CHAPTER 12

THE MUNICIPAL CONSTRUCTION PERMIT— CLAIMANT'S DUE DILIGENCE AND REASONABLE RELIANCE; RESPONDENT'S ACQUIESCENCE

Topical Arrangement of Sections

Section 1 Introduction

338. Respondent misunderstands Claimant's position concerning the supposed requirement of a municipal construction permit. Claimant does not suggest that its due diligence failed to uncover a statutory regime devoted to the issuance of such permits. Rather, Claimant's analysis addresses the legal necessity of obtaining a municipal construction permit, and the consequences of not doing so in this case.

339. Respondent relies heavily upon the Municipality's failure to issue a construction permit, suggesting that such an authorization was a juridical requirement and that the Claimant knew or should have known that it was legally essential. For the reasons to be

outlined in this Chapter, Claimant holds that the data available to it—both before and after its application for the permit—were far from clear on the issue and indeed militated against the position now taken by Respondent.

Section 2 The Positive Texts Are Ambiguous and Claimant's Interpretation Thereof Is The More Reasonable

A. THE CONSTITUTIONAL PROVISIONS ADDRESSING MUNICIPAL PERMITS

340. Article 115 V. of the Mexican Constitution empowers municipalities to grant licenses and building permits but makes this power operate "under the terms of the respective federal and state laws."[418] Rather than conveying the sense that federal authority can be rendered immaterial by municipal action, that language seems to subjugate the municipal permitting process to federal law.

The Authorities

341. The above conviction is confirmed by leading Mexican Constitutional scholar, Ignacio Burgoa Orihuela. Referring to the 1976 augmentation of the Constitution which inaugurated the fraction in question, he writes:

> Fractions V and VI of article 115 extended considerably municipal attributions in the matters

[418] The provision more fully states:

> Municipalities, under the terms of the respective federal and state laws, shall be empowered to ... grant licenses and building permits; ... For this purpose ... they shall issue regulations and administrative orders deemed necessary;

Federation the power to authorize construction and operation of hazardous waste landfills and no provision within the law suggests that this power is concurrent among the federal, state and municipal authorities. Thus, although, in general, there is power within municipalities to implement and enforce a system of construction permits, if they choose to do so, this power is supplanted by federal legislation as regards the construction of hazardous waste landfills.[423]

---

the States and the municipalities, in the areas of their respective competencies, in relation to environmental protection and the preservation and restoration of the ecological balance.

[423] The 1988 Law is unambiguous in making the distinction between *hazardous* waste matters (given to federal authorities) and non-hazardous waste regulation in which municipalities may play a role. Article 5 of the 1988 law provides that the *powers of the Federation extend to*:

> /...
>
> VI. *The regulation* and control of activities considered to be highly hazardous, and *of the generation, handling and final disposal of hazardous materials and wastes for the environment of ecosystems*, as well as for the preservation of natural resources, in accordance with [the] Law, other applicable ordinances and their regulatory provisions;

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

> [L]egal provisions in matters of prevention and control of the effects on the environment caused by generation, transportation, storage, handling treatment and final disposal of *solid and industrial wastes which are not considered hazardous*, in accordance with the provisions of Article 137 of [the 1988] Law (emphasis added).

Respondent's View Begs the Question While Promoting and Conceding Obscurity

345. Respondent's Counter-Memorial, which states in respect of this provision that the power of municipalities to issue construction permits "may be regulated by the federal, state and local laws and regulations, but cannot be superseded or ignored."[424]

346. The supposed distinction offered by Respondent between federal "regulation" and "supersession" demonstrates well the acute lack of transparency which faced Claimant in this case. The proposition that federal regulation is permitted but supersession is not depends upon a nuanced and circular constitutional argument.[425] Apparently conceding that the Constitution is not clear enough to prevent federal authorities from under-appreciating their putative limits, Respondent's expert observes:

> But even if under the assumption, which is not possible in this case, that federal Law did not respect such [municipal] power, because of hierarchical reasons, the constitutional text must prevail.[426]

---

[424] Counter-Memorial at 53, para. 191.
[425] Replicated in the Counter-Memorial at 52, paras. 190 *et seq.*
[426] Counter-Memorial at 53, para. 190 (last sentence).

The Conflicts Created by Concurrent Federal and Local Regulation of Hazardous Waste

347. Numerous obstacles to the exercise of federal powers over hazardous waste would arise if a municipal regime were allowed to intervene without limit. One example of many is provided by Article 16 of the Municipal law enacted by Guadalcazar in February of 1996. That article requires that an operating permit be procured from the Town Council for the exercise of any commercial, industrial or service activity, by a private individual; it is said that permits must be renewed annually.

348. Assuming the provision governs juridical entities, an obvious problem arises. If municipal authorities could decline to renew a permit for a project federally authorized for a term of years, gross inefficiency and disruption of the federal hazardous waste program could easily result.

B. THE FEDERAL CONSTRUCTION LICENSE OF 27 JANUARY 1993

349. The interpretation that federal authorities are empowered to set the terms under which the municipalities may affect hazardous waste facility construction is supported by the first permit issued by INE to COTERIN.[427] Under Paragraph "Fifth" in Section I, the "Site Preparation Stage," requirements are established with particularity:

> I.3 The material generated during the clearing and excavation of the land that will not be used in the related works and activities to follow, must be disposed

[427] Memorial, Vol. II, Ex. 6.

> of in places indicated by the competent authorities, and the corresponding permit must be presented before this General Office within a period of 30 days after obtaining it.
>
> ./...
>
> I. The development [exploitation or use] of banks for the loaning of material is not authorized. In such case, the respective permission must be applied for before the competent local authorities, and notification of this permission must be presented before this General Office within a time period of no more than one month after obtaining it.[428]

350. Two reasonable inferences may be drawn from the foregoing permit provisions: First, that federal authorities felt competent to delineate with precision the situations in which local authorities could function in relation to the construction of the hazardous landfill in question; second, that federal authorities felt competent to perform an oversite function with respect to the local authorizations delegated to the local permitting process.

351. Significantly, since Claimant's La Pedrera project neither employed a "borrow pit," disposed of waste off-site nor used off-site earth, under the terms of the permit, resort to the local permitting process was obviated.

---

[428] Similarly, FIFTH, II.2 (under the heading "Construction Stage") requires that:

> [s]olid wastes generated in the construction stage must be disposed of in the sites that are determined for this purpose by the appropriate local authorities, *excepting those that by their characteristics require disposal in the installation of the same landfill* (emphasis added).

C. FEDERAL AUTHORITIES' ASSURANCES

352. The Claimant's due diligence did not depend wholly upon the implications of the above-cited texts. Claimant sought and received assurances from government representatives. For example, by letter dated September 16, 1993, Lee Deets (the President of Eco-Metalclad) wrote to Mr. Reyes Lujan, knowing that Reyes Lujan —the President of INE —was soon to visit Governor Sanchez Unzueta. In pertinent part that letter states:

> We are prepared to begin construction immediately upon receiving the authorization from Governor Sanchez, but are not sure if a manifest [license] is necessary from the Guadalcazar municipality. Our law firm in San Luis Potosi believes that a municipal manifest may be needed for construction. If you believe it is appropriate, we would appreciate your discussing the municipal permit with [the Governor].[429]

353. On its face, the letter attests to the ambivalence local counsel entertained. This same uncertainty led to the renegotiation of the option to purchase COTERIN as early as April 23, 1993, which Respondent refers to in its Counter-Memorial at para. 271. The change was thought a useful prophylactic measure by Claimant's management and reflected the vendor's confidence in the successful conclusion of the permitting process. He shared those concerns with Claimant's officer, who then pursued an obvious avenue and received the assurance he sought. Dr. Reyes instructed Mr. Deets that federal authority in the matter was preeminent, and that the Claimant ought not to be concerned with the local permit. Mr. Reyes'

[429]Declaration of Lee Deets, Exhibit 9-5 hereto.

advice was consistent with a fair reading of the INE permit, the Constitution and various other indications.[430]

Section 3 The Inchoate Nature of the Relevant Municipal Permitting Machinery

354. On Article 115, fraction V provides that municipalities "shall issue the regulations and administrative orders deemed necessary" for the purpose of granting licenses and building permits, subject to the "terms of the respective federal and state laws." The regulating function of federal law was addressed above; here Claimant suggests that the Municipality of Guadalcazar has done little to implement the constitutionally derived powers it claims to have.

355. Although there is SLP state legislation setting forth some unified rules applicable to construction permits, a range of important matters remains unaddressed within Guadalcazar's own codes: On what basis, for example, is an entity supposed to structure its activities to comply with the Municipality's development plan, given that no such scheme has been formulated? Similarly, the state legislation makes compliance depend upon classifications upon which Guadalcazar has not elaborated, such as that delineating "strategic population centers."[431]

---

[430] When, for instance, COTERIN undertook construction in the summer of 1994 to rectify problems at the transfer station, PROFEPA, the appropriate federal agency, instructed the company to cease its activities. The order was not predicated upon the lack of a municipal permit but upon the fact that the seals had not been lifted by the federal authorities. *See* Counter-Memorial, Exs. 81 (PROFEPA Inspection Order of 16 Aug. 1994) and 82 (COTERIN Response to Inspection Order of 19 Aug. 1994).

[431] Ecological and Urban Code of SLP, Art. 121.

356. Additionally, there are simple clerical questions to which one finds no uniform answers: how does one obtain the relevant forms and other standard documentation? Where does one deposit its application, with whom and with what processing fee? Moreover, should the application be notarized?

357. Primitiveness and inaction remain characteristic of the permitting processes said by Respondent to be available in Guadalcazar. This is evident from the minutes of Notary Public Filberto Narvaez Gomez.[432] On June 4, 1997, he attended an interview with Julia Tapia Olvera, an employee of the Public Works Department at Guadalcazar City Hall. That interview produced the following responses to the questions supervised by Mr. Narvaez:

> 1] She was one of two employees attached to that department and its Director was the other;
>
> 2] During her one year at the Department of Public Works, she had not been informed of any particular forms or similar documentation with which one could apply for a municipal construction permit;
>
> 3] During that same year, to her knowledge, no municipal construction permits had been processed, nor had the notion been part of any matter of which she was aware.[433]

358. On What makes the above interview especially illuminating is that conspicuous building activity was underway within Guadalcazar throughout Ms. Tapia's year of employment. Consistent

---

[432] Memorial, Vol. II, Ex. 5.

[433] *Id.* at p. 4.

with her account, none of those projects was supported by a local construction permit; uniformly it was regarded as gratuitous by the property owners involved, whose interviews Mr. Narvaez also supervised and preserved.[434]

359. On The non-vitality of the Municipality's permitting operations is also evidenced by its failure to function under Article 139 of the General State Regulation. That provision requires the Municipality to supply the General Direction of the Cadastral "on a monthly basis" copies of "all municipal licenses for complete constructions ... expedited in the strategic population centers as well as [for] buildings in any part of the [municipality] that generate a significant impact." As of July 8, 1997, no such documentation had been forwarded by the Municipality to the above-mentioned body.[435]

Section 4 The Implications of the State Land-Use Permit

360. State law, on the other hand, stated that a municipal construction permit should be in place before a land use permit issued if certain conditions obtained.[436] The construction permit in place was that provided by the federal government. Both the Governor and the State Congress considered the land use permit application. In granting the land use permit, it appears that they either: (1) considered the conditions involving a municipal construction permit and found them inapplicable; or (2) recognizing

---

[434] *Id.*

[435] Declaration of Gustavo Carvajal, Memorial, Vol. I, Attachment, 20th page.

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

the primary authority of the federal government in matters of hazardous waste, and noting the INE authorization for construction, determined the municipal construction permit unnecessary. The issuance of the land use permit in disregard of the absence of a local construction permit underscores the inefficacy of the municipal construction permit as the *sine qua non* to operating the landfill.[437]

Section 5 Custom and Conventional Wisdom

361. On Claimant was entitled to interpret such positive texts as were available to it and the advice of federal officials in light of what appeared to be local custom and usage. These sources edified Claimant's understanding of the legal requirements to which it was subject, giving the distinct impression that the municipal construction permit was not part of an essential package of permits.

362. On For example, it is the statement of Mr. Francisco Castillo[438] that the common procedure within his engineering practice at the relevant time was for projects such as La Pedrera, to ensure only that state and federal permits were in place. He observes:

> Before initiating any construction work, it was a practice of Sitra to ask the client to have the corresponding permits for use of the land, and his respective construction licenses, as well as all appropriate government authorizations, out where they could be seen and inspected. In the present case, my superiors had a copy of all federal permits, state licenses and official correspondence. There is also an

[437] *See* Memorial, Vol. I, Ex. 34, Executive Summary ¶9; Declaration of Humberto C. Rodarte.

[438] Declaration of Francisco Castillo, Ex. 4 hereto.

> extension to the conclusion of construction, granted by the federal government.
>
> My understanding was then, that having the described permits, the local permits are just a formality since the federal permits take precedence. It was well understood, in other states where I worked, that with these federal and state permits the municipal permits could be obtained (in this case the construction permit), during the preliminary work. In my experience, no other municipality refused to give a construction permit when this one was asked for, specially when the federal and state permits had already been granted.[439]

363. On Similarly, an attachment to the Memorial documents the results of a random canvassing of Guadalcazar building sites. The notary's account[440] is that several projects of various types were encountered within the Municipality. With remarkable consistency the property owners, who were interviewed in the presence of the notary, explained that no construction permit was required when one owns the property in question; they seemed to treat that position as a notorious fact and evinced no fear of running afoul of the authorities.[441]

Section 6 Claimant's Pre-Purchase Due Diligence—The Ineffectual Caveats Relied Upon by Respondent

364. Certain clauses have been underscored in the Counter-Memorial; in Respondent's view, they placed Claimant on notice that

---

[439] *Id.*, para. 7-8.
[440] Memorial, Vol. II, Ex. 5.
[441] *Id.* at 4.

a municipal construction permit was indispensable to the operation of its investment. Logically, those which could have served the notice function ascribed to them by Respondent were those issued before Claimant was advised to apply for a Municipal construction permit on November 15, 1994. The three primary permits and the Governor's June 11, 1993 letter, all issued before Metalclad exercised its option, reflect most directly upon its due diligence.

The January 27, 1993 INE (Construction) Permit

365. In the authorization which Claimant refers to as a federal construction permit is found:

> TENTH: This authorization is issued without prejudice to the holder's need to apply for and obtain other authorizations, concessions, licenses, permits or such, that are necessary to conduct the works as a result of this authorization, or its operation or other stage of the project, pursuant to other Laws and Regulations that shall be applied by the Secretariat of Social Development and or by other federal, state or municipal authorities.[442]

366. Taken by itself this language alerts the reader to the possibility that other authorities may be entitled to regulate the use of lands in various ways. In that sense, it does not purport to be specific, but to state the truism that alone it may not be sufficient; that platitude was fulfilled in Claimant's subsequent application and receipt of a federal operating permit and a state land use permit.

367. On As notice that a municipal construction permit is required, the above language is wholly lacking, both in its generality and as a

---

[442] Azuela Declaration, Annex Two, Vol. I, Tab C, Ex. 5.

matter of construction. Canons guiding interpretation give priority to the specific over the general. It will be recalled that the same 27 January 1993 permit rather surgically identified those narrow instances in which local permits would be necessary (borrow pits and off-site earth utilization). It follows from a reading of the two provisions together that paragraph TENTH is subject to and elaborated upon in paragraph FIFTH.

State Land Use and Federal Operating Permits

368. Neither the land use permit of May 11, 1993 nor the Federal Operating Permit of August 19, 1993 contains language comparable to that placed in the January 1993 INE construction permit discussed above. The qualifying language in the state license merely notes that it is not a business permit. The Operating Permit sets forth 37 detailed conditions to the landfill's operations, including many references to legal norms, but makes no mention of local construction permits.

