# BREGRE THE MAPTA TRIBUNAL

# METALGLAD CORPORATION

73.

# UNITED MEXICAN STATES

October 1997

MEMORIAL

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# BEFORE THE HONORABLE TRIBUNAL OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES PURSUANT TO THE NORTH AMERICAN FREE TRADE AGREEMENT

METALCLAD CORPORATION,

CLAIMANT,

vs.

UNITED MEXICAN STATES,

RESPONDENT.

CASE NO. ARB(AF)/97/1

# **MEMORIAL**

October 13, 1997 .

# TABLE OF CONTENTS

	VOLUME I <u>Page No</u> .
Glossary	iii
Chronology	1
Preface	28
Jurisdiction	35
Question	37
Summary of Facts	40
Facts	43
Summary of Argument	108
Argument	110
Conclusion and Relief Sought	167
Notes	170
Attachments:	177
Declarations JURICI Expert Report	
Exhibits	VOLUME II
Notes: Support Documents	VOLUME II
Newspaper Articles	VOLUME II
Damages	VOLUME II

## GLOSSARY

#### CANACINTRA

- Cámara Nacional de la Industria de Transformación
- National Chamber of Industrial Transformation

#### CNA

- Comisión Nacional del Aqua
- National Water Commission

#### CONIECO

- Consejo Nacional de Industriales Ecologistas
- National Council of Ecological Industrialists

#### COPARMEX

- Confederación Patronal de la República Mexicana
- Confederation of Employers of the Mexican Republic

## COTERIN

- Confinamiento Tecnico de Residuos Industriales, S.A. de C.V.
- Technical Landfill of Industrial Waste

# **ECO-METALCLAD**

- None
- American corporation

#### **ECONSA**

- Ecosistemas Nacionales, S.A. de C.V.
- National Ecosystems

#### **ECOPSA**

- Ecosistemas del Potosi, S.A. de C.V.
- Ecosystems of Potosi

#### **EJIDO**

- A population center with legal capacity and patrimonium, that owns the land that has been granted to it as well as any other plots of land which it may have acquired through other means." In reality, it is a small village with very poor people.

#### INE

- Instituto Nacional de Ecología
- National Ecological Institute

#### MEM

- Movimiento Ecologista Mexicana
- Mexican Ecological Movement

#### **PROFEPA**

- Procuraduría Federal de Protección del Ambiente
- Federal Attorney's Office for the Protection of the Environment

#### SECOFI

- Secretaría de Comercio y Fomento Industrial
- Secretariat of Economic and Industrial Trade Development

#### SEDESOL

- Secretaría de Desarollo Social
- Secretariat of Social Development

# SEDUE (No longer in existence; supplanted by SEDESOL)

- Secretaría de Ecología y Desarollo Urbano
- Secretariat of Ecological and Urban Development

#### SEMARNAP

- Secretaría de Medio Ambiente, Recursos Naturales y Pesca
- Secretariat of the Environment, National Resources and Fishing

#### UASLP

- Universidad Autónoma de San Luis Potosi
- Autonomous University of San Luis Potosi

#### UNAM

- Universidad Nacional Autónoma de México
- Autonomous National University of Mexico

# CHRONOLOGY OF SIGNIFICANT EVENTS

# <u>1990</u>

Oct

Secretariat of Urban and Ecological Development, (SEDUE), authorized Salvador Aldrett, as an individual, to build and operate a transfer station for temporary storage of hazardous waste at La Pedrera in the Municipality of Guadalcazar, State of San Luis Potosi.

# <u> 1991</u>

Nov 1-

May 1

Approximately, 55,000 drums (15-20m tons) of diverse waste are stored at La Pedrera.

During this same time, some 400 kilometers northeast of La Pedrera, the company, RIMSA, in the municipality of Mina, State of Nueva Leon begins to operate a hazardous waste landfill. COTERIN has applied for a permit to become a hazardous waste landfill.

July

Ing. Sergio Aleman, a professor at the Autonomous University of San Luis Potosi, (UASLP), issues a geology report on the conditions at the La Pedrera transfer station and landfill site, claiming that streams and aquifers lie below the surface of the site, subterranean caves exist and there is evidence of earthquake activity (the "Aleman Report"). He concludes the site is inadequate for either a transfer station or a landfill.

Aug

Ing. Sergio Aleman resigns from Autonomous University of San Luis Potosi (UASLP) as a professor of Geology and is employed by RIMSA.

Sept

COTERIN continues the process to obtain construction and operating permits for a hazardous waste landfill at La Pedrera; begins Environmental Impact Report, Risk Assessment Study and other reports necessary for obtaining a State land use permit as well as Federal permits. This process takes 18 months and hundreds of thousands of dollars.

Sept 25

COTERIN transfer station at La Pedrera is closed by SEDUE on the basis of activities in excess of permit.

Oct

Ing. Gilberto Humara Gomez, retained by COTERIN, makes a geological study of the La Pedrera site to confirm the Aleman Report. His findings are in direct opposition to Aleman's, and, he disputes the authenticity of the methodology claimed to have been utilized by Aleman. He repudiates the Aleman Report by showing the studies Aleman claimed to perform were not, in fact, performed. Humara concludes the COTERIN site at La Pedrera meets all Federal and State requirements for landfills (the "Humara Report").

#### 1992

- Early 1992 Waste at La Pedrera was covered with dirt by Aldrett prior to closure. Subsequently, a state delegation from the Federal Environmental Attorney's Office (PROFEPA) ordered installation of a plastic and clay cover that was completed on August 9, 1994.
- Jan-Dec COTERIN continues the process begun in 1991 for a construction and operating permit for a hazardous waste landfill at La Pedrera.

# 1993

- Feb 3 COTERIN receives a Federal permit from the National Ecological Institute (INE/SEDESOL) (SEDESOL was the successor to SEDUE in 1992) for the construction of hazardous waste landfill at La Pedrera.
- April Metalclad purchases an option to buy COTERIN, including its landfill site at La Pedrera and the permits and licenses granted and in progress.
- May 11 State of San Luis Potosi grants COTERIN a land use permit for La Pedrera, for the "location of an Industrial Waste Technical Landfill" issued by the Secretariat of Urban and Ecological Development of the State of San Luis Potosi. This is the only non-federal permit Metalclad is instructed to obtain.

The state congress also issued a document providing concurrence in the permit issuance, endorsed by the state University of San Luis Potosi with David Atisha and Pedro Medellin as advisors.

- May 18 Governor Sanchez Unzueta is inaugurated. His election platform declares that the establishment of a hazardous waste treatment facility in the State of San Luis Potosi is of "highest priority."
- June 11 Metalclad meets with San Luis Potosi's Governor Horacio Sanchez Unzueta (Sanchez Unzueta). The Governor gives Metalclad a letter of support, welcoming the company to the State and encouraging the development of the La Pedrera project by Metalclad.
- July Dr. Pedro Medellin Milan is appointed to replace Dr. Diaz Barriga as the State Environmental Coordinator for San Luis Potosi.
- July 28 A pre-NAFTA border conference is held in San Antonio, Texas between the United States and Mexico, attended by members of the Salinas and Clinton cabinets, respectively. Pedro Medellin Milan (Medellin), State

#### 1993 - Continued

Coordinator of Ecology for San Luis Potosi, attends as the guest of Metalclad. Following the assurances generated by Mexican officials at the conference, including Luis Donaldo Colosio (then Secretary of SEDESOL, later candidate for president) and Santiago Oñate (then Attorney General for Environment, later head of Institutional Revolutionary Party (PRI)) and with the review and approval of Medellin, Metalclad issues a press release announcing its agreement with the State to construct and operate the Landfill facility.

Aug 10

COTERIN receives authorization for the "operation of a controlled landfill through the recollection, transportation, treatment, temporary storage and final disposition of hazardous waste" from the National Ecological Institute, (INE). INE is satisfied that COTERIN has met all the rigorous, permitting requirements and grants the permit to operate. With this operating permit and the construction permit granted in February 1993, and the state land use permit in May, 1993, all permitting requirements have been met.

Sept

Based upon the representations that it had all the government authorizations needed, Metalclad exercises option to purchase COTERIN and landfill site.

Oct 7

Governor Sanchez Unzueta meets with Sergio Reyes Lujan (Under Secretary of Ecology of Federal SEDUE, the predecessor organization to the Secretariat of the Environment (SEMARNAP). Governor requests Metalclad to work with the community and University of San Luis Potosi (UASLP) to secure their support. Heretofore, Metalclad had been told by both federal and state officials to stay away from the community. Governor agrees to grant his public political support upon completion of these requirements.

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NOTE: at this point, one might reasonably ask why such support is necessary since all legal requirements have already been met. It is therefore important to understand the system in Mexico as it differs from other countries.

In Mexico, a state governor is accorded an extremely high degree of respect by a very hierarchial population. This is particularly true in a poor community where the governor can literally grant or withhold financial and political support for municipal operations.

La Pedrera, Guadalcazar, is especially dependent on the governor. In a community of about 6,500 people, there is virtually no industrial employment. Many residences have no running water. There are no health

care facilities and no professionals except a few rural school teachers. The education level and literacy rate are very low, and superstitious beliefs are very high. For the governor to even visit the community is seen as a high honor. For a project like a hazardous waste treatement facility to operate in such a community, State political support is necessary to allay natural superstitious and fears about the danger to human health.

Nov

State Coordinator of Ecology, Dr. Pedro Medellin, sends letters to various federal officials in Mexico, including Dr. Sergio Reyes Luhan of SEDUE, indicating his official "doubts" about the Landfill project.

Nov-Jan

Metalclad repeatedly seeks meeting with Governor to try to understand the opposition expressed by Medellin. Governor refuses to grant such a meeting.

#### 1994

Jan 1

The North American Free Trade Agreement, (NAFTA), becomes effective.

Jan 9

Governor makes public announcement rejecting the landfill. He says he has a reliable scientific study that shows the Landfill is unsafe. He says the project does not meet international norms and the "people" were not consulted. He says that he has the final word and the word is "no." This announcement surprises Metalclad because of the complete and comprehensive studies that were submitted to the federal government in applying for a federal permit. All these studies have previously been given to the state.

Jan

Metalclad responded by publishing a public notice in the local newspaper and asking the Governor for a public investigation into the whole matter.

Jan

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Metalclad received an unsolicited letter from Attorney Jose Mario de la Garza Mendizabal suggesting a meeting with him because he could help fix the problems with the Governor. Company officials met with de la Garza Mendizabal who immediately arranged a meeting with the Governor. Metalclad now believes that Jose Mario de la Garza Mendizabal was acting at the request of the Governor in an effort by the Governor to avoid public criticism of his actions regarding Metalclad.

Jan 28

Metalclad officers meet with Governor who agrees that if Metalclad will satisfy the technical concerns raised by certain professors at UASLP, the State will accomplish the social and political tasks necessary for opening the

## 1994 - Continued

Landfill. The Governor appoints three UASLP professors, Roberto Leyva, David Atisha and Joel Milan as a Commission to work with Metalclad in addressing the Commission's "concerns."

- Feb 3 University Commission meets, makes an agreement with Metalclad to supervise various scientific studies to be funded by Metalclad and to make public its findings and conclusions.
- Feb 14 Incorporation of Pro-San Luis Ecológico, A.C. One of its founding members is Antonio Alemán Hernández. The latter is a relative of Sergio Alemán.

  This group was formed by Pedro Medellin to specifically oppose Metalclad's project.
- Feb-May

  Several meetings with UASLP Commission, geology reports are made, test holes, seismic studies, other investigations are all done to confirm the site as passing all scientific requirements. Work in the community by Metalclad begins with educational campaign. Several people from the state and local community are brought from Mexico to the U.S. to see facilities comparable in design.
- Mar 2 Luis Donaldo Colosio is assassinated. Within a few weeks, Ernesto Zedillo is named as new candidate for PRI party.
- Mar 30 State government agrees that Metalclad can begin construction, state officials agree to come to Newport Beach to visit corporate office and landfills in U.S.
- April 22 Medellin and four UASLP professors (three geologists) visit California as guests of Metalclad, to see first-hand the technology which is proposed for use at La Pedrera. The Medellin group expresses its satisfaction of the technology; Medellin declares to the company in the presence of all those assembled that the company can start construction, and that the company can begin operations, with concurrent remediation of the preexisting conditions from the former transfer station at the site, subject to the results of the further studies requested by the UASLP Commission.
- May 16 The Company hires local workers and construction begins on the Landfill site at La Pedrera with the full assent of the federal, state and municipal authorities.
- May 26 Letter from Medellin to de la Garza, attorney for Metalclad, memorializing official authorization from the State Ecology Coordinator for Metalclad to

construct and operate the Landfill facility at La Pedrera.

May 27

In a ceremony at the State Palace, with the press in attendance, the agreement between Metalclad and the State Government is publicly announced.

May

Almost immediately thereafter, the State government is critical of Metalclad, both privately and publically, and requests UASLP Commission to expand the scope and number of studies being conducted at the site.

June-July

Metalclad continues construction, continues UASLP Commission studies including new hydrogeology tests, seismic tests, drilling of test wells and establishing additional monitoring wells. State Government continues criticism of Metalclad in public while requiring Metalclad to stay completely quiet in public.

June-Dec

The construction is regularly monitored and inspected by PROFEPA, and various state and local officials.

Aug

Metalclad voluntarily requests Procuraduria Federal de Protección al Ambiente (PROFEPA) [Federal Environmental Attorney General] to conduct an ecological audit of the Landfill and former transfer station to confront and dispel charges from Medellin about the situation at the site, the operation of the preexisting Transfer Station and the conditions of remediation and operation at the Landfill site, with the involvement of outside companies, approved by PROFEPA, in conjunction with the federal ecological authorities. PROFEPA agrees to undertake the audit which Metalclad agrees to fund.

Aug 6

Opinion poll conducted by local economists of the state show 97% of the people living near the site favor its opening. In the broader community 33% are not aware of the project, 67% are aware and of those aware, 38% are in favor, 31% are not interested and 31% are against opening.

Aug 9

The installation of a plastic and clay cover at the transfer station site in La Pedrera that was earlier ordered by PROFEPA is completed.

Aug 18

Ernesto Zedillo elected as president of Mexico.

Aug 25

Governor announces that an opinion poll conducted in the community

#### 1994 - Continued

showed 85% of the people were against opening of the Landfill and that he will respect the decision of the people. This poll has never been released to the public or anyone and is thought to be nonexistent.

Sept 1

PROFEPA publicly announces its support for "the accord recently celebrated between the State Government of San Luis Potosi and Metalclad of California, for the restoration of the land, construction and operation of the controlled landfill in the zone known as 'La Pedrera'," in a ceremony attended by Miguel Limon Rojas, Environmental Public Prosecutor, the U.S. Ambassador to Mexico, Medellin and Metalclad's Chairman. Medellin is quoted almost immediately thereafter (in <u>Pulso</u>) as discounting the accord.

Oct

Concerned by the continual interference imposed by the Governor and Medellin, Metalclad considers withdrawing from Mexico. Hearing of this, Medellin calls Kesler at his home urging him not to leave: "You're almost there."

Oct 26

Representatives of the Town Council of Guadalcazar, with the cooperation of Pedro Medellin, deliver a handwritten document to Company officials at La Pedrera which purports to close all construction activities by the Company because the Company did not have a local construction permit.

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The Company briefly suspends work until directed by a federal PROFEPA official to resume work, that federal authority prevails. The Company is also directed to apply for the local permit, as a matter of respect, which will have to be granted by the Municipality since it has no authority to otherwise deny issuance.

Nov 15

As directed, the Company submits its application to Guadalcazar for a construction permit. The Company resumes construction.

**Nov 18** 

Letter to Metalclad from Joel Milan and Geologist Jaime Labarthe from UASLP stating that the hydrogeology study begun in April "looks promising" but need further permeability studies, regional hydrogeology studies, underground water flow studies and core samples approximately 200 feet deep.

Nov

Metalclad accedes to further demands from Medellin and the UASLP Commission and employs more consultants and experts for additional extensive studies of the Landfill site, including, hydrogeology, core samples,

#### 1994 - Continued

x-ray technology, etc., which tests consume an additional 5 months and more than \$500,000 U.S. to conduct.

Nov

PROFEPA begins its audit as agreed in August.

# 1995

Jan

The Company is given an additional construction permit from INE for other work at the landfill.

Feb 10 Metalclad submits its technological reports on the Landfill prepared by the Commission-approved company, GYMSA in conjunction with various specialists from UASLP. The findings and conclusions are that the site is geologically adequate in every respect. All agree, including Medellin and the UASLP Commission. Medellin refuses to let the findings be made public, however, in contradiction of the original charge to the Commission that a public report would be made of the findings, stating that "Now we have a problem: we have to tell the people that the site is adequate." One commission member resigns in protest of the failure of the State to release the report to the public. At this point, La Pedrera constitutes the most studied landfill site in Mexico.

- Feb 18 Officials of Metalclad meet again with the Governor who states that as soon as he has reviewed the results of the UASLP studies he will make a decision about his support for the project. Medellin and Ramiro Zaragoza, for PROFEPA speak well of the project. Construction is nearing completion. The opening is set for March 10.
- The UASLP Commission calls for further studies from Metalclad.

  The Commission, due to the request of Joel Milan, wants two more test holes dug, and monitoring wells; and, directs Metalclad to provide UASLP all geological information it has obtained.
- Metalclad officials extend an invitation to the Governor through Medellin, and to Medellin to attend an "opening ceremony" at the Landfill site on March 10, 1995, to also be attended by various federal Mexican officials, representatives from the U.S. Mexican Embassy, and other dignitaries from Europe, England and the United States. Medellin approves the invitation and assures the company that both he and the Governor will attend. Metalclad prepares and issues 300 invitations. The President of the Municipality of Guadalcazar (mayor) is also invited.

# 1995 - Continued

- Mar Metalclad performs additional tests requested by the Commission, which results reinforce the earlier findings. There are no underground aquifers or water of any kind (tests done about 600 feet depth). There are no seismic problems.
- Mar 2 Quimica Omega, a subsidiary of Metalclad, begins its recollection program for used oils, solvents and other degreasers, with both the support of Medellin and his public claim of credit for having brought Quimica Omega to the State. He attends the grand opening of the branch office of Quimica Omega in San Luis Potosi.
- Mar 3 Medellin informs Metalclad that the Governor will not attend the March 10 ceremonies, but that he, Medellin, will attend.
- Mar 7 Medellin tells a company representative that Medellin will not attend the ceremonies at the site, that Metalclad should call off the event.
- Mar 9 Medellin reportedly meets with the mayor of Guadalcazar and tells him that now is the time for the opposition to make a show of force through an organized demonstration at the site during the ceremony the next day.
- Unable to cancel the event on such short notice, Metalclad has a "facilities tour" of the Landfill facility at La Pedrera, attended by dignitaries from England, Mexico, Europe and the U.S. including a member of the U.S. Embassy in Mexico, Antonio Azuela de la Cueva of PROFEPA and others. More than 100 paid protestors from outside the local communities arrive in buses at the landfill site. Local residents in attendance confront the protestors, but withdraw at the request of Metalclad officials. The paid demonstrators block all traffic to and from the site, holding the visitors hostage in their buses for more than three hours. These people were picked up and delivered by the state police.
- Mar 11 The Governor places armed state police at the landfill who join paid thugs who intimidate workers, stop, search and deny entry to trucks for four weeks.
- Mar 28 PROFEPA finishes its audit voluntarily requested by Metalclad, and seeks further review of its data by enlisting six prominent institutions and experts to review the findings and information generated by the audit.
- Apr Antonio Azuela, the Environmental Public Prosecutor, in conjunction with Medellin, conducts a series of meetings in the local communities explaining

the technological and environmental soundness of the Metalclad project as proved by the audit.

- Apr Metalclad continues its efforts in the local communities, gathering in excess of 533 notarized signatures of community members in support of the Landfill project. This constitutes about 67% of the adult population of the communities around La Pedrera.
- Apr
  Medellin presents Antonio Azuela de la Cueva, the Environmental Public
  Prosecutor to a small group of dissidents called Pro-San Luis Ecological.
  Even after Azuela presents all of the scientific proof, findings and studies
  which evidence the project as technically sound, the group rejects all such
  findings including the company's proposal and agreement to remediate the
  present site.
- Apr 2

  Metalclad discharges the San Luis Potosi law firm of Jose Mario de la Garza.

  After paying fees in excess of \$70,000 (U.S.), company officials discover that
  de la Garza provides legal services to both the Governor and Pedro

  Medellin's brother, a serious conflict of interest never disclosed by de la

  Garza to Metalclad. Metalclad officials believe that confidential information
  may have been disclosed by de la Garza to the Governor.
- Apr 20
  Metalclad's president meets with the Governor Sanchez Unzueta who acknowledges that the technical requirements have been met and complied with. He still refuses to release the UASLP Commission report to the public but promises that following his meeting with Sec. Julia Carabias of SEMARNAP on May 4, 1995, he will announce his decision regarding support for the project.
- May 4 The Governor meets with Secretary Julia Carabias Lillo, Secretary of Environment (SEMARNAP).
- May 6 Governor meets with a group of invited local industrialists to whom he proposes that they build a new landfill for the State. He indicates that while the decision concerning the Metalclad project is to be made by the federal government, San Luis Potosi "will not be a national dumpsite." No one accepts the call from the Governor to build a new landfill. [Everyone understands Governor is opposed to Metalclad.]
- June 6 Public meeting presenting audit findings, present were National Water Commission (CNA), the Engineering Institute of the UNAM, PROFEPA,

# 1995 - Continued

National Ecological Institute (INE), San Luis Potosi's State Government, the town council of Guadalcazar and Greenpeace and Pro-Ecological San Luis.

- Jun 22 Head of PROFEPA, Antonio Azuela, is quoted as saying that La Pedrera "is the best site in Mexico for a hazardous waste landfill."
- June 28 Greenpeace, Pro-Ecological San Luis and The Regional School of Earth Sciences dispute PROFEPA and various government and academic conclusions.
- Jun 29 Sec. Julia Carabias publicly states that she will make a decision regarding the Landfill within two weeks, and will decide on the basis of science and technology, not on the basis of emotion. The decision by the federal authority "will be irreversible."

## June 19, 26-

- July 10 Several technical meetings are held regarding the conditions of the site of La Pedrera and compliance to official Mexican norms, involving members of the School of Civil Engineers of Mexico and the Geological Institute of the UNAM, and the National Academy of Civil Engineers.
- Medellin meets with Gabriel Quadri de la Torre of INE with a proposal to "solve the Metalclad problem." Medellin proposes that INE withdraw support for the Metalclad project and instead support a new site with local Mexican developers. Medellin is rebuffed in his stratagem to have Metalclad eliminated. He is invited to present his proposal independently of any linkage to the Metalclad Landfill project.
- Aug 15
  Incorporation of Promoción y Desarrollo de Infaestructura, S.A. de C.V., with the joint participation of nine different SLP construction companies. The company is headed by Samuel de Jesús González and Eugenio Sánchez Soler. The attorneys of the company are José Mario and Leopoldo de la Garza Marroquín. José Mario de la Garza Mendizabal is former attorney to Metalclad. This is a group of Mexican locals headed by Pedro Medellin formed to build and operate a hazardous waste landfill in place of and in competition against the Metalclad project.
- Aug 18 The additional expert reviews sought by PROFEPA of its audit are completed, with the conclusion that the Metalclad project is technically in compliance and that it surpasses in many important respects the standards of the federal government. Attorney General Antonio Azuela affirms that

#### 1995 - Continued

Metalclad has met all the norms and laws.

- Aug
- Sec. Julia Carabias is quoted as saying that in the "next year Mexico will have 30 more projects just like the Metalclad project in San Luis Potosi." Despite "the resistence of the people in the nearby regions," it is necessary to provide these sites.
- Aug
- UASLP professors release results of an opinion poll conducted among the Guadalcazar populace concerning the level of support for the La Pedrera Landfill project indicating that 82% are in favor of the project; and, of the 10% who expressed opposition to the project, the reasons given manifested ignorance of technological and scientific truths. We have been unable to get a copy of this study.
- Sept 1
- Jose Luis Medina Garcia, the new PROFEPA delegate to San Luis Potosi, was asked if the landfill was properly permitted. He replied that the State Government issued the permit for the use of the land, the Municipality and then the federal and state SEDUE gave the authorization for the construction of the civil engineering works. (El Heraldo)
- Sept 7
- PROFEPA issues public statement that Metalclad has complied with all laws and regulations.
- Sept 7
- Pedro Medellin is quoted declaring that La Pedrera will not open and that "we will not be a hazardous waste landfill."
- Sept 19
- PROFEPA announces authorization of the site.
- Oct 7
- Frustrated beyond tolerance, the Company has a draft complaint prepared that sets forth, at the time, its grievances. The Company's president provides a courtesy copy to the Mexican Ambassador, Silva Herzog. In continuing, however, to seek settlement over suit, Company officials seek help from The White House in getting their problem on the agenda for the October meeting between Presidents Zedillo and Clinton in Washington, D.C. Secretary Carabias asked the Company's chairman, Neveau, to "not embarrass my President," by having the issue raised by President Clinton. She assured that the federal government would solve the problem. The Company acceded to her wish.
- Oct 10
- Legal consultant to Greenpeace criticizes the Mexican Government for granting permits and then revoking them because it sets a negative precedent

#### 1995 - Continued

which will keep investors away from Mexico.

- Oct 12 Unzueta states that the State Government does not grant permits to operate landfills, this is the job of the federal authorities; however, the "people" have the final say.
- Oct 19 Newspaper article reports on meeting with the Secretary of Gobernación, federal, state and local leaders. "A definite resolution" is to be taken in the matter "in the next three weeks."
- Oct 23 Rosalio Tovar falsely claims in <u>Pulso</u> that there are "suits pending against Metalclad for damages to ecosystems of Guadalcazar."
- Oct 24 Sec. Julia Carabias Lillo sends documents to San Luis Potosi Congress regarding landfill; she states her complete support for the project.
- Oct 27

  Antonio Azuela quoted in <u>El Heraldo</u> "It is not a condition of the company "
  that "remediation is linked with opening." The "closure" resulted from a
  violation in 1990-1991. But the "authorization" has already been granted.

