties have made written substantive submissions and the process leading to a final Terms is a collaborative one involving the tribunal and both parties. *See* L. Craig *et al.*, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 252 (2d ed., 1990); J. Coe, INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT Ch. 9, § 9.6 (1997) (discussing practice under former ICC Rules)..

Second, contrary to the observations of the Respondent in the above-referenced note, although the Terms of Reference has been reached in definitive form, claims falling outside of the Terms may nonetheless be made with the permission of the tribunal. In weighing the request, it "shall consider the nature of such new claims....the stage of the arbitration and other relevant circumstances." ICC Rules of Arbitration, Art. 19 (eff. Jan. 1, 1998).

Claimant cannot reply to the quoted fragment offered by Respondent in the above-referenced note, as Respondent has provided neither context nor a citation.

> provisions that liberally allow amendments to the statements of claim and defense.[305]

255. Once a host State has been afforded the required three months notice before submission of the claim and the requisite six months have elapsed from the time of events giving rise to the initial claim, the policies underlying Articles 1119 and 1120 would appear to have been fulfilled: the host state has been placed on notice that a specific investor has grievances with respect to a specified investment under specific provisions of NAFTA. Accordingly, Claimant concludes the six-month requirement of Article 1120 ought not to obtain in relation to additional or amended claims arising out of the same investment, especially where the events prompting such claims are part of, or similar to, the pattern of conduct of which Claimant originally complained.

256. Holding the six-month rule inapplicable to matters subsequent to those giving rise to the initial claim does not prejudice the Respondent in such circumstances. Respondent is protected by the Additional Facility's Rule disallowing claims subsequent to the Reply and by the ability to submit a Rejoinder.[306]

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[305] H. Holtzmann, *Balancing the Need for Certainty and Flexibility in International Arbitration Procedures*, in INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY 3, 14 (R. Lillich & C. Brower, eds., 1993).

[306] *See* Additional Facility Rules, Article 48(2).

CHAPTER 10

STATE RESPONSIBILITY

Topical Arrangement of Sections

Section 1 The Two Components of State Responsibility

257. Under a widely adopted conceptualization, State responsibility is a function of two predicates:[307]

a] First, there must be conduct (acts or omissions or a combination thereof)[308] which—if attributed to the State in question—would constitute an international delict; and

b] Second, the conduct in question must be attributed to the respondent State under rules of imputation established by international law (as distinct from analogous rules that may operate in a particular domestic legal system).

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[307] *See* R. Higgins, *General Course in International Law*, 1991 (V) *Recueil des Cours* 13, 198.

[308] *Cf.* R. Ago, *Fifth Report on State Responsibility*, II Y. B. I.L.C. 4, U.N. Doc. A/CN.4/ 291 and Add. 1 & 2.

258. In instant case, the first predicate (often called the objective requirement) is informed by the NAFTA, *lex specialis*[309] which sets forth the obligations of its Members States *inter se*.

259. Article 105 makes plain that Respondent has undertaken to install NAFTA's protections at the state level. It provides (emphasis added):

> The Parties *shall ensure* that *all necessary measures* are taken in order to give effect to the provisions of this Agreement, *including* their *observance*, except as otherwise provided in this Agreement, *by state and provincial governments*.

260. The provision merely explicates, though in very firm terms, what has been regarded as the conventional wisdom for decades. As Dunn noted in 1932:

> If nations could escape responsibility for the actions of political subdivisions merely by pleading their own lack of control under their own laws, then the institution [of diplomatic protection] itself would be greatly restricted in operation. Any nation could, through its own action in adopting a particular form of internal organization, avoid international responsibility altogether.[310]

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[309] This is so in the sense that the NAFTA, as a more specific set of undertakings, takes precedence over general international law. To the extent that the NAFTA merely incorporates in places the international law standard, it is coextensive with it. In several of its provisions, however, it obviates resort to long-standing debates within international law by setting forth clear requirements.

[310] F. Dunn, THE PROTECTION OF NATIONALS 123 (1932). In accord are the ILC Draft Articles on State Responsibility (1996). They support the general proposition that ordinarily a State is chargeable with the acts or

261. Article 105's duty to exhaust *all* requisites to NAFTA's fulfillment is stated as a free-standing obligation. As more fully addressed below, to be meaningful that provision should carry an undertaking that there will be sufficient coordination among the various levels of government so that investments are not paralyzed through jurisdictional ambiguity and conflicting information.

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omissions of its constituent organs and subdivisions. Articles 4 through 7(1) of the Draft Articles state:

> Article 4: An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be affected by the characterization of that same act as lawful by internal law.
>
> Article 5: For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.
>
> Article 6: The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or subordinate position in the organization of the State.
>
> Article 7(1): The conduct of an organ of a territorial government entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

Reprinted in 37 I.L.M. 440 (1998).

Section 2 State Responsibility for Otherwise Private Acts

A. . IN GENERAL

262. While Respondent concedes that the actions of all three levels of government may be imputed to it, Respondent fails to account for the various bases upon which the acts and omissions of various ostensibly private actors can be attributed to a State. As Chamber One of the Iran-U.S. Claims Tribunal explained in *Yeager v. Iran.*[311]

> It is generally accepted in international law that a State is also responsible for acts of persons, if it is established that those persons were in fact acting on behalf of the State.[312]

Similarly, adoption or ratification of non-State acts by a State may also lead to attribution. In the *Hostages* case,[313] the International Court of Justice determined that Iran became responsible for acts commenced as seemingly private conduct:

> The approval given [*inter alia*, to the occupation of the embassy] by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate [it] translated continuing occupation of the Embassy and

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311 17 Iran-U.S. C.T.R. 92 (2 Nov. 1987).

312 *Id.*, para. 42. In *Yeager*, the Tribunal observed also that:

> [A]ttributability of acts to the State is not limited to acts of organs formally recognized under internal law. Otherwise a State could avoid responsibility under international law merely by invoking its internal law.

Under the facts, a presumption of attribution arose which presumption the Government of Iran did not rebut. Accordingly, Iran was held responsible for an unlawful expulsion of the claimant and for the resulting loss of personal property and salary. *Id.* at paras. 43 *et seq.*

313 U.S. Diplomatic and Consular Staff in Tehran Case [1979] I.C.J. Rep. 7.

> detention of the hostages into acts of the State. The militants, authors of the invasion and jailers of hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible....[314]

B. APPLICATION TO INSTANT CASE—SUPPOSEDLY PRIVATE ACTS SHOULD BE IMPUTED TO RESPONDENT.

263. An event which both parties have addressed in their submissions occurred on March 10, 1995. Respondent has suggested that the disturbance at the site was the result of a spontaneous demonstration, privately organized and implemented. The Tribunal will recall that at that event the movement of Claimant's guests were blocked for several hours by those assembled near the entrance. Those guests, who included a diplomatic person, thus suffered a form of personal trespass that the common law regards as false imprisonment. Though the full extent of Respondent's sponsorship of these delictual acts remains to be demonstrated, from Respondent's admissions and the testimony of eye-witnesses, the Tribunal can appreciate why attribution to the Respondent of the March 10 trespasses may be warranted.