The Governor's June 11, 1993 Letter

369. On The closing paragraph of Governor Sanchez Unzueta's letter of confirmation to Metalclad states:

> We appreciate Metalclad Corporation's interest in participating in an active manner in the instrumentation of this program. Likewise, I wish to emphasize that *as long as they comply with the environmental standards of the different levels of government* and respect the genuine interests of the community, the projects presented for my consideration have the necessary support to carry them out successfully.[443]

[443] Memorial, Ex. 11.

370. The above quoted language is not well crafted to alert Metalclad to the need to receive a municipal construction permit. Certainly, the reference to *environmental* standards would direct one to the relevant federal norms. Plausibly, while generic, it is sufficient also to notify one to consider the Ecological and Urban Code of San Luis Potosi, Chapter II of which treats municipal construction permits In the Municipality construction permits are found in the Revenue Code. Yet, from Claimant's vantage in 1994, without the benefit of hindsight, procurement of the state land use permit and federal permits issued under an apparently preemptive regime satisfied both the letter and the spirit of the Governor's final paragraph especially given the assurances Claimant received from federal representatives. Claimant maintains that, even in hindsight, that course cannot be said to be unreasonable.

Section 7 Documents Executed After Metalclad Became COTERIN's Beneficial Owner and After Metalclad Applied for a Municipal Construction Permit

371. After the Municipality had issued its putative closure order in November 1994, at least two federal documents related to the La Pedrera project were issued containing language making reference to local law and local jurisdiction.

372. The November 25, 1995 press release composed by PROFEPA to explain the *Convenio de Concertacion (Convenio).*[444]

> Finally it is important to clarify that the federal authorizations are a necessary requirement but not

[444] *See* Carabias Declaration, Annex Two, Vol. I, Tab A, para. 18 and Ex. 1 thereto (last page).

> 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.

On February 2, 1996, PROFEPA (SLP) lifted completely the former closure order.[445] That order provides in part:

> The company shall bear in mind that lifting of the closure is performed without prejudice to its compliance with the obligations set forth in the local legislation.

373. It places these caveats in perspective to note that by the time of the *Convenio*, the Municipality had already asserted jurisdiction over the construction process and had interacted with federal authorities over what the Municipality perceived to be an exorbitant exercise of power by them. Further, Greenpeace had become so significant a force that its representatives were invited to participate in the outreach program promoted by Attorney General Azuela, although their non-cooperation led to a suspension of those meetings.[446] It seems a plausible inference that the litigiousness of that organization also exerted an *in terrozum* influence.[447]

374. By the time of *Convenio*, moreover, the Zedillo government's decentralization policies had come to influence its public posture on a large range of issues.[448] It thus was understandable that the federal

---

[445] Azuela Declaration, *supra*, Ex. 2, sixth page.

[446] *See* Declaration of Environmental Attorney General Azuela, Counter-Memorial, Annex 2, Vol. I, Tab C, paras. 46-47.

[447] *Cf. Id.*, para. 47 (recalling lawsuit against federal officials).

[448] *Cf.* L. Crawford, *Feast and Famine Under One Regime*, Fin. Times, Oct. 28, 1996, at 4 ("Mr. Zedillo, by common consent, has been studiously

authorities would pursue two tacks: first, to push ahead with what they thought to be a well-conceived, environmentally sound solution to La Pedrera's remediation issue and, second, to publicly endorse state autonomy in relation to the project.

375. Nonetheless, as the content of those instruments makes plain, throughout that later stage, federal authorities scrupulously avoided addressing in detail what was required by state or local legislation, in fact disclaiming any capacity to do so. The inference Claimant believes is supportable from all the circumstances is that both from a federal policy standpoint, and to further inter-level discussions on the La Predrera issue, it became expedient for federal authorities to deemphasize federal primacy.

376. This may have reflected a genuine evolution in federal views or merely a desire to facilitate collaboration with state officials concerning La Pedrera; from Claimant's vantage it does not matter which is more accurate, for in either case Claimant was the victim of a federal system stumbling through a series of questions of first impression.

377. Because Claimant had already applied for a construction permit, these apparent testimonials to local jurisdiction served no meaningful notice function. As importantly, by the time of the *Convenio*, Claimant had already relied heavily upon its due diligence, which included the advice of federal officials.

Section 8 The Municipality's Inaction

A. UTTER DISREGARD FOR TIME LIMITS

---

respectful of local political affairs.")

378. On December 5, 1995 the Municipality pronounced itself on COTERIN's application for a construction permit which had rested with Municipal officials for over one year.[449] Events contemporaneous to the Municipality's belated response strongly suggest that its sudden diligence was prompted by the *Convenio* of November 24, 1995[450] and its desire to strengthen its position in the proceedings that followed. The equally strong corollary is that without such an impetus, no response to the application may have ever been forthcoming.

379. That this was an unreasonable practice seems to have been conceded by Respondent, which in its Counter-Memorial's admissions Annex states:

> [U]nder Mexican law....The Municipality had a "reasonable time" in which to consider the merits of the application which, according to applicable jurisprudence, is normally considered to be a period of *four months.*[451]

380. A fair reading of the state statute addressing municipal permits demonstrates that the Municipality was, by law, subject to a more stringent time frame than that admitted by Respondent. The General Regimentation of the Legal Urban and Ecological Code (1993) at Article 126 I. provides in relevant part:

> Once presented the application [for a municipal license] with the required documents, *within a period of 10 days*, the authorities will expedite a

---

[449] COTERIN's application was made on November 15, 1994.

[450] Counter-Memorial at 174, para. 572 *et seq.*

[451] *Id.*, Annex One, at 19-20, para. 83 (emphasis added).

> payment order of the respective rights or, if it be the case, reject the application...

381. The passage of a period which was over three times longer than that deemed reasonable under Mexican law, and nearly 40 times longer than that contemplated in the statute itself, is significant for at least two reasons. First, it further demonstrates that the legal framework envisioned in the relevant state statute exerted no influence upon the Municipality's actual comportment. Second, the period of inaction was accompanied by Claimant's reliance upon the counsel of federal officials, whose mandate and expertise seemed far clearer than that of the Municipality's representatives. The resulting progress made during that period—in the form of substantial, tangible work product at the site—was a principal ground upon which the permit was ultimately declined.

382. Mr. Ariel Miranda Nieto's first-hand account[452] states:

> Mr. Rodarte and I spoke with Jaime de la Cruz Nogueda at the PROFEPA offices in Mexico City, with whom I communicated on a frequent basis, about the municipality's order to stop construction. We asked him whether the Guadalcazar cabildo had the authority to close down the construction at the site as they had purported to do. The federal government had always told us that it had exclusive jurisdiction over the regulation of hazardous waste disposal matters.
>
> Ing. de la Cruz reaffirmed the federal government's preeminence in the area of hazardous waste disposal to us, but suggested that as a sign of respect for the municipal government, COTERIN should apply for the

[452] Miranda Declaration, Ex. 16 hereto.

> permit anyway. He said that we should continue to construct, and he assured me that the municipality would issue the municipal construction permit as a matter of course upon the payment of fees. In any case, de la Cruz said that there was no reason for the municipality to deny COTERIN's application.[453]

B. ESTOPPEL AND RELATED PRINCIPLES

383. Even when judged by the more rigorous of estoppel formulae offered by publicists, the urgings of Mr. de la Cruz fulfill the elements necessary to the doctrine. The three requirements articulated by Professor Bowett, for example, appear to have been fulfilled.[454]

> 1] "The statement of fact must be clear and unambiguous."[455]

384. As Mr. Miranda is prepared to confirm before the Tribunal, there was no equivocation in Mr. de la Cruz's representation, which Mr. Miranda recalls vividly given the drama associated with the purported closing of the project and the importance of the question.

> 2] "The statement of fact must be made voluntarily, unconditionally, and must be authorized."[456]

385. Mr. de la Cruz was under no apparent duress or legal incapacity. Assuming *arguendo* that he exceeded his actual authority (express and implied), his representations nevertheless are

---

[453] *Id.*, paras. 28-29.
[454] 33 Brit. Y. B. Int'l L. 176, 202.
[455] *Id.*
[456] *Id.*

attributable to Respondent, either based upon the law of state responsibility,[457] or upon principles of apparent authority common to municipal systems.[458]

> [3] "There must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement."[459]

386. Claimant's reliance is obvious. Respondent in turn benefitted by having the landfill progress toward completion despite the legally tenuous but politically troubling assertions of the Municipality.

387. Acquiescence is also an important principle in this context.[460] The openness of the interim works and their general character makes probable that the Municipality was aware that the project moved forward apace. No effort was made by Claimant or federal authorities to cloak the work being done. It is likely also that Municipal officials correctly surmised that such activities were undertaken with the encouragement of federal authorities. Under

---

[457] *See* Article 8, Draft Article on State Responsibility, adopted 1996, reprinted in 37 I.L.M. 440, 444 (1998). In pertinent part it provides:

> The conduct of a person ... shall also be considered an act of the State under international law if:
> (a) it is established that such person ... was in fact acting on behalf of that State ./...

[458] *Cf.* Sea-Land v. Iran, Westlaw, IRAN AWARD 135-33-1 at 8 (applying Iranian Civil Code articles treating agency principles).

[459] Bowett, *supra*, at 202.

[460] *See generally* I. MacGibbon, *Customary International Law and Acquiescence*, 33 Brit. Y.B. Int'l L. 115 (1957); H. Thirlway, The Law and Procedure of the International Court of Justice, 50 Brit. Y.B. Int'l L. (1989).

these circumstances, the passage of time combined with the Municipality's knowing acquiescence should preclude Respondent from now relying upon the lack of a local construction permit.

388. A fair interpretation of the events surrounding the construction permit application is that the putative closure of the site by the Municipality placed Claimant between conflicting claims to jurisdiction. The advice it received from federal authorities to continue building was sound; ultimately the Municipality could not be trusted to respond quickly or at all and a number of indications suggested that it lacked the authority it purported to wield. The federal authorities' belief in the project's safety and feasibility and their commitment to bring it to fruition are apparent from the record, and an indeterminate delay would serve no purpose, especially given that the municipal permit was viewed by those authorities as collateral and clerical under the circumstances.

Section 9 The True Function and Selective Application of the Local Construction Permit "Requirement"

389. As set forth above, even if, *arguendo*, the municipal construction permit can be said to be a *de jure* legal requirement to construction, *de facto* it simply received no recognition in the prevailing practices in and around the activity centers of Guadalcazar Municipality. Nonetheless, the Town Council insisted that COTERIN apply, only to decline the permit. Among the few reasons given by the Municipality for its determination was that the people, "unanimously," did not want the landfill.[461]

[461] Counter-Memorial at 179, para 581.

390. Putting aside the obvious exaggeration, and the inordinate delay, the function the Municipality was arrogating to the construction permit is significant. The process was resurrected to give a regulatory, legal texture to what amounted to the city fathers' conception of the popular will in relation to La Pedrera. Given the otherwise moribund state of the local permitting process, it is evident to Claimant that the process was selectively deployed in the case of COTERIN.[462]

391. Claimant has been unable to discover a case not involving COTERIN in which a construction permit was sought and declined within the Municipality of Guadalcazar. But, as noted above, it has documented several construction projects in which no permit was required. The legal conclusion that Claimant draws from these findings is that its enterprise was deprived of national treatment[463] in an attempt by the Municipality to forestall a federal initiative.

Section 10 The Serial Acquiescence of Respondent's Federal Organs

392. The instant case presents in Claimant's view the type of circumstance the majority in *ELSI* had in mind when it observed "it cannot be excluded that an estoppel could in certain circumstances

---

[462] Claimant speculates that to the Municipality, the decision to invoke the construction permit must have seemed in the abstract the most credible mechanism for blocking La Pedrera. It, after all, receives specific mention in the Constitution and had been sought by Mr. Aldrett for the same site several years earlier. *See* Avila Declaration, Annex Two, Vol. III, Tab A, para. 13. Claimant knows of no other applicant being refused a permit.

[463] *See* NAFTA, Article 1102.

arise from a silence when something ought to have been said[.]"[464] Whether one considers the relevant principle to be estoppel or acquiescence, the persistent failure of Respondent's federal organs to squarely raise an issue now portrayed as dispositive by Respondent cannot justly be ignored.

393. The following list of opportunities is representative and bears reiteration.[465]

3. February 3, 1993, when the federal government issued the construction permit;
4. May, 1993, when the federal government required the Company to have the state land-use permit;
5. August, 1993, when the federal government issued the operating permit;
6. On or about September 16, 1993 when Claimant's Mr. Deets sought clarification of the permit requirements from Mr. Lujan;
7. During October of 1993 when Messrs. Reyes and Altamirano met at the site with Metalclad officers.
8. On April 22, 1994, when INE extended the time period to construct the landfill;
9. May 16, 1994, upon the commencement of the construction;
10. August, 1994, when the federal authorities "lifted the seals" of closure on the transfer station and authorized construction thereon;

---

[464] 1989 I.C.J. Rep. at 44, para. 54. *See also* Air Services Arbitration, 38I.L.R. 182.

[465] *See also* Memorial, Vol. I, para. 218.

11. All during the construction phase (May, 1994–May, 1995) when federal officials regularly visited and inspected the construction site;
12. All during the extensive PROFEPA Audit (August, 1994–March, 1995) especially when part of the charter for the audit was to review the Company's permits for sufficiency and compliance;[466]
13. October 26, 1994, when the Municipality of Guadalcazar purported to close all construction activity for want of the local construction permit; indeed, to the contrary, as noted above, the federal representative, de la Cruz, instructed the Company that the local permit was not really needed but to make application anyway;
14. Each federal inspection from October 27, 1994 onward of the continuing construction;
15. When issuing, in January, 1995, a construction permit for additional construction at the La Pedrera facility;
16. During any of the several "technical explanations of the audit" sessions held in the community of Guadalcazar;
17. November 13, 1995, when Governor Sanchez Unzueta raised for the first time, publicly, the issue of the local construction permit;
18. November 24, 1995, during the negotiation and execution of the (*Convenio* Joint Agreement for Remediation and Operation of the La Pedrera facility). The *Convenio* imposed 24 conditions on the Company, not one of which was to obtain a local construction permit; and

[466] *See* PROFEPA: To Public Opinion, Memorial Vol. II, Ex.4.

19. On February 8, 1996, when the federal government issued a permit authorizing the Company to expand its landfill capacity ten fold to 360,000 tons a year at the landfill.

CHAPTER 13

UNFAIRNESS IN THE LEGAL REGIME SAID BY RESPONDENT TO OPERATE—INCONSISTENCY WITH ARTICLE 1105

Topical Arrangement of Sections

Section 1 Introduction

394. Respondent suggests that an investment which is admittedly consistent with federal and state objectives regarding both protection of the environment and need for infrastructure development and which has been manifestly proven to meet or exceed the most stringent of safety regulations (those propounded by the multiple federal agencies involved) is nonetheless dependent upon further requirements, the satisfaction of which is influenced not by objective criteria but by several interrelated, largely subjective factors. It apparently holds moreover that this state of affairs was evident to one undertaking a reasonable due diligence.

395. Claimant, by contrast, submits that disarray in the Mexican legal system at all relevant times would have confounded the most attentive due diligence and that the kinds of influences that Respondent would have had Claimant overcome are factors that, because of their subjective and political nature, have no place in a

legal regime designed to regulate investment in a manner consistent with the NAFTA. Hence, based on its own experience in San Luis Potosi during the same period, Claimant finds the World Bank's 1994 Report on Mexico to be entirely accurate:

In a section entitled "Recommendations," that study concludes:

> Remaining wide and unclear discretionary powers in administrative law matters need to be curbed at all levels of government. Regulations need to be more clearly drafted and in strict compliance governing law. They also must be less frequently changed. Finally, adequate resources must be made available so as to permit the publication and dissemination of laws, regulations and administrative directions at both federal and state level[s].[467]

Section 2 The Regime for which Respondent Vouches

396. The regime with which Claimant supposedly did not comply had, according to Respondent's submissions, the following characteristics:

1] The statutory array accessible to Claimant was such that, if performing ordinary due diligence, Claimant would have appreciated that a municipal construction permit was essential to the implementation of its landfill project at La Pedrera, located over 59 kilometers from the Guadalcazar city limits and that the municipal permit remains fundamental irrespective of whatever other state and federal authorizations Claimant might have earned.