  "The closure would have to be lifted and the Remediation Program approved
  so that the authorization could be put into effect. It is not a condition
  imposed by the company."
- Nov 13 Governor Sanchez Unzueta publicly declares that Metalclad cannot operate without a construction permit from Guadalcazar. This is the first mention by the Governor of the need for such a permit. Since the company has not obtained the permit but has "initiated activities" at the site, there may be grounds for revocation of the license for the Use of Land issued previously by San Luis Potosi in 1993 (May 11, 1993), which was endorsed by the local university committee and the state congress.
- Nov 13 Sanchez Unzueta states that Metalclad opened illegally because it did not have a local construction permit. (Pulso)
- Nov 17 General Director of Hazardous Waste of Mexican Ecological Movement (MEM), Carlos Alvarez Flores publicly challenges those who use scare tactics and misinformation concerning La Pedrera.
- Nov 19 President of CANACINTRA supports Metalclad landfill in letter to Secretary Carabias.

- Nov 24 PROFEPA announces the signing of an Agreement with Coterin/Metalclad to remediate and operate at La Pedrera. Agreement with INE, SEMARNAP, PROFEPA and Metalclad wherein:
  - •The company agrees to perform an integral remediation plant at the landfill.
  - •The new landfill will operate.
  - •People from Guadalcazar will be able to participate in supervising the landfill operation.

Antonio Azuela states: "there is no going back."

- Nov 26 Public letter from Governor to Potosinians in Excalibur and Reforma proclaiming that S.L.P. officials not a party to the Agreement and he does not subscribe to it.
- Nov 27 Sanchez Unzueta meets with the Guadalcazar Town Council and agrees not to grant the local construction permit to COTERIN. (Pulso)
- Nov 30 Carlos Abascal Carranza, President of Confederation of Employees of the Mexican Republic (COPARMEX) writes Sec. Julia Carabias Lillo in support of Metalclad and the project.
- Nov 30 President of COPARMEX supports Metalclad landfill in letter to Secretary Carabias.
- Dec 2 Reporter from El Heraldo (San Luis Potosi newspaper) tours the landfill and surrounding communities finding that more local inhabitants favor the landfill than oppose it.
- Dec 2 Journalist from <u>El Heraldo</u> tours the landfill and surrounding areas and "proved that there are greater numbers for the landfill than against." Those against have "erroneous opinions" as to the by-product of the facility."
- Dec 2 In response to a question about revoking the Company's authorization from the federal government, Antonio Azuela (PROFEPA) states that the results of all the studies are positive, and, since the Company has shown it is right and has complied with the law, there is no reason to take back the authorization given by the federal government. (El Heraldo)
- Dec 3 Metalclad hires 250 local workers and begins training them for operation and

remediation.

- Dec 4 <u>El Heraldo</u> declares that Governor Sanchez Unzueta is "blocking Metalclad" for the Governor's friend Alfonso Martinez Dominguez, federal Senator and former Governor of Nuevo Leon, the "lord and master of the toxic waste treatment monopoly" and presumed controlling owner of the only landfill in the country at Mina, Nueva Leon (RIMSA).
- Dec 5 In an official meeting, the Town Council of Guadalcazar refuses to consider the Company's application for a construction license made 13 months earlier with any rational basis.

Town Council of Guadalcazar meeting minutes state that the Council will not even consider the application of COTERIN for a local construction permit, which permit, the Governor declares, the Company must have to open.

- Dec 10 Governor Sanchez Unzueta sends a letter to U.S. Senator Paul Simon claiming COTERIN is in violation of state and local laws; and that the Company, and those who support it, are "cheapened" and "discredited" by their actions. Unzueta copies:
  - •Herbert L. Oakes, Jr., Chief Executive Officer of Oakes-Fitzwilliams of London, England, Metalclad's largest single institutional investor;
  - •Brian E. Hand, Managing Director, First Analysis Corporation, Chicago, Illinois, Metalclad's largest U.S. investor;
  - Sec. Julia Carabias, SEMARNAP,
  - Ronald Brown, U.S. Secretary of Commerce;
  - •James Jones, U.S. Ambassador to Mexico;
  - •Jesus Silva-Herzog, Mexican Ambassador to U.S.

This letter from Unzueta is <u>not</u> in response to any correspondence directed to him from any of the addressees, but is a flagrant attempt to disrupt Metalclad's relationships with its investors and supporters.

- Dec 13

  Unzueta states that an indispensable requirement for the landfill is that the Company have all the construction permits and the license to operate given by the Town Council. (El Heraldo)
- Dec 13 Town Council claims that since Metalclad did not request a local permit to

#### 1995 - Continued

begin construction, the local authorities and the population neither negate nor confirm what has not been asked for. (El Sol de San Luis) (No mention is made of the November 15, 1994 application by COTERIN for a local construction permit.)

- Dec 15 Town Council of Guadalcazar denies Metalclad's formal request for reconsideration of its denied request for a construction license.
- Dec 19

  Company officers, T. Dan Neveau and Javier Guerra, meet at Governor's mansion with Mario del Valle, Coordinator General for the Governor (i.e., Chief of Staff) and Leonel Serrato Sanchez, Legal Environmental Advisor to the Governor. After an hour and forty-five minutes, Governor Sanchez Unzueta joins the meeting. For more than an additional hour, information is given to the Governor and his staff of which they confessed to have been previously unaware. Metalclad officials left with assurances that the Governor wished to become more fully informed on the project and to keep communications open and current.
- Dec 21 The President of the National Chamber of Industrial Transformation (CANACINTRA), Lic. Victor Manuel Terrones Lopez, and the President of COPARMEX, Carlos Abascal Carvanza, write to Secretary Carabias lauding the government's agreement with Metalclad as of great benefit to Mexico.

#### 1996

- Jan 6 The Governor again places armed state police at the landfill for three months who stop and search all trucks coming and going at the site. They are angry and disappointed when they find no hazardous waste being transported and threaten to "plant" some.
- Jan 7 The School of Lawyers of San Luis Potosi endorses the waste landfill at La Pedrera as "urgent" by Lic. Joel Torres Salazar, President.
- Jan 7 President of the Lawyers of the Potosinian Forum supports the reopening of La Pedrera.
- Jan 8 Guadalcazar Municipal President states publicly that "in no way going to allow Metalclad... to convert the site into a controlled deposit, even if they have the federal authorizations they claim to have, because the Town Council denied the construction permit." Pulso.

- Jan 15 <u>El Heraldo</u> reports on Governor Sanchez Unzueta's speech in Guadalcazar wherein he pledges to erect a monument to Mexican hero, Benito Juarez, looking towards the <u>north</u> (La Pedrera and the United States) so that "no one will forget 'country is first'."
- Jan 20 Pedro Medellin publicly criticizes Metalclad stating that it "should have remediated the La Pedrera zone a long time ago" and that the company constructed without municipal permits. -- Pulso
- Jan 21 <u>El Heraldo</u>: Pedro Medellin states that "Coterin has not had, nor does it have the official authorization from the state and municipal governments for its landfill."
- Pedro Medellin states that the Municipality of Guadalcazar has not given any authorization for the landfill construction and has, in fact, refused the permit. Without the permit, the Company cannot operate. (El Heraldo)
- Jan 31 Municipality files an amparo proceeding before the SLP federal judge against SEMARNAP for dismissing the administrative appeal.
- Feb 2 Sec. Julia Carabias denies the "Disagreement Petition" filed by Guadalcazar in opposition to the Agreement between SEMARNAP and Metalclad on the grounds that:
  - 1. it was filed under a proceeding presently abolished under the Federal Law of Administrative Procedure;
  - 2. the appeal was untimely;
  - 3. the appeal lacked legal interest;
  - 4. the appeal lacked legal objective.
- Feb 2 Federal Judge (i) admits the amparo, (ii) orders suspension of the operations of the landfill until the amparo is resolved, and (iii) allows for remediation to take place at any time. The company is not a party to the amparo but is the victim of the procedure: neither the federal government nor the municipality has gone forward with the action which lies dormant indefinitely.
- Feb 8 INE issues the Company an additional construction permit authorizing the Company to expand its capacity to 360,000 tons/year from 36,000tons/year.
- Feb 15 HAZARDOUS WASTE, A NATIONAL PROBLEM
  The Case of Guadalcazar

Translation of an ecological Mexican newspaper.

The Ecological Journey, Mexico, D.F., Year 4, Number 43, Thursday,
February 15, 1996. A thorough recounting of the history of the La Pedrera
project by PROFEPA.

- May 6 Mexico-USA Bi-National meeting in San Antonio, Texas. Working with and through Ambassador Jones's office and the U.S. Department of Commerce, Metalclad forms part of the agenda, which is presented to Sec. Julia Carabias by Stuart Eisner of the U.S. Department of Commerce.
- May 8 Gustavo Carvajal, attorney for Metalclad, meets with Mario del Valle in SLP to introduce himself as Metalclad's attorney. Carvajal agrees to meet further with del Valle in search of resolution of the impasse.
- Pedro Medellín brings together in his office the leaders of Pro-San Luis Ecológico, Julio Castillón (Delegate of the SEMARNAP in SLP), Ernesto Tinajero (former employee of RIMSA), Federico Díaz Infante and Samuel de Jesús González (from Promoción y Desarrollo de Infraestructura, S.A. de C.V.) to announce that "this is the group of investors who will receive support from the State Government for a hazardous waste landfill."
- May 18 Gustavo Carvajal meets with Mario del Valle in Mexico City to review the first draft of a proposal, the two have agreed will be submitted to the Governor by Metalclad.
- May 21 As requested, Metalclad submits a proposal to Mario del Valle. The latter will travel with the Governor to Spain and promises to discuss the proposal with the Governor during the trip.
- May 22 Pedro Medellin criticizes PROFEPA for being "soft" with Metalclad and for not making the company remediate the site. (Pulso, El Heraldo).
- May 31 Pedro Medellin says that "the State Government is searching for an ideal place to build a landfill that will exclusively serve potosinian businessmen." (Pulso).
- Governor sends plane to Mexico City to transport company officials to Ciudad Valles, SLP for a lunch meeting with the Governor and his chief of staff, Mario del Valle. The Governor acknowledges to have read the company's proposal to operate and remediate the proposal, and to agree with the "general terms" of the proposal; however, he also sates that "he has in his

drawer, a study that proves the existence of health problems caused by the landfill." Metalclad agrees to continue discussions and to jointly draft a detailed implementation plan of the proposal. BFI, Metalclad's joint venture and operating partner, invites the Governor and his staff to visit different landfills located in the U.S. and operated by BFI. The Governor accepts.

- June 28 The implementation plan of the proposal prepared by Metalclad is submitted to the Governor through Mario del Valle.
- Dr. Héctor Marroquin, Assistant State Director of Health, announces the existence of 8 malformation cases, 12 chronic breathing disorders and 18 multiple abortions in areas bordering and close to the landfill. His "study" and other claims of a link between the landfill with health problems are refuted by federal officials. (Pulso).
- June 30 Leonel Ramos, municipal president of Guadalcazar, states that "under no circumstances will we allow that some foreign people" decide on the landfill, just to make a few dollars. We have filed an amparo to stop any attempt by North American companies that come to contaminate our country." (Pulso)
- Governor visits Houston, paying for his own expenses. The Governor travels with the Mayor of the city of SLP, the SLP State Health Secretary, Mario del Valle, among others. During the course of the trip, Governor tells Gustavo Carvajal, in private, that "it will not be possible to open the landfill due to the existing opposition of the community."
- July 8 Leonel Ramos, Municipal President of Guadalcazar, announces that "there is nothing in the world that can open the landfill due to the community's opposition." (Pulso).
- July 16 The Governor, through his Chief of Staff, Mario del Vaile, communicates to Metalclad that all negotiations are ended despite the fact that no resolution has been achieved.
- July 17 PROFEPA's state delegate states "that no health problems have been linked to the landfill." (Pulso).
- Grant Kesler sends letter to Sec. Julia Carabias, Alejandro Beuchot (Mexican Investment Board) and Amb. James Jones explaining Metalclad's negotiation efforts and the abrupt termination of mutual communications by the Governor.

- July 25

  Amb. James Jones speaks with Luis Téllez, Chief of Staff to President
  Zedillo, about the continuing lack of resolution of Metalclad's problems in
  San Luis Potosi, who promises to respond in a 3-4 day period.
- July 28

  The Garfias family publicly accuses Governor of planning and ordering, in November 1995, an invasion to their property "El Palmar", with the purpose to reduce the price of "El Palmar", and ultimately to acquire "El Palmar" at a reduced price in order to construct a hazardous waste landfill (note that it is a UASLP selected site). On several occasions, Garfias asks the Governor for help to get the invaders off his land, which requests go unanswered. In May, Federico Diaz Infante visited the Garfias family and offered to purchase "El Palmar" regardless of the invasion. A similar tactic was used in Nueva Leon to acquire the land in Mina where RIMSA presently operates a landfill.
- July 29 The Governor states that "if the Garfias family can not prove their accusations, they will be prosecuted." (Pulso, El Sol de San Luis).
- July 30 Invaders of "El Palmar" are removed by state police under the direction of the Governor.
- Aug 4-6

  Doug Land, Grant Kesler and Gustavo Carvajal attend the U.S./Mexico
  Border Conference in San Antonio, Texas. Metalclad's points of view about
  the government's failure to allow Metalclad to open, operate and remediate
  despite total compliance are clearly stated and supported by others. Sec.
  Julia Carabias and Sec. Herminio Blanco publicly agree to review the
  problem fully.
- Aug 7 Metalclad representative meets with Mario del Valle in Mexico City to explore possible alternatives solutions. Del Valle states that "it is a no way out situation if Metalclad insists on operating the landfill."
- Aug 9
  Gustavo Carvajal meets with Jaime Zabludovsky, Federal Undersecretary of Commerce, to present Metalclad's case and to summarize recent events.

  Metalclad sends Dr. Luis Téllez a letter explaining Metalclad's position and attaching a copy of the proposal submitted to the Governor.
- Aug 15

  Company officials meet with Sec. Julia Carabias and Antonio Azuela to explain the proposal and its implementation plan submitted to the Governor. Sec. Julia Carabias finds "unbelievable that the Governor refused this proposal" and states to Metalclad that the situation in "Guadalcazar has

nothing to do with the environment and a lot to do with economic interests." She also argues that "if a NAFTA claim is filed, the governmental authorities who were once friends of Metalclad will change their position."

Dr. Luis Téllez, Sec. Julia Carabias and Sec. Herminio Blanco meet to prepare for a next-day meeting with Amb. James Jones.

- Aug 16

  A meeting is held between Dr. Luis Téllez, (Chief of Staff to President Zedillo), Sec. Herminio Blanco, Sec. Julia Carabias, the Governor and Amb. James Jones. The Governor and his lawyers accuse COTERIN (Metalclad) of "not being able to have foreign shareholders" and, consequently, Metalclad is accused of "lying to Mexican and U.S. authorities." The meeting is suspended due to the accusations.
- Aug 20 Documents that prove the untruthfulness of the Governor's accusations are immediately submitted to Dr. Luis Téllez, Amb. James Jones, Sec. Julia Carabias and Sec. Herminio Blanco by Metalclad. Ambassador Jones subsequently threatens to "blacklist" San Luis Potosi or "hostile" to U.S. investment.
- Aug 21 Metalclad's lawyers meet with the Governor's lawyers regarding the specious accusations. John Harris, of Ambassador Jones's staff, acts as mediator in the meeting. After apologizing for the false accusations, the Governor's lawyers agree to submit a new proposal to the Governor.

Leonel Ramos sends a written petition to PROFEPA demanding "remediation of the site as agreed on November 1995." (Crónica).

- Aug 23 As agreed on August 21, a new proposal is sent to the Governor. The proposal is never acknowledged or responded to by the Governor.
- Aug 25

  Dr. Héctor Marroquin, despite compelling medical and scientific information to the contrary, and despite the acknowledgement of and concurrence with that information, by various federal and state officials, publically restates that "brainless children and other birth defects are being caused by the landfill and that the landfill has a high risk of explosion." (El Heraldo, Pulso).
- Aug 28 A visit and inspection of the landfill by the Environmental Committee of the Federal House of Representatives is announced. (Pulso).
- Aug 30 An article states that La Pedrera, which has been authorized for operation,

remains closed because of conflicts with San Luis Potosi's Governor; further, Greenpeace's hazardous waste coordinator confirms that Greenpeace is opposed to all subsurface hazardous waste disposal facilities. (The News)

- Sept 2 Greenpeace reveals a study alleging that "Metalclad will try to interfere in the upcoming municipal presidential election in order to open the landfill."

  (Pulso).
- Sept 10 A meeting with Amb. James Jones is held to explain the new proposal submitted to the Governor, and to review status of matters.
- Sept 11 A meeting with Oscar Cantón Zetina, head of the Environmental Committee of the Federal House of Representatives, is held to present Metalclad's position regarding the upcoming visit and inspection of the landfill.
- Sept 12 UASLP professor, David Atisha Castillo, states in <u>El Sol de San Luis</u> that there is never a completely adequate topographic site for a hazardous waste landfill; therefore, engineering designs counter the defects.
- Sept 17 ICF/Kaiser project in San Luis Potosi does not have a municipal construction permit; but, intends to build and operate solely under the INE authorization.

  (Fax from David Robinson in Mexico City.)
- Sept 19-25 Dr. Luis Tellez, Chief of Staff to President Zedillo, requests a series of proposals from the Company, which are submitted, but for which no response is received.
- Oct 2 Medellin states that a landfill will always produce public opposition.
- Oct 2 Metalclad files a Notice of Intent to Submit a Claim to Arbitration under Chapter 11 (Investment Chapter) of NAFTA.
- Oct 7 Greenpeace and Educación Ambiental, A.C. (A new environmental group headed by Angelina Nuñez) call for the remediation of the site due to the probable extinction of rare cactuses that exist in the zone.
- Oct 13 An "Amparo in Revision" is filed by COTERIN challenging the amparo filed by the Town Council of Guadalcazar against SEMARNAP (which was later voluntarily dismissed by COTERIN as a show of good faith during subsequent negotiations).

# 1996 - Continued

- Oct 30 In correspondence between U.S. Ambassador James Jones and Governor Sanchez Unzueta, the Governor takes offense at the Ambassador's reference to the Governor's declaration that he, Unzueta has the last word. (But see article in <u>Pulso</u>, January 9, 1994.)
- Nov 6 Member of San Luis Potosi State Congress (Acosta) publicly states "there are economic and political interests that oppose San Luis Potosi having a hazardous waste landfill.
- Nov 13 Victor Mendez Fernandez, sub-delegate of SEMARNAP, states that the population of Guadalcazar has no reason to be afraid because the landfill operations will be supervised.
- Nov 29 In a letter from the Governor to Ambassador Jones, Sanchez Unzueta says he will forward Metalclad's proposal to Guadalcazar authorities.
- Dec 12 Letter from Municipal President, Leonel Ramos, to Governor Unzueta regarding Metalclad's proposal.
- Dec 17

  Congressman Jorge Humberto Gomez Garcia stated before the House of Representatives, that in 1997 Mexico hopes to open at least seven industrial waste landfills, including one in San Luis Potosi. He stated that San Luis Potosi's state government was making a "grave mistake" in promoting the closure of La Pedrera; because of "economic interests" the citizens of Guadalcazar were misinformed.
- Dec 17

  Jorge Humberto Gomez Garcia, Secretary of the Ecological Commission of the San Luis Potosi House of Representatives publicly declares that La Pedrera is not operating due to political motives and economic interests; expresses his support for the landfill; states that the opposition is due to group whose only goal was to not allow the installation to open. He states that the hand of Governor Unzueta is behind this. First, Unzueta proposed the landfill and then took on an entire campaign against it.
- Dec 18 Letter from Unzueta to Ambassador Jones re the negotiations between municipal officials and Metalclad representatives.
- Dec 23 Acosta of State Congress: La Pedrera is an ideal site because studies have confirmed it.

# 1997

- Ambassador Jones is informed by Luis Tellez, Chief of Staff to President Jan 7 Zedillo, that the federal government had done all it could with this Governor and could do no more. Jan 8 Memorandum of Understanding executed by Leonel Ramos on behalf of Guadalcazar and Metalclad's representative. The parties state their understanding of the need for remediation, the need to operate commercially and the need for the support of the inhabitants of Guadalcazar. Jan 15 Governor Unzueta buys expensive home and is questioned as to where the money came from. Jan 29 Carabias is quoted that, regarding the facility at La Pedrera, all the necessary studies were done that show the site is viable and the technology is adequate. Mar 10 Governor publicly states: "the best way out of this [problem] is an agreement between the parties." Apr 17 Even though the state government reiterates that there have not been changes to its opposition to the landfill at La Pedrera, on March 17, Governor Unzueta met with inhabitants and municipal authorities to ask them to allow Metalclad to operate commercially. Reference to the memorandum of understanding between Metalclad and the Municipality of Guadalcazar was made. June 26 Governor Unzueta states that the State of San Luis Potosi will not be a party to the NAFTA lawsuit. He alleged Metalclad had acted "with fraud" but had been fought by the people of San Luis Potosi. July 26 Governor continues to reject the landfill on the basis that it is a hazard to the health of the people of the state. July 26 Metalclad receives negative press alleging that Metalclad was "political" in the recent elections and did not make the lawsuit known until after the elections.

law.

July 27

July 29

Municipal President, Leonel Ramos Torres, states that Metalclad had always

Governor publishes public statement that Metalclad had violated the law, was seeking \$130 million and that the state had strictly complied with the

done business in the margins of propriety and that the NAFTA lawsuit is merely an effort by Company officials to "justify themselves before their partners and shareholders."

- July 29 Representative Jorge Humberto Gomez states that the Governor should be held responsible because he has prevented the landfill from opening due to obscure and economical interests. He adds that Sanchez Unzueta abused his position as Governor to influence the Municipality of Guadalcazar against the landfill.
- July 30 Eduardo Martinez Benavente, a political analyst, criticizes the Governor and Metalclad, suggesting that the NAFTA suit is a "story" between the two parties to get pressure to open the landfill. He points out that the Governor should bear the responsibility because he misled Metalclad on more than three occasions regarding their authorization to operate.
- Aug 6 Governor characterizes Grant Kesler and his associates as lacking ethics. He also accuses them of "corruption and bribery at all levels."
- Aug 7 Carabias is reported to have told Governor Sanchez Unzueta in a prior meeting to open the landfill in "no later than fifteen days." The Governor replies that, in order to do so, Carabias is going to have to lend him the army to control the people of Guadalcazar. Meanwhile, Medellin continues to claim that the site is inadequate based on a study by UASLP (the Aleman study).
- Aug 8 Members of the Congress call for an investigation to determine whether there was corruption in San Luis Potosi regarding the landfill.
- Aug 10 After enduring a spate of negative press, Grant Kesler agrees to an interview with Excelsion.
- Aug 14 Azuela publicly states that Metalclad's project at La Pedrera was viable and no evidence to the contrary was provided. He adds that there are economic interests at play that continue to keep the site closed. He explains that Metalclad already had the authorization to open and operate but PROFEPA conducted studies and signed an agreement that gave the Company more obligations. The delay was to give people the guarantee that they did not run any risk for their health.

- Aug 14 Azuela points out that the population of the area closest to the La Pedrera site actually approves of the project.
- Aug 18 A spokesman for RIMSA denies any involvement or interest in the situation in Guadalcazar, despite a statement by <u>Excelsior</u> that it has proof of RIMSA's culpability.
- Aug 19 Quadri de la Torre, president of INE, declares that the La Pedrera project was a "viable" initiative "analyzed more than once by the INE." He blames misinformation for the difficulties faced in the development of the environmental industry.
- Aug 25 Nine armed and uniformed members of the Mexican army arrive unannounced at the entrance of the landfill seeking permission to enter from the Company's security guard. Being denied such permission on the basis that the guard had not been informed nor instructed to allow such entrance, the soldiers scaled the fence, roamed the facility, took photographs for approximately an hour, then left by the same means they had entered.
- Aug 29 Metalclad receives a copy of the decision of the federal judge in Mexico City, who, after nearly two years, issued an opinion rejecting the amparo filed by the Municipality of Guadalcazar on the grounds that the municipality was not a proper party to bring an amparo. Leonel Ramos Torres immediately reacts by publicly stating that they will resort to civil resistance, if necessary. Governor Unzueta publicly announces his support for the municipality.
- Sept 5 Carabias, in an interview with <u>Excelsior</u>, states that Metalclad "did things wrong" by not getting a municipal license. She claims to have said this from the time she took possession of the Secretariat. This is the first and only statement by a Government of Mexico official that the Company was informed from the beginning that it was constructing unlawfully without a local construction permit.
- Governor Sanchez Unzueta signs an agreement to declare the Altiplano area an ecologically protected area to protect some twenty species of cacti.

  Leonel Ramos joins the Governor in signing the declaration and Pedro Medellin signs as witness. The designated area includes the Company's entire facility at La Pedrera.

# 1997 - Continued

- President of the Potosinian Industrialist S.C., laments the inevitability of a discouraging message to potential investors. He explains that, first, the government authorities invited Metalclad to invest and later revoked any possibility to even recuperate what they had spent. He suggests it would have better ... if from the start they were given no hope.
- Sept 23 Three days before leaving office, Governor Sanchez Unzueta signs and publishes the official decree creating the ecological preserve that includes all of the Company's La Pedrera landfill project. The decree orders the cessation of all activities in the ecological preserve area indefinitely.

#### PREFACE

This case exemplifies the very reasons why the Investment Chapter of the NAFTA was enacted -- why standards of treatment, including due process and fair and equitable treatment; and why strict criteria for expropriation, including payment of full and fair compensation -- are codified therein.

The Tribunal will learn, as this case unfolds, how one official, the Governor of the State of San Luis Potosi, at the expense of the Mexican people and their environment, has used his office arbitrarily, prejudicially and unlawfully to deny this Claimant its rights under The North American Free Trade Agreement.