264. In his declaration,[315] Mr. Hermilo Mendez Aguilar describes his January 15, 1993 appointment as Ecology *Regidor* (i.e., councilman or alderman). He notes that he was given "broad power to seek remediation [and to pursue other activities]."[316] According to his certificate of appointment his mandate was to "develop the activities needed to preserve the environment of [the Municipality]."[317] Municipal President Carrera Mendoza is more specific in his

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[314] *Id.*, para. 74.
[315] Counter-Memorial, Annex Two, Vol. III, Tab D.
[316] *Id.*, para. 1.
[317] *Id.*, Ex. 1.

statement. He informs the Tribunal that Mr. Mendez was "mainly to take the necessary measures to prevent the La Pedrera toxic dump from causing further damage."[318]

265. At the time of the March 10 disturbance, Mr. Mendez had left office, although how long he had been out of office is not entirely clear from Respondent's submissions.[319] In any event, for the disturbance at the landfill on Friday, March 10, Mr. Mendez appears to take substantial responsibility. With apparent pride, he recalls:

> This is the day upon which the company planned the grand opening of the landfill facility and it was that very day, at 8 a.m., that the community and I learned of the opening of the landfill through the press. We quickly organized ourselves to stop the opening and notified other communities. At the demonstration we stopped traffic and prevented trucks and buses carrying food, drink, Mariachis, and guests from entering the hazardous waste landfill site.[320]

266. Further study of the declaration of Mr. Mendez reveals that he pursued these kinds of activities both before and during his post as Ecology *Regidor*, and did so against COTERIN in particular. Mr. Mendez recounts that during 1991 and 1992, as a municipal

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318 Declaration of Juan Carrera Mendoza, Annex Two, Vol. III, Tab B, para. 7.

319 Only the starting date of Mr. Mendez' term of office (January 15, 1993) is indicated upon the certificate of appointment, which itself contradicts his declaration that he started his post in 1992. If, as he seems to suggest, he served only a two-year term, the event of March 10, 1995 occurred approximately ten weeks after Mr. Mendez left office. Nonetheless, the declaration of Municipal President Carrera Mendoza implies that Mr. Mendez started his post in 1992. *Id.*, para. 7.

320 Mendez Declaration, *supra*, para. 18.

official,[321] he participated in protests staged against La Pedrera. Municipal President Carrera Mendoza states that Mr. Mendez "was also one of the most active persons requesting the closure of the landfill."[322] Mr. Mendez declares that later, as *Regidor,* he was able to undertake "more organized work with the citizens."[323] In particular he recalls:

> In 1993...[w]e obtained the support of 54 of the 56 *ejido* members of the Municipality, as well as letters of support from the Municipal Presidents of the central area of the country. I sent a letter to the President of the Republic, jointly with another 40 area representatives of *ejidos*, informing him of COTERIN's partnership with Metalclad, *an American company, which offered services in the United States for the treatment and confinement of hazardous waste in San Luis Potosi.*[324]

267. What emerges from the foregoing is that Mr. Mendez and those appointing him viewed his job description to include active opposition to La Pedrera. It follows that he used influence developed while in office to muster protestors at the site on March 10, 1995 and that his activities on that day were not greatly different from those

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321 *Id.*, para. 7.

322 Carrera Declaration, *supra*, para. 7.

323 Mendez Declaration, *supra*, para. 14.

324 *Id.*, para 14 (emphasis added). The italics highlight one of the many fallacious articles of faith that formed the misinformation campaign aimed at Metalclad and its entities. The "advertising" misnomer was discussed in Chapter 5, § 9. The only dated exemplar of so called "Metalclad advertisement" volunteered by Mr. Mendez relates to Metalclad's operation at Santa Maria del Rio, not to La Pedrera. That leaflet, produced only in Spanish, was not distributed in the United States, but rather at a trade show in Mexico City.

he had pursued before and during his appointment as *Regidor*. His admitted deep involvement in the disturbance of March 10, 1995 is but one element among several lending State sponsorship to the trespasses of that day.

268. Other manifestations of the State's *imprimatur* are established by the declaration of Doctor Jorge De la Torre.[325] Dr. De la Torre places at the site on that day the Secretary of the Guadalcazar Town Council, who was armed with a handgun. Other declarants recount the presence of armed persons, seemingly from one of the police agencies.[326]

Lack of Full Protection Distinguished

269. The *Hostages* case quoted above also illustrates the heightened, affirmative duty of a host state to afford protection and security to diplomatic persons and premises. Those principles have a bearing on this case. As explained in Chapter 14, in addition to having lent its support to the demonstration under the principles just enunciated, Respondent has failed to provide full protection and security as required by NAFTA and by general international law related to diplomatic relations.

Section 3 The Standards Against Which Respondent Has Agreed to Be Judged

A. ARTICLE 1105—NAFTA'S MINIMUM STANDARD

270. Paragraph 1 of Article 1105 states:

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[325] Ex. 8 hereto.

[326] *See e.g.*, Declaration of Anthony Talamantez, Ex. 23 hereto.

> Each Party shall accord to investments of an investor of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

B. RESPONDENT'S RESULTING OBLIGATIONS

271. Though merely setting forth the *minimum* level of protection[327] that an investor is entitled to expect, the preceding paragraph fixes manifold guarantees; individually and collectively they are intended to confer significant rights and obligations.[328] The components of the minimum standard can be summarized as follows.

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[327] From the characterization of the standard as a minimum, it follows that a NAFTA State can be chargeable with a higher standard where it is deemed to have undertaken greater obligations in relation to an investor.

[328] From an historical perspective, the American preference for an explicit international minimum standard covering U.S. investors in Mexico can readily be appreciated. Professor Grieg recalls Mexico as host state and apologist:

> Hasty police action in some cases, inertia in others; the virtual autonomy of local police and judicial authorities resulting from an absence of adequate communications with the regional or central capital; an attitude that human life is cheap; such factors make the criteria of the professionally trained international lawyer from Europe or from the United States seem divorced from reality. The many extraordinary cases involving injury to American nationals or their property heard by the Mexican/U.S. Claims Commission were not extraordinary occurrences in the context of life in Mexico at the time. The Mexican argument in a number of these claims was that if foreigners came to work in Mexico they must accept life as they found it, and should not be entitled to more favourable treatment than that meted out to Mexican nationals.

D. Greig, INTERNATIONAL LAW, 555-56 (2d ed. 1976). Claimant hesitates in suggesting that things have not changed appreciably.

Treatment [329] in Accordance with International Law

272. The ordinary meaning of "in accordance with international law, including..." conveys the clear intention that the more specific notions of fair and equitable treatment and full protection and security are not exhaustive, but are merely illustrative; they are augmented with such mandates as are supportable by reference to the classic law making processes of international law (often referred to as the "sources" of international law). As noted in Chapter 8, these include treaties, custom and general principles recognized by developed legal systems.[330]

Fair and Equitable Treatment

273. Some variant of this clause is widely employed among modern BITs.[331] Its purpose in general is to free the treaty from standards set by the host State's domestic law[332]and, according to some publicists, to elevate the level of treatment from that required by general international law.[333] It can have no precise content independent of

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329 "Treatment" is "a broad term which...refers to the legal regime that applies to investments once they have been admitted by the host State." R. Dolzer & M. Stevens, BILATERAL INVESTMENT TREATIES 58 (1995).

330 *See* Article 38, *reprinted in* Chapter 8, § 1, *supra*. Statute of the International Court of Justice.

331 The 1984 and 1987 U.S. Prototype BITs adopt this formulation. *See* K. Vandevelde, UNITED STATES INVESTMENT TREATIES (1992)(reproducing model texts as appendices).

332 Dolzer & Stevens at 58.

333 Thus, Dr. F.A. Mann observed:

> *The terms "fair and equitable treatment" envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words*....[A tribunal] will have to decide whether in all the

the factual context in which it is invoked, but the meanings ordinarily ascribed to "fair" and "equitable" give a relatively clear sense of what the drafters had in mind.[334]

274. Among the many concrete implications of the standard is that "foreign investors should not, in comparison with nationals be put at a competitive disadvantage in obtaining permits or authorizations necessary to conduct business operations in the state concerned."[335] Similarly, in Claimant's view, a regime which possesses less than a modicum of transparency cannot be said to be fair and equitable to those whom it regulates, for it cannot be described as open, just, honest, nor indicative of equity— descriptions which in ordinary meaning are attributed to the words "fair and equitable."[336] Based

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> circumstances the conduct in issue is fair and equitable or unfair and inequitable...The terms are to be understood and applied independently and autonomously.

F. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 Brit. Y.B. Int'l L. 242, 244 (1981)(emphasis added).

[334] It is not unusual for an arbitral tribunal to refer to leading dictionaries in searching for a treaty's ordinary meaning. *See, e.g.*, AMT v. Republic of Zaire, 36 I.L.M. at 1558 (Arbitrator Golsong's Separate Opinion, relying upon Webster's Third International Dictionary 1986).