---

[467] *World Bank Study* at 107.

By standard due diligence, Claimant would also be informed that if it failed to acquire the construction and perhaps other municipal permits, its federally approved project could be subject to permanent closure by municipal decree. These implications, insists Respondent, were sufficiently clear to meet international standards although no federal official or written parameter required or suggested that a municipal permit be procured *before* seeking federal permits.

2] Ordinary due diligence would have also revealed that to procure a municipal construction permit, the investor must make application to the Municipality offices at Guadalcazar. There was not and need not have been any mechanism, apart from the submission of an application itself, through which the investor could make and explain its proposal to the Municipality. There were no written guidelines indicating who would decide the request, how long that decision would take and upon what basis that decision would be made; no such guidelines were required by Mexican law or policy.

3] The Municipality was not required to respond to the application within a reasonable time as judged by Mexican law, or within the shorter period set by state statute, but was permitted to take longer than one year to do so; its failure to apprise the investor of the status of its application during the interim or to invite the investor to present further information was within its authority.

4] Though entitled to hold an application in abeyance for an indeterminate period, the Municipality, after the passage of nearly thirteen months, could decline to grant the permit and could do so on the grounds:

a] that because of federally authorized post-application developments at the site, in order to be effective the permit

would have to be given retroactive effect, which ratification of intervening progress would have been illogical given the name of the permit requested;

b] that COTERIN's land use license, as interpreted by the Municipality, had become a nullity, and

c] that "it was the personal knowledge of each and every member of the *Ayuntamiento* that the people of the Municipality were unanimously opposed to the *Ayuntamiento* granting a construction license to COTERIN."[468]

5] With the Municipality's decision to not issue a construction permit, however tardy, the project's viability ended. No measure of federal support for the project was competent to revive it, no matter how pressing the environmental necessity may have seemed to the federal authorities nor how suitable the site had been adjudged by them to be. The disappointed investor may attack the decision through the *amparo* process.

Section 3 Faulty Premises and Unfairness in Application

Due Diligence Reasonably Led Elsewhere

397. In Chapter 12 Claimant explains why the clarity of legal prescription upon which Respondent relies simply was not to be found in the provisions available for study by those planning the landfill project. The reasonable inferences drawn were, rather, that the paramount objective in relation to *hazardous* waste projects was

[468] Counter-Memorial, para. 581.

to satisfy federal authorities. Several other aspects of the scheme now defended by Respondent have promoted unfair treatment in the instant case.

Indeterminate Delay and Dysfunctional Recourse

398. The procedure endorsed by Respondent, even when viewed in the abstract, encourages unfair and inequitable treatment. Entities in Claimant's position, it is said, are required to apply for a municipal permit and to wait for an undisclosed period for a reply, while ignoring during the interim the urging of federal authorities to make progress toward completion of a project which, by all accounts, was desperately needed.[469]

399. Further, having waited for an indeterminate period, and assuming that the Municipality had elected to respond, the dissatisfied investor would then be invited by Respondent to take up *amparo* proceedings to address any shortcomings it finds in the Municipality's decision.[470] As discussed elsewhere in this Reply, the *amparo* process commended by Respondent is a daunting course predictable only in its ability to consume significant measures of time and money.[471]

---

[469] While federal officials now obliquely deny that any such advice was given, their mandate and the seriousness of the need make Claimant's unwavering account highly plausible. More importantly, if Claimant's account is false, several persons with reputations for veracity have perjured themselves.

[470] Counter-Memorial, Annex One at 19, para 83.

[471] Regarding abuse of the *amparo* process, *see* Chapter 15, Section 6, B-D.

Chapter 13

The Requirement of De Facto Referendum—Prima Facie Plausibility and the Problem of Order

400. Respondent relies heavily upon the supposed prerequisite of municipal licensing, concerning which its federal organs are said to have no preemptive authority. On its face, *de facto* municipal vetting of federally approved projects seems unlikely, even if it is understood to entail an objective analysis by the local authorities.[472]

401. The focus and premise of the federal approvals—and indeed the critical element in the scientific suitability motivating those approvals—was the unusually apt site selected by Claimant. Yet, if Respondent's portrayal of the regulatory framework is to be credited, "the people" (never defined by state authorities) are entitled, by withholding a municipal building permit, to disapprove an investor's plan for reasons already impliedly dismissed by the relevant federal organs. Moreover, as there is no formal mechanism for registering the views of the people, Municipal leaders are apparently entitled to invoke their individual senses of what the people want, or ought to want.

402. A moment's reflection reveals the significant waste and illogic involved in the regime now defended by Respondent. If federal representatives genuinely believed at the relevant times that the Municipality could exercise a form of veto, why was Claimant not instructed from the beginning to procure *first* the municipal authorizations? Why would an investor be encouraged to devote significant sums to verifying the site's scientific suitability and in particular to meeting the rigorous federal standards concerning

---

[472] Such a system would promote waste and redundancy and gives rather unlikely amounts of power to municipalities over an even more unlikely subject matter.

hazardous waste, if these efforts could be rendered meaningless by the Municipality's unwillingness to authorize construction?

Subjectivity and Opacity in Actual Operation

403. Moreover, whatever may be said in defense of a regime allowing some *objective* role for municipalities, Claimant was accorded access to no such regime. Instead, the predicates that Respondent now insists were juridically essential in this case are subjective, unpredictable and legally arbitrary, matters to which Claimant's submission now turns.

404. The state and local authorities have repeatedly referred to the necessity of Metalclad's gaining the support of the community for operations at La Pedrera. The Governor, in particular, seemed to equate this to a legal condition. He maintains that he counseled against La Pedrera as a site because of the difficulty Claimant would have in persuading the *municipal authorities and the community*, in light of practices at the site *before* Metalclad came to own the property.[473]

405. Apart from the obvious illogic and unfairness of equating Metalclad to the alleged unsafe practices of the pre-Metalclad COTERIN, there is persistent vagueness in referring to "the community" as a separate entity whose requirements must be met, seemingly, *in addition to those of the municipal authorities*. How in an objective sense does an investor plan with any security to garner the approval of the community? No formal referendum was provided, no detailed criteria were published; rather, the Governor and later municipal representatives, served as the self-appointed

[473] Sanchez Declaration, Annex Two, Vol. II, Tab A, at 7.

barometers of "the community's" position as a collective , while at the same time disclaiming any influence over the outcome.

406. On Respondent thus blends into the regulatory pattern a multi-faceted variable which offers an investor only a game of chance and invites local authorities to exercise complete arbitrariness. With respect, Claimant cannot accept that the poorly defined and contradictory mechanisms with which it was asked to comply fulfill an international minimum standard[474] let alone with Mexico's independent Article 105 obligation to bring NAFTA to life within its constituent polities.

Section 4 Respondent's Putative System and Its Basel Convention Obligations

407. In the same manner that the haphazard mechanisms left to operate within the Respondent's federation are ill-suited to effectuating NAFTA, they also provide an unlikely scheme within which to comply with Respondent's Basel Convention obligations. To allow municipalities to veto—with no objective restraints—federally approved hazardous waste projects can hardly be said consistent with Respondent's undertaking to, *inter alia*, "[e]nsure the availability of adequate [hazardous waste] disposal facilities....located, to the extent possible, within [Respondent's territory]."[475]

---

[474] *Cf.* F. Dunn, THE PROTECTION OF NATIONALS 155 (1932):

> Hence so far as foreigners are concerned, the test to be applied would be, not whether the local system of justice is adequate to the native economic system and cultural development, but whether it shows a condition that is compatible with the continuance of international economic and social relations.

[475] Basel Convention, Art. 4(2).

408. More consistent with the need to give effect to treaty obligations throughout a federation is an interpretation which assumes that, ultimately, federal authorities must have the last word in fulfilling such undertakings. Concomitant with their lack of treaty-making power and diffuseness, local governmental units have neither incentive nor accountability in respect of obligations entered into at the federal level. This reality is perhaps best evidenced by Governor Sanchez Unzueta's own attitude:

> Sanchez Unzueta reminded that the State of San Luis Potosi has not subscribed to any international treaty, as a result of which it has no responsibility in cases aired before an arbitration proceeding of this nature.[476]

Section 5 Implications of the Foregoing for Investment Flows

409. Nor is the system sponsored by Respondent beneficial to its own long-term development interests; foreign investors will not be attracted to a venue in which federal authorities, their powers and their representations cannot be relied upon, even in matters such as hazardous waste in which federal primacy is both logical and supported by numerous indications.

410. On Further, investors will not favor a country in which an investment's success depends both upon initial negotiations at three, uncoordinated, not hierarchical levels of government and upon sustaining—amidst inscrutable political factors—the very approvals that founded the investment. That aversion will no doubt be aggravated when it is disclosed that the host State's legal regime

[476] Exhibit 54 hereto.

masks a system of local politics and etiquette in which only at its peril does an investor: tout the merits of its investment in the local paper, seek help through diplomatic channels, suffer the rumor that it supports a party not in power, or appear to condescend.[477]

[477] *See* Counter-Memorial at 244.

CHAPTER 14

RESPONDENT'S FAILURE TO PROVIDE FULL PROTECTION AND SECURITY

Topical Arrangement of Sections

Section 1 The Nature of the Duty to Protect

411. The full protection and security guarantee of Article 1105 is rigorous. In respect to the similar treaty text before it, the ICSID tribunal in AMT v. Republic of Zaire[478] recently concluded:

> The obligation incumbent upon Zaire is an obligation of vigilance, in the sense that Zaire as the receiving State of investments made by AMT, an American company, *shall take all measures necessary to ensure the full employment of protection and security* of its investments and should not be permitted to invoke its own legislation

---

[478] ICSID Award in Case No. ARB/93/1, 36 I.L.M. 1531 (1997). The tribunal was presided over by Professor Sompong Suchartikul, a former member of the International Law Commission. It was construing Article II, para. 4 of the BIT between the United States and Zaire, which provides in pertinent part:

> Investment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and security in the territory of the other Party. The treatment, protection and security of investment ... may not be less than that recognized by international law ....

> to detract from any such obligation. *Zaire must show that it has taken all measure[s] of precaution to protect the investments of AMT on its territory.*[479]

412. The award could hardly have been phrased in more unqualified terms.[480] It also appears to place the burden upon the receiving State, in light of Claimant's *prima facie* case, to demonstrate that all measures of protection had been extended to the investor. This Zaire did not do; it was accordingly required to indemnify the investor for property damage inflicted by certain private individuals.

---

[479] 36 I.L.M. at 1548, para. 6.05 (emphasis added).

[480] The tribunal, however, expressly found it unnecessary to determine whether the language in question created "an obligation of result or simply an obligation of conduct." 36 I.L.M. at 1549, para. 6.08.

Respondent is probably correct to the extent that it suggests that full protection and security does not entail, *stricto sensu*, absolute liability for all injuries suffered by U.S. citizens within Mexico's territory. Nonetheless, the obligation combines with other duties to form a high standard. Thus, in the *Buckingham Claim*, 5 R.I.A.A. 286, 288 (1931), although the British-Mexican Claims Commission excused Mexico's failure to protect foreigners in areas of the State subject to the *de facto* control of insurgents, it found Mexico responsible. As Dr. Schwarzenberger recalled:

> [The Commission considered] it the duty of the Mexican Government to know the extent to which it was able to afford adequate protection, and to warn aliens if it was not able to do so. In fact, a Mexican Minister had sent a positively misleading letter to the Oil Company which employed Buckingham. In the Tribunal's view, this communication "must have induced the residents of the camp to believe that protection would be given, and that they ran no danger in remaining where they were." The failure of the Mexican authorities to follow up the Minister's assurance by appropriate action constituted neglect of duty which established Mexico's international liability.

G. Schwarzenberger, (I) INTERNATIONAL LAW 635-36 (3d. ed. 1957).

Section 2 Respondent's Failure to Protect

413. Claimant was not accorded reasonable measures, let alone *all* measures, designed to ensure protection and security in relation to its investment. Rather, as explained in Chapter 10, persons whose acts are attributable to Respondent have actively promoted physical and psychological insecurity. The duty to protect is, however, independent; therefore, even if Respondent's responsibility were not engaged by its sponsorship of various acts designed to disrupt the investment and dispirit the investor, Respondent would be answerable for breach of the NAFTA for its failure to actively protect Claimant's investment.

414. The March 1995 facilities tour provides a chief example. If the Governor's position is that he dispatched no police to the site on March 10, the Claimant is entitled to ask why he did not. In view of the several days' notice given the Governor, the Municipal President and Dr. Pedro Medellin, it is stupefying that no protective action was taken. That neglect is all the more astonishing when it is realized that state officials were aware that Ambassador Jones was scheduled to attend the festivities. Indeed, Dr. Nunez has made known to the Tribunal that according to her sources:

> [T]he previous day, the United States Embassy in Mexico called Dr. Medellin to ask him what sort of security arrangement existed for the Ambassador's attendance at the landfill opening ceremony.[481]

Respondent, thus, can be likened to the Iranian authorities in the *Hostages* case, who according to the Court:

---

[481] Nunez Declaration, Annex Two, Vol. IV, Tab C, at 2, para 8.

> Were fully aware of their obligations ... had the means at their disposal to perform their obligations [and] completely failed to comply with these obligations.[482]

415. As the Tribunal is no doubt well aware, the duty to protect diplomatic and consular persons is especially rigorous, for salutary reasons that are fundamental to the smooth functioning of international relations.[483]The Vienna Convention on Diplomatic Relations (1961), at Articles 26 and 29, provides in pertinent part:

> [t]he receiving State shall ensure to all members of the mission freedom of movement and travel in its territory./...
>
> The person of the diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. *The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.*

416. Similar obligations are to be found in the Vienna Convention on Consular Relations,[484] which in important respects reflects custom.[485] Among the persons whose liberty would have been

---

[482] [1980] ICJ Rep., 3, para. 68.

[483] *See generally* Rest. (Third) Foreign Relations §464 and associated commentary.

[484] Vienna, April 24, 1963.

[485] Concerning which, Sen writes:
It is now almost universally accepted that the receiving state must accord special protection to consular officials and treat them with due respect befitting their official position. This obligation, which extends also in respect of honorary consular officers, is regarded as forming part of customary international law.

protected on March 10, 1995 by timely action was Mr. Sean Kelly, a U.S. Commercial Attaché. It is a nice question whether Claimant in these proceedings has standing to assert breaches of the law of diplomatic and consular relations. At a minimum, however, Claimant is entitled to assume if it invites diplomatic and consular persons to visit its investment in a NAFTA State, and the authorities are notified of that fact, that those persons will be protected. Equally germane is the attitude this laxness betrays; Claimant submits that the omission, viewed in context, may be taken as purposeful.

417. Nor did the Governor lack the capacity to deploy state police upon short notice. He was able, with less than one day's consideration, to position state police at the site's entrance on the day following the disturbance "to prevent further confrontations and to report any acts that could entail the involvement of the authorities."[486]

Section 3 The *ELSI* Case Distinguished

418. On Respondent invokes the chamber decision of the International Court of Justice in *ELSI* in an effort exculpate itself. Respondent suggests:

> Several international incidents which have taken place from time to time show that in cases where a consul has been subjected to insults or bodily harm and injury the presumption has always been that the receiving state has failed in its duty to take care.
>
> B. Sen, A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE, 249 (1979) (citations omitted).

[486] Sanchez Declaration, Annex Two, Vol. II, Tab A, at 10.

> The facts of this case were even less intrusive than those considered in the *ELSI* case where the protesters actually entered the plant in question.[487]

419. On *ELSI* is, however, distinguishable on several important bases. First, in *ELSI* there was no indication that the workers who occupied the plant held any of the investor's personnel to false imprisonment. As the full Court observed in 1980:

> . . . Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.[488]

420. On Claimant does not suggest that the hardship suffered by the detainees at the landfill on March 10, 1995 is equivalent to that endured by the staff in *Hostages*. It does suggest, however, that freedom of movement is fundamental, and by failing to provide protection where it was foreseeably needed, Respondent promoted a violation of human rights.