To briefly frame the context, Mexico generates over 10 million tons of hazardous waste a year. As one example, Mexico produces enough waste oil to constitute an Exxon-Valdez spill every month. Less than 10% of this hazardous waste is properly disposed. The rest goes into hundreds of clandestine dump sites.

Today, Mexico has three hazardous waste landfills:

- One very small facility in Hermisillo which takes only the waste from Hermisillo;
- 2. A second in Mina, Nueva Leon, with a capacity of up to 600 thousand tons a year. This site is a nine hour truck drive from Mexico's industrial area where 70% of the hazardous waste is produced; and
- 3. A third one in the Municipality of Guadalcazar

in a valley called La Pedrera, San Luis Potosi, just five hours away from the industrial center.

This \$20 million landfill in La Pedrera is the only landfill built since the NAFTA. It is built to state-of-the-art specifications, meeting every Official Mexican Normative and even exceeding those regulations in some cases. The tests, studies and evaluations of this landfill over the past three years make it the most studied environmental project in Mexico's history.

In 1993, the Mexican company, COTERIN, (wholly owned by Claimant, Metalclad Corporation), received a federal construction permit for a hazardous waste landfill at La Pedrera.

Two years before that, COTERIN had been licensed by the Federal Government to establish a "transfer station" -- or storage site -- on one piece of its La Pedrera property. There it was permitted to store hazardous waste while it obtained the approval to build a landfill on an adjacent piece of the property.

In 1991, the federal government closed the storage site for activities in excess of the permit. However, in February, 1993, COTERIN, having complied with the requirements under the new comprehensive Mexican environmental law, received the federal construction permit.

Two months later, COTERIN was given a land use permit from the State of San Luis Potosi for use of its land at La Pedrera as a controlled hazardous waste landfill.

And in July, 1993, COTERIN was given the federal operation permit.

When Metalclad exercised its option a few weeks later to buy COTERIN, Company officials were assured by federal authorities that all federal and state permits were in place which constituted everything necessary for the Company to build and operate its facility.

In June of 1993, Metalclad officers met with the newlyelected Governor of San Luis Potosi. They fully explained their project in La Pedrera, with engineering plans and drawings, maps, photos and video. They left with the Governor's endorsement and commitment of support.

In what has turned out to be a malicious pattern, however, the Governor soon began to withdraw his support by public criticisms of the Company and its project. Many examples of this behavior follow in this Memorial, but several brief illustrations suffice for overview.

First, he claimed to have a study proving that there were aquifers and streams beneath the landfill site, and signs of recent seismic activity which made the site unsafe. With encouragement from Federal officials to try to appease the Governor, Claimant met with him. The Governor said he would again give his support if Metalclad would satisfy the concerns of a commission of professors from the University of San Luis Potosi (UASLP) -- to which the Company acquiesced.

But soon, one request from the commission led to a second,

then a third and a fourth. Always the Governor's promise of support was contingent upon just one more thing. Some fourteen months and after cumulative costs of U.S.\$1.5 million later, the Commission concluded its work with a favorable report on the landfill site. The findings thoroughly repudiated the study the Governor had earlier cited. On no rational basis, with no explanation, the Governor arbitrarily withheld his promised support, and refused to let the commission make its findings public as agreed.

Second, at about the same time as the results above were attained, a federal audit of the sites at La Pedrera was concluding. This audit was requested and paid for by Metalclad and conducted by independent companies under supervision of the federal government in a further good faith effort to satisfy the continual criticisms publicly raised by the Governor. After about nine months and \$1 million U.S. later, the audit was completed. And, in an extraordinary act, the federal government asked a number of experts from the prestigious University of Mexico and other federal agencies to further analyze the audit results. The conclusions: the site is safe and meets all technical requirements. There is no water within 600 feet below the site; no seismic activity. The study relied upon by the Governor was shown to be a patent sham. Again, the Governor, arbitrarily and without rational basis, refused to approve the landfill.

Third, following these studies and a number of efforts by

both the federal government and Claimant to placate the Governor, the federal government entered into an agreement with the Company to operate and remediate its La Pedrera facility. The Governor immediately publicly denounced the federal action, and said he didn't care if there was an agreement he would not let the landfill open. This arbitrary, confiscatory action again came with no rational explanation.

Fourth, in an incindiary speech to a crowd in Guadalcazar, the Governor held up an infant deformed from radiation, declaiming, "This what happens from having a landfill in our community." The baby, in fact, was from Matawala, 200 kilometers north of La Pedrera. And in a resulting test by the federal government for radiation at the landfill, it was discovered that there was three times the radiation at the State's Palace than at the landfill.

Fifth, in a later fiery speech in Guadalcazar, the Governor unveiled a statue of Mexican hero, Benito Juarez, which he positioned facing north, towards the U.S., so, the Governor said, "Everyone will remember -- country is first!"

Sixth, on two separate occasions, the Governor placed armed, State police at the entrance to the landfill, who stopped and searched all the trucks going in or out of the facility; and, on one of the two occasions, refused to let any trucks into the landfill, which police action lasted for several weeks.

Seventh, through his State Environmental Coordinator, the Governor supported a group of local Potosinian industrialists

forming a consortium to build, own and operate a landfill in San Luis Potosi in lieu of the U.S. investor, Metalclad.

Eighth, the Governor then claimed that the Company had never obtained a municipal construction permit. After Company officers had been assured by Federal officials that the Company had received all the permits it needed, plus had an agreement with the Federal Government to open and operate the facility. This local permit, administrative in nature, has been arbitrarily withheld, again with no rational explanation therefore.

Finally, at the direction of the Governor, the Municipality of Guadalcazar filed a legal action against the Federal Government over its agreement with Metalclad. A federal judge accepted the suit, (called an "amparo"), and ordered the Company not to operate pending the litigation. After eighteen months of inaction, the amparo was just recently denied. As of this writing, however, the order prohibiting the Company from operating has not been vitiated.

This state-of-the-art landfill was ready to open on March 10, 1995. Now, 959 days later -- it is arbitrarily, with no rational basis and without due process -- still unopened. Meanwhile, Claimant's damages, in excess of \$90 million, continue to grow.

Addendum: On September 23, 1997, just a week before his term ends, Governor Sanchez Unzueta administered the coup de grâce to Claimant. The Governor signed a decree creating an extensive ecological preserve to protect some rare cacti species, which

area fully includes Claimant's real property and landfill. The decree orders all activities in the designated area to cease as of September 24, 1997. The Governor's public statements concerning this action elucidate his intent: "any possibility that exists of opening the industrial waste landfill of La Pedrera is definitely cancelled" (See ¶145, infra).

### **JURISDICTION**

On October 2, 1996, Claimant, by personal service, delivered to the Government of Mexico a Notice of Intent to Submit a Claim to Arbitration in accordance with Article 1119.

In harmony with Article 1121, Claimant, on December 30, 1996, delivered to the Government of Mexico a written Consent to Arbitration and Waiver of Rights of Disputing Investor and the Enterprise.

On January 2, 1997, Claimant filed its Notice of Claim with the International Centre for Settlement of Investment Disputes (ICSID) under the authority of Article 1120 and the Additional Facility Rules of ICSID.

On January 13, 1997, ICSID Secretary General, Mr. Ibrahim F.I. Shihata, noting fulfillment of the requirements of Article 4(2) of the Additional Facility Rules, confirmed in writing his approval of Metalclad's application for access to the Additional Facility; and, his registration of the Notice of Claim.

Article 1122 of the NAFTA contains Respondent's consent to arbitration which satisfies the requirement of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties.

As noted in the Secretary General's January 13, 1997 letter, Metalclad's Notice of Claim included among its accompanying documentation, Metalclad's consent to arbitration under the Additional Facility Rules.

On April 30, 1997, Claimant, in conformity with Article 1125

of the NAFTA, wrote to the Secretary-General Claimant's consent to the appointment of each individual member of the Tribunal.

In accord with Articles 1116 and 1119 of the NAFTA, and Articles 2 and 3 of the Additional Facility Rules, Claimant's Notice of Claim sets forth factual assertions establishing an investment dispute involving Metalclad's claim that Respondent has breached obligations under Section A of Chapter Eleven of the NAFTA.

The Secretary-General notified the parties on May 19, 1997 that all the arbitrators had accepted their appointments. Under Article 14 of the Additional Facility Arbitration Rules, the Tribunal was thus deemed to be constituted and the proceeding begun. The official Minutes of the first session of the Tribunal held in Washington, D.C. on July 15, 1997 reflect that the parties were provided with copies of the declaration signed by the three arbitrators pursuant to Article 14 of the Additional Facility Arbitration Rules.

With the submission of a dispute by an investor alleging breaches of obligations by the Government of Mexico of the provisions of Section A, Chapter Eleven of the NAFTA; and, being appropriately constituted, this Tribunal is competent to arbitrate this case before it.

### THE QUESTION

The question before the Tribunal is whether Mexico

("Respondent") has breached its obligations under NAFTA to

Metalclad Corporation ("Claimant"), a U.S. investor in an

enterprise -- hazardous waste landfill -- in Mexico, by breaching

Respondent's obligations under Chapter Eleven: guaranteeing

national treatment; most favored nation treatment; minimum

treatment in accord with international law, fair and equitable

treatment, and full protection and security; prohibiting

performance requirements; and, depriving Claimant of its

investment through Respondent's actions that directly and

indirectly resulted in, and were tantamount to, expropriation of

that investment without due process and full compensation:

(1) where Claimant received both construction and operating permits from the federal government, then signed an Agreement to Remediate and Operate the landfill with the Mexican Government after meeting with high-ranking Mexican federal officials who told Claimant over a period of four years that the Federal Government's exclusive authority as to hazardous waste matters rendered its award of federal approval and formal agreement for construction and operation of the landfill fully sufficient for Claimant, upon which representations Claimant detrimentally relied; and, that any state and local issues, including political opposition, were matters for the Federal Government, not Metalclad, then refused to allow Claimant to operate because of political opposition of the Governor of San Luis Potosi;

- (2) where officials of the State of San Luis Potosi, after inviting and approving Claimant's landfill investment, interposed unreasonable, arbitrary, costly, delaying and nonlawful demands on Claimant and, after Claimant's good faith compliance, still refused to permit Claimant to remediate and operate its landfill; and, actively incited public opposition to Claimant and its investment through the use of specious reports of scientific data, nationality bias against a North American investor, and baseless claims of malformities in infants caused by the landfill, fomenting a threat of violence and harm if Claimant operated its landfill; and posted armed state police to patrol the entrance to the landfill to prohibit any operation;
- (3) where, after knowledge and approval by federal and state officials (including municipal officers) of Claimant's physical construction of its landfill facility, and Claimant's expenditure of U.S.\$20 million into the Mexican economy for the labor, equipment and materials to construct the landfill, the Governor of San Luis Potosi claimed, eight months later, that Claimant had failed to comply with a municipal requirement for a municipal construction permit when that requirement has not been enforced on any entity except Claimant, since the effective date of the NAFTA; and, when Claimant was assured by federal officials that compliance with federal law and obtaining federal operating and construction permits was adequate; and,
  - (4) where the Governor of San Luis Potosi issued a decree, (one week before the end of his term in office), proclaiming an

ecological preserve, which preserve fully includes Claimant's real estate and landfill operation within its circumscription, after which action the Governor, the San Luis Potosi Coordinator of Ecology and the Municipal President of Guadalcazar all separately, publicly state that now the landfill at La Pedrera, (Claimant's investment), can never open; all of which has deprived Claimant of its investment directly damaging Claimant in an amount of more than \$90 million.

## SUMMARY OF FACTS

- 1. The Claimant is Metalclad Corporation, at all relevant times herein, a juridical entity of the United States of America, chartered under the laws of the State of Delaware, (hereafter "Metalclad" or "Claimant" or the "Company"). Claimant is a publicly traded company, (NASDAQ: "MTLC"), with approximately 4,000 shareholders including major institutional shareholders in England, Europe and the United States.
- 2. Eco-Metalclad Corporation is a juridical entity of the United States formed under the laws of Utah, (hereafter "ECO"), and is wholly-owned by Metalclad. ECO fully owns Ecosistemas Nacionales, S.A. de C.V., a Mexican corporation, (hereafter "ECONSA"). ECONSA in turn owns 100 percent of Confinamiento Tecnico de Residuos Industriales, S.A. de C.V., a Mexican corporation, (hereafter "COTERIN").
- 3. On January 2, 1997, Claimant filed the first investorState arbitration action under the North American Free Trade
  Agreement, (hereafter "NAFTA"), against Mexico. For three and a
  half years, Metalclad has been denied its right to operate its
  landfill project in the Mexican State of San Luis Potosi,
  (hereafter "SLP"), because of the actions taken by the Governor
  of SLP, Lic. Horacio Sanchez Unzueta, (hereafter "Governor" or
  "Sanchez Unzueta"). (Sanchez Unzueta has now been succeeded in
  office by Governor Fernando Silva Nieto, who shall be fully
  identified by name when referred to hereafter.) The Governor,
  personally and through his agents, has inflamed local opposition,

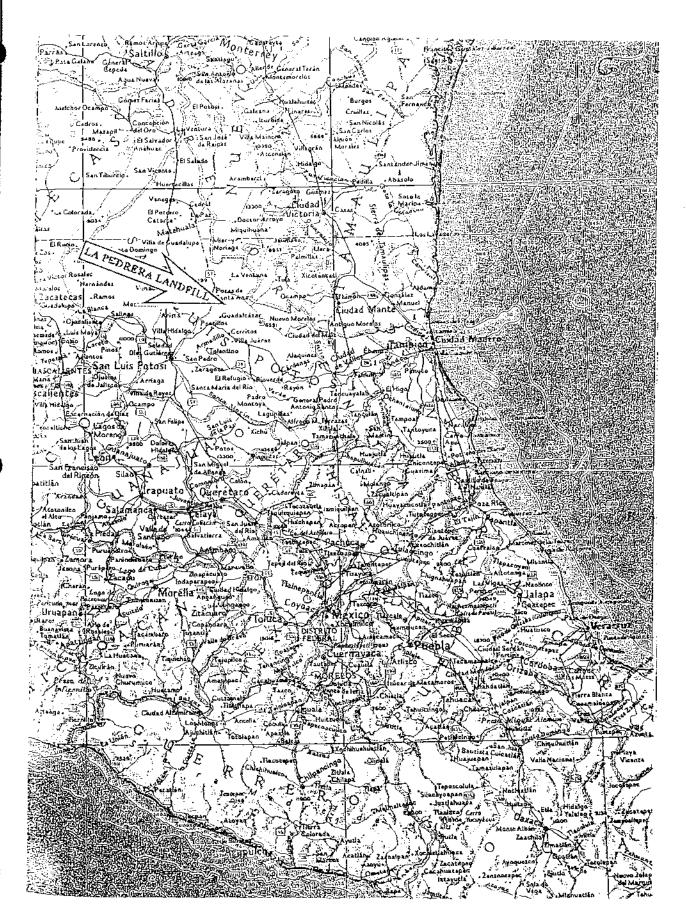
defied Mexican federal authority, and used armed state police to deny Claimant the right to operate its landfill. The Governor has used artifice, obloquy, prejudice, misrepresentation and duress to deny the Company's lawful rights respecting its investment.

- 4. COTERIN is the owner of record of the landfill property, and the permits and licenses which are integral parts of this dispute. COTERIN is the "enterprise" in which Metalclad is an "investor" under the provisions of the NAFTA as more fully discussed later in this Memorial (see "Argument" infra).
- 5. For its part, the Mexican Federal Government, in passive concession to the Governor, has failed to fulfill its legal obligations to Claimant, including failing to provide the protection and security -- both legally and physically -- to ensure the Company's right to operate. Notwithstanding the Claimant's compliance with federal and state law, and its good faith reliance on representations from federal and state officials, the combined acts and omissions of the Mexican Federal Government and the Government of San Luis Potosi, have confiscated Claimant's investment.
- 6. The Mexican National Ecological Institute, (hereafter "INE"), awarded Claimant both a construction permit and an operating permit, constituting the totality of necessary federal permits under Mexican Law. The State of San Luis Potosi granted the Company a Use of Land Permit for its landfill site which is the only requisite state permit. Notwithstanding the urgent fact

that Mexico generates 8 million tons of hazardous waste a year, less than 10 percent of which is properly disposed of; and, despite the fact that Metalclad's investment is the only landfill in all of Mexico constructed since the NAFTA that meets, and even in some instances exceeds, the Mexican environmental standards, Metalclad's landfill remains unopened and inoperative.

Description of the Landfill Project: If confusion cannot be altogether avoided, it can at least be lessened by bearing in mind that there are two distinct sites at Claimant's facility. One is the "transfer station," or storage site, licensed in 1990, closed in 1991, and authorized for reopening in 1994, whereon is confined approximately 20,000 tons of previously stored hazardous waste. The other site is the new, unopened, unused state-of-the-art landfill.

The Municipality of Guadalcazar is in the State of San Luis Potosi. (See Figure I, Map, page 42a.) The entire Municipality, (comparable to a county), has a population of 28,357 or 1.69 percent of the total population of the State. Only 5 of its 82 communities have more than 1,000 inhabitants. The community has only one medical facility (owned by the Mexican Institute of Social Services). The population suffers a high degree of illiteracy. The community significantly lacks infrastructure; has a high migratory movement in the region; and experiences a negative population growth. Ninety-five percent of the houses in Guadalcazar have no water; 1 percent has drainage and only 26 percent have electric energy. The average house is



occupied by seven people. While 37 percent of the homes have dirt floors and 60 percent cement floors, only 3 percent of the homes have wood flooring or other types of materials. There is no transportation system. Water is scarce. Within the borders of the Municipality of Guadalcazar, 100 kilometers northeast of the capital city of San Luis Potosi, and over the Sierra Guadalcazar mountains, is a valley known as La Pedrera. On a property comprising 814 hectares, lie the two sites owned by Metalclad Corporation: one site, previously permitted and approved by federal and state authorities as a "transfer station, " consists of three "cells" containing approximately 55,000 drums of diverse waste earlier accepted for storage by Metalclad's predecessor-in-interest in the land; and, a second site on which has been constructed the state-of-the-art, controlled hazardous waste landfill. In the region of the landfill are several small villages called "ejidos" (see Glossary).

### **FACTS**

8. On March 10, 1995, the first hazardous waste landfill in all of Mexico since the NAFTA became effective, that meets or exceeds all of the Mexican Official Normatives (NOMS), and is fully licensed and permitted by pertinent Mexican federal and state agencies, prepared to open. In a nation that generates in excess of 8 million tons of hazardous waste annually, less than 700 thousand tons of which are properly disposed of, such an occasion gave rise to hope. The expectation was short-lived,

however; for, the facility did not -- and to this day -- has not opened. The \$20 million state-of-the-art facility built by Metalclad Corporation<sup>3</sup> sits idle. The Company, and 450 local workers, are hostage to an intra-Mexican conflict between the State of San Luis Potosi and the Municipality of Guadalcazar, on the one hand, and, the Mexican Federal Government, on the other.

- 9. The present dispute comprises the following, including several acts by the Governor to encourage the Company to expend time and money, ostensibly to gain his political support, after which his support was not forthcoming. This behavior became repetitive and was expressed in several ways:
  - administration to arouse the local residents to oppose the operation of the landfill, through the use of invective, misinformation, prejudice, all of which was done in total disregard of the overwhelming evidence in support of the factual conclusions of federal and scientific authorities who certify the landfill project as fully meeting all technical requirements;
    - (2) an amparo<sup>4</sup> of January 31, 1996, filed by the Municipality of Guadalcazar against the Federal Government over the Agreement between the Federal Government and Claimant to open and operate the landfill. The amparo, which ordered the Company not to operate, had sat idle in the court for 18

months. Suddenly, after extensive newspaper coverage by Excelsior, a major Mexico City newspaper, of the political problems and the questionable conduct of the Governor of San Luis Potosi affecting the La Pedrera landfill, the federal court issued a terse decision on August 29, 1997, finding that the Municipality was not an appropriate party to bring an amparo;

- (3) evidence of bribery attempts and corruption in the governments of San Luis Potosi and the Municipality of Guadalcazar, including solicitations of bribes of Company officials by local government officers and payments to state and municipal officials and their families directly traceable to a competitor of Claimant;
- (4) a claim by the Governor that the Company cannot legally proceed without first obtaining a local construction permit;
- (5) the use of armed state police by the Governor to keep the landfill from operating; and using state police to transport paid demonstrators, who were armed and intoxicated, from 75 kilometers away to the landfill site, providing them alcohol and standing by while these demonstrators held nearly 200 people including women and children captive for three and one-half hours inside buses at the

- landfill site in an unruly demonstration;
- the decree by Governor Sanchez Unzueta, three days before his term expired, making the altiplano area of Guadalcazar an ecological preserve. The decreed area includes the totality of Claimants' landfill and property. The decree orders the cessation of all activities in the area indefinitely;
- (7) the passive capitulation by the Mexican federal government to the measures of the government of San Luis Potosi and the Town Council of Guadalcazar, which measures have discriminated against Claimant and have expropriated its investment; and
- (8) the failure of the Respondent to provide Claimant the full protection and security necessary for it to enjoy its rights to its investment.

Interspersed with the above interferences by the Governor, he, and the State of San Luis Potosi variously approved and encouraged the Claimant and its investment by:

- issuance of a state land use permit for a landfill at La Pedrera;
- (2) support of newly installed Governor Sanchez
  Unzueta for the Company's La Pedrera project
  expressed privately to Company officers, confirmed
  by letter, June 11, 1993;

- (3) a commitment of support predicated upon satisfying several issues raised University of San Luis Potosi professors, which the Company did;
- (4) a promise of full and public support upon evidence of conformity to all technical standards and demonstrated safety of the landfill (which was accomplished by an exhaustive federal audit and the study by the university);
- (5) a number of negotiations with federal officials to whom he promised that his support was forthcoming;
- (6) the visit to a landfill in California with comparable technology to that proposed for La Pedrera and, as a result thereof, a statement of approval by Medellin Milan, state environmental coordinator of Claimant's project;
- (7) knowledge and approval of the commencement of construction activity both at the new landfill site and also preventive construction works at the transfer station on May 16, 1994;
- (8) the public announcement at the Governor's palace on May 27, 1994 of the "accord" between the state and the Company regarding the landfill;
- (9) the agreement of both the Governor and Medellin Milan to attend the opening of the landfill on March 10, 1995 (later renounced);
- (10) the Governor's participation with the federal

- government in the negotiation of an agreement with the Company on the specific terms of remediation and operation of the project (later denied by the Governor, who did not sign the agreement);
- (11) a number of negotiation engagements variously involving federal officials of the Government of Mexico, U.S. Ambassador James Jones and other U.S. Embassy officials, the Company and the Municipality of Guadalcazar.
- 10. When pressured by federal authorities to give his political support to the Company, the governor, either intentionally or irresponsibly, made patently false charges against the Company which he knew or should have known were false. They included:
  - (1) the Company was a criminal enterprise operating illegally in Mexico and in his State;
  - (2) that the Company had a reputation for questionable ethics in the community;
  - (3) that the Company had spent money investigating governmental officials instead of developing the landfill;
  - (4) that the project was unsafe for operation;
  - (5) that the project was potentially explosive;
  - (6) that the project was dangerously radioactive;
  - (7) that the project would cause birth defects in the children of the surrounding community;

- (8) that the local community was 85% against the landfill;
- (9) that the University of San Luis Potosi had determined the landfill site did not meet Mexican standards; and
- (10) that the Company had ignored offers by the state government for sites that would have been geologically and technically better.
- 11. Because of the intra-Mexican conflict and confusion,
  Metalclad has been whipsawed between the Mexican federal
  government and the state government of San Luis Potosi for over
  three and a half years after a direct investment of U.S.\$20
  million, while still denied the benefit of its investment.
- encouraged, promised, assured, licensed and permitted Metalclad's landfill project; while on the other hand, San Luis Potosi and the Governor, after the State licensed the land for use as a landfill, and the Governor declared his support, imposed obstacles, requirements, expenses and conditions that have kept the Company variously encouraged and discouraged while all the time keeping the landfill from opening. In a series of events, the Governor led the Claimant to believe that: (1) its investment was desperately needed and welcomed; (2) he was in support of the Project and would give public support to the project upon the accomplishment of additional conditions; and, (3) the Governor would deal with the municipality on issues of political support.

As will be seen, these promises, upon which Claimant relied in expending millions of dollars directly into the local economy to construct the landfill, have proven to be meretricious.

# THE ROLE OF THE FEDERAL GOVERNMENT

- 13. Metalclad officers first met Mexican federal officials at a conference in New York City in October of 1992. Dr. Sergio Reyes Lujan, at the time Deputy Secretary of the Environment, Mexico's highest ranking environmental official, and Dr. Santiago Oñate Laborde, the first Environmental Attorney General, publicly invited U.S. investment to their country, especially to help Mexico deal with its acute hazardous waste problem. Metalclad officers had studied the hazardous waste needs in Mexico with a view toward entering the market under appropriate conditions. During this time, 1992, negotiations for the North American Free Trade Agreement (NAFTA) were nearing fruition (Declaration of Grant S. Kesler).
- 14. Ultimately, the Government of Mexico signed a Joint Agreement to Operate and Remediate the Site at La Pedrera with Metalclad's wholly-owned Mexican subsidiary, COTERIN, on November 24, 1995 (hereafter "Joint Agreement"). This agreement eventuated from months of tests, studies and an audit, carried out by the Federal Attorney's Office for the Protection of the Environment (PROFEPA), over a seven-month period. The audit was completed March 28, 1995, which added to the cumulative cost to the Company for tests, studies and audits beyond those required for the various permits, of more than U.S.\$1.5 million.

Metalclad requested the federal audit in the face of continuing charges by the Governor that the La Pedrera site was scientifically deficient, and that Claimant's permits had been issued improperly. The results of the audit and the Agreement it brought about are contained in Exhibit 2 attached hereto. In brief, the audit confirms that all the requisite permits were properly issued, sets forth the conditions for remediation of the transfer station site, and reaffirms that the landfill site at La Pedrera fully meets all of the scientific requirements set forth in Mexican NOMs (Declarations of Humberto Rodarte Ramon, Grant S. Kesler, Ariel Miranda Nieto).