[335] G. Sandrino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective*, 27 Vand. J. Trans'l L. 259, 311 (1994). In its Article 3(3) the Mexico-Switzerland BIT (effective Mar. 14, 1996) makes this point explicitly. It provides:

> Each party shall grant, in accordance with its laws and regulations, the necessary permits in connection with such investments, including permits for the carrying out of licensing agreements and contracts for technical, commercial or administrative assistance, as well as authorizations required for the activities of consultants or experts.

[336] The first definition of "fair" given by Webster's Encyclopedic Unabridged Dictionary (1989) is: "free from bias, dishonesty, or injustice...." Similarly, Webster's New Twentieth Century Dictionary, Unabridged (2d ed., 1983)

upon these and other common-sense constructions of the NAFTA, in subsequent chapters Claimant will explain why Respondent's treatment of Claimant and its investment falls short.

Full Protection and Full Security

275. In pertinent part, the NAFTA's minimum standard requires Mexico to accord investments "treatment in accordance with international law including...full protection and security." In its ordinary meaning, "full" denotes "complete; entire, maximum."[337] As a matter of construction, for the clause beginning with "including" to not be superfluous, it must be deemed to add something to what a simple incorporation of international law would have otherwise achieved. At a minimum, the language suggests that in the event there are competing articulations of the governing international law rule, that which provides the more complete protection should be adopted.

276. The application of this provision is discussed below, in Chapter 14. There Claimant will suggest that the standard set by this clause is exacting and is augmented by Respondent's other international obligations.

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defines "fair" as "open; frank; honest; hence equal; just; equitable; impartial; unprejudiced...." The preceding two authorities respectively define "equitable" as, "characterized by equity or fairness; just and right; fair; reasonable..." and, in part, as "possessing or exhibiting equity...."The definitions proffered by Respondent capture, more or less, these same elements. Counter-Memorial at 240, para. 836.

337 WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1989) (second definition).

B. Compensation Upon Indirect Expropriation or Measures Tantamount Thereto

The NAFTA Text

277. In pertinent part, Article 1110 provides:

> No party may directly or indirectly...expropriate an investment of an investor of another Party in its territory or take a measure tantamount to...expropriation of such an investment ("expropriation") except:
>
> a) for a public purpose;
>
> b) on a non-discriminatory basis;
>
> c) in accordance with due process of law and Article 1105(1) [the guarantee *inter alia* of fair and equitable treatment]; and
>
> d) on payment [without delay] of [fully realizable] compensation in accordance with [the subsequent five paragraphs requiring, *inter alia*, an amount equivalent to the investment's fair market value].

The Text's Ambit and Meaning

278. Respondent assumes through this provision a duty to fully compensate investors whose investments have been directly or indirectly expropriated or subjected to measures having the effect of an expropriation. The text acknowledges that compensable takings can occur in the absence of an official decree. Claimant holds that an actionable taking can arise through a chain or confluence of acts and omissions chargeable to Respondent, whether or not those acts

are intended to confiscate or impair an investment and whether or not they are part of a coordinated effort to dispossess the Claimant. Claimant's position is set forth in Chapter 15.

279. The structure of Article 1110, in keeping with recognized sovereign prerogatives, does not preclude takings by a NAFTA Party. Rather, it sets forth the criteria which must be met for an expropriation to be consistent with the treaty. On the international plane, a taking that is inconsistent with the NAFTA is "illegal",[338]a characterization which may have implications for the level of recovery, a point developed in Chapter 17.

280. The elaborate compensation provisions are of especial significance given Mexico's traditional reluctance to embrace the international standard long endorsed by the United States. Indeed,

> ...Mexico like the Soviet Union before it, categorically denied the existence of any international law rule requiring a State to pay compensation when it engages in a general nationalization program that affects foreign owned property [and] in so doing invoked again the national treatment doctrine.[339]

281. Article 1110 is also noteworthy for the extraordinary conditions it imposes upon the expropriating State. While codifying the three elements typically referred to among the authorities[340] (full

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338 *Cf.* G. Schwarzenberger & E. Brown, A MANUAL OF INTERNATIONAL LAW 84 (6th ed. 1976) ("Failure to comply with any of these conditions makes an otherwise legal expropriation an illegal confiscation and amounts to an international tort")(referring to the position in customary international law).

339 R. Lillich, *The Current Status of the Law of State Responsibility for Injuries to Aliens*, in INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 6 (R. Lillich ed., 1983).

340 *See, e.g.*, 2 Rest. (Third) of the Law of Foreign Relations, § 712.

compensation, non-discrimination and public purpose) it requires also that the measures or other sovereign acts effecting the taking be fair and equitable and in keeping with "due process."

282. The due process concept is a fixture within Canadian and American systems and redoubles the sense that the proceedings which effect the taking must be procedurally fair to the investor; at a minimum, said fairness obligation requires that the investor be given notice and a meaningful opportunity to be heard.[341]

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[341] According to BLACK'S LAW DICTIONARY 500-01 (6th ed. 1990), "due process" contains as its fundamental requisites "the opportunity to be heard, to be aware that a matter is pending, to make an informed choice whether to acquiesce or contest, and to assert before the appropriate decision making body the reasons for such choice." BLACK'S notes further: "[a]side from all else, due process means fundamental fairness and substantial justice."

The due process obligation is peculiarly associated with governmental acts and places a restraint thereon. Interestingly, the obligation, which one ordinarily associates with the common law, has been assumed by Mexico not only in NAFTA but in certain of its other international undertakings, perhaps signaling that it has become part of an international standard recognized by Mexico. *See, e.g.*, Bilateral Investment Treaty Between Swiss Confederation and United Mexican States (eff. March 14, 1996), Article 7(1).

CHAPTER 11

ARTICLE 1105 BREACHES BY STATE OFFICIALS

Topical Arrangement of Sections

Section 1 Good Faith—Relevance to Article 1105

283. Article 1105's requirement that NAFTA investments be treated in accordance with international law, under standard rules of construction, invites the Tribunal to consider established principles not specifically mentioned in that Article but which bear upon facts at hand. Those which derive from the principle of good faith are particularly germane. Among these are the prohibition of the abuse of rights and abuse of discretion and that embodied in the *Culpa in Contrahendo* Doctrine known in domestic fora. The domain of these two sub-denominations of good faith is fluid. In the present case, many state government acts are part of patterns of behavior that fit under both headings.

Section 2 The Abuse of Rights Doctrine

A. Content In General

284. The doctrine of abuse of rights has several dimensions. At its core is the notion that an act for which there is ostensible legal authorization can become unlawful by reason of its motive or excessiveness, or if it embraces some artifice designed to comply

with the letter but not the spirit of the relevant juridical requirements.[342] Of the doctrine's place among the classic sources, Dr. Hersch Lauterpacht, as he then was, wrote:

> [I]n addition to the recognized specific wrongs there is inherent in every system of law the general principle of prohibition of abuse of rights.
> ./...
> The purpose of the excursion, undertaken in the previous section, into the theory of private law of torts, was to show that, notwithstanding terminological differences, the prohibition of abuse of rights is a general principle of law. In view of its general recognition by almost all systems of law the objection that it is purely natural law doctrine is hardly convincing.[343]

More recently, the publicists have confirmed that the principle remains evident among municipal legal systems, including Respondent's own. Professor Brownlie's standard work explains, for example:

> Several systems of law know the doctrine of abuse of rights, exemplified by Article 1912 of the Mexican Civil Code:

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[342] *See generally* B. Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, Ch. 4 (1987 reprint).

[343] H. Lauterpacht, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 297-298 (1933 reprinted in 1973)(footnote omitted). Claimant notes that the Municipality's comportment in relation to the local construction permit question would seem to fall under Dr. Cheng's "Clearly unreasonable" subcategory of abuse of rights, though as suggested in Chapter 12, the rights abused by the Municipality are putative ones unsupported by a clear mandate.