421. Second, no persons attached to a mission were held in *ELSI*. In the instant case, by contrast, the commercial attache´ was detained, though according to Respondent's own declarants, the Governor's offices were alerted to the likely attendance of consular and diplomatic persons.[489]

---

[487] Counter-Memorial, para. 877.

[488] *Hostages*, *supra*, para. 91.

[489] *See* Nunez Declaration, Counter-Memorial, Annex 2, Vol. IV, Tab C.

422. Third, the *ELSI* decision gives no suggestion that the workers were armed and threatening, thus imposing psychological distress on invitees and employees of investor, facts present in instant case.

423. Fourth, in *ELSI*, there was evidence that the workers actually preserved the property by their actions. The *ELSI* Majority observed:

> [C]onsidering that it is not established that any deterioration in the plant and machinery was due to the presence of the workers, and that the authorities were able not merely to protect the plant but even in some measure to continue production, the protection provided by the authorities could not be regarded as falling below "the full protections and security required by international law."[490]

424. In the instant case, the Claimant suffered an appreciable drop in stock prices which can reasonably be attributed to the Respondent's failure to protect Claimant's investment.[491] In sum, *ELSI* is not apposite.

---

[490] [1989] I.C.J. Rep. at 65, para. 108.

[491] See Expert Report of Mark E. Zmijewski, Annex 5, Vol. I, para. 4.37.

CHAPTER 15

RESPONDENT'S EXPROPRIATION OF CLAIMANT'S INVESTMENT

Topical Arrangement of Sections

Section 1 Claimant's Position In Sum and Respondent's Feckless Counter

425. In referring to the question of expropriation, Respondent opines:

> [t]here is no official measure of any level of the Mexican State that purports to deprive the Claimant of its interest in its investment or of its investment's interests in the land.[492]

426. Respondent's characterization is correct in a narrow sense; no measure has yet transferred title to the La Pedrera site to Respondent. Article 1110, however, does not make Respondent's duty to compensate

[492] Counter-Memorial, para. 888.

dependent upon such narrow circumstances. Claimant asserts that the judicial and legislative measures forming part of the common ground in this case have independently and collectively had an effect "tantamount to...expropriation" within the meaning of Article 1110.

427. The two measures in question are the permanent injunction issued at the behest of the Municipality in its *amparo* action against SEMARNAP and Governor Sanchez Unzueta's decree on ecological protection for "Real de Guadalcazar." As more fully explained below, these measures have engaged Respondent's international responsibility by reason of its failure to tender compensation and because the processes effecting the taking of Claimant's property were not in accord with Article 1110 in other respects.

428. Elsewhere Respondent observes:

> To the Respondent's knowledge, there has been no successful expropriation claim involving a pre-existing regulatory scheme, where the investor had advance knowledge of the regulatory requirements, and of the strong opposition toward the investment.[493]

429. Claimant in reply asks how this insight relates to the present case, for it begs certain questions and ignores others. First and fundamentally, the regime upon which Claimant based its expectations was one supposedly disciplined by NAFTA, the full effect of which was an expected, likely event; NAFTA's text expressly incorporated Claimant's then-recent investment.

430. Second, it is among Claimant's cardinal contentions that "advance knowledge" of the regulatory requirements was rendered elusive by several influences chargeable to the Respondent. Third,

---

[493] Counter-Memorial at 255, para. 903.

the state Ecological Law of September 1997 cannot be said to have been part of the regime existing at the time when Claimant's commitment to invest was made. Fourth, the putative strength of the opposition relied upon by Respondent is not conceded by Claimant and, *a fortiori*, Respondent's premise—that Claimant was aware of strong opposition in planning its investment—remains to be proven. Confuting that premise is the tangible support enjoyed by Claimant in the community surrounding the landfill.

Section 2 Rudiments of Expropriation Law

431. Judge George Aldrich took stock of Iran-U.S. Claims Tribunal authority as of 1996 in his work entitled: THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL.[494] A number of the fourteen rules he collects are relevant to instant case. He states:

> 1. The Tribunal was concerned to ensure that property rights be respected and that compensation be paid when the alien owner of those rights is deprived of them by acts attributable to a State.
>
> 2. Liability exists whenever acts attributable to a State have deprived an alien owner of property rights of value to him, regardless of whether the State has thereby obtained anything of value to it.
>
> 3. Liability is not affected by the intent or absence of intent attributable to the state.
>
> 4. Liability does not require the transfer of title to property.
>
> /. . .

[494] Oxford: 1996.

6. Liability is not affected by the fact that the State has acted for legitimate economic or social reasons and in accordance with its laws.

7. Provisional or temporary assumption of control of an alien's property by State action gives rise to liability whenever the deprivation is not merely 'ephemeral' in the sense that (a) no reasonable prospect exists that control will be returned; or (b) that any losses that may ensue during the period of control are not compensable to the property owner; or (c) that the control has continued for a substantial period of time (perhaps several years) in circumstances where the property owner has not behaved in a manner clearly inconsistent with a claim of deprivation.

8. While a revolution does not by itself create liability, neither a revolution nor other changed political, economic, or social circumstances can be invoked to avoid liability for a deprivation of an alien's property that is attributable to the State.

./...

14. While the acts of employees of an enterprise owned by aliens are not normally attributable to the State, they may become attributable to it if the State or State agents have authorized or assisted such employees to deprive wrongfully the enterprise of its property.

Section 3 The Governor's Eleventh Hour Ecology Decree

432. Respondent "denies that the ecological protection agreement affected the Claimant's right to operate the landfill site at La Pedrera."[495] As set forth in its Memorial, however, Claimant understands that the agreement to make the Altiplano area an

[495] Counter-Memorial, Annex One, para. 145.

ecological preserve, having been decreed into law by the Governor on September 23, 1997, requires the cessation of all activity in the created zone pending further determinations by the state.[496]

433. Claimant's interpretation is in accord with that given contemporaneously by at least one newspaper[497] and an examination of the Decree[498] demonstrates that it makes direct and official that which the state had previously effected indirectly.

434. Respondent does not fully disclose its reasoning in relegating the Decree to a non-event. It presumably does not question that La Pedrera falls within the protected area. Contrary to what Respondent argues, a number of the Decree's provisions seem to preclude use of the property in the manner contemplated by Claimant from the project's inception and disclosed to the Governor on June 11, 1993 and on numerous occasions thereafter.

435. The text itself does not promote much predictability and inspires no confidence in Claimant's ability to exempt its investment; the Decree's provisions are malleable and wide discretion can be expected to operate in its implementation, given in particular the prerogatives traditionally enjoyed by the Governor of the state. Article Fourteenth, for example, forbids "any polluting activities." Article Fifteenth states that activities affecting "natural resources" will receive permits only to the extent that to do so is in

---

[496] Memorial, paras. 145-46.

[497] *Pulso*, Sept. 18, 1997:

> "The decree...ends [ ] the possibility that La Pedrera could operate as a industrial waste landfill, something that could discourage any type of investment in San Luis Potosi."

Exhibit 55 hereto.

[498] Memorial, Vol. II, Ex. 29.

accord, *inter alia*, with "this Decree, the management program[499] and other juridical dispositions."

436. Article Seventh of the Decree's transitory provisions states:

> The licenses, authorizations, and permits issued by state or municipal administrative authorities will be void and will not have any legal validity if they contradict that which is stated by this declaration.

437. The Decree also provides that "all administrative dispositions opposed to [the] decree will be revoked"[500] and disallows registration of deeds "when the tenor of those deeds is against that stated by this decree."[501]

438. Respondent implies that the landfill has been exempted from the Decree's full force by Article Fourth of the Transitory Provisions.[502] It states:

> Those permits, licenses, or authorizations granted before the date this decree came into effect will be legal; those irregular ones will have 90 days to become regularized.

439. Respondent's reliance upon this provision, however, gives rise to an estoppel,[503] for Respondent has also unequivocally

---

499 As provided in the Fifth and Six Articles, the Management Program is the document setting forth the program formulated to manage the reserve.

500 Memorial, Vol. II, Ex. 29, Ninth Transitional Article

501 *Id.*, Sixth Transitional Provision.

502 Counter-Memorial at 203, para. 652.

503 In this context, Claimant refers to "estoppel" as defined by a Chamber of the I.C.J. in the Case Concerning the Land, Island and Maritime Dispute (El Salvador/Honduras)[1990] I.C.J. Rep. 30 (attempted intervention by

maintained before the Tribunal that a municipal construction permit was an indispensable condition to lawful operation of the landfill and that the permit in question was lawfully declined by the municipal authorities.[504] Accordingly, Respondent ought not to be allowed to argue that Claimant either is fully permitted or retains the right to regularize the municipal permit it is said to lack.[505]

440. The Respondent is also estopped by the Governor's own characterization of the law he decreed. He is quoted as saying:

> [As a result of his decree] any possibility that exists of opening the industrial waste landfill of La Pedrera is definitely canceled[506]

Nicaragua) (" a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it"). *See also* Chapter 12, § 8B.

[504] *See, e.g.*, Phillips Petroleum Co., v. The Islamic Republic of Iran, *et al.*, Award No. 425-39-2 (29 June 1989) at paras. 196-97 (Tribunal applied estoppel theory though not found in Iranian law, citing, *inter alia*, MacGibbon at 7 I.C.L.Q. 468 (1958); Bowett at 33 Brit. Y. B. Int'l L. 176 (1957)). *Cf.* Nuclear Test Cases [1974] I.C.J. Rep. 253:

> When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with that declaration;

[505] The fact that various governmental officials were quite willing to treat the municipal permit as dispensable, depending upon other negotiated points, should not dilute the estoppel raised by Respondent's considered position before the Tribunal and by the variations of it intoned earlier as a pretext in opposing Claimant's investment.

[506] A. Gonzalez Vazquez, *Guadalcazar, Ecological Zone in SLP; The Reopening of the Landfill is Eliminated.* La Jornada, Wed., Sept. 17, 1997. The same article reports:

441. Demonstrating the official character of the Governor's characterization is the concordant view announced by Dr. Medellin:

> [The decree] clos[es]...all possibility for the United States firm Metalclad to operate its landfill in this zone, independently of the future outcome of its claim before the tribunal[ ] of the NAFTA treaty.[507]

442. Respondent also notes[508] that the Decree's Article Seventh allows the state to "authorize public or private works" within the protected area under certain circumstances. Again, Respondent's speculation is self-serving in its undue optimism, and is subject to the same inability to take as granted the municipal permit characterized as essential by Respondent. Nor is it plausible, given the state's comportment heretofore, to conceive of the state's discretion being exercised in favor of meaningful activities at La Pedrera, at least as long as Claimant is the entity seeking to pursue those activities.[509]

> During the interview the Governor... confirmed that there are no ways for the North American company Metalclad, owner of the La Pedrera, to obtain the reopening and operation of it.

Exhibit 56 hereto.

[507] Exhibit 59 hereto.

[508] Counter-Memorial, at 203, para. 652.

[509] One facet of the superior position enjoyed by the Respondent in this case is that it controls the authorizations that it requires an investor to procure. Claimant is thus reminded of *The Tattler Case* (1920) in which the tribunal reasoned:

> It is difficult to admit that a foreign ship may be seized for not having a certain document when the document has been refused to it by the very authorities who required that it should be obtained.
>
> Owners of the Tattler v. Great Britain, Brit.-U.S. Cl. Arb. (1910) (excerpted in II REPERTORY OF INTERNATIONAL ARBITRAL JURISPRUDENCE 40 (V. Coussirat-Coustere & P. Eisemann, eds. 1989).

Section 4 Injunctive Relief as an Expropriation

443. The authorities leave little doubt that a court order may constitute a measure tantamount to an expropriation. As noted by the Iran-U.S. Claims Tribunal:

> [i]t is well established in international law that the decision of a court in fact depriving an owner of the use and benefit of his property may amount to an expropriation of such property that is attributable to the state of that court.[510]

444. As the Tribunal has been informed, the judicial process which led to the site's ultimate closing began with the Municipality's attack upon the *Convenio de Concertacion* (*Convenio*). The Municipality claims to have become aware of that pact on or about November 30, 1995.[511] After its mid-December administrative claim against the *Convenio* was dismissed by SEMARNAP Secretary Carabias (on December 27, 1995), the Municipality resorted to an *amparo* proceeding, which it initiated on January 31, 1996.[512]

Claimant has no doubt that in the hands of an investor acceptable to the state government, La Pedrera, which is substantially ready to operate, could thrive in the manner prefigured by Claimant's diligent work.

[510] Oil Field of Texas, Inc. v. The Islamic Republic of Iran et al., Award 258-43-1 (8 Oct. 1986) para. 42. In *Oil Field*, Chamber One held that certain blowout preventers had been taken by a court order which prohibited NIOC (the government entity in possession) from returning the equipment or making lease payments upon it. *Id.*, para. 43.

[511] *See* Counter-Memorial at 183-84.

[512] *Id.*

445. Though notionally against SEMARNAP, the Municipality's *amparo* proceeding produced on February 6, 1996 a provisional injunction the tangible impact of which was to immobilize Claimant's investment; it prohibited commercial operations at the site[513] and was subsequently issued as a final injunction.[514] Despite manifold jurisdictional and procedural developments, the permanent injunction had been reestablished and remained in place as of March 3, 1998, as Respondent admitted in its Counter-Memorial.[515] Further proceedings produced defeat for the Municipality, which has nonetheless appealed the matter.[516]

Section 5 The Cumulative Effect of Respondent's Measures, Acts and Omissions Is Confiscatory

446. As Professor Burns Weston observed over two decades ago, "[f]requently—perhaps usually—constructive takings are the culmination of combinations and series of governmental

---

[513] Counter-Memorial, Ex. 126

[514] At page 189, para. 603, of its Counter-Memorial, in a passage chronologically out of place, Respondent states that "[o]n February 23, 1995, the District Judge granted a final injunction." The document cited in support of this proposition and belatedly supplied to the Claimant in redacted form bears the date mentioned by Respondent but relates to a different judicial disposition. It is nonetheless common ground that a permanent injunction issued.

[515] Counter-Memorial at 203, para. 653.

[516] On July 17, 1998 the municipality was again held not to have standing. The municipality's appeal was pending at the time this Reply was prepared.

initiatives...."[517] Claimant holds that ample authority would support a Tribunal finding that, taken separately, either the Governor's Ecology Decree or the permanent injunction upon Claimant's commercial operations constituted a compensable measure within the meaning of the NAFTA's Article 1110.

447. Because these and other acts attributable to Respondent coexist and are mutually supportive, however, Claimant need not depend upon one measure to the exclusion of the others.[518] Indeed, viewing the separate measures as discrete may divert attention from their cumulative impact. Claimant submits that when the combination of measures, acts and omissions chargeable to Respondent are viewed as a whole, the conclusion once again follows that an indirect expropriation has occurred within the meaning of NAFTA's Article 1110(1).

448. While the Decree and the injunction are tangible, juridical acts to which Claimant has pointed, they are not the only form of imposition presently borne by Claimant's investment; the security of investment which it is entitled to expect under NAFTA is further impaired by structural matters which seem to be endemic. Thus, even if the injunction were to be lifted, the Ecology law held to accommodate the La Pedrera landfill, and the years of non-

---

[517] B. Weston, *"Constructive Takings" under International Law: A Modest Foray into the Problem of "Creeping Expropriation,"* 16 Va. J. Int'l L. 101, 109 (1975).

[518] *Cf.* G. Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 88 Amer. J. Int'l. L. 585, 592 (1994):

> In my view, [in *Otis*] there was a taking, but it resulted from separate actions by a number of government agencies that combined to deprive Otis of its investment in the inactive manufacturing company.".

productivity imposed upon Claimant redressed by compensation, there would remain the vague and unpredictable intersections between the federal and local regulation and the political character of the means provided to mediate the two. The project, which seems to have become a symbol of state and municipal autonomy, has been made to shoulder the risk of inter-level governmental conflict and evolving federal policies. The market value of Claimant's investment has no doubt suffered because of the non-attainment of NAFTA discipline at the local level.