- 15. The relevant history of La Pedrera pre-dates Claimant's involvement. La Pedrera is situated in the Municipality of Guadalcazar, in the State of San Luis Potosi (see map of landfill area, Figure I, page 42a). As stated before, the Municipality has a sparse population (28,357 or 1.69 percent of the state's total population), which struggles with severe poverty, pervasive illiteracy and a spartan environment (see Exhibit 3 Hazardous Waste: The Case of Guadalcazar).
- application to establish a hazardous waste disposal site, the Secretariat of Ecological and Urban Development (SEDUE) authorized Salvador Aldrett, individually as a Mexican citizen, to build and operate a "transfer station" for storage of hazardous waste at La Pedrera. At the time, Aldrett (personally and not through COTERIN), was operating a hazardous waste

landfill in Mexquitic, SLP which he had begun in 1981. In settlement of a political dispute with the governor, Aldrett agreed to relocate the Mexquitic landfill. With the help of federal and state SEDUE officials, the site at La Pedrera was approved, as a site for storage of hazardous waste, pending the approval of the applications filed by Aldrett for a hazardous waste landfill at La Pedrera. This creative permitting of a "transfer station" accommodated the closing of the landfill at Mexquitic while at the same time providing a depot to receive the demand of the continuing waste creation which was previously deposited at Mexquitic (Declarations of Grant S. Kesler, Humberto Rodarte Ramon, Ariel Miranda Nieto).

- 17. With the permit from the federal government, and with the consent of the state and local authorities, Aldrett constructed the "transfer station" at La Pedrera. No construction permit from the Municipality of Guadalcazar was sought or required, nor has the lack of such a permit been timely raised by any government authority. As late as May, 1994, remedial construction work on the transfer station -- directed, authorized and supervised by PROFEPA -- was performed without a municipal construction permit. Not until December, 1995, did any state or local official allege that such a permit was or is needed (see Exhibit 4 PROFEPA: To Public Opinion).
- 18. In fact, during the time-period in question, the procedure and practice of the Municipality of Guadalcazar was neither to require nor to issue construction permits for

construction projects in its jurisdiction.6

- 19. Between the opening of the transfer station in October, 1990, and the time that federal SEDUE closed it for activities in excess of the permit, on September 25, 1991, some 55,000 drums of diverse waste -- approximately 20 thousand tons -- were stored at La Pedrera. (About 72 thousand tons of hazardous waste are generated in one year in San Luis Potosi, nearly all of which is dumped in thirty, open, clandestine dump sites in the State.) During this time, some 537 kilometers northeast of La Pedrera, the company, Residuos Industriales Multiquin, S.A. de C.V., (hereafter "RIMSA"), began to operate a hazardous waste landfill in Mina, Nueva Leon. The facility at Mina was constructed, opened and operated for an indeterminant time without federal, state or municipal permits (Declaration of Grant S. Kesler).
- 20. In 1988, Mexico enacted its first comprehensive environmental law, the General Law of Ecological Equilibrium and Environmental Protection (hereafter, "General Ecology Law"). The new law required, among other things, the submission of an environmental impact statement and risk assessment (EIS) with the application for a federal construction license. During the eighteen months (and NP\$500,000) required to prepare the EIS, including all of the soil testing, geological and hydrogeological studies, Aldrett became ill and made known his interest in selling his ownership of COTERIN (Declarations of Humberto Rodarte Ramon and Grant S. Kesler).
  - 21. Since, at the time, the federal policy was to have a

hazardous waste landfill in each state, Mexican federal officials introduced a number of interested U.S. investors to Aldrett, with a view toward continuing and bringing to fruition the La Pedrera landfill project. One such potential investor was Metalclad. In the course of its due diligence, officers of Metalclad met on a number of occasions with government officials, including the late Luis Donaldo Colosio Murrieta, then Secretary of SEDUE; Santiago Onate Laborde, Secretary of Labor; Mexican Ambassador Negroponte; Jaime Alatorre, president of the Mexican Investment Board; Alexandro Beauchot, vice president of the Mexican Investment board; Dr. Sergio Reyes Lujan, Deputy Secretary for Environment of SEDUE; and Humberto Rodarte Ramón, then assistant to the president of the INE and later technical coordinator of the Integrated Border Environmental Program (Declarations of Grant S. Kesler, Humberto Rodarte Ramon).

- 22. On February 3, 1993, COTERIN received a federal permit from the National Ecological Institute (INE) for the construction of a hazardous waste landfill at La Pedrera in partial culmination of a process begun nearly a year and a half earlier. Two months later, on April 23, 1993, Metalclad purchased an option to buy Aldrett's ownership in COTERIN, including its landfill site at La Pedrera and the permits and licenses awarded and in process (Exhibit 6 Federal Construction Permit).
- 23. COTERIN received, on May 11, 1993, a Use of Land Permit from the State of San Luis Potosi for the "location of an Industrial Waste Technical Landfill" at La Pedrera, issued by

SEDUE of San Luis Potosi. (Exhibit 7 San Luis Potosi Land Use permit). Prior to the decision by the state SEDUE to issue the permit, it requested an accord from the San Luis Potosi congress affirming such action. As part of its deliberative process, the state congress requested a review of the La Pedrera site and recommendation relating thereto from a group of three geology professors from the Autonomous University of San Luis Potosi, (hereafter "UASLP"). One of the three professors was Dr. Pedro Medellin Milan, (later to become Coordinator of the Environment for San Luis Potosi and a primary active opponent of Metalclad and its rights to operate its La Pedrera project). The three professors found the La Pedrera site to be adequate and recommended approval of the Use of Land Permit, which recommendation the state congress followed (Declarations of Ariel Miranda Nieto and Grant S. Kesler).

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of Land Permit in place, INE issued COTERIN the authorization for the "operation of a controlled landfill through the recollection, transportation, treatment, temporary storage and final disposition of hazardous waste," ("operating permit") (Exhibit 8 Federal Operating Permit). Having returned a month earlier from a pre-NAFTA border conference in San Antonio, Texas, involving Mexico and the U.S. in July, 1993, where Metalclad officers met with representatives of the Mexican federal government about the La Pedrera project, company officials relied confidently upon assurances received there that the company had-now-done-all-it

was required to do to construct, open and operate its landfill investment. Questions that Metalclad raised about any necessary dealings with the respective state and local administrations were answered by the assurance from Dr. Reyes Lujan that the state and municipal governments were "issues" for the federal government to handle, not Metalclad. Nevertheless, the Company did significant work in the local communities around the site and succeeded in gaining broad-based support in the community affected (Declaration of Grant S. Kesler).

Throughout this period of time, i.e., 1992-1993, NAFTA negotiations intensified, as did the accompanying pronouncements of the three respective governments -- especially Mexico and the United States. Following the lead of President de la Madrid, President Carlos Salinas de Gortari urged Mexico forward, through NAFTA, to an open trade policy, hospitable to and competitive for foreign investment. In emphasizing the paramountcy of the foreign investment aspect, Mexico's President declared the NAFTA a "success story" for Mexico in its efforts to solidify its own economic reforms. "After centuries of trying to choke off outside influences, Mexico now invites foreign investment."9 Mexico capped its liberalized 1993 Foreign Investment Law with its negotiation and agreement of NAFTA. The personal assurances given to Claimant by various Mexican officials with federal authority over environmental matters, and of federal approval and support for the La Pedrera project, resonated with the public and official pronouncements concerning Mexico's restructured, NAFTA-

enhanced environment for foreign investment.10

- 26. All during the process of due diligence analysis, permit applications, numerous tests, studies and evaluations, an extensive audit, and the construction and approval of the landfill facility, Mexican federal officials have been competent, readily available, diligent, energetic, professional and supportive. This is true for the Company's dealings with officials in the office of the President, SECOFI, SEMARNAP, INE and PROFEPA. It is the obstructive actions of State of San Luis Potosi officials, led by its Governor, that have riven the equities in this matter. (See the following section "The Role of the State Government.") The consequences of the Governor's actions, left unremediated by the Respondent, account for the confiscation of Claimant's U.S.\$20 million investment and its damages in excess of U.S.\$90 million.
- 27. A defining event occurred on March 10, 1995. On this date, the construction of the landfill at La Pedrera was substantially completed and an "Opening Celebration" scheduled. As the construction neared completion, Metalclad mailed over 300 invitations to its major investors from Great Britain and the United States as well as various government representatives. Invitees included officials of: SECOFI, SEMARNAP, INE, PROFEPA, the U.S. Embassy, the Governor and his Director of Environment, the Guadalcazar Municipal President, the leaders of various ejidos, including families from the surrounding communities, labor leaders and UASLP professors (Declarations of Ariel Miranda

Nieto, Grant S. Kesler).

- 28. One week before the scheduled event, Medellin Milan, San Luis Potosi Coordinator of the Environment, informed Metalclad's chairman that the Governor would not attend because the construction was not totally finished and so the site could not technically be opened (they had previously agreed to attend and participate). However, Medellin Milan would attend. Then just two days before the event, Medellin Milan cancelled his appearance also. Unable at such a late date to call off a major event which involved people traveling from England, Europe and the United States, the Company went ahead on March 10, 1995, with the event recast as a "Facilities Tour" (Declarations of Ariel Miranda Nieto, Grant S. Kesler).
- 29. The day before, however, Medellin Milan met with municipal officials to whom he reportedly said, "There will be no state officials present. Do what you have to do." At Medellin Milan's urging, the municipal leaders organized a group to demonstrate at the landfill site. Approximately 100 paid demonstrators, who were not locals, blocked the gates at the landfill site holding the invitees hostage for several hours. These people had been transported 75 kilometers in state owned vehicles. The demonstrators barricaded the entrance to the landfill with vehicles and bodies, blocking the exit from the landfill facility, and keeping the guests from England, Mexico and the United States, including representatives from embassies and other government officials, trapped in their buses for almost

three and one-half hours. The demonstrators, who were intoxicated and many of whom carried guns, were initially met by angry local residents who were also guests at the celebration, and who were the beneficiaries of a number of jobs at the landfill. They were outraged at the incursion of paid out-oftown demonstrators imperiling their livelihood. At the request of company officials, however, who feared violence, the locals retreated from the confrontation (Declarations of Ariel Miranda Nieto, Grant S. Kesler).

- 30. Claimant sought assistance from the federal government to provide the necessary protection for its facilities and personnel so that it might open and operate its landfill. While some discussions were had involving the federal agency, Gobernación, about providing the necessary protection and security for the Company to operate, Mexican officials prevailed upon the Company to continue instead efforts to get the Governor's support for the project, as a preferable course of action to one of a federal-state confrontation (Declarations of Grant S. Kesler, Ariel Miranda Nieto).
- 31. Over the next year, federal officials continued to meet and negotiate with Governor Sanchez Unzueta in efforts to address his concerns, provide information and reassure him of the project's soundness. Within a few weeks of the vain attempt of March 10, Secretary Julia Carabias Lillo (SEMARNAP) and Antonio Azuela de la Cueva (PROFEPA) met with the Governor and members of his administration to review and discuss the results of the just-

completed PROFEPA audit of the La Pedrera site.

- Following the meeting with the Governor, a SEMARNAP spokesperson stated that "in ten days a final decision" will be made on the landfill facility at La Pedrera, and that it would be based on the "scientific evidence and not on emotion."11 Although Metalclad officers took hope that a "final decision" was imminent, the statement from SEMARNAP also confused them. the Secretary taking a position that the decision to open and operate the landfill was not yet "final?" Or, was she affirming that the Federal Government, in ten days, would make a final decision to go ahead without the Governor's support because of the probity of the "scientific evidence" as opposed to the "emotion" which had been aroused in the community? Having complied with all the requirements of law and having made numerous good faith extensions of comity, being appropriately permitted, and having, in fact, substantially completed the actual construction of the facility, company officials believed that the Secretary's declaration related entirely to the negotiations with the Governor (Declarations of Grant S. Kesler, Ariel Miranda Nieto).
- 33. As if in confirmation of that view, just a few days later, the Governor publicly declared that he had not been consulted and had not participated in the process reaching the positive conclusion and therefore could not support the view and conclusions of federal authorities. 12
  - 34. Nevertheless, in a further effort at conciliation,

profepa responded to the Governor's request, (despite his public, declarative "no" to the landfill project), to go into the community for a series of meetings. In company with Medellin Milan, Antonio Azuela de la Cueva in May, June and July, 1995, conducted a number of meetings in the community explaining the audit results. Azuela de la Cueva took with him several representatives of the federal agencies that had participated in the analysis and review of the audit, including the National Water Commission, National Commission of Nuclear Safety and Safeguard as well as representatives from UNAM's Institutes of Geology and Engineering. This group met over the course of several days with various constituent groups in Guadalcazar, explaining the scientific conclusions of the audit and the subsequent expert analyses. The groups included representatives of The National Water Commission, The Institute of Engineering of the National Autonomous University of Mexico (UNAM), PROFEPA, INE, the State Government, the Town Council of Guadalcazar, and the organizations Pro-San Luis Ecológico and Greenpeace of Mexico in its role as consultant to the Municipal President. Exhibit 4 SEMARNAP Notice: To Public Opinion). These meetings were held in the community on May 2 and June 6, 1995.

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35. Subsequently, on June 19 and 26, and July 10, 1995 meetings of a technical nature were held with the addition of experts to opine on the site conditions and compliance with the applicable official Mexican norms, including the Association of Civil Engineers of Mexico, A.C., the Geology Institute of UNAM,

and others. Greenpeace and state officials were also invited (Exhibit 4 SEMARNAP Notice: To Public Opinion).

36. As to the transfer station site, PROFEPA concluded that there were few specific concentrations in the country of "such an amount of hazardous wastes improperly disposed of as in La Pedrera." But, PROFEPA went on to point out, it is "important to recognize that the problem that we see [in La Pedrera] in a concentration form exists in a disperse form in the rest of the country. Just in the State of San Luis Potosi, it has been calculated that over 30 clandestine dumps exist in which the population has the risk of entering directly into contact with industrial wastes without any control whatsoever .... In La Pedrera, it has already been determined what should be done to treat the site, while in the rest of the State the problem will keep on growing as long as there are no sites ...."

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37. Following the meetings, SEMARNAP representative, Julio Castillo N. Garcia, publicly announced that a final decision would issue in a week, based upon technology and not emotion, and that the decision by the federal government "will be irrefutable and irreversible." This declaration by the federal representative publicly verified what Company officials were told privately by federal officials, and it contradicted the statement by the Governor that the landfill "will not reopen because it is rejected by more than 85% of its neighbors." The Company was bewildered as to the source of the Governor's information since the Company's own information shows the opposite.

In an open letter "To Public Opinion" in August, 1995, 38. (Exhibit 4), PROFEPA and INE published a detailed statement about the technical and legal conditions of the hazardous waste at La Pedrera in Guadalcazar. 16 The federal agencies set forth the pertinent history of the two areas, i.e., the transfer station and the hazardous waste disposal site. The report identifies: (1) the requisite permits granted by the government and the dates; (2) dates of certain construction; (3) the PROFEPA audit authorized on May 6, 1994 which resulted in 11 volumes of technical information; (4) a summary of the conclusions of the audit regarding the existing transfer station; (5) a summary and conclusion of the technical and legal elements pertaining to the new landfill site; and (6) restatement of PROFEPA'S commitment to the community to be involved in on-going monitoring of the site. The document states:

The studies carried out before the granting of [the] authorizations, together with the analyses coming from the audit supervised by PROFEPA, as well as those that have been conducted recently in the context of the technical consultation, make it possible to ensure that the site meets the requirements of the environmental norms .... (emphasis added.)<sup>17</sup>

39. Shortly thereafter, Sec. Julia Carabias Lillo stated publicly that "within the next year, Mexico will have 30 projects just like the one of Guadalcazar, San Luis Potosi;" despite "the resistance of the people in the nearby regions," it is necessary to provide these sites. Explaining the technological reviews and determinations conducted by PROFEPA concerning the landfill,

the Secretary then stated:

The other problem is of a social nature, because people know that they want and need hazardous waste landfills, however, they do not want them close to where they live, even though there will always have to be people near them. This is a problem we will face anywhere in the country; there has never been a landfill in the world that has not encountered controversy.

- 40. Having concluded the audit and the reviews by various academic and institutional experts, PROFEPA and INE, on November 24, 1995, entered into an agreement with Claimant for the remediation of the transfer station and the preventive measures for the operation of the controlled hazardous waste landfill. The state government was involved with this agreement and had agreed to sign it but later refused. In a subsequent public statement concerning the agreement, Antonio Azuela de la Cueva of PROFEPA declared that "there is no going back," and that "the controversies are the Governor's responsibility." Azuela de la Cueva said he possessed information that showed no real municipal opposition to the operation of Claimant's landfill. 22
- 41. Two days after PROFEPA announced the agreement with the Company, (which occurred only after the Governor refused to sign as agreed) the Governor published a letter to the Potosinians in two newspapers claiming that he did not know about the agreement, was not a party to it and does not accept it. Secretary Carabias Lillo, however, indicated that she personally tried for a week to contact the Governor to obtain his agreed upon signature before Proceeding, without success. Attorney General Azuela de la Cueva

made a similar effort with the same unsuccessful result.23

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- 42. On December 27, 1995, SEMARNAP received a petition in administrative action filed by the Town Council of Guadalcazar in the form of a "Disagreement Petition" against the "Coordination Agreement" entered into between SEMARNAP, PROFEPA, INE and the Company.<sup>24</sup>
- 43. Secretary Carabias Lillo denied the petition citing both procedural and substantive reasons. The Town Council then filed Amparo 51/96 in Mexican federal court against the dismissal of its administrative petition by SEMARNAP and against the implementation of the agreement between the Federal Government and Claimant.
- 44. On February 6, 1996, the federal judge admitted the amparo, ordered suspension of operations of the landfill until the amparo is resolved, but allowed for remediation to proceed at any time. For eighteen months, Claimant was denied access to and the benefit of its investment, victimized by a process that took its property without hearing or just compensation. On August 21, 1997, Claimant received notice of the decision rejecting the amparo (Declaration of Grant S. Kesler).
- 45. Throughout the process of endeavoring to open and operate its investment, the Company was aided by the efforts of U.S. Ambassador James Jones and members of his staff. A number of contacts between the U.S. Embassy and the Mexican Government (including Office of the President, SECOFI, SEMARNAP, PROFEPA), yielded assurances and commitments to "solve the problem."

Finally, however, President Zedillo Ponce de Leon's Chief of Staff instructed Ambassador Jones that the administration had done "all that it can do with this Governor" (Exhibit 10 U.S. Embassy document re Metalclad).

- 46. At the behest of the Company, Ambassador Jones, after first considering "blacklisting" San Luis Potosi as "hostile to U.S. investors," used his good offices to bring the Company together with the Governor for renewed negotiations in August, 1996. The Governor brought the Town Council of Guadalcazar into the deliberations, pledging to endorse the agreement achieved by the Company and the Town Council (Exhibit 10 U.S. Embassy document re Metalclad).
- 47. When those negotiations ultimately broke off, (see "Role of the Government of San Luis Potosi," hereafter), Claimant discussed with representatives of SECOFI, SEMARNAP and PROFEPA its remaining option of a claim pursuant to NAFTA. The Company was advised to pursue its remedies under NAFTA, as no other solution appeared likely.

#### ROLE OF THE GOVERNMENT OF SAN LUIS POTOSI

48. On May 18, 1993, Horacio Sanchez Unzueta was inaugurated as Governor of San Luis Potosi. Claimant was already active in the state pursuing its investment in creating hazardous waste facilities having received approval from both the Government of Mexico and the State of San Luis Potosi. The Company got its INE construction permit on February 3, 1993; a Use of Land Permit from San Luis Potosi on May 11, 1993; and, the

INE operating permit on August 10, 1993 (Exhibits 6, 7 and 8, respectively).

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- 49. Officials from the Company quickly sought and were granted a meeting with the new Governor whose election platform made the establishment of a hazardous waste treatment facility in San Luis Potosi of "highest priority." Although the Company had been given official approval from the State, its officers believed that it was important to also get the new governor's support. In this meeting of June 10, 1993, the Company presented to the Governor its maps, engineering plans, renderings and studies pertaining to its hazardous waste landfill investment in La Pedrera. The Governor's immediate response was a letter of June 11, 1993, 26 giving the Company the assurance of his support for its project (Declarations of Grant S. Kesler, Ariel Miranda Nieto).
- 50. Seeing the Governor's tender of support to the Company for its project, federal officials then granted the INE operating permit on August 10, 1993 (Declaration of Humberto Redarte Ramon).
- 51. With the written declaration of support from the Governor in hand, coupled with the State use of land permit and the construction permit and operating permit from INE, Claimant exercised its option to purchase the stock of COTERIN from Aldrett on September 2, 1993 (Declaration of Grant S. Kesler).
- 52. The following month, October, Dr. Sergio Reyes Lujan, (at the time the highest ranking environmental official in

Mexico), met with Governor Sanchez Unzueta to fully explain the federal government's position of support for the La Pedrera landfill. During the meeting, the Governor requested that the Company get the support of the Autonomous University of San Luis potosi, (hereafter "UASLP"), and the community. Heretofore, the Company had been instructed, by both federal and state authorities, to stay out of the community. The Governor agreed to grant his active public support (beyond his letter of June 11, 1993) upon Claimant's accomplishment of those two tasks<sup>27</sup> (Declaration of Grant S. Kesler).

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- position as State Director of Environment to accept another position. Dr. Diaz Barriga, in his official capacity, was strongly supportive of the Company's landfill project. He was replaced by Dr. Pedro Medellin Milan, (hereafter "Medellin Milan"), as the State Director of Environment for San Luis Potosi. In July 1993, Medellin Milan attended a pre-NAFTA border conference as a guest of the Company and approved a press release announcing state support of the Company's project. In a reversal of official position, Medellin Milan in November, 1993, sent letters to various federal officials in Mexico, including Dr. Reyes Lujan of SEDUE, indicating the state administration's doubts about the landfill project at La Pedrera (Declaration of Grant S. Kesler).
- 54. As support for his position of doubt as to the adequacy of the site at La Pedrera for a landfill, Medellin Milan

referenced a report made in July, 1991, by his UASLP colleague, Ing. Sergio Aleman Gonzalez, (hereafter, the "Aleman Report," Exhibit 12). The Aleman Report claimed that La Pedrera was unsuitable as a site for a landfill because his tests revealed that there were aquifers and underground streams directly beneath the site; that there were numerous caverns in the soil beneath the site; that area geology revealed great porosity in the rock strata; and, that there was evidence of recent earthquake activity at the site. Therefore, he concluded, the site was inadequate for either a transfer station or a landfill. One month after issuing his report, Aleman Gonzalez resigned from UASLP and was employed by RIMSA, the owner-operator of a controlled hazardous waste landfill, located about 537 kilometers northeast of La Pedrera in Mina, Nuevo Leon (Exhibit 12 Aleman Report).

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- 55. The negative report prepared by Aleman Gonzalez concerning the landfill at La Pedrera could only benefit RIMSA, and its founder, Hector Vargas Garza.
  - 56. Vargas Garza is godfather to Aleman Gonzalez's son. 28
- 57. COTERIN employed Ing. Gilbert Humara Gomez, who had earlier done some geological work at the site, to confirm the Aleman Report. In October, 1991, Ing. Humara Gomez published his findings, (hereafter the "Humara Report," Exhibit 14).29 The Humara Report reveals the Aleman Report to be a patent sham. Humara Gomez concludes that tests which Aleman Gonzalez purported to conduct were, in fact, incapable of being performed in the

time and manner claimed by Aleman Gonzalez.30

- 58. Additionally, the eleven volumes of technical data compiled as a result of the PROFEPA environmental audit of the sites at La Pedrera controvert the Aleman Report as do the opinions of those experts retained by the federal government to further evaluate the PROFEPA audit conclusions (see Exhibit 23, PROFEPA Dictamenes). Moreover, the tests, studies and conclusions reported by the group of UASLP scientists, selected by the Governor, also contradict the Aleman Report (Declarations of Ariel Miranda Nieto, Grant S. Kesler).
- 59. Notwithstanding the preponderance of official scientific data and opinions, both the Governor and Medellin Milan have continued to use the Aleman Report as the source for publicly claiming that the site at La Pedrera is inadequate (Declaration of Grant S. Kesler).
- officials from Medellin Milan expressing doubts about the adequacy of the sites at La Pedrera, Claimant repeatedly sought a meeting with the Governor. Claimant's requests went unanswered. Meanwhile, the Company's work in the local community continued. (Declaration of Grant S. Kesler).
- date of the NAFTA, the Governor made a public announcement rejecting the Company's landfill as unsafe. His position, he said, rested upon a reliable scientific study (Aleman Report). He further alleged that the project failed to meet "international"

 $_{\rm norms}$  " and that the "people" were not consulted, that he was  $_{\rm final}$  word and the word was "No."  $^{\rm 31}$ 

- 62. Knowing that the Governor had been provided with the copies of all the studies, tests and analyses submitted to the federal government in the process of obtaining construction and operating permits, as well as the Humara Report, Company officials sought another meeting with the Governor for clarification of his position (Declaration of Grant S. Kesler).
- 63. Finally, on January 28, 1994, the Governor met with Claimant and agreed that if Metalclad would address and satisfy some additional technical concerns raised by certain UASLP professors, the Governor would publicly support the project and would accomplish the social and political tasks necessary for opening the landfill. Further, the Governor instructed the Company officials to concentrate on satisfying the technical issues of UASLP group; he, and his environmental coordinator, (Pedro Medellin Milan), would take care of any local problems (Declaration of Grant S. Kesler, Humberto Rodarte Ramon).

of three professors, appointed by the Governor, (hereafter the "University Commission"), 12 met with Claimant and set forth a procedure of various tests and studies to be supervised by the University Commission and funded by Metalclad. They all agreed to make public the results of their tests and conclusions. For approximately 14 months, and at a cumulative cost of over U.S.\$1.5 million, the University Commission generated tests,

seismic studies, geology and hydrogeology reports and other investigations. Various meetings were held over that time between the University Commission and Claimant, frequently resulting in the University Commission requiring further work. In just one example, Medellin Milan's UASLP colleague, (and relative), Joel Milan, co-authored a letter on behalf of the Commission, directing Metalclad to perform yet further tests on the La Pedrera site. The Commission called for: further permeability studies, regional hydrogeology studies, underground water flow studies, x-rays, test holes and core samples approximately 200 feet deep, all of which demands continued to rest upon the specious foundation of the disreputable Aleman Report. Moreover, the science already provided to the Commission, and the state-of-the-art technology employed by Metalclad in the construction and operation of the landfill project, rendered such concerns wholly irrelevant. In the end, in April, 1995, all the data generated and analyzed by the University Commission resulted in a concensus of the UASLP professors that the La Pedrera site was adequate for a landfill and the project complied with all scientific and technological In violation of the agreement, however, the Governor requisites. forbade the University Commission from making public its results, nor did he, as pledged, give his public support to Metalclad's project based upon the affirmative conclusion of the University Commission. One member, Dr. Roberto Leyva, resigned in protest of the Commission's failure to make its findings public

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- 65. On May 30, 1994, in an apparent further effort to divert Metalclad from realizing the fruition of its investment, and in a bold attempt of self-aggrandizement, Joel Milan submitted a "proposal" to Metalclad for the "Study for the Selection of a Site in the State of San Luis Potosi, For the Construction of a Controlled Landfill for Hazardous Industrial waste" on behalf of the School of Engineering, Autonomous University of San Luis Potosi. Milan acknowledges that San Luis Potosi needs "to have a hazardous industrial waste landfill, in view of the fact that ... waste that should be disposed of in a controlled landfill is being dumped in clandestine sites ...."