> When damage is caused to another by the exercise of a right, there is an obligation to make it good if it is proved that the right was exercised only in order to cause the damage, without any advantage to the person entitled to the right.[344]

The variant of the doctrine typified by the above-quoted Civil Code section is one of several. Another permutation of the principle governs abuse of discretion. Dr. Cheng summarized the position as follows:

> *Whenever, therefore, the owner of a right enjoys a certain discretionary power, this must be exercised in good faith, which means that it must be exercised, honestly, in conformity with the spirit of the law and with due regard to the interests of others.* But since discretion implies subjective judgment, it is often difficult to determine categorically that the discretion has been abused. Each case must be judged according to its particular circumstances by looking either at the intention or motive of the doer or the objective result of the act, in light of international practice and human experience. *When either an unlawful intention or design can be established, or the act is clearly unreasonable, there is an abuse prohibited by law.*[345]

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[344] I. Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 444 (4th ed. 1990). *See also* Cheng, *supra* at 121 ("The prohibition of malicious injury is an important aspect of the theory of abuse of right as it has been applied in most Continental legal systems"). Brownlie ultimately concludes that the doctrine "is a useful agent in the progressive development of the law, rather than a general principle." Brownlie, *supra* at 446.

[345] Cheng, *supra* at 133-34 (footnote omitted).

B. FACTS IMPLICATING THE DOCTRINE

Selective Police Deployment and Intimidation

285. Of the March 10, 1995 disturbance at the site Governor Sanchez Unzueta was informed, according to his declaration, that the "attendees to the event were detained for more than three hours, until the Municipal President intervened."[346] Governor Sanchez Unzueta maintains that he became aware of the intended event four days earlier[347]and has repeatedly spoken of what he regarded as robust local opposition to the site. Yet, he makes no mention of deploying police on the 10th, a measure that would have been consistent with Respondent's NAFTA's duty to provide full security and protection and to protect diplomatic and consular staff.[348]

286. It is nevertheless the vivid recollection of Mr. Talamantez[349] that at the event on the 10th there appeared to be police present; though they wore no uniforms, their sidearms were readily apparent. According to Mr. Gordon,[350] if there were police present, they did nothing to stop the drunken brandishment of machetes and guns by certain demonstrators.[351] Mr. Dan de la Torre recalls that there were three or four men who were carrying weapons, but in plain clothes, who were alleged to have been from the Governor's office. Among other things, he states that "[the demonstrators] shout[ed] 'hang the Gringos' and 'Gringos go home!'"[352]

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346 Declaration of Sanchez, Annex Two, Vol. II, Tab A, at 9.

347 *Id.*

348 *See* Chapter 14, *infra*.

349 Declaration of Anthony Talamantez, Ex. 23 hereto.

350 Declaration of William Gordon, Ex. 10 hereto.

351 *Id.*, paras. 6 *et seq.*

352 Declaration of Daniel de la Torre, Ex. 7 hereto. *See* Declaration of Javier Guerra, Ex. 11, para. 57.

287. In his first declaration, Mr. Miranda Nieto recalls the rather more active police detachment that was stationed at the site beginning in January 1996:

> [T]he state police came back to the landfill for a three month period. Many trucks entering and exiting the landfill were stopped and under strict surveillance when they had no [cause] to do so. Because Metalclad and its subsidiaries never entered one ounce of waste to the landfill, the police were infuriated. Later a group of inhabitants of Los Amoles backed by the municipality and with the state police protecting them blocked the roads and for some weeks no trucks could get in to the landfill.[353]

Interference with Contractual Relations

288. On or about December 10, 1995, Governor Sanchez Unzueta transmitted to Messrs. Brian Hand and Herbert Oakes copies of a letter by the Governor to Senator Paul Simon.[354] In that letter, the Governor makes repeated references to the infractions which led, prior to Metalclad's ownership of COTERIN, to the closure of the transfer station. He accuses Metalclad, *inter alia*, of refusing to remediate the site, and alleges that COTERIN was presently violating (because of construction) both state and municipal laws. He pledged that the municipal and state laws "shall always provide for the highest levels of environmental protection *to counterattack and expose the illegal actions of companies such as COTERIN, which cannot manage to hide their true nature under the pressure of...such laws.*"[355]

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[353] Declaration of Ariel Miranda, Memorial, Vol. I, Attachment, fifth page.

[354] Counter-Memorial, Sanchez Declaration, Annex Two, Vol. II, Tab A, Ex. 24.

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

289. Putting aside the misrepresentations and exaggerations the unsolicited letter attempted to convey to Senator Simon, the question remains: what proper state function was this letter serving in the hands of Metalclad's financial backers and affiliates? It could not have been to encourage the Claimant to procure a municipal construction permit, for COTERIN had already made an application. Nor had any information been requested by the two recipients. Its more obvious purpose was to disrupt Claimant's relations with its investors.

290. In addition to containing much hyperbole, the letter is also replete with telling word choices; if that is how the Governor referred to Claimant in high level correspondence, it is a fair inference that he was at least as defaming in less formal settings.

Invocation of Supposed Talismans

291. In his December 1995 letter to Senator Simon, Governor Sanchez Unzueta maintained that COTERIN, by failing to obtain a permit, and nonetheless pursuing construction, had "violated the terms and conditions of the land use license which was issued, under a completely different set of circumstances and facts, by the State Government of San Luis Potosi and has therefore rendered it invalid." The notion that the land use permit was in peril was intoned by the Governor periodically, as he saw fit. Its withdrawal was also discussed by Dr. Pedro Medellin with the citizenry,[356] a fact well appreciated by Claimant. Yet, the state license was never revoked, presumably because the Governor was fully aware that the allegations upon which he relied were ill-founded. [357]

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[356] *See* Medellin Declaration, *supra*, paras. 51-52.

[357] *See* Chapter 5, Section 3.

Selective and Tactical Revelation of Information

292. During the period leading up to his visit to BFI's Texas landfill in early July 1996, the Governor claimed to possess a study that conclusively proved that the La Pedrera site was responsible for illness and birth defects.[358] By this he apparently referred to the document prepared by Dr. Hector Marroquin, the state's Assistant Director of Health. He supplied no copy of this material to Claimant's management, but thought it appropriate nonetheless to disseminate it through the media on the eve of his departure for the tour organized by Metalclad.

293. It thus appears that he was anticipating the repercussions that this potentially inflammatory material would have when informing Metalclad's attorney during that Texas trip that the landfill would not operate "because the community of Guadalcazar is against it."[359] Claimant maintains that the Governor's approach to revealing the Marroquin opinion was designed to incite rather than to inform.

Suppression of Vindicating or Beneficial Information and Prejudicial Withholding of Good Offices

294. Though apparently willing to publish prejudicial information in a manner designed to arouse ill will, the Governor also withheld or disparaged information helpful to Claimant's endeavor. That strategy

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[358] This accusation had been made by the Governor at least as early as January 9, 1994. The *El Sol de San Luis* bearing that date attributed to the Governor the representation that he had "in his power a reliable and serious study, where it is technically demonstrated that the industrial wastes landfill in Guadalcazar does not meet the minimal conditions of security for the population nor for the environment." Sanchez Declaration, *supra*, Ex. 36.

[359] Declaration of Gustavo Carvajal, Memorial Vol. I, fifth page.

was evident when company officers met with Municipal officials on October 30, 1996. It is the earnest recollection of Messrs. Carvajal[360] and Guerra[361] that the Municipal President expressed willingness to reach an agreement and to receive the company's written proposal, but was wholly unaware that two such proposals had already been tendered to the Governor. Claimant can only conclude that the Governor's determination to keep the Municipality ill-informed was motivated by a desire to slow all momentum rather than by some misguided sense of *noblesse oblige*.