449. Any proceeds resulting from a sale of Claimant's SLP holdings would no doubt reflect the very concrete potential for local government interference. There remains in place a legal labyrinth capable of tolerating similar intervention in the future, as will be apparent from Claimant's discussion of the *amparo* process below. Any successor to Claimant would be therefore equally open to local charges of putative missteps and similar pretexts under which state and municipal authorities could continue to test federal tolerance and acquiescence.

Section 6 Further Violations of Article 1110

A. IN GENERAL

450. Respondent's duty to compensate arises upon an expropriation, whether or not other elements of Article 1110 have been satisfied. Nonetheless, Claimant also questions whether the measures of which it complains can be said to have been implemented in accordance with due process of law and in a fair and equitable manner as required by the above-referenced Article. These additional requirements bear further upon the legality of the

expropriation, a determination which influences the measure of recovery.[519]

B. GENERAL DEFICIENCIES IN THE *AMPARO* MECHANISM

451. In its 1994 study of obstacles affecting Mexico's private sector development, the World Bank took especial note of the *amparo* process and related factors detracting from the Mexican legal system:

> The resolution of disputes through the courts is a lengthy, costly and unpredictable process. The chief causes are: abuse of judicial procedures for resolution of civil and commercial disputes; a lack of confidence in the state court system, evidenced by the extensive use and misuse of the *amparo* writ of review as a tactic for taking a dispute to the federal courts; an unacceptable level of competence and integrity of the judges, especially in the local court system; the crowded docket for civil and commercial cases; politicization of the appointment process and confirmation of judges; the inadequate compensation of judges; and an arcane court administration.
>
> ./...
>
> From these beginnings, *amparo* has evolved into an extra-ordinary legal remedy subjecting to review by the federal judiciary the following [three] general classifications of government action....
>
> There are, however, significant problems with amparo proceedings. This legal mechanism, intended as recourse in exceptional cases, is now used routinely basically because of a lack of confidence in state level courts. The "amparo" provides an automatic means of appeal to

[519] As more fully discussed in Chapter 17.

> federal courts. Almost every case governed by the civil or commercial code follows a series of four proceedings before it is definitively resolved....Given that cases normally take four or more years to complete, it is not surprising that there is a reluctance to litigate.[520]

C. ABUSE OF THE AMPARO PROCESS IN INSTANT CASE

452. Consistent with the foregoing, the Municipality's initiation of *amparo* proceedings began an arcane, convoluted process which predictably clouded Claimant's rights from the outset and which has prohibited their exercise to date. After the injunction was issued, the train of additional *amparo*-related proceedings[521] included *proprio motu* declarations denying jurisdiction, resulting venue transfers to Mexico City where the *amparo* was apparently admitted only on January 24, 1997[522] but rejected on July 15, 1997 because the Municipality lacked standing,[523] only to be reinstated on January 14, 1998 on a purely clerical ground, which nonetheless had the effect of refurbishing the injunction,[524] subject to the constitutional hearing set for March 3, 1998, which ultimately produced the obvious result—the Municipality lacks standing.

453. Unfortunately, because the *amparo* process produces only limited preclusive effects, once the Municipality's lack of standing is finally announced at the highest level, any private person is free

---

[520] World Bank, *Mexico Country Economic Memorandum*, May 16, 1994, Vol. I (hereinafter *World Bank Study*) at 112-13.

[521] Recounted by Respondent in its Counter-Memorial [at page 190 *et. seq.*, paras. 606-07, 609-11.

[522] *Id.*, para. 653.

[523] *Id.*, para. 649.

[524] *Id.*, para. 653.

to start a fresh *amparo* action against the landfill, a characteristic lamented in the World Bank Study.[525]

D. The Process Subjected Claimant to Unfair and Inequitable Treatment

454. The foregoing also reveals a lack of Article 1110(1)(c) fairness on two bases. First, the Claimant was placed at an extraordinary disadvantage by a predictably confounding procedure that allowed a disgruntled municipality patently devoid of standing to exploit a weakness in the system to neutralize (typically for four years) a federally approved investment. Claimant's ability to participate as an interested third party is meaningless given that by merely bringing and perpetuating the *amparo*, the Municipality even without standing has achieved the substantive result it sought—the stultification of Claimant's investment. The resulting substantial loss of use and enjoyment by Claimant of its property can hardly be said to have resulted from due process. Second, the invocation of the procedure has hampered Claimant's ability to compete for financing; investor confidence and project financing are matters of critical importance to modestly diversified companies such as Claimant. The Municipality thus was able through the *amparo* to conduct a campaign of attrition, in which Claimant is given only collateral rights of representation.

455. The Claimant is thus not surprised that the *World Bank Study* reports:

> A review of the Mexican commercial law framework and of dispute resolution mechanisms indicates that constraints they impose on a private enterprise are related

---

[525] *World Bank Study, supra*, 112-16.

> to the size and location of the enterprise and to the nationality of its controlling shareholder(s). In general, larger domestically owned or controlled firms are least constrained by deficiencies in the legal system, while smaller firms are the most constrained. Difficulties in complying with State and local regulations and licensing requirements and the quality of the Judiciary vary with location....Foreign firms, unfamiliar with the culture, particularly at the State and local level, appear to have greater difficulty than national firms in complying with local licensing and other regulatory requirements.[526]

Section 7 Respondent's Reliance Upon *ELSI*[527]

A. ELSI DISTINGUISHED

456. Respondent is correct in concluding that the *ELSI* decision differs factually from the case at hand.[528] Because of the reliance Respondent nonetheless places upon that judgment, Claimant must underscore a few of the important differences between that case and the one now before the Tribunal.

The chief governmental act complained of in *ELSI* was an order of requisition. The local authority initiating the action was motivated by the prospect that ELSI would soon discontinue its operation such that, among other negative effects, several hundred persons would lose their jobs. As the Court noted, undeniably:

---

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

[527] Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States v. Italy) [1989] I.C.J. Rep. 71.

[528] Counter-Memorial at 232, para. 804.

> [The] requisition was issued to avoid the closure of ELSI's plant, the dismissal of its workforce, and as a consequence the probable dispersal of the assets, all of which were an integral part of ELSI's plan for orderly requisition.[529]

457. The United States' principal argument was that the investor's right to manage and control the enterprise—a right guaranteed by the governing treaty—had been impermissibly abridged by the requisition order.

458. It also mounted a taking theory, based upon the well-supported premise that a taking may be deemed to have occurred where state interference with management and control of an enterprise is substantial and sufficiently long-lived.[530] According to the United States, the requisition order effected such interference by preventing the orderly private liquidation of ELSI which its management claimed to have prepared, thus causing the entity to enter bankruptcy.[531]

B. RESPONDENT MISCHARACTERIZES *ELSI*'S HOLDING

459. Respondent suggests that in *ELSI*,[532] the requisition order "which affected the company's rights of ownership, was

---

529 *ELSI*, para. 70.

530 *See* Memorial submitted 15 May 1987 by the United States in Case Concerning Elettronica Sicula S.p.A. (ELSI), at 112-17 (and authority cited therein).

531 *See* Reply of the United States, 18 March 1988, *ELSI*, *supra*, at 71.

532 Case concerning Elettronica Sicula S.p.A., United States v. Italy, 1989 I.C.J. Rep., 71.

nevertheless found not to be an expropriatory act."[533] Elsewhere Respondent posits that in *ELSI* "[t]he International Court [of Justice] found that there was no exprorpriation...."[534]In so doing, Respondent inaccurately describes the holding of the four judges forming the majority.

460. While it is literally correct to state that in *ELSI* the United States' expropriation argument did not prevail, that result occurred as a matter of causation—the enterprise having been found to have impoverished itself—and did not reflect the view that a requisition order could not effect a compensable deprivation of property.[535] In particular, Judges Ruda (President), Ago and Jennings reasoned:

> [I]t is simply not possible to say that the ultimate result was the consequence of the acts or omissions of the Italian authorities, yet at the same time to ignore the most important factor, namely ELSI's financial situation, and the consequent decision of its shareholders to put an end to the company's activities....[T]he municipal courts considered that ELSI, if not already insolvent in Italian law before the requisition, was in so precarious a state that bankruptcy was inevitable.[536]

Rather than suggesting that the requisition order was by its nature incapable of causing compensable interference with property, all

---

533 Counter-Memorial at 233, para. 804.

534 *Id.* at para. 802.

535 It is distinctive that the requisition, having been held to be unlawful under Italian law, resulted in compensation for the investor in the Italian courts. Had that compensation been sufficiently great, presumably no case would have been marshaled on the international plane. *See ELSI*, para. 43 and Diss. Op. Judge Schwebel, [1989] I.C.J. Rep. 94, 109-110.

536 [1989] I.C.J. Rep. at 71.

five judges agreed that it was "undeniable that the requisition of a firm's plant and relative equipment must normally amount to a deprivation, at least in important part, of the right to control and manage" (a reference to the governing treaty's Article III).[537] Similarly, the Chamber suggested that the requisition was fully capable of ripening into a taking "if while ELSI remained solvent, the requisition had been extended and the hearing of the administrative appeal [was] delayed."[538]

C. *ELSI*'S UNUSUAL HOLDING AND ITS DETRACTORS

461. Respondent also cites *ELSI* for the proposition that:

> [E]ven the fact that a domestic court had subsequently found the requisition to be unlawful did not automatically lead to a finding that the local official [who ordered the requisition] had committed an act that constituted a breach of an international treaty.[539]

While this distillation does not misrepresent *ELSI*, it should be viewed in the context of how learned commentators have reacted to that feature of the case. Thirlway—perhaps constrained by his position at the Court—considered the judgment "unusual" on this

---

[537] *Id.* para. 70.

[538] *Id.* para. 119.

[539] Counter-Memorial at 233, para. 804 (e).

point.[540] Dr. F. A. Mann, who had several criticisms of the judgment, was more direct. He wrote:

> [T]here is no doubt as a matter of Italian law, the requisition was unlawful. As a matter of pure logic, it is plain that illegality under a municipal system of law does not necessarily entail illegality in international law. Yet, as a matter of practical justice, it does cause discomfort to realize that...treaties designed, *inter alia*, to protect foreign investment should fail to condemn acts which...the legal systems of civilized nations consider illegal....[T]he standards of international law and in, particular, of treaties designed to protect foreign investors are not usually lower than those of municipal legal systems.[541]

462. In the instant case, an injunction with lasting effects was improvidently granted on behalf of an entity with tenuous standing under Mexican law. Claimant was subjected also to a municipal permitting process which deviated substantially from its governing statute and which Claimant believes was commandeered, quite artificially, by local authorities as a vehicle for exerting local autonomy and to thwart an otherwise legitimate federal initiative.

---

[540] H. Thirlway, *The Law and Procedure of the International Court of Justice*, 50 Brit. Y.B. Int'l L. 1, 117 (1989). Thirlway observes:

> The unusual aspect of this finding is that it operates in favour of the State whose national law is in question. The principle of the supremacy of international law has developed in the form of findings that a State cannot rely on its own national law as a defence on the international level. In the *ELSI* case, on the other hand, the fact that the domestic courts censured an action affecting foreign nationals was not regarded as sufficient to support a claim of breach of treaty.

[541] F. Mann, *Foreign Investment in the International Court of Justice*, 86 Amer. J. Int'l L. 92, 95 (1992).

Nothing in *ELSI* requires the Tribunal to ignore these facts in assessing the treaty standard to which Respondent should be held.

463. Nor does *ELSI* dilute in any way the supremacy of international law; thus, that the state's ecological preserve decree was the product of licit internal processes does not immunize Respondent from its treaty duty to supply compensation for its indirect expropriation of Claimant's investment.

Section 8 The Pyramids Arbitrations

A. IN OVERVIEW

464. The Case at hand bears a marked resemblance to Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt (ARE)[542] (the Pyramids Arbitration), in which a tribunal chaired by Dr. Eduardo Jimenez de Arechaga held, as had an ICC tribunal before it,[543] that Egypt was responsible to compensate the investor for interference with its contract rights caused by cancellation of a resort development project. The cancellation occurred in order to protect antiquities thought to be contained within the project site.

465. By agreement the investor (SPP) and EGOTH (an organization under the control of Egypt's Ministry of Tourism), were to pursue a joint venture formed to develop, *inter alia,* resorts and tourist housing in the Pyramids area near Cairo. ARE's organs, per the agreement, transferred to the joint-venture the right of usufruct for the relevant area and were "to assist in obtaining all

---

[542] ICSID Case No. ARB/84/3, *reprinted in* 106 I.L.R. 589 (1997).
[543] ICC Award of March 11, 1983, *reprinted in* 86 I.L.R. 435 (1991).

necessary local approval for the execution of the projects...."[544] Through the joint venture vehicle, SPP funded various infrastructure improvements en route to completing the project, though the limited advancement in other respects led the tribunal to conclude that "[t]he project was in its infancy."[545]

466. As the tribunal recounted, however, "[i]n 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."[546] There followed two presidential decrees which made public the lands encircling the Pyramids and canceled the area's tourist use classification.[547]

467. In the ICC arbitration which followed, the ARE was ordered to pay SPP U.S. $12.5 million. The award was later annulled by French courts on the basis that the ARE had not formally become a party to the arbitration clause, a purely jurisdictional ground. The subsequent ICSID proceeding resulted in an award to SPP of U.S. $27,661,000. The ARE's counterclaim against the investor was dismissed.[548]

---

[544] 106 I.L.R. at 600, para. 43.

[545] *Id.*, para. 188.

[546] *Id.*, para. 62. As Redfern & Hunter recount:

> The project was confronted by a storm of public opposition, not only in the Egyptian People's Assembly but also outside Egypt, borne out of fears for the historic Pyramids site. The project was effectively canceled.

M. Hunter & A. Redern, INTERNATIONAL COMMERCIAL ARBITRATION 439-40 (1991).

[547] *Id.*, 106 I.L.R., paras. 63 *et seq.*

[548] ARE initiated annulment proceedings, which were discontinued upon settlement. Docket history available from ICSID.

B. THE PYRAMIDS ARBITRATION AND THE PRESENT CASE

468. Not unlike the Respondent's position in the instant case, the respondent in the Pyramids Arbitration argued that the investor was too financially weak and inexperienced to complete the project. Both assertions were rejected by the Tribunal. As to SPP's financial capacities, the tribunal noted with emphasis that SPP "had obtained at the required times the funds necessary to finance the [project] according to the agreements that had been concluded and the method of financing that had been envisaged."[549]

469. Moreover, respondent's own authorities had contributed to SPP's financing difficulties by failing, *inter alia*, "to obtain customs clearance of materials and equipment imported for the project"[550] as had "opposition to the project in Egypt and the resulting uncertainties about its future."[551] Similarly, having investigated SPP's expertise before approving the investment, the ARE could not persuasively contend that SPP lacked the requisite know-how.[552]

---

[549] 106 I.L.R. at 616, para. 117. The ARE was aware that the investment was to be largely financed by revenue resulting from sales of the lots developed as part of the project, *i.e.*, to be "self-financed" *Id.* at para. 123.

[550] *Id.*, para. 121.

[551] *Id.*, para. 122. Significantly, the tribunal did not conclude that the risk of political opposition was one borne by the investor; rather, it was taken by the tribunal to be a partial excuse for difficulties Claimant was having in mustering its financing.

[552] *Id.*, para. 126. In the present case, Respondent had ample opportunity to investigate Claimant's background in environmental abatement and should be presumed to have done so. The presumption should be very strong indeed because of the Claimant's documented efforts to supply the Governor with background information. If in fact Respondent did not make the relevant inquiries, which Claimant doubts, its own lack of due diligence is to blame, not any obfuscation by Claimant, the *dossier* of which was readily available.