  Milan's "proposal" calls for Metalclad to expend N\$858,000 to Milan and his colleagues for the study (See Exhibit 15 Milan Proposal).
- 66. During the spring of 1994, (April 21 and 22), Medellin Milan, in his official capacity as State Coordinator of the Environment, at Metalclad's invitation, visited the Company's corporate headquarters in California. Medellin Milan was accompanied by four UASLP professors who, all as guests of Metalclad, were invited to see first-hand, the technology proposed for use in La Pedrera. The engineering firm of Harding-Lawson & Associates, designers of the technology to be used by Claimant, showed Metalclad's Mexican guests a landfill in Orange County, California, built upon the same state-of-the-art technology planned for La Pedrera (Declarations of Grant S.

Kesler, Ariel Miranda Nieto).

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- of. Following meetings with the engineers, and on-site visits, the parties all convened in the Company's offices. The Medellin Milan group unanimously expressed satisfaction with the technology; and, Medellin Milan, in the presence of all there assembled, declared that the Company could begin its construction with the State's support, and that it could operate the landfill concurrently with its remediation of the preexisting conditions at the transfer station, subject to any technical modifications that the results of the UASLP study might call for (Declaration of Grant S. Kesler).
- 68. With Medellin Milan's affirmation of support freshly in hand, the Claimant believed that now, in addition to having complied with all legal requirements for permits, it had finally achieved the federal government's wish for political consonance with the Governor. Thus fortified, the Company began construction on the site at La Pedrera, May 16, 1994, with a scheduled completion-opening date of December 15, 1994 (Declaration of Grant S. Kesler).
- 69. On May 27, 1994, in a ceremony at the State Palace in San Luis Potosi, with the press in attendance, the accord between Metalclad and the State Government (achieved during Medellin Milan's visit to Orange County), was publicly announced. A short while after the ceremony at the State Palace, PROFEPA publicly announced its support for "the accord recently celebrated between the State Government of San Luis Potosi and Metalclad of

california, for the restoration of the land, construction and operation of the controlled landfill in the zone known as 'La pedrera'," in a public gathering attended by Miguel Limon Rojas, Environmental Public Prosecutor, an emissary of the U.S. Ambassador to Mexico, Medellin Milan and Metalclad's chairman, T. paniel Neveau.<sup>34</sup>

70. Soon after the State Palace ceremony, the Governor began criticizing Metalclad both privately and publicly and requested the University Commission to expand the scope and number of studies being conducted at the site (Declaration of Grant S. Kesler).

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- 71. Responding to the Governor's direction, the University Commission ordered new hydrogeology tests, additional seismic tests, the drilling of test wells and the establishment of additional monitoring wells at the site (Declaration of Grant S. Kesler).
- 72. Having acceded to the Governor's insistence that it make no public statements, Metalclad remained silent while the Governor and Medellin Milan were quoted in the press as discounting the accord the Governor had announced with Metalclad and expressing criticism of the site at La Pedrera as inadequate.
- 73. In October, 1994, Metalclad officers seriously considered "cutting its losses" and pulling out of San Luis Potosi. Upon learning of this news, Pedro Medellin Milan telephoned the home of Metalclad President, Grant S. Kesler, on a weekend and urged him not to leave. "You're almost there. Don't

quit now. Too many people quit too soon because they don't understand how Mexican politics work" (Declaration of Grant S. Kesler).

74. Deciding to continue their project, and in a further good faith effort to alleviate the criticisms of the Governor, Metalclad, pursuant to provision in the Mexican General Law of Ecology, voluntarily requested that PROFEPA conduct an environmental audit of the sites at La Pedrera. PROFEPA agreed to undertake an audit but required Metalclad to pay for it. The audit was performed by independent Mexican companies supervised by PROFEPA. At the same time, Metalclad was busy responding to the requirements of the University Commission for even further tests, by funding more consultants and experts for additional hydrogeology tests, core samples, x-ray technology, etc., which tests consumed another five months and an additional U.S.\$500 thousand. Between the federal audit and the UASLP project, the Company spent over U.S.\$1.5 million (Exhibit 17, PROFEPA Audit Letter; Declaration of Grant S. Kesler).

75. News of an opinion poll, on August 6, 1995, conducted by local economists, disclosed that 97% of the people living near the La Pedrera site favored the project opening. In the broader community, 33% were not aware of the project; of the remaining 67% who were aware, 38% were in favor; 31% were against; and, 31% were "not interested." Less than three weeks later, the Governor announced that an opinion poll conducted in the community showed 85% of the people were against opening the landfill and that he

would respect the decision of the people. This poll has not been released to the public. Claimant believes it to be non-existent (Declaration of Grant S. Kesler).

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- 76. On February 10, 1995, the technical reports on the sites at La Pedrera were presented by the University Commissionapproved Company, GYMSA, in conjunction with various specialists from UASLP in a meeting which also included San Luis Potosi officials and Claimant. The findings conclude: the site is geologically and technically adequate in every respect. The specious concerns raised in the Aleman Report are further confuted by the results generated by the former UASLP colleagues of both Aleman and Medellin. All present concurred with the conclusion, including Medellin Milan who stated to those present: "We have a problem. Now we have to tell the people the site is adequate." Medellin Milan forbade releasing to the public the results of the studies, in violation of the agreement to do so, which led to the resignation of the chairman of the University Commission in principled protest (Declaration of Grant S. Kesler, Ariel Miranda Nieto).
- 77. A week later, (February 18, 1995), Company officials again met with the Governor, who promised that upon his review of the results of the University Commission studies, he would again make a decision about his public support for the project (Declaration of Grant S. Kesler).
- 78. During this time, construction of the new landfill.
  Project had gone forward and, in February, 1995, was nearing

completion. Stories appeared in the local papers discussing the construction being carried out by Mexican companies, and the fact that nearly 250 local citizens were employed at the site.

Federal, state and local authorities, fully aware of the construction, made several inspections of the project during its construction, including several by the Director General of Environmental Regulations of SEMARNAP, 35 as well as representatives from the State Coordinator of Ecology's Office, and from PROFEPA (Declaration of Ariel Miranda Nieto).

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- 79. On September 8, 1994, Ramiro Zaragoza García, delegate of PROFEPA in San Luis Potosi, signed an official document lifting the closure on the transfer station for purposes of allowing the Company to do preventive civil construction work, necessary for the safe maintenance of the site. (See Exhibit 19, Order to Lift the Seals, attached hereto.)
- 80. But on October 26, 1994, the Municipality of Guadalcazar, with the collaboration of Pedro Medellin Milan, through its Sindico, Manuel Castro Castañon, in a handwritten document delivered to the La Pedrera property purported to impose closure on the construction activities at the site, citing the lack of a municipal construction permit as the basis, (a copy of which is attached as Exhibit 20). This was the first indication by any governmental official that a municipal construction permit was essential, even though officials at all three levels of government knew that construction at La Pedrera was begun on May 16, 1994, five months prior to this action by the Municipality

(Declarations of Ariel Miranda Nieto, Grant S. Kesler).

- The San Luis Potosi PROFEPA delegate, Zaragoza García, 81. instructed the Company to continue with the construction but, out of respect for the local officials to apply for the construction permit. With the federal construction and operating permits and the state land use permit already in place, the Municipality would have to routinely grant the local permit. The PROFEPA official then wrote to the Company approving the continuing construction of an evaporation lagoon and other constructions for the environmental audit, and requested that the Company obtain the corresponding state and municipal permits.36 (Since no state permit pertained, other than the land use permit already granted, only the municipal construction permit was sought.) This was the first mention by any official, federal or state, that the Claimant should obtain a local construction permit. All previous representations emphasized the exclusive authority of the federal government in the area of hazardous waste in Mexico. Repeatedly -- and even subsequent to this occasion, as will be shown hereafter -- federal authorities assured privately and declared publicly, that Metalclad could construct and operate on the basis of having the permits necessary to do so, viz., the construction and operating permits from INE, and the state use of land permit (Declarations of Grant S. Kesler, Ariel Miranda Nieto).
- 82. Nevertheless, the Company, confronted by the paradox of critical construction costs, commitments and deadlines, and continuing its good faith cooperation with the Government of

Mexico, complied with Zaragoza García's direction (Declaration of Ariel Miranda Nieto).

- 83. On November 15, 1994, Claimant submitted its request for a municipal construction permit to Guadalcazar. (The date of this submission -- November 15, 1994 -- emerges with great importance more than a year later in the unfolding scenario of facts.) The Municipality took no action on the Company's submission. Further construction work as required by the activities of both the University Commission and the PROFEPA audit continued under the oversight of the respective local, state and federal authorities (Declaration of Ariel Miranda Nieto).
- 84. INE, under the signature of the General Director of Environmental Regulations of SEMARNAP, Francisco Giner de los Ríos, issued a construction permit to the Company to build one cell and other installations at La Pedrera, dated January 31, 1995, three months after municipal authorities purported to impose closure on all construction at the site. (Exhibit 21 hereto.)

85. As the construction at the site neared completion, in February, 1995, the University Commission insisted that more test holes be dug and monitoring wells established. The Company complied, drilling test holes in excess of 350 meters. The results of these further activities confirmed the earlier conclusions: there are no underground aquifers or water of any kind; there are no indications of seismic activity. Neither,

federal, nor San Luis Potosi, nor municipal authorities required
a local construction permit, directed Claimant to obtain one, or
stopped the construction work called for by UASLP for want of
such permit (Declarations of Grant S. Kesler, Ariel Miranda
Nieto).

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- 86. At last, in early 1995, having substantially completed construction, and with the Governor's public statement of support, 37 Metalclad prepared to celebrate the opening of the facility. The Company issued 300 invitations to an opening ceremony to be held on March 10, 1995. (The actual invitation was approved by Medellin Milan before any were sent, in keeping with the agreement between the Governor and the Company that anything "public" by the Company would be reviewed and approved before issuance.) Invitees included: major investors from Great Britain, Europe and the United States; Mexican federal officials; United States Ambassador; the Governor of San Luis Potosi and members of his administration including Medellin Milan; the President of the Municipality of Guadalcazar; and various local residents, workers and ejido leaders (Declarations of Grant S. Kesler, Ariel Miranda Nieto).
- 87. One week before the opening at La Pedrera, Medellin Milan informed the Company that, contrary to his earlier acceptance, the Governor would not be attending the event since the "opening" could not be celebrated without the facility being fully completed, and the tests and audit might require further construction. Then on March 7, Medellin Milan told a Company

representative that he would not attend the opening ceremony, and that the event should be cancelled (Declaration of Grant S.  $_{\text{Kesler}}$ ).

then met with the Municipal President of Guadalcazar, whom Medellin Milan informed that since no one from the state government would be there, the Municipal President should "do what needs to be done." What followed was the organizing of a demonstration at the landfill site on March 10, 1995 (Declaration of Humberto Rodarte Ramon, Grant S. Kesler).

On March 10, after the Company's guests had participated in the day's festivities, more than 100 paid protestors from outside the local communities arrived at the landfill driven by San Luis Potosi state police in San Luis Potosi-owned vehicles. Most of the demonstrators were intoxicated, many had guns. The demonstrators intimidated those trying to leave the landfill shouting, "Out gringos!" and blocked the exit with vehicles and bodies, denying egress to the Company's guests. For more than three hours, dignitaries from England, Mexico, Europe and the United States and other guests were held hostage in their buses. During this period, a pick-up with a San Luis Potosi ensignia on its doors arrived, its bed laden with beer and soda for the demonstrators. Company officials and others feared violence when local residents in attendance as Company guests, confronted the demonstrators. Company representatives avoided violence, however, when they

persuaded the local residents to withdraw from the confrontation. Four uniformed state policemen stood at the outer perimeter of the mob, neither saying nor doing anything (Exhibit 25 herewith is a video of the March 10, 1995 event, Declaration of Ariel Miranda Nieto, Pulso, March 11, 1995, p. 1).

- 90. The very next day, the Governor placed armed state police at the entrance to the landfill, who stopped all persons going to or coming from the landfill. For three weeks, trucks and commercial vehicles were stopped and searched by the state police who denied entry of all such vehicles to the facility. This, of course, affected the construction activity severely during the several- week period the state police were stationed at the landfill entrance (Declaration of Ariel Miranda Nieto).
- 91. Beginning in June, Antonio Azuela de la Cueva of PROFEPA, in the company of other federal officials and academic experts, at the request of the Governor, went into the community of Guadalcazar. In a series of meetings, Azuela de la Cueva and his group explained the details of PROFEPA's just-concluded audit of La Pedrera and the expert conclusions of the safety, adequacy and legality of the Company's project at La Pedrera (See Exhibit 3 Hazardous Waste: The Case of Guadalcazar; Exhibit 4 To Public Opinion; Exhibit 23 SEMARNAP Dictamenes).

92. At about the same time, Metalclad, in its continuing efforts in the local community begun at the Governor's request several months prior, gathered more than 533 notarized signatures of community members in favor of the landfill project, (see

exhibit 24 attached hereto), which constitutes about two-thirds of the adult population in the immediate vicinity of La Pedrera (Declaration of Ariel Miranda Nieto).

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- 93. In the midst of these activities, on April 2, 1995, Metalclad discharged the San Luis Potosi law firm of José Mario de la Garza Mendizabal. In January of 1994, Metalclad received an unsolicited letter from de la Garza Mendizabal offering expertise as a lawyer in San Luis Potosi who could deal with the Governor. After retaining the de la Garza Mendizabal firm for over a year, and after paying legal fees in excess of U.S.\$70,000, Company officials learned that the de la Garza Mendizabal firm also provided legal services to the Governor, Pedro Medellin Milan, and his brother, Manuel Medellin Milan, a patent conflict of interest not disclosed by de la Garza Mendizabal to Metalclad. Company officials believe that confidential information may have been disclosed by de la Garza Mendizabal to the Governor. Thereafter, de la Garza Mendizabal was appointed by the Governor to the prominent position of state election judge. In a further serious conflict of interest, de la Garza Mendizabal represented the Municipality of Guadalcazar in its amparo action against the federal government which has, in effect, further shut down the landfill operation (Declaration of Grant S. Kesler).
  - 94. In a meeting on April 20, 1995, with the Company's president, Governor Sanchez Unzueta acknowledged that the technical requirements for a landfill at La Pedrera had been

fulfilled by the Company. The Governor still refused, however, to make public the results of the University Commission study.

Re cited an upcoming meeting with Sec. Julia Carabias Lillo, (of SEMARNAP), on May 4, 1995, following which he would announce his decision regarding support for the Company's project (Declaration of Grant S. Kesler).

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- 95. Although the meeting between the Governor and the Secretary of SEMARNAP occurred as scheduled, nothing was said publicly by the Governor or the Secretary until May 6, 1995. On that day, the Governor met with a group of local Potosinian industrialists to whom he proposed that they, not Metalclad, build a new landfill for San Luis Potosi. He stated publicly that, while the decision concerning the Metalclad project was to be made by the federal government, San Luis Potosi "will not be a national dumpsite." 38
- 96. It must be emphasized that the population of Guadalcazar suffers one of the maladies of wide-spread illiteracy: the proclivity to superstitious beliefs. So, when their Governor, upon whom this impoverished community relies for nearly all its funding, and to whom they accord unusual regard, proclaims that the "people" are not in favor of the project at La Pedrera, they agree. When the Governor holds up before a crowd an infant "born without a brain" and declares the tragedy a result of the toxins at the La Pedrera transfer station, they believe. (In fact, the child used by the Governor was born and resides in Matawala 200 kilometers north of the site with his

mother. His father is a migrant farm worker in the United States, and none of the family members has resided anywhere near the transfer station.) When the Governor says that, regardless of what the federal government decides or says, the landfill will not open, they accede. And, when the Governor claims to the people gathered in the town square of Guadalcazar that he will erect a monument to Mexican hero, Benito Juarez, facing north (toward La Pedrera and the United States) so that "no one will forget 'country is first,'" they rally to his prejudice. 39 (Declarations of Grant S. Kesler, Ariel Miranda Nieto).

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- 97. In an apparent attempt to undo the commitment of the federal government to Metalclad, in July of 1995, Medellin Milan met with INE president, Gabriel Quadri de la Torre, with a proposal to "solve the Metalclad problem." Medellin Milan proposed that INE withdraw approval of the Metalclad project and instead support a new site with local developers, which project already enjoyed the support of Medellin Milan and the Governor. INE responded that Medellin Milan should submit his proposal through normal channels and without any linkage to the Metalclad project. At this time, Medellin Milan possessed all of the company's drawings, studies, designs, operating manuals, safety manuals, financial data, and virtually everything necessary to construct and operate a hazardous waste treatment facility (Declaration of Grant S. Kesler).
- 98. Following closely behind the meeting at INE, Medellin Milan formed a group which, on August 15, 1995, was incorporated

promoción y Desarrollo de Infaestructura, S.A. de C.V., (hereafter IDP), with the joint participation of nine San Luis potosi construction companies, headed by Samuel de Jesús González and Eugenio Sánchez Soler. The attorney for the new company is José Mario de la Garza Marroquín, son of José Mario de la Garza Mendizabal, former attorney for Metalclad. This group of Mexican locals was organized by Medellin Milan to build and operate a hazardous waste landfill in place of the Metalclad project (Declaration of Grant S. Kesler).

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99. At about this same time, (August, 1995), a group of UASLP professors released the results of an opinion poll conducted among the Guadalcazar inhabitants. Concerning the level of support for the La Pedrera project, the poll reported 82% favored the project; and, of the 10% who opposed it, the reasons given manifested ignorance of technological and scientific facts. (Claimant has been unsuccessful in obtaining a copy of this poll.) (Declaration of Grant S. Kesler.)

100. Claimant, on the basis of information and belief, alleges that the Governor and his aide Medellin Milan, gained proprietary information on trips to the United States in touring facilities, and requiring Metalclad to provide engineering and financial information concerning its project, under the pretext of needing to evaluate that data in order to give support to the La Pedrera project. In fact, that information was used to Provide IDP the technical data necessary to compete with Claimant. Moreover, the Governor, with and through Medellin

Milan, predicated support on onerous concessions from the Company, including:

- a. the construction of a laboratory by the Company which would be provided to UASLP for use;
- b. commitment from the Company for infrastructure development in the local communities;
- c. provision of all technical data and financial information relating to the development, construction and operation of a hazardous waste landfill; and
- d. the delivery of culinary water, by the Company, to the local community in a water truck owned by the Company, on the side of which truck was painted: "Water Provided Compliments of the State Environmental Coordinator, Dr. Pedro Medellin Milan."

The Company acquiesced to those conditions in its continued efforts at good faith conciliation (Declaration of Grant S. Kesler).

- 101. The technical and financial information, for which Metalclad had spent millions of dollars gathering and developing, that the Governor obtained, was used as a basis for organizing a group of local Potosinian industrialists for the purpose of constructing and operating a landfill in lieu of Metalclad (Declaration of Grant S. Kesler).
  - 102. Continually, the Company was lured by the blandishments

of the Governor -- directly, and through Medellin Milan, the University Commission, and others -- to do a few more tests, make a few more concessions, with the promise that support for the project would follow. What inevitably followed was a demand for yet a few more tests, a few more concessions. When "support" was given, it was quickly repudiated. All the while, RIMSA continued to thrive despite the fact that 80% of its depositors pass by the front gate to La Pedrera and travel another 533 kilometers north to use the RIMSA facility (Declarations of Grant S. Kesler, Ariel Miranda Nieto, Humberto Rodarte Ramon).

103. In an extraordinary action for a sitting governor, Sanchez Unzueta wrote to U.S. Senator Paul Simon, with copies to Metalclad's largest institutional investor, Oakes-Fitzwilliams of London; and the Company's largest U.S. investor, First Analysis of Chicago. The Governor was not responding to a letter sent to him, but to a letter sent by Senator Simon to President Zedillo. In his letter, the Governor aspersed the Company legally, politically and morally, and suggested that investors in the Company had misplaced their funds and should be prepared to take their losses (see Exhibit 26). The Governor's intentional distribution of his letter to Metalclad's British and U.S. investors induces the regrettable conclusion that the Governor acted more out of malice than ignorance.

104. Continuing to seek a resolution to the problem with the Governor, Metalclad's attorney began negotiations with Mario Del Valle, Chief of Staff to Governor Sanchez Unzueta, in May, 1996.

The two agreed that the Company would prepare a written proposal for the Governor, which was submitted to him on May 21, 1996 [Declaration of Lic. Gustavo Carvajal Isunza].

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105. On June 12, 1996, Company representatives, including Kesler and Carvajal, attended a lunch with the Governor in Ciudad valles, San Luis Potosi. All agreed that the best possible solution was one derived through negotiations. The Governor indicated that he was the one who would decide whether the landfill would open, and that he had concerns about some of the technical conditions required for operating the landfill. Company officials, and members of its joint venture partner, Browning-Ferris Industries, (BFI), invited the Governor to visit a similar landfill to La Pedrera in Anahaus, Texas, which was operated by BFI. The Governor agreed to visit. He also said that the Company's proposal submitted to him through del Valle was acceptable as a general framework, and requested two additional memoranda with details of how remediation and operation would be done if they were to reach an agreement (Declaration of Lic. Gustavo Carvajal Isunza).

several times that he had a study "in the drawer of my desk" that proved the landfill was causing health damages to the inhabitants of the region. He also insisted that Metalclad would have to leave the State and not be a presence at the project; but, he liked having BFI there (Declaration of Lic. Gustavo Carvajal Isunza).

107. On July 6 and 7, 1996, the Governor visited the Gulf
West Class 1 Hazardous Waste Landfill in Anahuas, Texas, operated
by BFI. Riding back to the hotel, the Governor instructed
Metalclad's attorney, Gustavo Carvajal Isunza, to tell the
Company that the landfill will not operate, "because the
community of Guadalcazar is against it" (Declaration of Lic.
Gustavo Carvajal Isunza).

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108. During the period just before the Governor's visit to the Texas landfill, the Potosinian newspapers had carried stories about a "study" reported by Dr. Hector Marroquin, (Assistant State Director of Health), alleging that the storage site at La Pedrera was producing birth malformations, multiple abortions and chronic respiratory diseases. Apparently, the Governor had directed the release of the study which, a week before visiting the landfill in Texas, had been "in the drawer of my desk." On the heels of this "report" by Marroquin, followed strong public denouncements by the local environmental group (Declaration of Lic. Gustavo Carvajal Isunza).

109. The PROFEPA representative in San Luis Potosi again assured that there was no evidence that any health damages have been caused by the La Pedrera site (Declaration of Lic. Gustavo Carvajal Isunza).

110. Frustrated by the Governor's continuing prevention of the opening of the landfill facility, U.S. Ambassador James Jones threatened to "blacklist" San Luis Potosi as unfriendly to U.S. investment (see Exhibit 10 U.S. Embassy document re Metalclad).

- 111. On August 15, 1996, Company officials met with Secretary Carabias Lillo and reviewed the bitterly frustrating history of dealings with Governor Sanchez Unzueta. The Secretary asked for a copy of the Company's proposal submitted to the Governor so that she might review it in her meeting with the Governor the next day (Declaration of Lic. Gustavo Carvajal Isunza).
- 112. The next day, Ambassador Jones met at Los Pinos with Luis Tellez Kuenzler, Chief of Staff to President Zedillo, and the Governor, who brought his state lawyers to the meeting.

  Before the main purpose of the meeting could be addressed, i.e., solutions to the problems preventing the opening of Metalclad's landfill, the Governor charged that Metalclad was in violation of both U.S. and Mexican laws, was subject to criminal prosecution, had misrepresented its ownership of the La Pedrera landfill and had defrauded its investors. In view of such charges, the meeting was abruptly ended, with a further meeting scheduled one week later (Exhibit 10 U.S. Embassy document re Metalclad; Declaration of Gustavo Carvajal Isunza).

- 113. On August 21, 1996, through the good offices of U.S. Ambassador Jones, representatives of the Governor met with officers of Metalclad in Mexico City. Negotiations were reestablished, and it was agreed that Metalclad would submit a formal proposal to the Governor (Declaration of Gustavo Carvajal Isunza).
  - 114. Within a day, the Company submitted yet another

proposal to the Governor to which neither the Governor nor his attorneys have responded (Declaration of Gustavo Carvajal Isunza, which contains a copy of the proposal).