295. In like fashion, the Governor has, apparently with purpose, impeded an appreciation of the UASLP study; as more fully detailed in Chapter 6, its results and those of other studies support La Pedrera's feasibility. Presumably to mask what appears to be his studied suppression of information, the Governor and Dr. Medellin invite the Tribunal to concentrate its attention upon a semantical question—whether one should refer to the university body as a "commission." Whichever nomenclature one employs, the findings of that study contradict the notion that Claimant's site was poorly suited to its intended use.

Section 3 State Officials Negotiated in Bad Faith

A. THE *CULPA IN CONTRAHENDO* PRINCIPLE

296. Claimant suggests that an investment can not be said to have enjoyed fair and equitable treatment when government officials have pursued negotiations with the investor with no intention of resolving the obstacles they themselves have erected. The UNIDROIT

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[360] *Id.*, ninth page.

[361] Declaration of Javier Guerra, Ex. 11 hereto, paras. 90-91.

Principles, a text designed, *inter alia*, for use in international arbitration, states in pertinent part:

> ./...
> (2) [A] party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.
>
> (3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

297. In civil law systems the principle codified above is widely recognized and generates pre-contractual liability in situations in which a negotiating party entertains "no serious intention to contract or [precipitates an] abusive rupture of negotiations."[362] Traditionally, common law systems have addressed the same concerns through the law of unjust enrichment, misrepresentation and other doctrines;[363] modernly, however, notions of good faith and fair dealing have increasingly been extended within common law jurisdictions to reach the negotiation process as well as contractual performance.[364] For inter-state relations, in matters such as maritime delimitation, the

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362 M. Bonnel, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW 142-43 (2d ed. 1997).

363 *Id.*

364 *See* Bonnell *supra* at 142-43, nn 91-92 (and authority cited therein). The UNIDROIT Principles are expressly designed, *inter alia*, for use by international arbitral tribunals. Claimant submits that they are no less relevant because a State is a party; they often reflect an existing general principle of law or one that is emergent. In the case of the *culpa in contrahendo* doctrine they merely distill into a positive form a specific application of the good faith principle.

International Court of Justice has developed an analogous principle of good faith applicable to negotiations.[365]

B. THE CONDUCT OF MESSRS. SANCHEZ UNZUETA AND MEDELLIN — ILLUSTRATIVE ACTS AND APPROACHES

In General

298. At several key junctures, Governor Sanchez Unzueta or persons over whom he exerted a strong influence, have selected modes of action and inaction that leave Claimant with a regrettable conclusion: for reasons best known to the Governor and his advisors, it was opportune to perpetuate discussions with Claimant but not to actually resolve the supposed "obstacles" to an accord—obstacles defined and revised almost exclusively by the Governor and Dr. Medellin. Claimant, in retrospect, is confident that the ambulatory goals set throughout by the Governor's team, the opaque standards referred to by him, his insistence upon secrecy and the studied efforts of his representatives to create false hope are not the indicia of one seeking resolution in good faith.[366]

Heavy Involvement in the Process But Reluctance to Take Responsibility

299. In its Memorial, Claimant recounted that during July of 1993, while on a trip to San Antonio funded by Metalclad, Dr. Medellin

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[365] H. Thirlway, *The Law and Procedure of the International Court of Justice* (Part I) 50 BRIT. Y.B. INT'L L. 1, 21-25 (1990).

[366] The facts also support the sense that the Governor often had either not concerned himself with the technical details supporting the project or had willfully ignored them.

was given an advance copy of the press release that Metalclad would soon thereafter publish.[367]

300. Claimant notes that the position taken by Dr. Medellin in his written statement is that Claimant's intention to develop La Pedrera became known to him only at the end of August or early September 1993.[368] He states elsewhere that until September of that year he believed he was engaged in multi-year process intended to find a site,[369] but that Metalclad was very careful to "conceal" its true intentions from Dr. Medellin and the Governor until several months after Metalclad's June 1993 meeting with the latter.[370] Indicative of Dr. Medellin's recollections concerning the period contemporaneous to the press release is:

> Before September 1993, we worked with [Metalclad] believing that we were helping them find a site in which they could install a facility. Instead of following through with the process, they purchased the biggest problem in the state. I later became aware that Metalclad had made promises to investors that the landfill would be constructed and operating in a short period of time.[371]

301. Claimant's position is that the Governor was made aware of its intentions regarding La Pedrera on June 11, 1993 and that the press release related to a project the location and general outline of which was already known to Dr. Medellin. Assuming, *arguendo*, that Dr.

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[367] Memorial, Vol. I, Declaration of Grant Kesler at p. 3; *See also* Declaration of Dr. Pedro Medellin at para. 37 *et seq.*; Text of Release *reprinted at* Counter-Memorial, Annex 2, Vol. II., Tab A, Ex. 9.

[368] Medellin Declaration, *supra*, para. 38.

[369] *Id.*, para. 35.

[370] *Id.*, para. 86.

[371] *Id.*, para. 84.

Medellin's implausible account[372] is nevertheless true, it is remarkable. Neither Dr. Medellin nor Governor Sanchez were sufficiently alerted by the press release, which (under their portrayals) they both read during July 1993,[373] to pursue certain obvious questions it raised: to which existing hazardous waste landfill did it refer in announcing the expected acquisition; and why would Metalclad use a press release to broach its plans to Dr. Medellin?[374]

302. Dr. Medellin, anticipating these questions, responds weakly, that "[d]aily obligations then distracted our attention from Metalclad for a few weeks." Claimant submits that it is unlikely that both Dr. Medellin and the Governor, having read the press release would fail to pursue the matter with Metalclad—for approximately six weeks—until after Metalclad exercised its option on September 2, 1993. Moreover, the attempt to imitate specific recall by Dr. Medellin as to some matters and his vagueness as to others must be viewed in light of Respondent's position that Dr. Medellin kept no diary or day book during his years in state government.[375]

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372 It is difficult to see what Metalclad would have to gain from concealing its intentions from the two state officials whose support was an important element in predictable achievement of its goals. In Claimant's submission it is, by contrast, easy to appreciate the trust and goodwill that would be lost by excluding the Governor and Pedro Medellin from Metalclad's groundwork in deciding whether to exercise its option. Thus, the version of events tendered by Respondent leaves unanswered the question why Metalclad would sabotage its own project in the manner described.

373 Medellin Declaration, *supra*, para. 40.

374 If, as Dr. Medellin suggests, Metalclad was carefully concealing its plan from state officials, giving Dr. Medellin a copy of this press release was an unlikely way to further that aim.

375 Ex. 47 hereto. *See* letter from Hugo Perezcano Diaz to Clyde C. Pearce, July 16, 1998, para. 37 (copy to Tribunal indicated).

303. To react promptly to the press release would have been consistent with the Governor's recollection, in seeming contradiction to Dr. Medellin's above account, that upon reading the press release he instructed "the State Ecological Coordination [headed by Dr. Medellin] that they be very careful and cautious with respect to the Metalclad representatives given their obvious lack of responsibility and honesty [and that] their experience in the management of hazardous waste was completely unknown to us."[376]

304. More reliable than the accounts of Messrs. Sanchez Unzueta and Medellin is that established by correspondence contemporaneous to the press release. It demonstrates that the Governor and Dr. Medellin are not representing with fidelity essential matters. By letter dated July 2, 1993,[377] Grant Kesler transmitted to the Governor a draft of the press release he intended to publish July 15, 1993 in San Antonio. After explaining the nature of the San Antonio Conference and inviting the Governor to participate, Mr. Kesler wrote in part:

> In addition to the above idea, we are a public corporation and our shareholders have been expecting an announcement as to our progress in Mexico for several months now, we would like to use this conference as a forum to make public an update on our projects in Mexico....
>
> *Because we do not want to say anything publicly that you would not support, we would like to have you know in advance what we would like to do and gain your permission to do so. I have therefore enclosed a copy of a proposed Press Release to be issued on July 15th and before issuing such a Press Release would like to*

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[376] Sanchez Declaration, Annex Two, Vol. II, Tab A, at 4.

[377] Ex. 48 hereto.