470. The ARE had also argued that the investor retained the right to pursue development activities, albeit on a less attractive basis, at a second site approved for project activities. The tribunal found the position unrealistic because of the interdependence of the two project areas and because:

> The Pyramids Oasis Project received most of the investment and publicity. [The venture entity's] ability to attract capital for that project was due in large part to the enthusiastic endorsement of the project by the Egyptian Government. When that same Government subsequently canceled the project — the primary part of the development plan envisioned by the parties' agreements — it clearly impaired [the entity's] ability to go back to the world's capital markets and raise financing for another project in Egypt.[553]

471. Reminiscent of Respondent's apparent argument in relation to Governor Sanchez Unzueta's Real de Guadalcazar Decree, the ARE suggested that because no rights *in rem* were disturbed by the cancellation,[554] there could be no compensable taking. Noting the overwhelming authority opposed to that proposition, the Tribunal rejected it, confirming that Respondent's acts:

> had the effect of taking certain important rights and interests of the Claimants. What was expropriated was not land nor the right of usufruct, but the rights that SPP(ME), as a shareholder of [the venture entity], derived from [the Ministry's] right of usufruct....Clearly, those rights and interests were of a contractual nature rather than *in rem* nature. However, there is considerable authority for the proposition that contract rights are

---

[553] *Id.*, para. 171.
[554] *Id.*, para. 164.

> entitled to the protection of international law and the taking of such rights involves the obligation to make compensation therefore.[555]

472. In the present case, while it may be argued that various forms of property enjoyment remain available to Claimant, the decree and other acts of Respondent have denatured the business plan which was at the heart of Claimant's investment; of that plan Respondent was aware as early as 1993.

Section 9 Nature of Property Taken in This Case

473. Not unlike many disputes between investors and host states, the present matter involves alleged damage to interests of a hybrid character, implicating tangible an intangible property rights and promise-based, contractual rights. From the outset, Claimant's purpose in acquiring *in rem* rights within Respondents' territory was to exploit the intangible property contained in its business plan, which grew in value as increasingly the foundational steps were accomplished. Ultimately, in November 1995, some twenty-six months after purchasing COTERIN, Claimant entered into a *Convenio de Concertacion* with federal authorities. It was based upon the fruits of a comprehensive, Claimant-financed, audit (and audit of the audit); it further formalized Claimant's concession-like interest.

474. It might be argued that Claimant's interest, rather than being vested, was contingent upon an unfulfilled condition—the granting of a municipal construction permit. Claimant submits that Respondent may rely upon this condition only to the extent that it:

---

[555] *Id.*

1] is genuine (reflecting a true picture of local law);

2] has not been waived by Respondent; and

3] is consistent with the NAFTA (including, but not limited to, the requirement of fair and equitable treatment).

475. As developed in earlier chapters, Claimant contends that the supposed condition is nullified under any of the above-mentioned three grounds.

Section 10 Time of the Taking

476. Customarily, the time of taking is an important question within expropriation analysis. It serves several functions. First, it may bear upon a tribunal's jurisdiction. Second, it can influence applicable law. Third, the value of the property appropriated is usually fixed as of the date of taking. Finally, interest is generally thought to run from that date.

477. Nonetheless, where jurisdiction is not in issue, and alternative taking theories are advanced, tribunals can afford to be somewhat flexible. They are not strictly bound by the date fixed by a claimant; nor, it appears, do they require the dispossessed party to prove the exact moment of taking in situations in which indirect expropriation is alleged.[556]

---

[556] *See, e.g.*, G. Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claims Tribunal*, 585, 595 (1994) (discussing arbitrators' differing views of when process of expropriation was complete).

478. Claimant has argued above that the injunction rendered by the federal court, which was converted to a permanent injunction on February 23, 1996 was sufficient alone to require compensation. Under that theory, a taking occurred on that date, although the Tribunal may prefer to select one of the later junctures within the Municipality's protracted litigation aimed at emasculating the *Convenio*.

479. Claimant's second theory, that the state's ecological preserve decree worked an expropriation, allows a more precise designation of time. The Decree became effective on September 23, 1997 and at that time its effects joined with those of the injunction to, in Claimant's view, remove all doubt that compensable interference with Claimant's investment had occurred.

CHAPTER 16

UNJUST ENRICHMENT AS AN AUTONOMOUS BASIS OF RECOVERY

Topical Arrangement of Sections

Section 1 An Overview

480. The gravamen of Claimant's indirect expropriation thesis is that a series of influences combined to work a taking of Claimant's tangible[557] and intangible property. Claimant regards two events in that series—the state's Ecological Preserve Law and the permanent injunction—as independently constituting takings. In reliance upon NAFTA, it therefore has asked to be awarded the fair market value of its investment within the meaning of Article 1110.

481. The Claimant has, however, alleged additional violations of the NAFTA; these relate to provisions—such as that requiring fair and equitable treatment—which supply no formulae for quantifying Claimant's recovery. Given the Tribunal's mandate to apply international law, it may consult principles common to domestic fora, including those which exist to nullify the undue enhancement of one party at the expense of another. Claimant suggests that this may be done by the Tribunal without departing from its mandate;

---

[557] Specifically, by rendering the real property and fixtures thereupon incapable of lawful exploitation.

that mandate does not include an *ex aequo et bono* capacity, but does invite the application of equitable principles upon which municipal systems agree, including those developed to counter unjust enrichment.[558]

482. The roles of the unjust enrichment doctrine may be several under the present facts. Its most minimal function would be as a *ratio legis* for Claimant's full compensation under Article 1110. Additionally, though, it may inform and confirm a recovery attributable to Respondent's breach of Article 1105's minimum standard (fair and equitable treatment and full protection and security, *inter alia*); where, as here alleged, a failure to meet that minimum standard has produced a benefit in the host state, the coupling of Article 1105 and an unjust enrichment recovery is both logical and warranted.[559]

483. Similarly, as in the instant case, where an investor's reasonable reliance has augmented the host state's wealth and capacities, granting a recovery equal to the value of the benefit conferred would be consistent with the autonomous theory of restitution found in municipal systems.

484. The facts substantiate in particular, that Claimant was induced to allocate to its investment significant resources by Respondent's assurances and requirements; after considerable cultivation by Claimant there was in place the equivalent of a turn-

---

[558] *See generally*, A. McNair (Lord), *The General Principles of Law Recognized by Civilized Nations*, 33 Brit. Y.B. Int'l 1 (1957); C. Schreuer, *Unjustified Enrichment in International Law*, Amer. J. Compar. L. 281 (1974).

[559] Both inquiries are exceedingly fact-dependant and facts suggesting a lack of fair and equitable treatment also bear upon the 'unjustness' of allowing a party to retain a benefit for which it has not paid.

key facility. Though not by any fully coordinated design, Claimant's ready-to-operate landfill was then paralyzed by a combination of two ostensibly unrelated events chargeable to Respondent: a permanent injunction and the state's ecology law.

485. Even if the injunction is ultimately lifted (because of the Municipality's seemingly obvious lack of standing) the state ecology law will remain, so that—in Claimant's hands—the property retains only a depressed, residual value. When viewed in relation to Respondent's position, the above chain of events has resulted in a net advancement in Respondent's ability to mitigate its severe hazardous waste dilemma, placing it much nearer to fulfilling its Basel Convention obligations and related internal goals. The much improved potential it now has is a direct result of Claimant's cooperation, initiative and funding.

Section 2 Unjust Enrichment Under Article 1131 (1) (Applicable Rules of International Law)

486. As noted above, among the precepts that tribunals have distilled from a canvassing of civil law and common law traditions[560] is the principle that even in the absence of delictual or contractual liability, justice may be served by requiring compensation measured by the value of a benefit conferred. The remedy is appropriate in circumstances in which it would be unjust to allow the recipient to assume the benefit without making payment for it.

---

[560] *See*, I. Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (4th ed. 1990) 15-19 (observing at 17, that "[a]rbitral tribunals have frequently resorted to municipal analogies").

487. The Iran-U.S. Claims Tribunal has employed the doctrine in several cases saying of it in one such award that:

> The concept of unjust enrichment had its origins in Roman Law, where it emerged as an equitable device "to cover those cases in which a general action for damages was not available." It is codified or judicially recognized in the great majority of the municipal legal systems of the world, and is widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international tribunals.
>
> The rule against unjust enrichment is inherently flexible as its underlying rationale is to "reestablish a balance between two individuals, one of whom has enriched himself, with no cause, at the other's expense." Its equitable foundation "makes it necessary to take into account all the circumstances of each specific situation." *It involves a duty to compensate which is entirely reconcilable with the absence of any inherent unlawfulness of the acts in question. Thus the principle finds an obvious field of application in cases where a foreign investor has sustained a loss whereby another party has been enriched, but which does not arise out of an internationally unlawful act which would found a claim for damages.*[561]

---

[561] Sea-Land Service, Inc. v. Iran, 6 Iran-U.S. C.T.R. 149, 168-69 (Award of 22 June 1984) (citations omitted) (emphasis added). In *Sea-Land,* the Tribunal awarded $750,000 to the claimant to account for the use made of the claimant's port facility by organs of the Iranian Government. While the two members of Chamber One forming the award found it preferable to base compensation upon actual use of the facility, a number of authorities discredit an actual-use requirement. *Sea-Land, supra,* Separate Opinion of Judge Holtzmann.

488. Well over five decades earlier, the tribunal in the *Lena Goldfields* Arbitration[562] prefaced its application of the doctrine by noting its pedigree:

> [Claimant's unjust enrichment] formulation of the case rest[s] upon the principle of Continental law, including that of Soviet Russia, which gives a right of action for what in French is called "*Enrichissement sans cause*"; it arises where the defendant has in his possession money or money's worth of the plaintiff's to which he has no right.
>
> This is recognized and enforced in Germany under Article 812 of the Civil Code. It is also recognized in Scottish law, but not fully in English law; although the English right of action "for money had and received" on "total failure of consideration "often leads to the same result. The principle was discussed and approved in the British House of Lords in the Scotch case of Cantiare San Rocco S.A. v. Clyde Shipbuilding Company, Limited, 1924 Appeal Cases, p 226.[563]

489. Confirming the doctrine's time-honored place among legal systems, a leading commentary on the *Goldfield's Arbitration*, published nearly fifty years ago, observed that the application of the unjust enrichment principle by that tribunal was unremarkable, for, unjust enrichment had "long been recognized as [a] legitimate

---

[562] *The Times* (London), Sept. 3, 1930, *reprinted in* A. Nussbaum, *The Arbitration Between the Lena Goldfields, Ltd. and the Soviet Government*, 36 Cornell L.Q. 31, 42 (1950-51).

[563] As per Nussbaum, *supra*, at 51.

cause of action under the various systems of law, including international law."[564]

490. Indeed, then President of the International Court of Justice, Eduardo Jimenez de Arechaga, in his Hague Academy Lectures, suggested that the prevention of unjust enrichment was the policy most squarely at the foundation of the duty to compensate in cases of nationalization:

> The doctrine which constitutes the legal foundation of the conduct actually followed by States is the principle of unjust enrichment. If the nationalizing State were to grant no compensation when nationalizing alien property, it would enrich itself without justification at the expense of a foreign State considered as a distinct political, economic and social unity. Through the exercise of its sovereign right to nationalize, that State would be depriving an alien community of the wealth represented by the investments it has made on foreign soil: it would be taking undue advantage of the fact that economic resources originating in another State had penetrated its territorial domain....The measures which bring about a transfer of wealth in favour of a nationalizing State or one of its agencies are those which give rise to a duty to compensate.[565]

---

[564] Nussbaum, *supra* at 41. *See also* H. Lauterpacht, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 275-276, n. 5 (1933) ("The common law does not countenance the retaining of advantages `against equity and good conscience.'").

[565] *General Course in Public International Law*, 1978 (I) *Recueil des Cours* 3, 299-300.

491. Recoveries based upon unjust enrichment are well established in Respondent's legal system. Article 1882 of the Mexican Civil and Commercial Codes provides:

> Whomever becomes enriched without justification at the expense of another shall be obligated to indemnify the other person for his loss in the portion of the former's enrichment.

492. The movement in Anglo-American law toward an autonomous restitutionary remedy founded upon unjust enrichment doctrine is typified by discussion to found in texts such as Burrows, who writes:

> Generally the injustice of an unjust enrichment does not depend on its having been acquired by tort or breach of contract, or indeed by any other wrong, and therefore most unjust enrichments, and consequent restitutionary remedies, are best viewed as belonging solely to the law of restitution.[566]

---

[566] A. Burrows, REMEDIES FOR TORTS AND BREACH OF CONTRACT 251 (1987) (giving the English position); *see also*, D. Dobbs, LAW OF REMEDIES 390 (1993) wherein Professor Dobbs states:

> As a matter of history, restitutionary ideas developed mainly in the particular forms of Common counts [such as *quantum valebant*]. But those forms of action have long since been abolished by modern procedural codes....The significant questions today are very different. They ask whether unjust enrichment should be redressed, and if so in what mode and by what measure.

American courts have adopted the theory and applied it liberally. The oft-cited decision in Boomer v. Muir *et. al.* (1933), for example, grew out of a dam project and an action brought by a sub-contractor. After substantially completing the dam despite obstacles posed by the general contractor, the subcontractor was forced to rescind the

493. Professor Schreuer's 1974 survey of authority[567] gives a sense of how the doctrine operates.

> Whomever In the *Landreau Arbitration*[568] between the U.S.A. and Peru two brothers, one French and one American, had been partners in an enterprise for the discovery of guano in Peru under a concession. In accordance with the provisions of the contract they had provided the Peruvian government with valuable information on the location of guano deposits. After the death of the French partner, the U.S.A. brought a claim on behalf of his brother against the Peruvian government which had repudiated the contract and refused to make the stipulated payments. The Tribunal found that it had to uphold the repudiation of the contract, but that Peru was
>
> > The bound to pay on a *quantum meruit* for the discoveries which they appropriated for their own benefit. The principle on which the sum to be paid is to be computed is quite different from that on which the sum should have been assessed if Célestin [the claimant] was entitled to claim payment on the footing of that contract.[569]

---

contract by the general contractor's failure to cooperate in the manner contemplated by the agreement. The jury award based upon the reasonable value of materials and services rendered was affirmed even though that recovery exceeded the amount to which the subcontractor would be entitled under the contract if fully performed by both sides. That is, it mattered not that it would have been for the plaintiff a "losing" contract. 24 P.2d. 570 (Cal. Dist. Ct. App. 1933).

567 *Supra.* 22 Amer. J. Compar. L. 281 (1974).

568 1 R.I.A.A. 352.

569 *Id.* 354.

> The amount due was then determined on the basis of "the fair value of the communication to Peru."[570]
> ./...
> In Joseph E. Davies v. United Mexican States,[571] a case decided on a contractual basis, the U.S.-Mexican General Claims Commission held *obiter* that services rendered extra-contractually might be subject to a compensation on a *quantum meruit* basis.
> ./...
> *General Finance Corporation v. United Mexican States*,[572] concerned contracts of concession concluded with Mexican cities for the supply of water which had been declared void because they purported to delegate sovereign authority. The Commission held that
>
> > The Government of Mexico, under international law, must reimburse claimant to the extent that it has been unjustly enriched.[573]

Section 3 Elements Establishing the Unjustness of Respondent's Enrichment

A. IN GENERAL

494. As the Iran-U.S. Claims Tribunal has observed:

---

[570] *Id.*
[571] 4 R.I.A.A. 139, 144.
[572] U.S. Dep't State, Pub. 2859, Arb. Series 9,546.
[573] Schreuer, *supra* at 293-296 (footnotes renumbered and edited).

> Unjust enrichment represents a principle based on justice and equity and therefore makes it necessary to take into account all the circumstances of each specific situation.[574]

495. Many of the events, policies and systemic problems identified by Claimant elsewhere in this Reply bear on the question of unjustness. Claimant will not replicate these here in full. Recalling some of the main points, however, will better place Claimant's unjust enrichment argument in context.

B. SYNOPSIS

Claimant Sought and Received Assurances and Encouragement Before Committing its Resources

496. Metalclad's officers met with the Governor on June 11, 1993 and introduced itself and shared with specificity its plans for La Pedrera with the help of a booklet;[575] the meeting produced a letter dated the same day[576] which both Metalclad and federal authorities

---

[574] Schlegel Corp. v. National Iranian Copper Industries Co., Award No. 295-834-2 (27 Mar. 1987), *reprinted in* 14 Iran-U.S. C.T.R 176, para. 14 (internal quotation marks omitted).