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115. Six days later, Ambassador Jones met with the Governor, and they agreed to work together to "solve this investment dispute," and avoid the Ambassador's determination to "blacklist" the State of San Luis Potosi in the absence of satisfactory resolutions. The Governor agreed that he would not hinder Metalclad's operation of its investment in the event the Mexican Supreme Court cited primacy of federal law over municipal law. Both parties agreed that there would be a moratorium on public statements during the attempt to get a settlement underway (Exhibit 10 U.S. Embassy document re Metalclad).

116. Lamentably, the press campaign from San Luis Potosi against Metalclad intensified with active participation by the Governor (Exhibit 18 U.S. Embassy document re Metalclad).

117. Ambassador Jones and the Governor exchanged several letters regarding the proposal from Metalclad and the Governor's expressed desire to find a negotiated resolution. The Governor offered to organize a meeting of the authorities of the municipality and the representatives of the Company at his house in San Luis Potosi to see if they could reach an agreement (Exhibit 10 U.S. Embassy document re Metalclad; Declaration of Lic. Gustavo Carvajal Isunza).

118. On October 30, 1996, the meeting took place. The Municipality was represented by the Municipal President, the

Secretary of the Town Council (Ayuntamiento) and an advisor; the Company was represented by Grant S. Kesler, Javier Guerra Cisneros and Gustavo Carvajal Isunza. At the end of a three-hour discussion focusing primarily on the technical elements of the project, the Municipal President expressed his willingness to reach an agreement, and asked for a proposal. He was completely unaware that the Governor already had two proposals (Declarations of Lic. Gustavo Carvajal Isunza and Grant S. Kesler).

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- officials stated at least twice that the construction permit was not a problem. They were mainly interested in seeing to it that the community got all the economic benefits they felt it should get for having this project, and to be assured of the landfill's safety. Their legal counsel was Leonel Serrato, sent to them by the Governor (Declaration of Lic. Gustavo Carvajal Isunza).
- 120. The Municipal President committed to respond to the Company's proposal ten days after its receipt. He further promised to put the proposal before the Cabildo (the governing body of the Municipality which is led by a municipal president), for a "Yes" or "No" vote after receiving the proposal. The Municipal President pointed out, however, that any agreement was contingent upon approval from the Governor (Declaration of Lic. Gustavo Carvajal Isunza).
- 121. On November 9, 1996, Company representatives, Javier Guerra Cisneros and Gustavo Carvajal Isunza met with the Municipal President, and the Treasurer, to review and modify the

draft proposal submitted by the Company. The purpose of the meeting was to produce a final document which met the municipal representatives' expectations, which document could then be put before the Cabildo (Declaration of Lic. Gustavo Carvajal Isunza).

122. On November 11, 1996, the Company delivered the proposal to the office of the Municipal President. The proposal differed from the terms and conditions of the November 24, 1995 Joint Agreement between the Company and SEMARNAP in only three notable areas.

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First: financial benefits to the Municipality -an increase in the amount of revenues to be paid to the Municipality. The Agreement with SEMARNAP called for the Company to pay \$2 (new pesos) per ton of waste received at the landfill to Guadalcazar for "social works" in the Municipality; the proposal for Guadalcazar called for 1% of the "net income" to be paid monthly with a minimum guarantee to the Municipality of \$1 million (new pesos) the first year, increasing by \$250 thousand (new pesos) a year. The Municipal proposal also required the Company to hire a minimum of 200 locals. In addition, the fifteenmember "Citizen Supervision Committees" under the Municipal proposal, would receive a salary, paid by the Company, of three times the minimum wage. The Municipal proposal also called for the Company to help the Municipality develop programs such as the "industrialization of certain crops."

Second: remediation time frame -- the period of time for the Company to remediate the storage site (transfer station) went from three years, under the SEMARNAP Agreement, to two years, under the Municipal proposal.

Third: company withdrawal -- the Municipality, as the Governor had earlier insisted, also wanted Metalclad to withdraw from its La Pedrera project leaving only the presence of BFI to operate the landfill.

(Declaration of Lic. Gustavo Carvajal Isunza, which contains a full copy of the proposal to the Municipality; Exhibit 2 the Joint Agreement between SEMARNAP and the Company.)

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- 123. Ten days after delivery of the proposal, the Company's representative telephoned the Municipal President at both his office and his home, without success. From that day through December 18, 1996, the Company's representative telephoned the Municipal President twice a day without ever having his call taken or receiving a return call (Declaration of Lic. Gustavo Carvajal Isunza).
- 124. On December 19, 1996, the Company was contacted by the U.S. Embassy and told that the Governor was offering his house in San Luis Potosi to host another meeting between the Municipality and the Company. The Governor (not the Company) had received a

letter from the Municipality stating that the officials agreed in part and disagreed in part with the proposal, and requested another meeting where the entire Cabildo might attend (Declaration of Lic. Gustavo Carvajal Isunza).

125. On the day following Christmas, two representatives of the Company met at the house of the Governor with the Municipal president, legal counsel Leonel Serrato, and four of the eight Cabildo members. The legal counsel spoke on behalf of the Governor and expressed the Governor's concern with having this problem go to international arbitration. (Metalclad's "Notice of Intent to File a Claim" was served on the Government of Mexico, and filed with ICSID, on October 2, 1996.) He stated that to reach agreement, the Company must consent to leave the State and have its investment in La Pedrera operated by someone else; and, the Company should refrain from any political involvement in the Municipality during the July, 1997 elections. The legal counsel said further that the Governor wished the Company to know that he had enough evidence to prove that the former owners of the Company had obtained the state land use permit through wrongdoing, for which the Governor could cancel the land use permit. That the Governor had not done so was submitted as "proof of his good faith towards the Company" (Declaration of Lic. Gustavo Carvajal Isunza.)

126. The parties arrived at agreement on a number of points, most of which were substantially the same as those earlier derived. The agreements included the Governor's "revalidation"

of the land use permit, the termination of the Municipality's amparo action, and issuance of the local construction permit. It was also agreed that a Memorandum of Understanding, (MOU), to be executed before December 31, 1996, setting forth these points of concurrence, would follow but be non-binding (Declaration of Lic. Gustavo Carvajal Isunza).

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- 127. Metalclad's lawyer sent a draft of the MOU on pecember 27, 1996 to Leonel Serrato, legal counsel for the Municipality and the Governor, which was finally signed on January 8, 1997, with the condition that the earlier agreement to have a final document and protocol no later than January 30, 1997, be deleted (Declaration of Lic. Gustavo Carvajal Isunza, containing a full copy of the MOU).
- 128. The Company's lawyer submitted a draft agreement to Leonel Serrato on January 14, 1997, for comments. No response has been received (Declaration of Lic. Gustavo Carvajal Isunza).
- Carvajal Isunza, representing the Company, met with all the members of the Guadalcazar Cabildo except one. For two hours, the Company representatives reviewed the history of negotiations, showed videos of operations and discussed technical safeguards. Although the Cabildo members said they were willing to consider the landfill operating, even though they had some doubts about safety, they knew they had no support from the Governor to do so, and any position in favor of the landfill would be blocked by the environmentalist groups in Guadalcazar who were controlled from

the State Capitol. Having reached a deadend, the talks ended (Declaration of Lic. Gustavo Carvajal Isunza).

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130. The disclosures by the members of the Cabildo confirmed the futility of not only on-going negotiations, but also the reality that all the negotiations that had gone on before, for three years, were doomed from the outset. For, behind the alluring facade of every negotiation, lurked the one force determined to prevent the landfill from opening and operating: the Governor of San Luis Potosi. On January 7, 1997, in a telephone conversation between Ambassador Jones and Luis Tellez Kuenzler, Chief of Staff to President Zedillo, the Ambassador was informed that the federal government had done all it could do with this Governor and it could do no more. The Governor had defied the Government of Mexico, and he controlled the state and municipal governments. The Company's choices were reduced to one (Exhibit 10 U.S. Embassy document re Metalclad).

- 131. Having thus exhausted the limits of its negotiation resources, and its investment taken by political and judicial actions, the Company was left only with its recourse to the NAFTA dispute resolution mechanism.
- 132. On June 26, 1997, Governor Sanchez Unzueta published a statement declaring that the State of San Luis Potosi will have no part in any NAFTA resolution because it is not a part of the controversy. He alleged that Metalclad had acted "with fraud" but had been fought by the "people" of San Luis Potosi. 40
  - 133. As late as July 26, 1997, the Governor declared that

the landfill was rejected by Guadalcazar, with the support of the State, because "it is extremely dangerous to the health of the population.41

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134. Articles in a Potosinian newspaper on July 26, 1997 carry attacks against Metalclad for being "political" in the recent elections in San Luis Potosi and only making known its NAFTA suit after July 6, 1997; and for victimizing Mexico with a claim for \$130 million because Mexico had "submitted to the interests of the United States."

135. On July 27, 1997, the Governor published a full page statement in *El Pulso*, stating that Metalclad was seeking \$130 million in a NAFTA complaint; that Metalclad had violated the law; that the State of San Luis Potosi had "acted at all times in strict compliance to the law"; and, that the State Government, not being a part of the NAFTA, was free of any implications of a judgment.<sup>43</sup>

136. Joining the public chorus of comments on the NAFTA case, the Municipal President of Guadalcazar, Leonel Ramos
Torres, stated publicly that Metalclad had always done business in "the margins" of propriety. He asserted that the Company's \$130 million NAFTA suit was merely an effort by Company officials to "justify themselves before their partners and shareholders."

137. Representative Jorge Humberto Gomez, First Secretary to the Ecological Commission before the Chamber of Deputies in a public statement said, "responsibility should be given to Horacio Sanchez Unzueta, because due to obscure and economical interests"

the Governor has prevented the opening of the landfill. Humberto Gomez accused Sanchez Unzueta of abusing his position as Governor in influencing the Municipality of Guadalcazar to not "authorize this landfill due to 'obscure economical interests'." 45

138. Political analyst, Eduardo Martinez Benavente criticized Metalclad's suit and the Governor's actions, suggesting that the NAFTA suit might be a "story between Sanchez Unzueta and Metalclad" to use pressure to get the landfill opened. Martinez Benavente writes that the Governor "should be the principal responsible party of Metalclad's problems, since in more than three opportunities he has told them that they can operate, only to tell them later on that [they] better not." 46

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139. In the month of August, 1997, the leading Mexico City newspaper, Excelsior, ran a series of front page stories on the issues surrounding the La Pedrera project.<sup>47</sup>

Wednesday, August 6, 1997: Governor Sanchez
Unzueta charges that "Grant Kesler and his associates were
characterized by their lack of ethics." The Governor further
accuses the Company of "corruption and bribery at all levels, for
a lot of years, be it at the federal level and going all the way
to the municipal level." Mr. Kesler refuted the Governor's
unproven charges, inviting the Governor to produce any supporting
evidence.

Thursday, August 7, 1997: When confronted by Secretary Carabias to open the Metalclad landfill in "no later than fifteen days!", Governor Sanchez Unzueta replied, "Fine, but

you are going to have to lend me the army, because with the police force I have available in the state, I am not going to be able to control the people of Guadalcazar. If you loan it to me, I will open tomorrow." The article also quotes Pedro Medellin Milan still claiming that the site "is inadequate according to the study of the Autonomous University of San Luis Potosi." [The Aleman Study.] The report inculpates the company RIMSA in a nefarious scheme to acquire the property of the family of Marco Garfias for the purpose of constructing a landfill after the failure of Metalclad is sealed.

Friday, August 8, 1997: Members of the Congress (the Chamber of Representation) call for an investigation to determine if there was corruption in San Luis Potosi regarding the landfill in Guadalcazar. One legislator stated that "it looks as though the industrialists in Nuevo Leon [RIMSA] have interests in San Luis .... Mexico falls into irregularities at the fault of the government of San Luis Potosi ...." The article contains several paragraphs of statements and information attributable to SECOFI "high level officials ... who asked to be kept anonomous," setting forth their belief that Mexico will win the NAFTA arbitration. 48

Sunday, August 10, 1997: After abiding eleven articles, (including those paid for and published by Governor Sanchez Unzueta, published in the Potosinian press, and reading further statements by state, local and federal officials, Grant S. Kesler, the Company's President, consented to an interview

with Excelsion. A second part of the same interview was published by the paper the next day, August 11, 1997. Kesler defended the Company, refuted the Governor, and put the case's labyrinthine history in perspective.

Thursday, August 14, 1997: The Federal Attorney General for the Protection of Environment, Antonio Azuela de la Cueva was quoted extensively. He affirmed that the Metalclad project in La Pedrera was viable, and no evidence to the contrary was provided. Azuela also stated that there are economic interests at play that maintain the site closed. He states that the Governor's accusations of "pressure on [Azuela's] part and on the part of Secretary Julia Carabias," are false. Regarding the audit results of La Pedrera, "it is the first time an audit is made known to the public, we went ahead of the law. I repeat to you that the authorization [for Metalclad to open and operate] already existed, we only lifted the closure, studied and signed an agreement where the Company acquired more obligations." (Emphasis added) Azuela concludes by acknowledging, "There is a disagreement, to put it mildly, between the government and the It is public and we should not be scandalized by it. We had no conflicts with the Company .... If we delayed the reopening it was to give the people the guarantee that they did not run any risk for their health."50

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Thursday, August 14, 1997: In a second article on this date, (on page 10A) Azuela is further cited as pointing out that the population of the area nearest the La Pedrera site

actually approves of the project. He indicated that "the law considers waste as hazardous and non-hazardous. The first group should be handled by the federal authorities, while the second one should go to the local and municipal authorities."51

Monday, August 18, 1997: A spokesman for the company RIMSA, that is partially owned by Waste Management, Inc., denies any involvement or interest in the situation in Guadalcazar.

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Tuesday. August 19, 1997: Gabriel Quadri de la Torre, president of the National Ecological Institute, (INE), declares that the La Pedrera project was a "viable" initiative "analyzed more than once by the INE." Referring to the misinformation that is spread about landfills, Quadri is quoted: "What we can say is that in all this information there could be monopolic interests of those who could see themselves in competition." When he is asked why the development of the environmental industry has been so difficult, Quadri said, "Due to misinformation, [and] we have also sinned in not having sufficiently informed the population ...."52

of the decision of the federal judge in Mexico City, who, after nearly two years, issued a tersely written opinion rejecting the amparo filed by the Town Council of Guadalcazar on the grounds that the municipality was not a proper party to bring an amparo. 53 Under Mexican law, however, the order proscribing the Company from operating issued earlier by the lower court, remains

in place pending the expiration of a time period within which the  ${\tt municipality}$  may appeal.

141. The municipal president of Guadalcazar, Leonel Ramos Torres, immediately reacted publicly saying that if necessary, they will resort to civil resistance. He proclaimed the committed support of both the newly-elected governor and municipal president.<sup>54</sup>

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- 142. The Governor publicly stated his support for the Municipality of Guadalcazar and vowed that the State Government will watch that this case observes the law. 55
- Carabias Lillo were published by Excelsior, Friday, September 5, 1997. She referred to the NAFTA claim filed by Metalclad, citing certain deadlines for decisions including "elements for the counter suit we are going to start .... Metalclad Corporation did things wrong. They do not have the municipal license, and the landfill is already constructed. With this action, they violated several laws. We have said this for a long time now, since I took possession of the Secretariat .... [The Company] does not have all that is needed to win." To Claimant's knowledge, this is the first and only statement by a Government of Mexico official that the Company was informed from the beginning that it was constructing unlawfully without a local construction permit.
- 144. During the fomentation of public colloquy caused by the spate of press, a bizarre episode happened at La Pedrera. On Monday, August 25, 1997, nine armed, uniformed members of the

Mexican army arrived unannounced at the entrance to the La pedrera landfill in military vehicles and sought permission from the Company's security guard to enter the premises. Not expecting the military contingency and without instructions to the contrary, the security guard denied permission. In disregard of being granted permission of entry, the soldiers removed to a point along the perimeter fence of the property where they scaled the fence. For approximately an hour, the army contingent roamed the facility and took photographs, then left by the same means the soldiers had entered. The Government of Mexico, although requested by Claimant, has provided no information.

145. With less than a fortnight remaining in his term of office, Governor Sanchez Unzueta signed an agreement to declare the Altiplano area an ecologically protected area to protect some twenty species of cacti unique to the Potosinian semi-desert. The Governor proclaimed that this action assured that "any possibility that exists of opening the industrial waste landfill of La Pedrera is definitely cancelled." Municipal president of Guadalcazar, Leonel Ramos, joined the Governor in signing the declaration and Pedro Medellin Milan signed as witness. Medellin Milan "expressed confidence in closing in this way, all possibility for the United States firm Metalclad to operate its landfill in this zone, independently of the futute outcome of its claim before the tribunals of the NAFTA treaty." 58

146. On September 23, 1997, three days before leaving office, the Governor formally signed and published the official

decree making legally effective his earlier agreement. The decree creates an ecological preserve that fully includes claimant's entire property and landfill. The decree also requires the cessation of all activity in the created zone pending a determination by the state as what activities, if any, will be allowed (Exhibit 29: Decree of Governor: Ecological preserve).

147. In response to the precipitous action of the Governor, the president of the Potosinian Industrialist S.C., lamented the inevitability of a discouraging message to potential investors. He complained "that the government authorities, first, had 'set the table' and invited Metalclad to invest and later on revoked all their possibilities of even recuperating what they had spent. It would have been better ... if from the start they would have given them no hope."59

## SUMMARY OF ARGUMENT

- 148. The quid pro quo between Mexico and the United States in the NAFTA negotiations was a greater ability to attract foreign investors (for Mexico) in exchange for strong investor protections (for the U.S.). Patterned after the U.S. Model BIT, the NAFTA grants the highest standard of investor protections of any multilateral international agreement.
- 149. Claimant has been deprived of its rights to the control and benefits of its investment for almost three years as a result of the separate and cumulative actions and inactions of Respondent (which includes the Governments of San Luis Potosi and Guadalcazar). Claimant has suffered damages directly caused by Respondent's:

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- 1. Failure to accord Claimant treatment in accordance with international law, including fair and equitable treatment and full protection and security as required by Article 1105 of the NAFTA. Respondent's actions of failing to protect Claimant's rights, leaving claimant victim to prejudice, governmental capriciousness, scandal and corruption, failed to rise to the minimum standard of treatment required by Article 1105 and principles of international law.
- 2. Breach of its obligations to accord national treatment, most-favored-nation treatment, or the better treatment of the two; and, to not impose performance requirements. Since January 1, 1994, no one has been

required to seek a construction permit from the Municipality of Guadalcazar -- except Claimant. And no one, since January 1, 1994, has been denied a construction permit by the Municipality of Guadalcazar -- except Claimant. The treatment accorded to Claimant's investment has been discriminatory as compared to that given to citizens of Mexico and residents of San Luis Potosi, and of countries other than the United States.

3. Expropriation of Claimant's investment, by direct and indirect acts and by measures tantamount to expropriation in breach of the obligations imposed by Article 1110. Respondent expropriated Claimant's investment without due process and without compensation to Claimant of fair market value. Respondent's expropriation of Claimant's investment was not without prejudice nor for a public purpose. Respondent's actions, separately and cumulatively, have ripened into a sufficient degree of interference so as to deny Claimant its rights to its investment.

150. All of which conduct by Respondent has directly caused Claimant damages, the appropriate measure of which, as set forth in Article 1106, is fair market value, including going concern value, which also includes reasonably ascertainable future profits.

## ARGUMENT

- 1. The NAFTA establishes liberal standards of access and treatment.
- 151. The Parties to the NAFTA set forth their objectives in Article 102, which provides that
  - "1. The objectives of this Agreement as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:
    - (b) promote conditions of fair competition in the free trade area;
    - (c) increase substantially investment opportunities in the territories of the Parties."61

These objectives conform to the overarching resolutions of the Preamble to the NAFTA where the Parties determine to "ESTABLISH clear and mutually advantageous rules governing their trade;" and to "ENSURE a predictable commercial framework for business planning and investment" (emphasis added).

Parties is declared in Article 103(2): "In the event of any inconsistency between this Agreement and such other agreements, [to which such Parties are party], this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement." 62

153. Article 105, "Extent of Obligations," informs a cardinal element of this case: "The Parties shall ensure that all

necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided by this Agreement, by state and provincial governments. (emphasis added). Article 201(2) adds: "For purposes of this Agreement, unless otherwise specified, a reference to a state or province includes local governments of that state or province." (emphases added).

154. The term "measure," as used in the NAFTA, is defined in Article 201(1) as, "any law, regulation, procedure, requirement or practice."

155. These further definitions are salient:

Article 201(1): "enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association."

Article 1139:

"enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there."

Article 1139:

## "investment means:

- (a) an enterprise;
- (b) an equity security of an enterprise;
- (c) a debt security of an enterprise
  - (i) where the enterprise is an affiliate of the

investor, or

- (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise;
- (d) a loan to an enterprise

- (i) where the enterprise is an affiliate of the investor, or
- (ii) where the original maturity of the loan is at least three years,

but does not include a loan, regardless of original maturity, to a state enterprise;

- (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
- (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);
- (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
- (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
  - (i) contracts involving the presence of an investor's property in the territory of the Party, including

turnkey or construction contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party;

investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment."

156. The declarative objectives of these NAFTA provisions insist that the central intent of the Parties, as thus expressed, governs the construction of the Treaty's articles. To borrow an expression from the late F.A. Mann: "It is hardly necessary to remind the reader of the overriding instruction to construe a treaty 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'." Article 102(2) requires the same: "The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law."

157. Respondent, the Government of Mexico, is responsible for damages to Claimant as an investor in an enterprise,

therefore, for breaches of NAFTA obligations by the State of San Luis Potosi and the Municipality of Guadalcazar, "except as otherwise provided" by the NAFTA or "unless otherwise specified" in the Agreement. "This conclusion, that Mexico bears ultimate responsibility for breaches of the NAFTA by its component subdivisions, accords with relevant principles of international law. Both the Vienna Convention on the Law of Treaties in Article 26,67 and The Third Restatement of the Foreign Relations Law of the United States, \$321,68 set forth the established doctrine of pacta sunt servanda: "Every treaty [international agreement] in force is binding upon the parties to it and must be performed by them in good faith." Even though "a federal state may leave implementation to its constituent units ... the state remains responsible for failures of compliance."

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158. To the extent that the governor of San Luis Potosi, and other Potosinian officials, as well as the municipal president of Guadalcazar, have violated provisions of the NAFTA, including provisions for national treatment, most-favored-nation-treatment, fair and equitable treatment, and protections against performance requirements and unlawful expropriation, the Government of Mexico is responsible for those actions. International law provides that "a state is responsible for acts of officials and official bodies, national or local, even if the acts were not authorized by or known to the responsible national authorities, indeed even if expressly forbidden by law, decree or instruction." The Provisions of the NAFTA, in an obvious, purposive implementation

of rigorous investment protections, specifically screen the investor from violations by state and local governments as well as the federal government. For the Parties not to have so provided, would, of course, have left a gaping exception large enough to swallow the rule.

- 2. Respondent breached its obligation under Article 1105(1) to accord Claimant treatment in accordance with international law, including fair and equitable treatment and full protection and security.
- 159. Article 1105, "Minimum Standard of Treatment" provides in paragraph 1: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

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- 160. This well-established international legal doctrine has its genesis in the nineteenth century and holds host States to observe a minimum standard of treatment of aliens and their property. This obligation of the host State is not necessarily discharged by providing aliens the same treatment accorded nationals. Historically, breach of the international minimum standard engaged the responsibility of the host State, and gave a legitimate basis for the home State to exercise the right of diplomatic protection.<sup>72</sup>
- 161. Under Article 1105(1), the Parties to the NAFTA extended the protection of a minimum standard of treatment to investors and their investments by agreement, and where a Party fails to meet its obligation to accord such protection, the

investor who has been denied such treatment may pursue justice for the wrong done to it in accordance with the Chapter Eleven dispute resolution mechanism.

- 162. In addition to the traditional international minimum standard requiring the host Party to provide fair and equitable treatment, or good faith, in its conduct towards investors from other Parties, the NAFTA itself informs the standard. The preamble directs the Parties to "ensure a predictable commercial framework for business planning and investment" (emphasis added). Article 102 adds the rules and principles of "national treatment, most-favored-nation-treatment and transparency."
- 163. These definitional components of the NAFTA's standard find consonance in other modern international investment instruments such as the Investment Protection Principles adopted in October, 1992, by the council of the European Community. As one international law scholar observed:

"According to the EC Principles, the 'fair and equitable' treatment standard should be understood as an 'overriding concept' that encompasses in particular the following investment protection principles:

- (i) transparency and stability of investment conditions;
- (ii) full protection and security;
- (iii) most-favored-nation-treatment;
  - (iv) national treatment;

(v) observance of undertakings."73

(Emphasis added.)