> *have your review, input and comments, so that whatever we say is to your liking and in support of your own goals and objectives in San Luis Potosi.*
>
> *Would you be so kind as to review the proposed disclosure and let us know if you would like to have any modifications, amplifications or deletions.*[378]

305. The draft release submitted for the Governor's consideration states in relevant part:

> [O]n February 26, 1993, Metalclad's subsidiary was issued a permit from Mexico's Ministry of Social Development to build a fully integrated hazardous treatment facility, using the world's best and safest available technologies for the treatment of all hazardous wastes....
>
> [O]n April 23, 1993, *Metalclad entered into an agreement to purchase majority interest in a Mexican corporation known as [COTERIN]. Approximately 2 ½ years ago, COTERIN operated a hazardous waste landfill in Guadalcazar, Mexico.* The facility was closed by the government.... On January 27, 1993, SEDESOL issued a Permit for allowing operation of the landfill subject to strict operating and safety standards. Metlaclad is presently working with [the Governor] and his staff to ensure that the local requirements and constraints are met and that remediation is accomplished for that portion of the landfill that was used in prior years.[379]

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

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

306. Thus, far from trying to conceal its intentions with respect to La Pedrera, and consistent with its June 11 meeting with the Governor, Metalclad's management actively deferred to the Governor, keeping him fully apprised, and seeking his response.

Perennial False Encouragement

307. Dr. Medellin's recollection of the events surrounding April 21 and 22, 1994 are in many respects in accord with those of Claimant's declarants. After a visit to the Harding Lawson facility, which was indicative of the technology to be used at La Pedrera, there occurred a meeting. Grant Kesler recalls:

> During that trip, yet another draft of an agreement between us and the state was agreed to by Dr. Pedro Medellin and the Company. The fact of the agreement between us and the state was announced by Dr. Pedro Medellin himself in Metalclad's conference room in Newport Beach, California ... All those in attendance literally applauded his decision. [Those in attendance] included every member of the University of San Luis Potosi commission, except one.[380]

308. Dr. Medellin's explanation of this event is as follows:

> Soon after a meeting with Guerra and Neveau, Mr. Neveau announced to a group of Metalclad employees, in my presence, that I had agreed that Metalclad could install themselves at La Pedrera. I had not said that to Mr. Guerra or to Mr. Neveau but I did not find it appropriate to contradict Mr. Neveau or argue with him then and there. He was speaking to his own

[380] Memorial Vol. I, Declaration of Grant S. Kesler at 7.

> employees and did not consider it my place or responsibility to correct him.[381]

309. Claimant is struck by what Dr. Medellin leaves out of his account. One important element of context is that the meeting, which he agrees occurred, lasted for over one hour; it involved Dr. Medellin in an assiduous study of the document attached to Mr. Kesler's declaration.[382]It was on the basis of that document and in light of his trip to the Harding Lawson facility that he gave his assent to terms of the agreement. Yet, his portrayal casts himself as the victim of a surprise announcement, which he was too embarrassed or too polite to counter openly.[383] He also forgets that many of his university colleagues were present; it was thus not merely an announcement to Metalclad employees. Mr. Neveau's reaction to Medellin's portrayal of events is that of a participant and eye-witness. He states:

> We emerged from the private office and I announced that we had reached an agreement. Medellin then informed the audience made up of the UASLP professors, Metalclad executives and management–Grant Kesler, Lee Deets, Humberto Rodarte, Ariel Miranda, Javier Guerra, Garcia Leos and me–as well as Ramon Chavez, of the terms of the agreement as aforementioned.

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381 Medellin Declaration, *supra*, para. 60.

382 Declaration of Grant S. Kesler, *supra*, third attachment.

383 Naturally, given the many witnesses in theconference room that day, he could not simply aver that the event did not occur, as he did with respect to his phone call to Mr. Kesler during October 1994. *See* Medellin Witness Statement, *supra*, paras. 70 and 71 and, by contrast, Kesler Declaration at 9.

> Everyone in the room stood and applauded. There was general feeling of relief and exuberance. For the management of Metalclad, our hard work and perseverance in finally attaining the Sanchez administration's full public support and approval had finally paid off. The members of the commission also seemed to share our enthusiasm in that they would be participating in the development and construction of the first fully permitted hazardous waste landfill in all of Mexico. Later, when Mr. Kesler asked Medellin to sign a document reflecting our agreement, Medellin replied it was not necessary given the announcement he had just made. He convinced Grant and me that it would be better if he first took it to the Governor for his concurrence and then made a public announcement of our accord.
>
> Dr. Medellin's witness statement is incomprehensible when it states that he was reluctant to correct *me* on the terms of the agreement that *I announced* in front of Metalclad employees. It was *he who announced and explained* the terms of the agreement, and thus there was no one who would have been embarrassed but him had the terms been different than those announced.[384]

310. Taking Dr. Medellin's account on its face, Claimant finds implausible Dr. Medellin's sustained acquiescence in the weeks following that announcement. Certainly, his sense of politeness does not explain nearly five weeks of inaction. He could not even be prompted to clarify the situation by Mr. Kesler's letter, which immediately followed the Newport Beach announcement.[385] Rather,

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[384] Declaration of T. Daniel Neveau, Ex. 18 hereto, paras. 23-26 (paragraph numbers omitted).

[385] Exhibit 33 hereto.

Dr. Medellin broke his silence only on May 26, 1994, by sending a letter to Metalclad's then-legal counsel, Mr. de la Garza.[386]

311. When Dr. Medellin's May 26 letter is compared to the draft studied during his California visit, the divergence is dramatic. The preambular paragraph to Mr. Kesler's confirmation, after making clear he was referring to La Pedrera, states "in view of the agreement that we have, it is very pleasant to put to your consideration the following program of activities."[387]

312. The letter then records *inter alia* that a Metalclad subsidiary will initiate "no later than the 16th day of May 1994, the relative works for the remediation of the site, *including the construction of a controlled landfill and complementary works of the same.*"[388] It provides further that remediation will be *in situ*, aided by a thermal system to be installed and that once the complementary works are concluded "based in the authorization granted by the Federal Government, [*Metalclad's subsidiary] will carry out the hazardous waste landfill, so that Metalclad can be financially compensated for the remediation.*"[389]

313. By contrast, Dr. Medellin's May 26, 1994 letter,[390] while acknowledging that the company will remediate La Pedrera *in situ*, made commercial operations dependent upon convincing the state

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386 Counter-Memorial, Annex II, Tab B, Ex. 7. The Tribunal will recall that Mr. de la Garza's relationship with Metalclad was terminated on April 28, 1995.

387 Exhibit 33 hereto.

388 *Id.* (emphasis added).

389 *Id.* (emphasis added). A patent contradiction inheres in this position. *In situ* remediation involves operating the landfill by taking waste to be remediated, testing, processing and then confining it.

390 Medellin Declaration, *supra*, Ex. 7.

and municipal authorities that the facility could "operate with high safety standards" and upon community acceptance, said acceptance to be judged jointly by the state and local authorities and the company.[391] That letter was only indirectly in response to Mr. Kesler's letter. It was primarily intended to prefigure Medellin's further actions. As Mr. Neveau states:

> On May 27, 1994, Dr. Medellin called a press conference at the Governor's palace wherein he purported to announce the terms of the Metalclad - state government accord. The agreement we had reached in Newport Beach was that Metalclad would remediate and simultaneously operate La Pedrera until another site in San Luis Potosi could be located, approved as technically suitable, and fully permitted for construction and operation.
>
> In the press conference, however, Medellin announced that Metalclad would remediate La Pedrera and not operate, but rather find an alternative site to build and operate a hazardous waste landfill. This was ***never*** contemplated, and Metalclad issued a press release reporting the terms that had been agreed to, and announced by Medellin, in Newport Beach. The only issue outstanding at the time of the agreement reached in California was the length of time period that Metalclad would have to operate at La Pedrera site and find another site. The Metalclad Board wanted at least 5 years and Dr. Medellin insisted on 3 years. However, given Medellin's attempt to change the basic terms of the agreement without our consent, this became irrelevant.
>
> ./...