[575] Exhibit 49 hereto.

[576] It states in part:

> We appreciate Metalclad Corporation's interest in participating in an active manner in the instrumentation of this program. Likewise, I wish to emphasize that as long as they comply with the environmental standards of the different levels of government and respect the genuine interests of the community, the projects presented for my consideration have the necessary support to carry them out successfully. Letter of June 11, 1993 from Governor Sanchez Unzueta to Grant Kesler, Memorial, Ex. 11.

interpreted as an endorsement of Claimant's project.[577] The Governor's recollection of the event is not reliable.[578]

497. At two critical junctures,[579] when it had questions about the relevance of local permits, it sought the advice of local federal officials; on both occasions it proceeded according to the advice it received.

498. The evidence strongly suggests that federal officials vigorously welcomed the project as a solution to the region's hazardous waste problem.

---

[577] The May 24, 1994 internal PROFEPA memorandum excerpted by Respondent observes that:

> [t]o date, [the Governor] and the Congress have not expressed opposition to the project. *However, there is evidence of the favorable opinion from the Governor and the President of the Ecological Committee of the Congress...thus on June 11, 1993 the Governor wrote a letter to the President of the company... informing him that [under the State Development Plan a hazardous landfill is needed]*" Counter-Memorial, para. 525, Ex. 104 (emphasis added).

[578] The Tribunal will recall that by the time of the meeting, COTERIN had already been issued a state land use permit (dated May 11, 1993) which was, of course, site specific to La Pedrera and expressly contemplated a controlled landfill for hazardous industrial wastes. Also before that meeting, in April of 1993, Metalclad had acquired the option to purchase COTERIN. Given these specific steps in furtherance of the landfill project, it is not plausible that Claimant would seek a meeting with the Governor only to discuss another project or to otherwise mislead him. As Metalclad was aware, the Governor's support was desirable for myriad reasons.

[579] These were in September 1993 when Metalclad's local counsel was unsure of the local permits role in relation to hazardous waste and in October 1994, when the Municipality purported to close the site.

Claimant's Due Diligence and Subsequent Reliance Thereon Were Reasonable

499. Respondent's statutes were murky and amenable to multiple interpretations and the construction that Claimant adopted was supported by logic, local custom, and the views of federal officials.

500. Despite a train of opportunities for various officials to insist upon a local construction permit,[580] there was silence. *A fortiori*, no federal organ required Claimant to present proof of local approval before proceeding at the federal level, the procedure subsequently initiated by the federal government after the impasse in San Luis Potosi.

Claimant Attempted In Good Faith to Collaborate, Openly and Honestly With All Government Officials and Stood Ready to Contribute to the Community

501. The correspondence produced by Claimant and the impressions of credible observers establishes that Claimant went to great efforts to keep state and federal officials apprised, and to solicit the wishes and assistance of same throughout the course of the project.

502. Claimant went to exceeding lengths to conduct the extraordinary number of tests requested, and to sponsor programs that would be beneficial to the community in terms of revenue, jobs and miscellaneous services.

---

[580] *See* Chapter 12, §10.

Claimant's Facility Is Composed of Quality Elements that Met or Exceeded U.S. Standards and Satisfied All Mexican Norms; The Site Was Well Chosen

503. Among the reasons that Claimant's facility received federal approval notwithstanding unremediated conditions at the site was that Claimant had chosen a sound design appreciated by those with technical expertise.

504. No question of sub-standard components can legitimately be raised; Claimant envisioned a facility that would remain modern for years to come and allocated resources accordingly.

505. The geo-hydrology of La Pedrera and its susceptibility to engineering solutions was confirmed by federal audits, audits thereof, and academic experts.[581] These endorsements were in keeping with earlier studies predating Aldrett's selection of the site.

The Forces Arrayed Against Claimant Were Not Legitimate Business Risks But Were Imponderables That Worked An Injustice

506. Despite the foregoing, Claimant found itself unable to receive a genuine hearing from the Governor, whose prejudices against Claimant remain difficult for Claimant to understand. While the extreme positions of Greenpeace is a fact of life which Claimant might have reasonably foreseen, their apparent power to

---

[581] Consistent with their representations to Claimant, in defending *amparo* proceedings initiated by the Municipality, the federal authorities referred to Claimant as having a "vested right granted in accordance with the corresponding laws." *See* Memorial, Ex. 32, 4th page (Revision Recourse against an Interlocutory Ruling).

render Claimant's efforts for naught is inexplicable unless other forces were at work. There can be no doubt that Claimant's investment was beset by misinformation, which the Governor only exacerbated by his public pronouncements and private maneuvers.

507. For reasons about which Claimant can only speculate, though federal officials serving San Luis Potosi readily appreciated the quality of Claimant's project, state and local authorities were unprepared to be convinced, except upon terms that had in reality little to do with the construction permit notionally at the heart of Respondent's case.

Section 4 The Benefit Respondent Has Received

508. Through the sustained encouragement of federal authorities and repeated, if mutating, assurances of state and local officials there came to exist in the San Luis Potosi a modern landfill capable of remediating the site itself and thousands of tons annually of the region's new and stockpiled waste.

509. The Respondent's withholding of the right to operate diminishes considerably the site's worth to Claimant; at present, because of the inability to function commercially, its resale value in an arms-length transaction is slight compared to its value if performing as designed. Nonetheless, in order to recoup some of its costs Claimant will eventually have to sell the property, perhaps to the State itself. The latter, *ex hypothesi*, is not restrained by the lack of a permit and can adopt an interpretation of the state's ecology law which exempts the landfill; Claimant, can rely upon no such interpretation.

510. Whether Claimant sells to the State or one of the private entities with which San Luis Potosi is in discussions, the site left

behind by Claimant is one that has been verified as safe and improved with high-quality capital fixtures. If the State were the vendee, little would stop the State from operating the facility itself with the help of outside consultants or managers. To operate the facility would be consistent with Respondent's Basel Convention obligations and its pressing need to both develop and eliminate clandestine dumps. If the sale is to a private entity with the State's approval, the State has nonetheless been able to discharge a sovereign duty—the duty to provide hazardous waste processing within its territory. It will of course also receive tax revenue from the landfill's operations.

Section 5 Structuring a Recovery and Quantifying the Benefit Received

511. Claimant would expect that, just as in the case of an award of fair market value under Article 1110, an award to prevent unjust enrichment would be conditioned upon Claimant's conveyance of its right title and interest to Respondent.

512. Claimant, in the interest of time, has instructed its expert to concentrate upon responding to questions raised by Respondent in valuing Claimant's loss rather than upon valuing Respondent's gain. Claimant, nevertheless, has also instructed its expert to formulate in a preliminary way a model for quantifying the amount of Respondent's unjust enrichment. Should the Tribunal deem it useful, Claimant will be pleased to adumbrate its model in a supplemental filing. Initially, the questions such a formula might pursue include: What cost savings will the Respondent enjoy in remediating the waste within a plausible radius from La Pedrera by

not having to employ alternatives?[582] How much would a comparable North American company charge Respondent if commissioned to build the same site under the same circumstances, including the same extraordinary number of tests?

---

582 Presumably, a study of transportation costs and processing fees if Respondent were to transport the waste to and commission RIMSA would be relevant to this question.

CHAPTER 17

QUANTUM OF RECOVERY

Topical Arrangement of Sections

Section 1 The Treaty's Standard—Fair Market Value

513. The level of compensation which Respondent has undertaken to pay upon expropriating a NAFTA investment has been stated without ambiguity in Article 1110:

> Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place....

514. By referring to "market value" the drafters have sought to objectify the valuation process.[583] To guide the Tribunal the same Article

---

[583] The language seems wholly inconsistent with adoption of the controversial "appropriate compensation" standard under which payment of less than full value may be deemed to satisfy a State's duty to compensate. To the extent that theory enjoyed currency, it did so largely in the context of broad scale nationalizations (as opposed to discrete takings of property). Some members of the Iran-U.S. Claims Tribunal have acknowledged in principle that more flexible standard, but the majority of its Arbitrators seem to have given the Treaty of Amity's "full equivalent" phrasing its natural meaning. *See generally* Separate Opinion of Richard C. Allison, in Award No. 560-44/46/47-3, Ebrahimi v. The Government of Iran.

mandates that "[v]aluation criteria shall include going concern value,[584] asset value...[585] and other criteria, as appropriate...." In its *Phillips Petroleum* Award,[586] the Iran-U.S. Claims Tribunal described the process leading to fair market value as follows:

> [T]he determination of the fair market value of any asset inevitably requires the consideration of all relevant factors and the exercise of judgment. In the absence of an active and free market for comparable assets at the date of taking, a tribunal must, of necessity, resort to various analytical methods to assist it in deciding the price a reasonable buyer could be expected to have been willing to pay for the asset in a free market transaction, had such a transaction been possible at the date the property was taken. Any such analysis of a revenue-producing asset...must involve a careful and realistic appraisal of the revenue-producing potential of the asset over the duration of its term, which requires appraisal of the level of production that reasonably may be expected, the costs of operation, including taxes and other liabilities, and the revenue such production would be expected to yield,

---

[584] Chamber Three of the Iran-U.S. Claims Tribunal set forth the following non-DCF conception of that measure:

> Going concern value encompasses not only the physical and financial assets of the undertaking, but also the intangible valuables which contribute to its earning power, such as contractual rights (supply and delivery contracts, patent licen[s]es and so on). as well as goodwill and commercial prospects.

Amoco International Finance Corp. v. The Government of Iran, *et al.*, Partial Award No. 310-56-3 (July 14, 1987), *reprinted in* 15 Iran-U.S. C.T.R. 189, 270.

[585] "Including declared tax value of tangible property."

[586] Phillips Petroleum Co. Iran v. The Government of Iran, *et al.*, Award No. 425-39-2 (June 29, 1989), *reprinted in* 21 Iran-U.S.C.T.R. 79, 124.

> which, in turn, requires a determination of the price estimates for sales of the future production that a reasonable buyer would use in deciding upon the price it would be willing to pay to acquire the asset. Moreover, any such analysis must also involve an evaluation of the effect on the price of any other risks likely to be perceived by a reasonable buyer at the date in question, excluding only reductions in the price that could be expected to result from threats of expropriation or from other actions by the Respondents related thereto.[587]

Section 2 The Relevance of Going Concern Analysis

A. IN GENERAL

515. Respondent insists that Claimant's investments cannot be treated as a "going concern" for purposes of valuing its loss.[588] From that premise Respondent reasons that the DCF method is inappropriate in quantifying the fair market value of Claimant's investment. Upon these submissions, Claimant has several observations.

516. First, Respondent should be precluded from relying upon the fact that Claimant's investment had not begun operations, for that failure was caused by Respondent's own acts and omissions. Thus, as one tribunal has observed "no one should be allowed to reap advantages from their own wrong, *Nullus Commodum Capere De Sua Injuria Propria.*"[589]

---

[587] *Id.*, para. 111.

[588] Counter-Memorial at 259 *et seq.*

[589] *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA*, Award No. 141-7-2 (29 June 1984), 6 Iran-U.S. C.T.R. 219, 228.

517. Second, as Respondent intimates, the going concern classification is merely a way of responding to the problem of speculativeness of damages; generally there is a more concrete basis upon which to project future emoluments when the subject enterprise is an established business. Yet, the "New Business Rule" is far less of a rule than it once was.[590] At least within American practice, it has become subject to manifold exceptions and to serious reconsideration. Given the disintegration of the principle in American jurisprudence,[591] it is unlikely that the United States intended for the notion to qualify the express adoption of going concern analysis. Therefore, to the extent that a ready-to-operate facility is supported by factors making profits likely, a going concern approach is warranted especially given the NAFTA's explicit designation of that approach.

518. The general acceptability of the DCF method also deserves note. A number of tribunals have employed the method or accepted it in principle and this tendency constitutes a discernable trend.

---

[590] *See generally* Note, *The Evolution of the New Business Rule*, 17 Cumb. L. Rev. 239 (1987).

[591] *Id.* at 239-40, wherein the author reports:

> The entrenched principle, known as the New Business Rule, that an unestablished business may not collect damages for lost profits because no profit history exists upon which to base the claim, has become *riddled with exceptions. In twenty-nine jurisdictions it is either specifically rejected as a strict rule of law or ignored altogether; in others, the rule has been virtually consumed by exceptions as courts seek to avoid the inherently unjust result of allowing a breaching party to escape the consequences of his wrongful act, while forcing the non-breaching party to bear the cost of his good-faith reliance. Today, the majority of courts allow new business with no history of profits to recover lost profits when they can be proven with reasonable certainty* (emphasis added).

Lieblich's study of awards, which spanned nine decades, led him to conclude:

> The clearest trend is the shift from the use of accounting-based concepts of "profits" and "income" in measuring economic value in the earlier decisions to a recognition that owners and prospective purchasers of business properties value them because of the *cash* that those properties are expected to generate in the future. This trend may in part reflect the diminishing influence of accountants....In any event, the Amco Asia, Starrett, and Phillips Iran decisions all purported to apply the DCF method, the Liamco decision based its award at least in part on the results of a DCF analysis performed by the claimant, and the Aminoil decision approved of the method in principle. The Amoco International Finance decision therefore represents the minority view in its refusal to apply the DCF method to measure the value of an expropriated enterprise.[592]

Similarly, Brower and Brueschke, in their recently published treatise on the Iran-U.S. Claims Tribunal, summarize as follows:

> In valuing going concerns, the Tribunal has held that where an active market exists for the expropriated entity the actual market value must be granted. Where an active market does not exist, the DCF method has proved a valuable tool to approximate fair market value.[593]

---

[592] W. Lieblich, *Determinations by International Tribunals of he Economic Value of Expropriated Enterprises*, 7 (1) J. Int'l Arb. 37 (1990).

[593] C. Brower & J. Brueschke, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 589 (1998).

B. PROFITABILITY WAS LIKELY

519. Claimant submits that the carefully planned facility, its physical and legal capacity, the demand for the services available there, its geographical and technological advantages over its limited competition, and Claimant's business plan,[594] taken together, meet the Whiteman formula invoked by Respondent that, to be recoverable, future profits ought to be "reasonably anticipated; and that the profits anticipated were probable and not merely possible."[595] The detailed support that exists for this assertion is found in the report of Claimant's valuation expert.[596]

Section 3 The Role of Alternative Valuation Methods

A. IN GENERAL

520. Tribunals are generally said to welcome the presentation of alternative valuation scenarios. The practice reflects the fact that the appropriate method may vary depending upon whether the investment taken is a going concern and with various assumptions that may influence the outcome. The existence of manifold approaches also facilitates confirmation of the results of one method by reference to another. Claimant's expert, having studied Respondent's reasons for opposing the DCF method, is not convinced. Claimant nonetheless remains ready to augment its pleadings, upon the Tribunal's request, to pursue in detail

---

[594] The plan, which was well in place at all relevant times, was all the stronger because of the synergism between COTERIN and its affiliate entities and between Claimant and Browning Ferris International.

[595] Counter-Memorial at 261, para. 925 (citing M. Whiteman, II DAMAGES IN INTERNATIONAL LAW 1837 (1937)).

[596] AAA Expert Report submitted herewith.

alternative valuation models. By way of introduction, Claimant surveys in the next subsection the alternative adopted in the *Pyramids* (ICSID) award.[597]

B. THE *PYRAMIDS* ALTERNATIVE

521. The ICSID tribunal deciding the *Pyramids* case concluded that the fact that only 6 percent of the resort lots had been sold created a contingency that rendered a stream of profits hypothesis too speculative to warrant use of the DFC method.[598] The self-financing format of the investor's business plan meant that much depended upon those sales.[599]

522. There was also the prospect that, given emerging Egyptian and international law related to antiquities, the longevity of the project would not warrant the protracted revenue assumption necessary to legitimately operate the DCF method.[600] Consequently, the Tribunal considered the other valuation approaches presented by Claimant and adopted one appropriate to a project "in its infancy"[601] which nevertheless had a value greater than merely the out-of-pocket costs incurred by Claimant in relation to the project.[602] Under the method employed by the Tribunal, the "fair measure of compensation" included several elements, noted below.