- 164. He further observes that with respect to investor protections, "the NAFTA clearly aims for the highest standards of treatment." 74
- 165. Respondent's actions, and in some cases its failure to act, evince a disjunctive, at times contradictory, and over-all desultory, confused attempts at observance of its undertakings and the execution of its responsibilities under the NAFTA as to Claimant's investment. Rather than "transparency" and "predictability," Respondent's conduct has left Claimant in a tenebrous investment environment, full of bewilderment, bereft of predictability.
  - a. The Government of Mexico consistently represented its authority to act in matters relating to hazardous waste, and specifically the project in La Pedrera as exclusive and primary, then failed to act in fulfillment of its representations to Claimant.
- 166. Consistent with its newly adopted policy of attracting foreign investment, 15 the Government of Mexico aggressively sought Claimant's investment, both its capital and its technology, to help Respondent address one of its severest domestic problems (¶¶13, 21-26). In the course of its due diligence, Claimant met on a number of occasions with various officials of the Government of Mexico who told, and consistently reassured Claimant, that the federal government had full and exclusive authority in the area of hazardous waste; that obtaining the federal construction and operating permits, with

the state land use permit, satisfied all the legal requirements necessary for the Company to open and operate its landfill (Declarations of Grant S. Kesler, Humberto Rodarte Ramon, Sergio Lujan Reyes, ¶¶13, 21-26). Claimant's legal advice and analysis confirmed the position taken by the federal government. Further, expert legal opinion on Mexican law, concludes that pursuant to the Mexican Constitution and the applicable laws, including the 1988 General Ecology Law, primary of the federal government in matters of hazardous waste is unquestionable (see Exhibit 34, JURICI Expert Report). Further, in specific reference to the question of whether Metalclad should deal at all with the state and local governments, Company officials were told by federal authorities that the state and municipality were "issues" for the federal government to deal with, not the Company (¶24; Declarations of Grant S. Kesler, Ariel Miranda Nieto, Humberto Rodarte Ramon). The Secretary of SEMARNAP, head of PROFEPA, and other federal officials, even Governor Sanchez Unzueta, himself, uttered publicly what Claimant had been repeatedly assured privately: the federal government was the supreme authority in the area of hazardous waste (¶¶12, 13, 14, 32, 37, 38, 39, 40, 43).76

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their declarations in this regard. Federal officials, (SEMARNAP, PROFEPA, INE), executed the Joint Agreement with Claimant in which were a number of concessions and benefits for the Municipality of Guadalcazar that were negotiated solely by the

federal government. (Exhibit 2, ¶¶14, 38, 40, 41). Federal officials involved Governor Sanchez Unzueta during the course of the negotiations leading up to the Joint Agreement, and provided for the Governor to be a signer on the Joint Agreement. When the Governor broke his commitment to sign the Joint Agreement, however, federal officials signed without him (¶¶40, 41). These are not the actions of a government which believes that it is only one-third of the authority needed to enter into an agreement. Quite the contrary, these actions evidence the federal government's position of singularity and primacy of authority.

of federal primacy in rejecting the administrative complaint filed by the Municipality of Guadalcazar. On December 27, 1995, the Municipality filed an administrative action with SEMARNAP seeking to have the agency abrogate its Joint Agreement with the Company as being an unlawful overreaching into areas particularly reserved, by law, to the Municipality. While the Secretary dismissed the Complaint for untimeliness, she elaborated on the position of the federal government that, as to the specific matter of the hazardous waste project at La Pedrera, the issue was within the purview of SEMARNAP, and the Municipality therefore was without standing to bring its complaint (Exhibit 9, 1142, 43).

169. Failing in their administrative complaint, officials of the Municipality of Guadalcazar filed an amparo in federal court

in San Luis Potosi" in which essentially the same contentions made in the administrative complaint were reasserted (Exhibit 27, amparo decision of federal court, Mexico City, D.F., August 20, 1997). In its response to this action, SEMARNAP, among other things, argued that it would be improper for the judge to order that the Company not be allowed to operate during the pendency of the substantive decision. For, argued SEMARNAP, the right of the Company to operate rested not upon the terms of the Joint Agreement but upon the "respective authorizations and licenses" that had been granted to the Company. The order of the judge prohibiting operating, asserted SEMARNAP, suspends the Company's "vested right granted in accordance with the corresponding laws" to operate its facility.

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170. The position taken by the Government of Mexico that Claimant had "vested rights" with respect to its investment comports with the view expressed by Schwarzenberger that "a concession which has duly come into force is a 'vested private right'." O'Connell adds that in international law, respect for acquired rights is a well-established principle. 81

171. Although the "nature, character and legal status of a concession agreement have never been clearly determined nor its definition agreed upon," certain elements seem to inhere that are common: one party is a State, the other an alien or nation; the concession is normally for a designated period; the agreements usually involve a State with natural resource in want of development on one hand, and a company of a nation with

capital and technology, on the other developed to the reciprocal benefit of the parties. $^{83}$ 

172. While the Government of Mexico and the Company did not enter into a "concession" agreement, they did become vested of rights: the right to construct, the right to operate, the right to operate and mediate under the specific terms and conditions of the Joint Agreement, and, of course, the right to expect the fruition of its investment without the interferences of the granter of these rights.

173. The Government of Mexico benefitted by having its environment emeliorated. (Many could be found who would passionately advocate that the environment is a more precious natural resource than oil or gold.)

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174. On May 21, 1996, the Company's lawyer met with Martín Díaz Díaz, head of the legal department of SEMARNAP, to discuss the filing of a Constitutional Controversy<sup>84</sup> by SEMARNAP against the Municipality of Guadalcazar, concerning which he had earlier submitted a legal memorandum to Mr. Díaz Díaz. SEMARNAP's counsel stated that, although in his opinion SEMARNAP would succeed in a Constitutional Controversy, Secretary Carabias considered such an action inadvisable. To do so, she felt, would be contradictory to the concept of "new federalism" in Mexico President Zedillo was currently mentioning in his speeches.<sup>85</sup>

175. The JURICI opinion (Exhibit 34) holds that the federal government should have succeeded in such a Constitutional Controversy, and that the Government of Mexico was obligated

under Mexican Constitutional law to have brought the suit.

promulgated a new regulation, NOM-055-Ecol/1996, requiring that beginning in January, 1997, applicants for federal landfill construction and operating permits must first have the local construction permit as well as the state land use permit. Reportedly, this action was in furtherance of the declared purpose of the 1996 amendments to the General Ecology Law which president Zedillo stated were to increase the transparency of Mexico's environmental laws, and to more fully and clearly delineate the relative roles of the federal, state and local governments.

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admits to the conclusion that either, (1) the measure of the Government of Mexico that was previously in effect was different from that of the new regulation, or (2) the subject matter addressed by the new regulation was neither transparent nor predictable, or (3) both. No matter, however, to the results on Claimant's investment. For it is in looking back at the measure, in full light of the instant case, that the former measure is seen as through a glass dimly. At the time, the position of the Government of Mexico was illumined and explicit: the federal government had primacy in matters of hazardous waste. Only after colliding repeatedly with the Governor's obduracy did the federal government's resolve weaken and what was once sure became unsure, what was once absolute in assurance became equivocal in

execution. In the meantime, Claimant went from the federal government to the state house and back again seeking a solution. Instead, bouncing mercilessly between Scylla and Charybais, the Company only found delay and damages of epic dimensions.

General for the Protection of Environment, Antonio Azuela de la Cueva, quoted in Excelsior, states: "I repeat to you that the authorization [for Metalclad to open and operate] already existed, we only lifted the closure, studied and signed an agreement .... The law considers waste as hazardous and non-hazardous. The first group should be handled by the federal authorities, while the second one should go to the local and municipal authorities" (¶139). The Government of Mexico's declared position remains today what it has been from the beginning, even after the filing of this claim: the Company had the right to operate its hazardous waste facility because the federal government had authorized it to do so.

179. These representations of officials of the Government of Mexico constitute pivotal facts in this case; for, the representations so made, form a material part of the basis upon which Claimant relied, in good faith and to its detriment, in exercising its option to purchase COTERIN, and in going forward with the construction of the landfill. (Declaration of Grant S. Kesler).

180. The NAFTA and international law require of Respondent a standard of due diligence in providing investors and their

investments full protection and security. In Asian Agricultural products Ltd (AAPL) v. Republic of Sri Lanka (1990) 6 F.I.L.J.

526, the Tribunal examines the doctrine of full protection and security in the context of an armed rebellion, citing and discussing various cases and writings. Several such cases involved the Mexico/USA General Claims Commission, and found Mexico deficient in its "duty to protect." Id. at 577. Finding the Government of Mexico responsible for what was characterized as "lack of protection," in a fourth, Victor A. Ermerins case (1929), cast the Mexican authorities' failure to provide Ermerins protection in the view:

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"'a crime of this nature could not have taken place if the authorities of the town had properly fulfilled their duty to afford protection to the property of Ermerins'." Id., citation omitted.

181. After citing <u>Chapman</u> and <u>Mead</u>, where the <u>Mexican/USA</u> General Claims Commission, in spite of the insufficienty of the records submitted, relied on sworn affidavits and non-official reports to find a lack of protection, concluded:

[A]dequate protection afforded by host
State authorities constitutes a primary
obligation, the failure to comply with ...
creates international responsibility ....
"[T]here is an extensive and consistent
state practice supporting the duty to
exercise due diligence" (Brownlie, "System

of the Law of Nations, State Responsibility -Part I, Oxford, 1986, p. 162. Id. at 557.

182. Notwithstanding the threats and acts of violence to Claimant's investment, the misuse of state police by the Governor against Claimant's investment and the responsibility to defend its authority (and thus Claimant's investment) as committed, Respondent failed to exercise due diligence and deprived Claimant of full protection and security.

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- b. The State of San Luis Potosi committed support and approval to Claimant's landfill facility, upon which Claimant reasonably and detrimentally relied only to have the State breach its commitments.
- 183. The State of San Luis Potosi granted the Company a land use permit for purposes of a controlled hazardous waste landfill at La Pedrera on May 11, 1993 based on an application filed on July 15, 1991. The cognizant state agency at the time, SEDUE, requested concurrence from the state congress before it issued the permit which, in turn, sought advice from UASLP. Three geology professors from UASLP, including Pedro Medellin Milan, made a report to the congress in support of the site's adequacy for the land use permit. With that recommendation, the state congress concurred, and SEDUE issued the land use permit (Declaration of Humberto Rodarte Ramon).
- 184. The relevant law of San Luis Potosi at the time required that before the State could issue a land use permit the applicant must have already been granted the necessary

construction permit. On the presumption that the State knew its own law, its inquiry would have yielded the fact that the applicant, Claimant, had a construction permit -- a federal construction permit. It had no local construction permit. The granting of the land use permit on May 11, 1993 by San Luis potosi to Claimant ratifies the sufficiency of the federal construction permit and the primacy of federal authority. (For a fuller discussion of this issue, see Exhibit 34, JURICI Expert Opinion.)

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185. Notwithstanding the official support of the State in the form of the land use permit, Company officials sought an affirmance of support from the newly-elected Governor, Horacio Sanchez Unzueta. In his letter of June 11, 1993 to Grant S. Kesler, the Company's president, Governor Sanchez Unzueta expressed his support as a result of a meeting the previous day at which the La Pedrera project was explained in some detail. With Governor Sanchez Unzueta's support, and with the federal operating permit to go with the construction permit, Metalclad exercised its option to purchase the stock of COTERIN (Declaration of Grant S. Kesler and Exhibit 11, letter from Governor to Kesler).

186. When Dr. Sergio Reyes Lujan, (the Government of Mexico's top environmental authority), heard of some questions being raised by the Governor, he personally met with the Governor and explained the commitment of the federal government to the project. The Governor informed Dr. Reyes Lujan and

representatives of the Company that some concerns had been raised about the La Pedrera site by certain UASLP professors which the Governor wished to have addressed. In a meeting with Company officers, also attended by his environmental coordinator, Pedro Medellin Milan, the Governor assured, "You take care of the technical matters with the university, and Pedro and I will take care of any social matters and the municipality." As long as the project was "safe," the Governor promised he would give his support. The Company complied (Declarations of Grant S. Kesler, Humberto Rodarte Ramon).

187. The "investigation" undertaken with the oversight of the UASLP group of professors grew in scope, time and cost (the Company, as agreed with the Governor, was footing the bill for the study). So, in the Spring of 1994, in an effort to expedite the evaluation process, the Company invited Medellin Milan and the UASLP professors to Orange County to visit a landfill engineered by Harding-Lawson and Associates, the environmental engineering firm designing the La Pedrera facility. Upon touring the facility and receiving a technical briefing on its operation on April 15, 1994, Medellin Milan said to the group assembled in Metalclad's conference room that he was impressed and satisfied with the technology, and that the Company could begin its construction subject to any modifications which might need to be made as a result of the final report from the committee of UASLP professors, who were all in the group to which he spoke, save When Medellin Milan finished, those in the room applauded

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(Declaration of Grant S. Kesler).

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188. In reliance on Medellin Milan's approval, the Company began its mobilization and construction activities on May 16, 1994. On May 27, 1994, at a public meeting in the Hall of Governors, attended by press, a representative of the U.S. Embassy, Pedro Medellin Milan and Company representatives, public statements were made signifying the "accord" achieved between the Governor on behalf of the State of San Luis Potosi and Metalclad. This "accord" for the "restoration of the land, construction and operation of a controlled landfill, that will be located in the zone known as 'La Pedrera,'" was further acknowledged in a public statement by PROFEPA official Lic. Miguel Limon Rojas in a meeting that included U.S. Ambassador James Jones, Jose Luis Calderon of PROFEPA, Dr. Pedro Medellin Milan and T. Daniel Neveau of Metalclad (Exhibit 16, SEDESOL, Bulletin, Press, Radio, Television).

189. As the construction at the site progressed, various federal and state officials inspected the site, including Pedro Medellin Milan (Declaration of Ariel Miranda Nieto). Then, after the purported closure on October 26, 1994 by the Town Council of Guadalcazar, (in which Medellin Milan was a complicator), both the Governor and Medellin Milan agreed to attend the Company's March 10, 1995 "Opening Ceremony." In fact, before the Company mailed 300 invitations to the opening, the invitation, itself, was approved by Medellin Milan (Declaration of Grant S. Kesler).

190. In response to Metalclad's request and in a joint

effort with the Company to deal probatively with the continued impediments interposed by the Governor about the condition and safety of the La Pedrera site, PROFEPA undertook an extensive environmental audit of the project. Under PROFEPA's aegis, the audit results were further evaluated by a cadre of experts, whose collective expert opinions acquitted the landfill of the specious charges of the Governor (¶¶31, 36; Exhibits 4 and 23 Audit and Dictamenes). The audit results and the experts' analyses, which generated eleven volumes of technical information, fully validated the legal-technical compliance of the project (¶34). The Government of Mexico attached its imprimatur to the audit conclusions publicly on several occasions, and in the Joint Agreement (Exhibit 2 "The Case of Guadalcazar," ¶¶12, 14, 32, 34, 37, 38, 39, 40).

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- 191. In continuing negotiations with federal officials, the Governor asked for, and was given help from SEMARNAP, PROFEPA, UNAM, National Water Commission, Nuclear Safety and Security Commission, School of Civil Engineers of Mexico and the Secretariat of Health in meeting with constituencies in Guadalcazar, answering questions and explaining the safety of the project.
- 192. The Governor was fully aware of and participated with SEMARNAP officials in the negotiation of the terms and conditions of the Joint Agreement and kept promising his decision of support (140, Exhibit 2).
  - 193. Rather than permitting the landfill to open, however,

the federal government continued placatory political efforts with the Governor. PROFEPA officials along with representative experts who had analyzed the audit results, agreed to a series of meetings among constituencies of Guadalcazar (¶¶34, 35, 36, 38). The federal officials and experts explained the empirical scientific results attesting to the safety of the landfill, and the people nearby, the elements of remediation and the legaltechnical compliance of the project.

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numerous contacts with Governor Sanchez Unzueta, seeking to help resolve the issue of the Company being denied its right to operate. The Governor consistently assured Ambassador Jones that he would support the project if just one more thing were done (e.g., a meeting held, safety further checked, the municipality conferred with, Metalclad left the State, etc.). After the exasperated Ambassador finally threatened to declare the State of San Luis Potosi as hostile to U.S. investments, the Governor reopened negotiations and promised his support if the officials of the Municipality of Guadalcazar agreed to the Company's proposal (Exhibit 10, U.S. Embassy document re Metalclad, 146).

195. Despite the efforts of the federal officers, the cooperation and support of the Governor continued to be withheld. Nevertheless, federal officials publicly declared their findings of full compliance of the project, their support of the project and their commitment to open it (¶¶37, 38, 39, 40). PROFEPA and INE published an open letter to "Public Opinion" in August, 1995,

which set forth a summary of the audit and conclusions and the Government of Mexico's support for the project (¶38, Exhibit 4). Secretary Carabias stated that "within the next year, Mexico will have thirty projects just like the one in Guadalcazar [even with] the resistance of the people in the nearby regions ... this is a problem we will face anywhere in the country; there has never been a landfill in the world that has not encountered controversy" (¶39). Believing that the federal government was fastly committed to Claimant's project, that neither the Governor nor the contrived opposition to the landfill would ultimately deter that commitment, the Company extended its patient good faith toward comity with the Governor.

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- 196. These herculean efforts by federal officials, as well as the tireless demonstrations of good faith by the Company, were all in reliance upon the repeated representation that the Governor's full and open support would follow.
  - c. Respondent, through Governor Horacio
    Sanchez Unzueta and his administration,
    has misused public power and authority
    specifically and prejudicially against
    Claimant and its investment.
- 197. For three and a half years, the Governor has used the Aleman Report as a basis for casting doubt on the technical viability of the landfill project. Long after numerous authorities opined on the technical adequacy of the site and project, including the ratification of the federal government authorities, Governor Sanchez Unzueta questioned the safety and adequacy of the La Pedrera sites based upon the discredited

conclusions of the Aleman Report, acting as the man who refuses to be confronted by the facts because his mind is already made up (Preface p. vii, ¶¶34, 35, 36, 38, 39, 40, 52, 54, 55, 56, 57, 58, 59, 61, 70, 76, 94).

198. Using frightening information, the Governor delivered a hortatory speech to Guadalcazar residents warning of the birth malformities inflicted by the La Pedrera landfill. The Governor punctuated his oration by shamelessly holding up to his audience a baby "born without a brain" because of the radiation and toxicity emanating from La Pedrera, when, in fact, the baby was born and lived with its mother some 200 kilometers north of the landfill. The infant's father is a migrant farm worker in the United States, and none of his family members has ever lived anywhere near La Pedrera (¶96, Declarations of Grant S. Kesler, Ariel Miranda Nieto).

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199. The Governor caused to be released a "study" by one of his assistant state director of health, Dr. Hector Marroquin, alleging that the site at La Pedrera was producing birth malformations, multiple abortions and chronic respiratory diseases (¶108). This report was promptly refuted by PROFEPA's conclusion that no credible evidence existed linking health damages to the La Pedrera site (¶109). The "Dictamenes" published by SEMARNAP and PROFEPA further renounce the Governor's "study." The National Nuclear Safety and Security Commission (CONASENSUA), after conducting field and laboratory tests, concluded that the radiation levels in the landfill are "within

the value intervals" of normal standards, while the "natural level of radiation" at several points in the center of the City of San Luis Potosi including the Governor's office, were three times greater (Exhibit 23). The Secretariat of Health concluded: "The deaths due to malformations in the neural tube, in the State of San Luis Potosi, are found at a rate lower than that observed at a national level ...." (Exhibit 23, emphasis added).

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200. In a drastic overreaching of public power, Governor Sanchez Unzueta, on December 10, 1995, disseminated a letter he sent to U.S. Senator Paul Simon to various significant Mexican and U.S. officials. Senator Simon had earlier written to President Zedillo concerning the problem of opening the La Pedrera facility. In his letter, the Governor maligned the moral, commercial and legal integrity of Metalclad and accused Senator Simon, and apparently those to whom he copied the letter, of bad faith and actions which "cheapen and discredit" those who endorse Metalclad. Finally, in his coup de bec, Governor Sanchez Unzueta enlisted the support of the Company's investors "no matter what the consequences to their investment." egregious abuse of his public office, Governor Sanchez Unzueta sent the letter to the chief executive officer of Oakes Fitzwilliams in London, Metalclad's largest investor, and, to the managing director of First Analysis Corporation in Chicago, Metalclad's second largest investor (Exhibit 26). An overly generous spirit would assign the Governor's actions to benign ignorance; a more realistic observer sees the malefide intent to

harm the Company.

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201. The Governor continued to asperse Metalclad in a meeting on August 16, 1996, with President Zedillo's chief of staff, the U.S. Ambassador, and the Secretary of SEMARNAP. With his cadre of lawyers for support, Governor Sanchez Unzueta charged the Company with being criminal, fraudulent and legally non-existent (¶112, Exhibit 10, U.S. Embassy document re Metalclad).

202. Abusing the power unique to his position as Governor, Sanchez Unzueta provoked anti-North American and anti-Metalclad prejudice in the community. The Governor erected a large statue of Mexican hero Benito Juarez that he "faced to the north," (toward the U.S. and La Pedrera), "so that everyone will remember," Mexico is first (¶96).

203. The Governor further brought to light his prejudice against Metalclad by bringing together a group of Potosinian industrialists to whom he pledged support for their owning and operating a hazardous waste landfill in lieu of Metalclad (¶97, 98, Declaration of Grant S. Kesler). He insisted during several negotiations that a condition precedent for his support was for Metalclad to leave San Luis Potosi (¶95, 97, 101, Declaration of Lic. Gustavo Carvajal Isunza).

204. Twice the Governor deployed armed state police to stop and search vehicles going into and out of the landfill facility (1190, Declaration of Ariel Miranda Nieto). On the infamous day of March 10, 1995, the scheduled opening of Metalclad's landfill,

governor Sanchez Unzueta provided state vehicles for transport of paid demonstrators to the La Pedrera landfill and for alcohol and other drinks for the demonstrators who shouted "Out gringos!" at the guests (¶89, Pulso, March 11, 1995, p. 1, Declaration of Grant S. Kesler). On a number of occasions, the Governor publicly stated that, regardless of what the federal government or the courts may decide, La Pedrera would not open because "the people" are against it and he supports "the people" (¶¶33, 61, 95, 96).

205. Just a few days before the submission of this Memorial, on September 16, 1997, Governor Sanchez Unzueta administered his coup de grâce to the Company. Joined by Municipal President of Guadalcazar, Leonel Ramos, and his Coordinator of the Environment, Pedro Medellin Milan, the Governor signed a document declaring the Altiplano area, which includes the entirety of Claimant's 814 hectares of property and its landfill at La Pedrera, a protected ecological preserve. On September 23, 1997, Governor Sanchez Unzueta signed the decree making his act official, just three days before he left office. The decree requires the cessation of all activities in the defined area effective September 24, 1997. The Governor affirmed that by virtue of this action "any possibility that existed of opening the industrial waste landfill at La Pedrera is definitely cancelled." According to one report, "the decree that could stop the Northamerican (sic) company Metalclad from operating the landfill of La Pedrera, is going to be accompanied, in a few

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weeks, by a suit for defamation of character against the foreign capitalists" to be brought by Sanchez Unzueta and Medellin Milan (El Sol de San Luis, Sunday, September 21, 1997; ¶145). This action was taken without notice, without hearing, and without payment of fair market value compensation for the property taken.

206. Simply presented, the Governor:

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- charged that the landfill was unsafe, based on the
   Aleman Report; extensive evidence refuted the charge;
- 2. alleged that babies born without brains were a result of the landfill; no evidence at all exists, in fact, statistics show such is less likely to happen in San Luis Potosi than on the average in Mexico;
- 3. proclaimed that "the people" haven't been consulted and "the people" are against the landfill; polls indicated overwhelming support, and federal officials held explanatory meetings in the community;
- 4. refuses the federal officials his promised support; they sign a Joint Agreement with the Company anyway;
- 5. cause the municipality to file administrative and amparo actions; they are ultimately denied;
- 6. declares the landfill part of an ecological preserve so "now it will never open."
- 207. When the predetermined answer is "No," any reason can be found.
  - d. It appears that corruption and abuse of public trust have motivated the harmful conduct toward Claimant.

208. On two separate occasions, Company representatives were solicited for bribes by the Municipal President of Guadalcazar once for \$200 thousand, the second time for \$1 million to assure local support." Each solicitation was refused (Declarations of Ariel Miranda Nieto, Grant S. Kesler). A member of the law firm of the former governor of San Luis Potosi told Company representatives that for \$1 million, which he would appropriately allocate among government officials, he would get the landfill open (Declaration of Grant S. Kesler). The offer was refused.

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- 209. In November, 1996, a Company representative saw official receipts, used in tax submission to the Government of Mexico, bearing the name of the wife of Dr. Pedro Medellin Milan, Coordinator of the Environment for San Luis Potosi, revealing that Medellin Milan's wife had been paid NP\$30,000 a month for at least six months, an amount about the same as Dr. Medelliln Milan's salary from the state government, through a subsidiary company of RIMSA (Declaration of David Robinson). In addition, the Company representative was told that further records exist establishing payments from RIMSA, directly or through one of its subsidiaries, to a municipal president of Guadalcazar, and to support the activities of Angelina Nuñez and Pro-Ecologico San Luis (Declaration of David Robinson).
- 210. Two Wall Street analysts, doing research on Metalclad Corporation in January, 1996, spoke with Hector Vargas Garza,

  Director General of RIMSA. Vargas Garza declared that Metalclad Would never open La Pedrera. What's more, he offered, Metalclad

would never open a facility anywhere in Mexico. "North Americans are not going to take our landfill business," he warned neclaration of Grant S. Kesler).

211. The troubling question as to motive regarding the intransigent opposition to the opening of La Pedrera in light of the urgent need for the project and the overwhelming proof of its compliance with safety and technical requirements, has not escaped public observation. One writer accused the Governor of fronting for RIMSA'S chief owner, Dominguez Hernandez, the "godfather of hazardous waste" (El Heraldo, December 4, 1995). Excelsior openly referenced the footprints of RIMSA'S financial influence on the landscape of the La Pedrera problems (¶139). Secretary Carabias opined that the opposition to the La Pedrera project was "more economic than political" (¶39, Declaration of Grant S. Kesler).

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212. In summary, Respondent has breached its obligation to Claimant of a minimum standard of treatment. Respondent induced and got Claimant's reasonable reliance, then failed to fulfill the commitment upon which it induced Claimant. In light of all the circumstances, Claimant's reliance was reasonable, in good faith, and detrimental. The Government of Mexico chose not to protect Claimant's investment by opting for a political result which the Government of Mexico felt was in keeping with its "new federalism" program. Despite its continued and consistent position as to the primacy of its authority in the area of hazardous waste, and despite knowing that without an appropriate

assertion of that authority by the federal government, Governor Sanchez Unzueta would prevent the opening and operating of the Company's landfill, the Government of Mexico abdicated its responsibility which deprived Claimant of its investment. Respondent failed its due diligence responsibility to provide full protection and security to Claimant's investment knowing, or with minimum due diligence should have known, that the Governor on at least two occasions used armed state police to interfere with Claimant's investment; that corruption and prejudice have influenced the actions of Sanchez Unzueta's administration against this Claimant; that the Governor publicly declared that no matter what the federal government said, the landfill would not open; that through the use of false information, untruths and prejudicial invective the Governor aroused local opposition against this U.S. Claimant and its investment; and, that through the Municipal President "civil disobedience" was threatened if Claimant tried to open. upon the experience of March 10, 1995, the last threat is more a promise of violence. Treatment under the law of civilized nations, and particularly that set forth in the NAFTA, requires a higher standard of treatment than that received by Claimant for its investment at the hands of Respondent, which has been neither fair nor equitable.