[391] *Id.*

> When I later questioned Medellin about why he had announced terms substantially different than those upon which we had agreed, he told me that he had done it so as to slowly introduce the idea to the people that a hazardous waste landfill would open. Thus, he announced it would open, but for a limited purpose.[392]

314. Variability, whether caused by the Governor's intervening disapprovals or Dr. Medellin's own agenda, became Dr. Medellin's trademark—at least in Claimant's experience.[393] By that point in 1994, Dr. Medellin had already come to be characterized as unreliable, as captured in Mr. Kesler's March 31, 1994 letter to Metalclad's counsel in which he exclaims: "Hopefully, he [Pedro Medellin] will actually do what he says for the first time since we've known him and avoid a conflict."[394]

315. Not dissimilar are the reflections of Environment Attorney General Azuela, who in the declaration supplied by Respondent volunteers "...I believe that it is useful for this Tribunal to know that the relation[ship] with Pedro Medellin in this case was very difficult."[395] He opines also that Dr. Medellin was not without an agenda of his own, one unhelpful to federal initiatives. He states:

> Governor [Sanchez's] political obligation to Navismo was compounded by the fact that a number of his

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392 Neveau Declaration, *supra*, Ex. 18, paras. 27-30.

393 The record gives the sense that as a technical person, Dr. Medellin was intellectually able to be convinced, but then may have had his authority undermined by the Governor, whose failure to engage the technical aspects of the La Pedrera question was readily apparent to some.

394 Memorial, Vol. I, Attachment to Declaration of Grant Kesler, second attachment.

395 Federal Attorney General for the Environment Azuela Declaration, Annex Two, Vol. I, Tab C, para. 37.

> advisors, including Dr. Medellin...were strong supporters of the decentralization of federal power in favor of the local government.[396]

316. The press release incident of July 1993 and the events of mid-1994 detailed above were part of a chain of episodes in which the Claimant, for lack of any alternative, engaged Dr. Medellin in problem-solving initiatives only to have him repeatedly feign approval, then recant.[397] If Dr. Medellin lacked in law or in fact the capacity to speak for the Governor, that disability was concealed from Metalclad, who accordingly was entitled to rely upon Medellin's undertakings.

Disruptive Accusations

317. It is common ground that by August 1996 high level federal and diplomatic officials on both sides of the border had taken a strong interest in Metalclad's impasse with the state Government. As the Governor knew, whether San Luis Potosi should be blacklisted for U.S. investment because of Metalclad's experience was already being discussed at the diplomatic level.[398]

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396 *Id.*, para. 35.

397 The train of unwarranted reliance upon Dr. Medellin includes the Claimant's collaboration with him in planning the March 10, 1995 facilities tour. *See* Declaration of Ariel Miranda, Ex. 16 hereto, paras. 33 *et seq.*

398 In his declaration, at page 12, Governor Sanchez Unzueta recalls receiving a phone call from Minister Herminio Blanco who told him that, according to Ambassador Jones, "[SLP] was at risk of being designated as unreliable for United States investors as a result of the stalled opening of the Guadalcazar landfill." Annex Two, Vol. II, Tab A.

318. On August 16, 1996, the Governor was to meet with President Zedillo's Chief of Staff and Ambassador Jones and others. The group was to address ways to resolve the problem at La Pedrera. The meeting convened, but was short-lived, preventing the high level officials assembled there from confronting, in the Governor's presence, the Governor's position concerning the site.

319. The account to be found in Mr. Carvajal's declaration[399] is that meeting ended abruptly in the face of the Governor's charges that the Company: 1] was not properly registered with the SEC; 2] was illegally incorporated in Mexico, and 3] had not properly registered its COTERIN share acquisition. The Governor, represented accordingly that the Company and its officers were subject to criminal prosecution under Mexican and American law.

320. Like the canard that COTERIN's land use permit was illicitly procured, these charges were hollow. Mr. Carvajal states that at a subsequent meeting not attended by the Governor, apologies were made by the Governor's lawyers. Metalclad's representatives had supplied the relevant documentation, which disproved the Governor's claims. The Governor's lawyers requested that Claimant make yet a further proposal for presentation to the Governor, which Claimant did. No response to the proposal was given by anyone at the Governor's offices.[400]

321. Several, to some extent alternative, assessments of the events of mid-August 1996 are possible. Each reflects upon the regime with which Claimant was made to contend.

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[399] Memorial, Vol. I, Attachment, 6th and 7th pages.

[400] *Id.*, 9th page.

322. The first, and Claimant suggests most plausible, is that the Governor had no intention of meaningfully participating in the high level meeting to which he felt summoned. This is clearly the conclusion reached by Mr. Carvajal, a professional who appreciates well the issues surrounding La Pedrera as well the political and cultural environment in which the events in question unfolded. He remarks in his declaration:

> Ms. Carabias and the Company both felt that the reason the Governor was attending the meeting was due to the fact that the Embassy of the United States of America in Mexico had asked the federal Government for help in this matter and that the Federal United Government had respectfully requested the Governor...to attend this meeting in order to find a solution to the legal and political issues....
> /...
> Neither the Governor nor his attorneys answered our proposal. The Governor never again came back to a meeting that he purposely and with the use of the most absurd lies tore apart with representatives of the Office of the President of Mexico, the Ministry of Trade and Industrial Policy and the Ministry of Environment, Natural Resources and Fisheries to explore the alternatives of solution to the problem.[401]

323. A second alternative is that the team of lawyers were unable to ascertain the true facts through what they regarded to be due diligence. Their failure to ascertain COTERIN's full compliance with applicable regimes may be the best evidence of the challenges presented by the Mexican legal system. Claimant suggests, however, that it is equally indicative of the pressure the Governor's lawyers

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[401] Carvajal Declaration, *supra*, 6th and 9th pages.

must have been under to uncover something with which to discredit Metalclad for purposes of changing the direction of the meeting. Though Mr. Carvajal recalls that they admitted to negligence when presenting apologies, it may well have been negligence promoted by an unforgiving deadline.

324. Additionally, Claimant submits that the Governor's decision to reveal these supposed findings says much about his good faith and true motives. He chose to risk slandering Claimant rather than to wait for verified information which, if true, would remain equally relevant after the meeting.

325. Ambassador Jones' first-hand account of his attempts to engage the Governor in problem-solving are consistent with those given by Claimant's representatives. He moreover confirms that the Governor has in many respects misstated the facts. Ambassador Jones reports, *inter alia*, that:

> 1. The Governor's willingness to finally meet with him (several months later than the May 1996 date suggested by the Governor) surfaced only after Ambassador Jones threatened to list San Luis Potosi as an unfriendly state for foreign investment;
>
> 2. Contrary to the Governor's declaration, Ambassador Jones was not persuaded by the Governor's proffers that Metalclad was dishonest. Rather, Ambassador Jones:
>
> > [B]elieved at the time, and still do[es], that it was the Governor or his government of San Luis Potosi who was less than honest about the events surrounding the permitting of the landfill rather than Metalclad. [He] had spoken with Metalclad representatives on several occasions and believed that they were doing

> everything possible to satisfy the federal government's and the Governor's concerns about the technical suitability of the site, gaining the necessary permits, educating the community about the benefits of the project and so forth.[402]

326. In the diplomatic realm in which words are carefully chosen and understatement prevails, the Ambassador's observations upon Governor Sanchez' lack of honesty are remarkable.

C. OTHER ACTS OF BAD FAITH

Continued Revisionism and Misleading Accounts

327. Respondent's agents are obliged to participate in these proceedings in good faith. Nonetheless, documentation generated in relation to the June 11, 1993 meeting confirms that former Governor Sanchez Unzueta's recollections ought not to be credited.