Capital Contributions and Loans to the Entity

---

597 106 I.L.R. 589 (1997).
598 *Id.*, paras. 188-89.
599 *Id.*, para 116.
600 *Id.*, para. 109-91.
601 *Id.*, para. 188.
602 *Id.*, para. 214.

523. The investor had made undisputed capital contributions and loans to the venture entity which would not be reimbursed as a result of the cancellation of the project. There was also an associated loss of interest at commercial rates which some of the loans bore.[603] To these amounts investor was held entitled.[604]

Design, Construction, and Marketing Costs

524. The tribunal also concluded that a range of expenditures falling under this heading must be included in Claimant's recovery for compensation to be fair. It noted:

> [T]he evidence shows that, when the project was cancelled, construction was under way and considerable marketing activity had been carried out. Most of the detailed engineering design and specifications for the first phase of the infrastructure and golf course had been completed. A construction contract had been concluded for the infrastructure, construction had begun and lots sales had commenced.[605]

Development Costs

525. The claimant in *Pyramids* documented numerous costs expended to implement the project. These consisted in, *inter alia*, salary allocations, various executive and employee costs including overhead, travel, recruiting, market consultation, banking and entertainment.[606] The cancellation meant that these outlays would not otherwise be recovered. It was thus "reasonable and legitimate

---

[603] *Id.*, para. 198.
[604] *Id.*
[605] *Id.*, para. 198.
[606] *Id.*, para. 202.

to take these losses into account in determining the fair measure of compensation."[607]

Legal, Audit and Earlier Proceedings Costs

526. The legal costs incurred in obtaining indemnification must be considered as an element of compensation, given that the amount offered by Respondent was patently insufficient and that the claimant therefore had to litigate to be made whole; that was the view of the *Pyramids* tribunal and that principle extended to accounting costs and expenses amassed in the earlier ICC arbitration (the award of which was nullified) to the extent that those earlier activities were relevant and useful to the ICSID proceedings that followed.[608]

Loss of Commercial Opportunity

527. Under this rubric the tribunal awarded an amount signifying that the value of the investment taken was greater than the amount of the costs incurred in pursuit of the project's objectives. The tribunal noted that there was in this component of recovery a subjective element betraying some uncertainty. Yet, it was thought "well settled that the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss has been incurred."[609] Based upon the facts of that case, the tribunal felt it appropriate to compare claimant's imputed share of project revenues (generated by pre-cancellation lot sales) and the

---

[607] *Id.*
[608] *Id.*, paras. 210-11.
[609] *Id.* para., 215.

expenditures required to generate that share of revenues. The difference between the two amounts, said the tribunal, was the "minimum measure of the value to be ascribed to the opportunity to make a commercial success of the project."[610]

Interest From the Time of the Wrong

528. Because of the ICSID Convention's designation of the host State's law, the tribunal applied the relevant Egyptian law's proscription upon commercial interest greater than 5 per cent (simple).[611] Importantly, despite the respondent's contrary contentions, the tribunal endorsed:

> the logical and normal principle usually applied in cases of expropriation, namely that the *dies a quo* is the date on which the dispossession effectively took place, since it is from that date that the deprivation has been suffered.[612]

529. As the tribunal noted, to set the day of filing or the day of the award as the starting point for interest "would encourage parties

---

[610] *Id.*, para. 217. In the instant case, Claimant suggests preliminarily that a similar lost opportunity measure could be determined by attributing to the landfill project revenues likely to have occurred between the time the landfill should have opened and the time of taking, compared to an appropriate allocation of Claimant's direct costs.

[611] *Id.*, para. 220. Those portions of loan interest damages governed by English law, however, were compensable at the contract rate (an augmented bank deposit rate, compounded). *Id.* at 229.

[612] *Id.*, para 234.

who have expropriated property to refuse to pay compensation and to delay the proceedings seeking compensation."[613]

Interest Upon the Award

530. The award in *Pyramids* granted simple, post-award interest until the time of payment. But the tribunal, because it had elected not to use a commercial rate of interest, augmented Claimant's recovery to take account of the U.S. dollar's decline in value during the considerable period over which claimant had sought its remedy. It did so because it recognized that the 5 percent rate it adopted left the claimant well under-compensated.[614]

Section 4 Factors Potentially Influencing Quantum

A. The Parties' Expectations and the Need to Encourage Investment

531. In the oft-cited *Aminoil* award, the learned arbitrators were influenced by the profit expectations of the parties developed in the course of their relationship and the need to fix compensation that would support foreign investment. As Dr. Christine Gray observes:

> [In Aminoil] the fact that Kuwait welcomes investment is crucial; it means that there is no room for rules of compensation that would make nonsense of foreign investment. For central to the tribunal's approach to indemnification is the notion of the legitimate expectations of the parties. These expectations arise from their particular relationship; in every long-term contract

---

613 *Id.*

614 *Id.*, para. 238.

> economic calculations, the weighing up of rights and obligations, of chances and risks constitute the contractual equilibrium.[615]

532. In its Memorial, Claimant likened its relationship with Respondent's regulatory entities to a concession.[616] That analogy remains apt in connection with the expectations of Claimant, which grew with every additional federal approval and every confirmation of the site's exceptional geological and hydrological attributes. Those expectations were galvanized with the conclusion of the *Convenio de Concertacion*. Concomitant with Claimant's own perception, the successful completion of the state and federal permitting process led federal authorities to refer to Claimant's interest as a vested one. As suggested elsewhere in this Reply, that interest can only be regarded as contingent to the extent that the condition imposed is both genuine and consistent with NAFTA requirements of fair, equitable and national treatment.

B. THE LAWFUL-UNLAWFUL DISTINCTION

533. Tribunals and commentators sometimes distinguish between legal and illegal takings; the distinction accounts for differences in the remedies available to the aggrieved party and is generally attributed to the *Chorzow Factory* case.[617] Several Judges of Iran-

---

615 C. Gray, JUDICIAL REMEDIES IN INTERNATIONAL LAW 203 (1990); *see also* P. Tschanz, *The Contributions of the Aminoil Award to the Law of State Contracts*, 18 Int'l Law. 245, 279 (1984).

616 Memorial, Vol. I, para. 170 *et. seq.*

617 Germany v. Poland (Merits), [1928] P.C.I.J. Rep., Series A., No. 17. *Chorzow*'s *locus classicus* concerning reparation for illegal takings states:

> The essential principle contained in the actual notion of an illegal act....is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the

U.S. Claims Tribunal[618] and numerous commentators have addressed the distinction, by interpreting *Chorzow*.[619] Perhaps the most widely accepted notion is that illegality warrants an award that includes *lucrum cessans*, (essentially, lost profits) although that result may also follow from construction of a treaty containing a full compensation requirement.

534. Claimant notes that NAFTA's mandate of a "fair market value" is unequivocal and unqualified by any express lawful-unlawful distinction. The market value, after all, does not vary depending upon which classification applies. Had the drafters intended lawfulness to influence the otherwise clear meaning of "fair market value" they could have selected language equal to that task; they did not do so.

535. As to the meaning of "illegality" F.A. Mann offered the following synopsis:

> [A]n international wrong undeniably occurs where an alien's property is taken in breach of a treaty, or where the taking is arbitrary, abusive or discriminatory and therefore has the character of punishment, *or where it is unaccompanied by the payment of or at least the clearly*

> situation which would, in all probability, have existed if that act had not been committed. [If restitution in kind is not possible, then] payment of a sum corresponding to the value which restitution in kind would bear; [plus an] award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it[.]

Id. at 46-47.

618 *See* Brower & Brueschke, *supra*,at 508-12.

619 *Id.*

defined and readily enforceable right to compensation
....[620]

The Tribunal will appreciate that Claimant has been offered no compensation by Respondents, despite the treaty mandate to do so. On that basis alone the taking is unlawful, at least *sub modo*.[621]

C. DEGREE OF FAULT MAY ENHANCE CLAIMANT'S RECOVERY.

536. Some authorities hold that gradations of fault, in practice, influence the forms of remedies and levels of recovery to which an aggrieved party is entitled. Professor Gaetano Arangio-Ruiz, while he was the ILC's Special Rapporteur on State Responsibility, observed, for example, that deliberately and maliciously committed delicts occupy—remedially—a different position than simple negligence, although tribunals do not always expressly make the distinction.[622] From his investigation of the cases and state practice he suggests that tribunals are inclined to enhance damages when appropriate to give them a quasi-penal attribute corresponding to a

---

620 F. Mann, *Consequences of an International Wrong in International Law and National Law*, [1975-76] Brit. Y.B. Int'l L. 1, *reprinted in* F. A. Mann, FURTHER STUDIES IN INTERNATIONAL LAW (1990) (citations omitted).

621 *See* I. Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 537-39 (4th ed. 1990).

622 G. Arrangio-Ruiz, *State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance*, in LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DEVELOPPMENT: MELANGES MICHEL VIRALLY 25, 35-38 (Paris: 1991).

heightened degree of *culpa*.[623] He found confirmation for his own work in that of other scholars.[624]

537. Claimant has identified throughout this Reply acts and omissions, particularly by state officials, which were odious and apparently driven by personal animus. It maintains further that those same persons have revised cardinal facts in an effort to cloak themselves as victims; by doing so they attempt to mislead the Tribunal in critical respects. As importantly, they endeavor to obscure the causal nature of their acts—acts which are to a great extent responsible for Claimant's losses.

---

[623] *Id.* at 36.

[624] He states:

> Once more the authority of Oppenheim-Lauterpacht can be invoked: "International tribunals have in numerous cases awarded damages, which must, upon analysis, be regarded as *penal*. Such punitive damages have been awarded in particular, for the failure of States to apprehend or effectively to punish persons guilty of criminal acts against aliens. The practice of States and Tribunals shows other instances of reparation indistinguishable from punishment, in the form of pecuniary redress unrelated to the damage actually inflicted."
>
> This *dictum* represents an explicit recognition of the impact of the presence and degree of willful intent or culpa upon satisfaction in the form of "punitive damages."

Id. at 37, n. 32 (citations omitted); *see also* R. Jennings & A. Watts, I OPPENHEIM'S INTERNATIONAL LAW 533 (9th ed. 1992).

CHAPTER 18

Conclusion and Prayer for Relief

Topical Arrangement of Sections

Section 1 Conclusions
Section 2 Prayer for Relief

Section 1 Conclusions

538. Both parties to this case agree on the underlying matter that brought them together: Mexico's need for environmental solutions. The Country is under pressure both nationally and internationally to deal with its pervasive crisis. The promise of the 1988 General Ecology Law, the OECD commitments, and the pledges of the NAFTA side agreement on the environment, have yielded little gain on the problem.

539. It is easy to understand the urgency felt by federal officials to get results. But to date, only one hazardous waste landfill has been constructed during the Zedillo Administration: Metalclad's La Pedrera facility. Only one other is under construction: Metalclad's Aguascalientes facility.[625] Understandably, Mexican officials were eager to expedite the completion and opening Metalclad's state-of-the-art facility. Socially and politically they needed success on the environmental front.

540. That Government of Mexico officials moved ahead swiftly is not an issue. But the fact that they moved ambivalently is.

---

[625] This is presently being built as a state-approved landfill for non-hazardous waste, pending approval of the federal authorization for hazardous waste, to which state and municipal officials have already agreed.

Though confident at the time, both in their representations to Company officers, the position of the Respondent in this arbitration is a revisionist's explanation for failure. Simply put, Respondent's case is a hoped-for result in search of a rationale.

541. An early soldier in Mexico's environmental battle, Rene Altamirano, described in almost poignant terms what confronted those freshly called to this new focus of the government's. He spoke of an "area of work and law...totally new in Mexico." And of facing day after day "*de facto* situations, those not written or foreseen." Apparently without a body of institutional experience, he lamented that "we went along learning, understanding and resolving on the road of infinite situations that...could never have been imagined."

542. This tutorial of magnitude continued, as Secretary Carabias confessed, in the way that her agency dealt with the Governor. The approach was "a political risk which originated in our position and which regrettably materialized."

543. These were not, however, caveats shared with Metalclad. Federal officials instructed Claimant that federal authority was paramount in matters of hazardous waste. Besides the federal construction and operating permits, all that was asked of Claimant was to obtain the state land use permit.

544. Claimant, of course, procured all those permits. But from that point to this point, much has intervened.

545. An overriding question, however, remains: how did this hazardous waste landfill get completely built, if it was unlawful to do so? The Respondent hopes for a result holding that it was not its responsibility. In search of a rationale for its hope, Respondent has sought to redefine the dispute. The preponderance of space, words,

expert time, resources and witness statements it marshals—not in a defense of Respondent's actions in this case—but in an attack on Claimant says much. Respondent seems to be like the family with the elephant in the living room—if no one talks about it, it really isn't there. But what is there is the issue of Claimant's treatment under the NAFTA.

546. The much-rehearsed facts in this case vindicate Claimant's answer as to how the landfill got built. It was built with $20 million in reliance on federal representations; with support of and agreement with the state; and the assurances of tests, studies and audits.

547. The legal position recognized and argued by SEMARNAP in defense of its position in the amparo filed by the municipality over the *Convenio*, remains pertinent. Metalclad did not need the authority of the *Convenio* because, by virtue of the permits already held, the Company had a "vested right" to open and operate the landfill. The ENSCO case, (introduced by Respondent's Ms. Williams), is to the point. Recognizing ENSCO's "right to legally incinerate and import hazardous waste against the will of the public," the governor of Arizona negotiated to "take back this right" from the company. In achieving that result, the state agreed to pay ENSCO $44 million.

548. Neither the NAFTA nor Claimant deny the sovereign right of Respondent to "take back this right" from Metalclad. But the treaty provides, just as Arizona realized, that "taking back" requires full compensation.

549. Claimant is sorry to have to ask this Tribunal for an award of $90 million. Pursuing legal claims is not its business. It would much prefer to have operated its landfill. That is its business. But its 6,000 shareholders should not bear the loss caused by

Respondent's institutional immaturity. That Mexico could not deliver what its laws promise—including its commitments under the NAFTA—should not leave the resultant losses on Claimant's doorstep. Under the NAFTA, that burden now belongs to Mexico.

Section 2 Prayer for Relief

550. For the reasons set forth in the foregoing Chapters and Conclusion thereto Claimant reiterates and amends its Prayer for Relief by asking that the Honorable Tribunal award in favor of Claimant the following:

1] $90,000,000 (ninety million U.S. dollars) plus simple interest there upon at 9 percent per annum, or such market rate as the Tribunal shall deem appropriate, from the date of taking as determined by the Tribunal;[626] AND

2] A sum to be determined upon completion of these proceedings representing Claimant's costs of the proceedings and composed of:

a] Claimant's Attorneys' Fees, plus

---

[626] Claimant's expert has used January 2, 1997 as the date of taking, a date by which the injunctive relief issued by Respondent's courts can be said to have ripened into non-ephemeral interference with Claimant's investment. Additionally, on or about that date, negotiations (through which Claimant had hoped to procure the full cooperation of the Respondent) ended without resolving the underlying impasse. As noted in Chapter 15, however, the date upon which the state's ecological preserve decree took effect — September 23, 1997 — may, because it relates to a readily discernable event, provide a more satisfactory date from which to accrue interest.

b] Claimant's Executive Costs, plus

c] Claimant's ICSID and Other Administrative Costs; AND

3] Simple interest upon the award, to accrue until payment thereof, at 10 percent per annum or such market rate as the Tribunal shall deem appropriate.

This Reply is hereby submitted to this Honourable Tribunal, as it has directed, in accordance with the Rules governing this proceeding, on this 19th day of August, 1998.

Respectfully submitted,

LAW OFFICE OF CLYDE C. PEARCE
ATTORNEYS FOR CLAIMANT
METALCLAD CORPORATION

CLYDE C. PEARCE, ESQ.

PROFESSOR JACK J. COE, JR.