328. To be found as an exhibit hereto[403] is a forty-page overview of the company's policies, management structure, personnel biographies and proposed San Luis Potosi activities. It carries a copy of the

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[402] Declaration of Ambassador Jones, Exhibit 14 hereto, para. 8. In accord, Mr. Kevin Brennan, Minister Counsel for Commercial Affairs, recalls:

> The Governor made accusations about Metalclad for which he provided no credible proof. My dealings with Metalclad officials were quite different. The representatives that I met ... demonstrated to my entire satisfaction that they were always willing to do whatever they could to meet the concerns [of] the Governor and the Municipal government[.]

Exhibit 2 hereto (paragraph numbers omitted), paras. 2-3.

[403] Exhibit 49 hereto (hereinafter *Introduction Booklet*).

routing slip (circulated for "read and return")[404] dated July 26, 1993, which is completed with the handwritten notation:

> This is the hand-out provided to Gov. Sanchez during the meeting on June 11. This is my only copy—FROM Sandy.[405]

329. The thirty-second page of that document is devoted to "GUADALCAZAR." Under the heading "LANDFILL," seven paragraphs are dedicated to explaining the decision to acquire COTERIN, the logistical and scientific advantages of relocating to the Guadalcazar site, and the physical components that will be employed to ensure maximum safety.

330. These materials contradict the former Governor's signed, written account, said to have been aided by reference to his "schedule for that day."[406] He avers:

> They did not show any projects, plans, designs, videos or any other documents.
> ./...
> In this meeting I was never informed that they were negotiating the acquisition of La Pedrera or that they acquired it.[407]

The former Governor's disavowal of detailed knowledge is the same technique he uses with respect to the subsequent press release; to that extent he has been consistent. Even the Governor's skillful casuistry, however, cannot reconcile this statement with the fact of

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[404] Transmitted "[t]o Grant, Dan, Mike, Jim, Elgin, George."

[405] Declaration of Sandra Ray-Baucom, Exhibit 26 hereto.

[406] Respondent has not supplied a copy of the diary entries to which the Governor refers, despite Claimant's requests for same.

[407] Sanchez Declaration, Annex 2, Vol. II, Tab A at 3-4.

the project booklet or its detailed contents. The booklet's Guadalcazar Landfill page states, for example:

> [T]he availability of another operating hazardous waste management facility in the state of San Luis Potosi, one dedicated to landfill, was brought to ECO's attention during development of the Mexican Hazardous Waste Market Study.
>
> *After a careful review of this facility, its operations, and permit status, ECO negotiated an agreement in principle to purchase control of [COTERIN].* This acquisition provides ECO the opportunity to relocate the inorganics plant *to the Gudalcazar site* which will result in an optimal arrangement *for inorganic processing and disposal.*[408]

331. Additional paragraphs elaborate upon the advantages of COTERIN, the potential for combined operations with the Santa Maria del Rio facility and the modern standards and elements to be utilized at the Guadalcazar site, *e.g.*, dual synthetic liners, a cement underliner, and lechate collection systems.[409]

332. Given the foregoing, Claimant's explanation of the June 11 meeting—an exceedingly important event from Claimant's perspective[410]—should be preferred to that propounded by former Governor Sanchez Unzueta, whose version of the facts is both implausible and refuted by contemporaneous documentation. To

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[408] *Introduction Booklet*, Exhibit 49 hereto (emphasis added).

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

[410] That the meeting was central to Claimant's business plan is indicated by Grant Kesler's attitude; he thought it necessary, by a letter dated the same day, to apologize for being unable to attend in light of a family emergency. *See* letter dated June 11, 1993 to Governor Sanchez Unzueta from Grant Kesler. Sanchez Declaration, Annex 2, Vol. II, Tab A, Ex. 7.

allocate credibility in this way would be consistent with the practices of other tribunals.[411] To recognize this as part of a pattern, moreover, would be supported by the record.[412]

Section 4 Motives Interfering With the Exercise of Good Faith

333. It has been said the bad faith on the part of government officials is not to be presumed.[413] Nor, however, should there be a presumption against bad faith. Though Claimant is not required to prove the state of mind of the officials with whom it dealt in order to recover, in its Memorial it has relied upon information and belief to suggest that there existed at relevant times commercial incentives which influenced the two central figures, many of whose actions are consistent with that thesis.[414]

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411 Judge Brower's distillation of the general evidentiary practice developed by the Iran-U.S. Claims Tribunal, for instance, includes the following:

> 1. Contemporaneous written exchanges of the parties antedating the dispute are the most reliable source of evidence ....
>
> /...
>
> 3. The failure of a party to object in writing to a writing ... it has received at or shortly after the time of receipt is strong evidence of its acceptance.

C. Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules*, 28 Int'l Law. 47, 54 (1994).

412 The Governor's pattern also includes the receipt and present disavowal of Metalclad's draft press release and his demonstrably false account of the University Committee's aims.

413 Case Concerning the Barcelona Traction, Light and Power Co. Ltd., (Belgium v. Spain) 46 I.L.R. 2, 333 (1973) (Separate Opinion of Judge Tanaka).

414 The Claimant is not the only one to question what commercial considerations may have influenced the Governor's policies. *See, e.g.*, M. Ortiz Elizondo, *Sanchez Unzueta Bought a Home*, El Universal, Jan. 15, 1997,

334. Without retreating from the strong sense it has already shared with the Tribunal,[415] Claimant concedes that a comprehensive view of the instant dispute may include consideration of various non-monetary factors and influences. The Respondent's own submissions establish many of these. There is first the strong pressure upon officials applied through the well-documented efforts of Greenpeace and one other NGO.[416] The Greenpeace initiatives are noteworthy because they left sympathetic officials no room to maneuver; Greenpeace it is said offered no compromise—whether based upon scientific aptness or related site attributes—to its no-landfill policy.[417]

Memorial, Vol 2.(Newspaper Articles):

> The news [of the million peso home purchase] provoked different reactions in the different political levels [including] "for the sake of the Potosinean people" [the Governor] should explain how and with what resources he acquired this residence. This same attitude was adopted by the local official of the PRD, Gregorio Flores.

[415] The limited discovery of arbitration and the fact that substantially all data germane to the question are beyond Claimant's reach, leave Claimant with reliable but mainly intangible support for its views.

[416] The Tribunal will recall, however, that many reputable NGOs supported the La Pedrera site. *See* Memorial, Vol. I, Chronology and Declaration of Ariel Miranda. Among them were the National Chamber of Industrial Transformation (CANACINTRA); the National Council of Ecological Industrialists (CONIECO); the Confederation of Employers of the Mexican Republic (COPARMEX); Mexican Ecological Movement (MEM); the Red Cross Ladies; and the San Luis Potosi College of Lawyers.

[417] *See* Azuela Declaration, *supra*, para. 49. Consistent with its position in this case, Greenpeace is widely regarded as an extremist environmental organization. *See. e.g.*, Patrick Moore, "Hard Choices for the Environment Movement" attached hereto as Exhibit 53 ("In the name of deep ecology many environmentalists have taken a sharp turn to the ultra left ... [as] in 1990 Greenpeace called for grass roots evolution against

335. Claimant acknowledges that NGO's often provide States, especially developing States, valuable policy guidance; nevertheless, the influence bestowed upon Greenpeace by Respondent in this case was disproportionate and subjugated the interests of Claimant.

336. Moreover, Claimant reiterates that the targeting of it in contrast to the self-restraint exercised by local NGOs in relation to RIMSA gives rise to reasonable suspicions. A new landfill was established on August 14, 1997 near the San Luis Potosi airport—apparently owned by Potosinians—on a permit signed by Pedro Medellin just days before leaving office. Claimant is unaware of any protest or objection from either Greenpeace or Pro San Luis Ecologico.

337. Also introduced earlier are the pro-decentralization policies driving state officials and the federal-state tension that became increasingly manifest and which culminated in a protracted train of *amparo*-related court proceedings. These elements intermingled and were in part exacerbated by federal policies which evolved during the approximately six years spanned by Claimant's investment activity in San Luis Potosi. The federal approach to La Pedrera is an important element of context and is discussed in Chapter 7.

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pragmatism and compromise."). *See also*, Moore, P. "A Heartland Perspective," April 5, 1995, *Id.*