- 3. Respondent failed to accord Claimant national treatment as provided by Article 1102.
- 213. Article 1102: National Treatment, provides:

- "1. Each party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
- 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
- 3. The treatment accorded by a Party under paragraphs
  1 and 2 means, with respect to a state or
  province, treatment no less favorable than the
  most favorable treatment accorded, in like
  circumstances, by that state or province to
  investors, and to investments of investors, of the
  Party of which it forms a part."
- 214. The imposition of the requirement for a construction permit from the Municipality of Guadalcazar was enforced selectively and singularly upon Claimant. The evidence available sustains the conclusion that, since the effective date of the NAFTA, municipal construction permits have not been required at

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all in the Municipality of Guadalcazar. During the relevant time period, the Municipality had no "construction" office or any employee charged with construction oversight. The one person in the office for permits knew nothing about construction permits, stated that there were no forms of any kind relating to construction permits, and admitted to never having issued a construction permit in the year that she had been there (Exhibit 5 Notary statement of survey of Guadalcazar, Declaration of Lic. Gustavo Carvajal Isunza). A survey of various construction projects in Guadalcazar by a Notary produced evidence that no one sought or was granted a Municipal construction permit, nor was anyone sanctioned for having constructed without such a permit. The general understanding was that if one owned the land a permit was not necessary (Exhibit 5 Notary Statement, etc.)

215. San Luis Potosi law requires that annually each municipality submit to the state a report of its construction permit activity, i.e., permits applied for and their disposition. An inquiry at the appropriate state office revealed that the Municipality of Guadalcazar had never filed such a report.

Indeed, no municipality had (Declaration of Lic. Gustavo Carvajal Isunza). The unimportance of enforcing the ordinance requiring a municipal construction permit as evidenced by the practice of Guadalcazar was reflective of San Luis Potosi's practice of disregarding its requirement that municipalities report construction permit activities. It is one thing to have a law on the books. The practice of its enforcement, or, in this case,

lack of enforcement, is quite another.

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- 216. The theme of manifest confusion and inconsistency concerning the municipal construction permit recurs consistently throughout this case. First, the federal officials assured claimant that the federal government's primacy in matters of hazardous waste demanded satisfaction of the requirements for federal construction and operating permits. To ensure state concurrence, INE required that Claimant have the state land use permit before it issued the federal operating permit. INE did not require a local construction permit nor did the State of San Luis Potosi before issuing the land use permit (Declaration of Grant S. Kesler).
- 217. Next, the federal, state and local government officials were each aware of the remedial and preventive construction work performed by Claimant on the transfer station site in the Spring and Summer of 1994. None of the three levels of government requested or demanded a local construction permit. Federal PROFEPA authorities in an official act (Exhibit 18 Document #PFPA-04/883/055/94) on August 30, 1994 lifted the seals of closure on the transfer station, and authorized, inspected and approved the construction which followed (¶21, 22, 23, 24, Declaration of Grant S. Kesler).
- 218. Without question, the Government of Mexico had copious opportunities to insist upon, even raise the question of, the municipal construction permit, i.e.:
  - 1. February 3, 1993, when the federal government issued

the construction permit;

- May, 1993, when the federal government required the Company to have the state permit for use of land;
- August, 1993, when the federal government issued the operating permit;
- 4. May 16, 1994, upon the commencement of the construction;
- 5. August, 1994, when the federal authorities "lifted the seals" of closure on the transfer station and authorized construction thereon;
- 6. All during the construction phase (May, 1994 -- May, 1995) when federal officials regularly visited and inspected the construction site;
- 7. 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 (see Exhibit 4 PROFEPA: To
  Public Opinion);
- 8. 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, the federal representative instructed the Company that the local permit was not really needed, but to make application anyway and the municipality would have to grant it as a matter of routine since to do otherwise was beyond the municipality's authority in

this matter;

- 9. Each federal inspection from October 27, 1994 onward of the continuing construction;
- 10. Before federal officials agreed to attend, and then attended, the March 10, 1995 "opening" of the landfill facility;
- 11. When issuing, in January, 1995, a construction permit for additional construction at the La Pedrera facility;
- 12. During any of the several "technical explanations of the audit" sessions held in the community of Guadalcazar;
- 13. November 13, 1995, when Governor Sanchez Unzueta raised for the first time, publicly, the issue of the local construction permit;
- 14. November 24, 1995, during the negotiation and execution of the Joint Agreement for Remediation and Operation of the La Pedrera facility; this Joint Agreement imposed 24 conditions on the Company, not one of which was to obtain a local construction permit; and
- 15. On February 8, 1996, the federal government issued a permit authorizing the Company to expand its landfill capacity from 36 thousand tons a year to 360 thousand tons a year at the landfill.
- 219. Both the action by the federal government in approving the construction without requiring a municipal construction permit, and the inaction on the part of state and municipal

officials with respect to a municipal construction permit, validated: (1) the Government of Mexico's primacy in matters relating to hazardous waste; and, (2) the practice of the Municipality of Guadalcazar of not requiring a construction permit.

220. When, on May 16, 1994, the Company began construction of the landfill at La Pedrera, officials at each of the three levels of government were fully conscious of the construction commencement. The federal government authorized the construction, inspected and approved it along the way. Inspections of the work were also made by officials from San Luis Potosi (Declaration of Ariel Miranda Nieto). Federal officials did not ask for, require or even mention a municipal construction permit. State and municipal officials were silent as hundreds of local residents worked on the project, and millions of dollars were infused into the state and local economies (Declarations of Grant S. Kesler and Ariel Miranda Nieto). This behavior on the part of the various government officials reconfirmed the primacy of the federal government regarding hazardous waste, and the practice of the Municipality of not requiring the construction permit.

221. Five months later, however, on October 26, 1994, representatives of the Municipality of Guadalcazar arrived unannounced at the landfill construction site and, in a handwritten document, purported to close all construction activity at the landfill for want of a municipal construction

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permit (Exhibit 20, Declarations of Ariel Miranda Nieto, Humberto Rodarte Ramon). This attempt by the Municipality to close all construction activities frontally contradicted the federal action of lifting the seals on the transfer station and authorizing construction at both the transfer station site and the landfill. Company officials consulted right away with the federal PROFEPA official overseeing their project. They were told to continue construction but, to show respect for the municipal leaders of Guadalcazar, the Company should make application for the local construction permit. The local permit, they were assured, would issue routinely since all federal and state laws had been conformed to, and, because the federal government had exclusive authority in the area of hazardous waste, the Municipality had no power to do otherwise (Declarations of Grant S. Kesler, Ariel Miranda Nieto).

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222. In concert with the federal position, PROFEPA issued an additional construction permit on January 31, 1995 for further construction at the landfill site. This action was followed by yet another extension of federal authorization on February 8, 1996, where the Company was given permission to increase the capacity of its facility from 36,000 tons per year to 360,000 tons per year. In each instance, the INE permits stated:

The regulations of the General Law of Ecological Equilibrium for the Environment in the Matter of Hazardous Waste, points out in its 4th article, fraction X, that it is the responsibility of the

federal authorities to authorize the construction and operation of the installations for the treatment and confinement of hazardous waste (Exhibits 21 and 32).

223. The Company complied with the directions from PROFEPA: it continued construction, and, on November 15, 1994, submitted an application to the Municipality of Guadalcazar for a local construction permit (Declarations of Grant S. Kesler, Ariel Miranda Nieto). (The municipality took no action on the Company's application for thirteen months, even though Mexican law deems four months a maximum time period for governmental entities to act on applications for permits. (See Exhibit 34, JURICI Expert Opinion, for more.)

224. Construction work at the site continued apace, and although Governor Sanchez Unzueta opposed the opening of the landfill on specious grounds, ("it's unsafe; we'll have babies born without brains; the 'people' are against it"), no mention of the lack of a municipal construction permit was made, until November 13, 1995.

225. To state it perhaps more clearly:

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- No government official, (federal, state or local), required or directed the Company to obtain a local construction permit;
- Municipal officials issued a closure order October 26,
   1994, which contravened federal actions;
- 3. Federal officials instructed the Company to continue to construct, which it did;

- 4. No government official, (federal, state or local), invoked the local construction permit after October 26, 1994 until twelve months later, when the Governor raised the issue;
- 5. Construction had long since been completed; more than U.S.\$20 million invested, a significant portion of which went into the state and local economy;
- 6. One month after Governor Sanchez Unzueta resurrected the issue of the local construction permit, the Town Council of Guadalcazar, on December 27, 1995, rejected the application made by the Company thirteen months earlier; (which, in fact, was not an evaluation on the merits of the application, but a refusal to even consider the application); (see Exhibit 31, Minutes of Meeting of Town Council of Guadalcazar).
- 226. The actions of federal, state and local officials, until October 26, 1994, affirmed the repeated representations to Claimant of the federal government's primacy of authority in regard to the landfill project. The actions and inactions of federal, state and local officials after October 26, 1994, were further consistent with those representations. For the Government of Mexico to breach Claimant's right to open and operate its investment because Governor Sanchez Unzueta and the Municipal President of Guadalcazar withheld their support based upon the lack of a local construction permit, when all practice and procedure, upon which the Company relied, had been to the

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contrary; and, when the issuance of the local construction permit has not been required of any other local industrialist or resident, violates, prima facie, the NAFTA requirement of national treatment.

- 4. Respondent failed to accord Claimant most-favorednation treatment in breach of its obligation under Article 1103.
- 227. Article 1103(2) states:

"Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.<sup>86</sup>

- 228. Respondent has not required of "investments of investors of any other Party [including its own] or of a non-Party" the licenses, permits, testing, studies and political accommodation that it has imposed upon Claimant. The facts and law argued in the section next above regarding national treatment also apply here.
  - 5. Respondent failed to accord Claimant the better of national treatment and most-favored-nation treatment in breach of its obligation under Article 1104.
- 229. Article 1104 provides: "Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles

1102 and 1103."

230. This standard of treatment, not uncommon in modern BITS, 87 is yet another provision supporting the proposition that the NAFTA clearly aims for the highest standards of treatment. 88 By failing to provide either of the standards of treatment obliged by Articles 1102 and 1103, Respondent, ipso facto, has failed in its obligation under Article 1104.

- 6. Respondent has breached its obligations under Article 1106 which proscribe the imposition of performance requirements.
- 231. Article 1106 states, in relevant part:
- "1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:
  - (f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement .... \*\*\*
- 232. In a continuing good faith effort to comply with Respondent's direction to seek, through conciliatory means, the

political and public support of Governor Sanchez Unzueta, Claimant provided Sanchez Unzueta and members of his administration, viz., Medellin Milan, upon their demand, proprietary knowledge about Claimant's investment. The provision of this information was not required for legal compliance or disclosure. It included all of the Company's drawings, studies, designs, operating manuals, safety manuals, financial data, and most of what is necessary to construct and operate a hazardous waste landfill facility (¶97, Declaration of Grant S. Kesler).

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- 233. In addition to the specific information the Company had given him, Medellin Milan and Governor Sanchez Unzueta each visited landfills in the United States receiving detailed information from Claimant's engineering contractor (Harding Lawson and Associates) in California, and its operating partner (BFI) in Texas.
- 234. Medellin Milan organized a group of local Potosinian industrialists into a consortium which was incorporated to build and operate a hazardous waste landfill in place of Metalclad and its project at La Pedrera (¶98).
- 235. The Company agreed, in various meetings and negotiations over the past four years with the federal, state or local governments: to build a laboratory of which the UASLP would have full use; to provide free medical care weekly to the community; to provide culinary water to the community while giving credit to the state therefor; to help the municipality with unrelated problems such as industrialized crops; to provide

free consulting to the federal government regarding hazardous waste matters; to provide collateral funding for education; and, several other such contributions. While in some cases the Company was more than willing to comply, in all cases, it really had no choice.

- 236. For its part in imposing these performance requirements on Claimant, Respondent is guilty of violating the prohibitions of Article 1106.
  - 7. Respondent has breached its obligations under Article 1110 which require that Respondent will not directly or indirectly expropriate Claimant's investment or take a measure tantamount to expropriation of such investment, except for a public purpose, on a non-discriminatory basis, in accordance with due process of law and Article 1105(1) and on payment of compensation as provided in Article 1110.
- 237. From an old and deep tap root of international relations, spring the critical investor protections clustered in Article 1110: Expropriation and Compensation: 90
  - "1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
    - (a) for a public purpose;
    - (b) on a non-discriminatory basis;
    - (c) in accordance with due process of law and Article 1105(1); and
    - (d) on payment of compensation in accordance with

paragraphs 2 through 6.

- 2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.
- Compensation shall be paid without delay and be fully realizable.
- 4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.
- 5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.

- 6. On payment, compensation shall be freely transferable as provided in Article 1109 ...."
- 238. In Mexico's negotiation of an increased opportunity for foreign investment, she accepted the codification of the U.S. position on expropriation and compensation. The definitional reach of Article 1110(1) is long: a Party may not "directly or indirectly" or "take a measure ("law, regulation, practice, requirement or procedure") tantamount to nationalization or expropriation "of an investment of an investor of another Party" except in accordance with the four listed provisions. (Emphasis added.) Of commensurate breadth, are the components of "investment." As set forth in Article 1139, they include:
  - "(a) an enterprise;
    - (b) an equity security of an enterprise;
    - (c) a debt security of an enterprise;

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- (d) a loan to an enterprise;
- (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

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- (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purpose; and
- (h) interests arising from the commitment of capital

or other resources in the territory of a Party to economic activity ... such as lender

- (i) contracts involving the presence of an investor's property in the territory of the Party ... or concessions, or
- (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise."
- 239. Claimant's "investment" touches several of the component criteria including enterprise, equity and debt securities, loan to an enterprise, a share in income and profits, intangible property, commitment of capital, contracts dependent on revenues or profits (Declaration of Grant S. Kesler). As such, the Company's claim falls squarely within the definition of "investment," and a deprivation of rights coupled with any of those constituents of "investment" constitutes an "expropriation," direct or indirect, or "a measure tantamount to ... expropriation" of Claimant's investment.
- 240. International tribunals have long held that intangible rights are property the deprivation of which may constitute an expropriation entitling the claimant to compensation. Two early cases that generated considerable progeny concerning expropriation and compensation are Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), 1926 P.C.I.J. (Ser.A) No. 7 (May 25), and The Norwegian Shipowners Claims (Nor. v. U.S.), 1 U.N. Rep. Int'l Arb. Awards 307 (1922). In the Upper Silesia

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case, Poland expropriated a nitrate factory at Chorzow. The German company that had contracted to manage the factory alleged that Poland's act had also "unlawfully expropriated the contractual rights of that company," and the Permanent Court of International Justice agreed, 1926 P.C.I.J. (Ser.A) No. 7, at 44. Wrote the court: "[I]t is clear that the rights of the Bayerische to the exploitation of the factory and to the remuneration fixed by that contract for the management of the exploitation and for the use of its patents, licenses, experiments, etc., have been directly prejudiced by the taking over of the factory by Poland." Id. at 44.

- 241. In <u>Norwegian Shipowners</u>, the U.S. and Norway agreed to submit to arbitration the claims of Norwegian subjects who had contracts to purchase ships from American shippards at the time the United States entered World War I and requisitioned all ships under construction. *Id.* at 314-18.
- 242. The United States argued that it had taken only the physical property of the partially completed ships and was only liable for the value of whatever partial payments and purchases of materials had been made by Norwegian shipowners. Id. at 318. The tribunal held "[t]hat, whatever the intentions may have been, the United States took, both in fact and in law, the contracts under which the ships in question were being or were to be constructed." Id. at 325. See also id. at 334 ("The United States intended to 'take' and have 'taken' in fact, the contracts under which the fifteen hulls in question were being constructed

by American Shipbuilders in 1917. These contracts were the property ....") (emphasis in original). The United States was adjudged liable for the "fair market value" not just of the partially completed ships but of the shipbuilding contracts. Id. at 339-41. See also G.C. Christie, What Constitutes a Taking of Property Under International Law?, 1962 BRIT. Y.B. INT'L L. 307, 316 ("In the German Interests in Polish Upper Silesia and the Norwegian Claims cases ... contract rights were held to have been expropriated by the action of States which disclaimed any intention to expropriate such rights.").

243. Other international arbitral tribunals have similarly held that deprivation of contract rights may be an expropriation of contract rights. See Rudloff Case (U.S. v. Ven.), 9 U.N. Rep. Int'l Arb. Award 244, 250 (1903-05) (American-Venezuelan Comm.)("[T]he taking away or destruction of rights acquired, transmitted and defined by a contract is as much a wrong, entitling the sufferer to redress, as the taking away or destruction of tangible property."); Shufeldt Claim (U.S. v. Guat.), 2 U.N. Rep. Int'l Arb. Awards 1079, 1097 (1929)("There cannot be any doubt that property rights are created under and by virtue of a contract."); Libyan American Oil Co. v. Libyan Arab Republic (1977), 20 I.L.M. 1, 53 (1981)("[I]ncorporeal property comprises all interests and rights which, though incapable of immediate material composition, may produce corporeal things or may be evaluated in financial and economic terms .... Concession rights, as those of the present dispute, may be included under

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the class of incorporeal property.").

244. A number of the decisions rendered by the Iran-U.S. Claims Tribunal reconfirm this principle. See, e.g., Phillips petroleum Co. Iran v. Islamic Republic of Iran, 21 Iran-U.S. Cl. Trib. Rep. 79, at ¶76 (1989)("[E]xpropriation by or attributable to a State of the property of any alien gives rise under international law to liability for compensation, and this is so whether the expropriation is formal or de facto and whether the property is tangible, such as real estate or a factory, or intangible, such as the contract rights involved in the present Case."); Starrett Housing Corp. v. Islamic Republic of Iran, 16 Iran-U.S. Cl. Trib. Rep. 112, at ¶361 (1987) (final award) ("[I]nternational tribunals have also recognized that taking of contract rights, like taking of tangible property, is compensable."); Amoco Int'l Finance Corp. v. Islamic Republic of Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, at \$108 (1987) (partial) award) ("Expropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction, i.e. freely sold and bought, and thus has a monetary value.").

245. Against this backdrop, the terms "expropriation" and "measure tantamount to" expropriation should be read to include the deprivation of rights suffered by Claimant herein. Through the actions of Respondent, Claimant has been deprived of its "vested right" pursuant to its construction, operating and land use permits to its investment (see Exhibit 32 for Respondent's

characterization of Claimant's rights in its pleadings filed in response to the amparo of Guadalcazar); and, its right to operate and remediate under the Joint Agreement between Claimant and SEMARNAP. (See Exhibit 34 JURICI Expert Opinion for discussion of multiple violations of Mexican law committed by state, local and federal governments which constitute a "measure" "tantamount to expropriation.")

246. Just as not every taking of physical property constitutes an expropriation, so not every deprivation of incorporeal rights constitutes an expropriation of such rights. In the *Upper Silesia* case, the Permanent Court of International Justice found an expropriation of contractual rights where Poland's actions in taking over a factory had "directly prejudiced" the contractual rights of company managing the factory. Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), 1926 P.C.I.J. (Ser. A) No. 7, at 44 (May 25).

247. In Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, 6 Iran-U.S. Cl. Trib. Rep. 219 (1984), the Iran-U.S. Claims Tribunal observed:

While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that his deprivation is not merely ephemeral. The

intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control of interference is less important than the reality of their impact.

Id. at III.1. (emphasis added). Another chamber of the Tribunal expressed the same idea in somewhat different terms.

Where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of property, the breach forming the cause of action is deemed to take place on the day when the interference has ripened into more or less irreversible deprivation of the property rather than on the beginning date of the events. The point at which interference ripens into a taking depends on the circumstances of the case and does not require that legal title has been transferred.

International Technical Products Corp. v. Islamic Republic of Iran, 9 Iran-U.S. Cl. Trib. Rep. 206, at II.C.4.c. (1985) (emphasis added).

- 248. Two years and seven months appear to be well beyond the short-life requirement of "ephemeral." Not only are thirty-one months plenty, but also the effects of Respondent's measures over that time, and the reality of their impact, have fructified into an irreversible deprivation of Claimant's property.
- 249. For 959 days, Respondent, through Governor Sanchez Unzueta has interposed a series of interferences including officially promoted demonstrations against Claimant; public

aspersions of the Claimant; threats of violence; malefide negotiations; public dissemination of false and misleading information about Claimant's investment designed to arouse community antipathy to the project and destroying Claimant's goodwill; filing of an inapt legal action barring operation of the project; use of armed state police, twice, to intimidate employees and vendors at the landfill, while insuring that the landfill did not open; repeated public declarations that the landfill will never open; the federal government's abdication of its duty to Claimant: "we can do no more with this Governor;" and, finally, an official act decreeing Claimant's investment to be circumscribed within a just-created ecological preserve. the while, venal motives lurked about infecting conduct toward Claimant with corruption. The effect of their measures -- these laws, regulations, practices, requirements and procedures -- on Claimant is indisputable: its investment is gone, rendered sterile of the possibility of any return.

250. The Tribunal observed in Phillips that "in circumstances where the taking is through a chain of events, the taking will not necessarily be found to have occurred at the time of either the first or the last such event, but rather when the interference has deprived the Claimant of fundamental rights of ownership and such deprivation is 'not merely ephemeral,' or when it becomes an 'irreversible deprivation'." Id. Significantly, the Tribunal found that the expropriation of Phillips' rights under oil exploration agreement had been expropriated nearly a

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 $_{\rm full}$  year before the contract was officially declared null and  $_{\rm wold}.$  Id. at ¶102.

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251. But for Respondent's representations to Claimant, Claimant would have not acquired the investment. Granting permits and giving assurances that such were fully sufficient for Claimant's investment objectives, induced Claimant's good faith reliance on the concession by the Respondent to operate a hazardous waste landfill, and its expenditure of U.S.\$20 million in its enterprise and investment. Significantly, the Respondent had more than a mere administrative interest in this Claimant's investment. This was not a fast food restaurant; but, a response to a desperate call for help from the Government of Mexico to address a critical social problem that threatens the health and safety of Mexico's people.

252. Governor Sanchez Unzueta's frequent public statements portended doom for Potosinians because of the storage site at La Pedrera. The unuttered scandal the Governor ignored is that but for his actions, the transfer station would have been more than half remediated by now, and meanwhile, the thirty clandestine dump sites in his state swell up with unconfined toxic waste, nearing proportions akin to those at the transfer station. Claimant relied not on casual representations of mildly interested governmental officials, but on ardent, compelling assurances, the consequences of which were also of great importance to the Government of Mexico. What reliance on an undertaking could be more justified? What subsequent failure to

fulfill an undertaking could be a clearer act tantamount to an expropriation?

253. And throughout, the taking (expropriation) has not been for a public purpose. At best it has been for a political purpose; at worst, a personal one. The absence of due process and fair and equitable treatment join an equally harmful denial of rights in the failure of any fair market value compensation.

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254. Turning now to the subject of compensation, Article
1110 codifies an even clearer standard of compensation than U.S.
Model Bilateral Investment Treaty (BIT) after which Chapter
Eleven is patterned. The NAFTA provision "fair market value"
for compensation by the expropriatory Party is the standard long
advocated by industrialized states including the United
States. The combination of "fair market value in freely
transferable dollars" provides the foreign investor the highest
value for the expropriated property. S

255. The manifest intent of the language in Article 1110, "fair market value" including "going concern value," covers the case where, as here, the primary investment value of the expropriated rights relates to intangible rights to obtain future revenues, as opposed to tangible rights, damages will be measured by future expected earning power.

256. The NAFTA's inclusion of "going concern" value assures the full value of the investment in question as an income-producing asset. "Value" is a forward-looking concept. In the Sapphire arbitration, 35 I.L.R. 137 (1963), which involved a

petroleum agreement with Iran, the arbitrator (Cavin) held that the measure of damages for the premature termination of the agreement, included the present value of the reasonably ascertainable future expected earnings. The Tribunal wrote:

According to the generally held view, the object of damages is to place the party to whom they are awarded in the same pecuniary position that they would have been in if the contract had been performed in the manner provided for by the parties at the time of its conclusion .... [T]he creditor should thereby be given full compensation. This compensation includes the loss suffered (damnum emergens), for example the expenses incurred in performing the contract, and the profit lost (lucrum cessans), for example the net profit which the contract would have produced. The award of compensation for the lost profit or the loss of a possible benefit has been frequently allowed by international arbitral tribunals .... Id. at 185-86.

Citations omitted. The Restatement (Third) is in accord. (§712, comments c and d, note 2.)

257. Professor Dupuy, the sole arbitrator in <u>TOPCO</u>, 53

I.L.R. 422 (1971) rendered an award supporting the position that the damage measure of full restitution should be derived from the going-concern value including present value of reasonably

determinable expected profits. Two recent ICSID arbitrations, AGIP<sup>96</sup> and Benvenuti et Bonfant,<sup>97</sup> each awarded the investors their expected profits that were reasonably ascertainable at the time of the breach or nationalization.<sup>98</sup>

258. The accompanying expert opinion on Claimant's damages, prepared by American Appraisal Associates, (Vol.3), employs the international legal standard of going-concern as specifically required by Article 1110.

259. The case for the reasonableness of Claimant's profit expectations is compelling. The demand for Claimant's service is overwhelming to insatiable. Against a yearly demand of treatment and confinement for 8 to 10 million tons of hazardous waste, only two other facilities exist to respond to this demand. One landfill has been expanded (500% in 5 years) to receive 600 thousand tons a year; the other's capacity is 80 thousand tons per year. Simple subtraction makes the point. Not factored into this equation is the amount of hazardous waste presently stored by industries awaiting proper disposal, nor the years of unquantifiable waste accumulating in scores of clandestine dumpsites throughout the country and being added upon daily.

260. Because the Government of Mexico is emphatically committed to ameliorating the serious threat to the health of its citizens due to its hazardous waste problem, both under national law and international agreement, (viz., the NAFTA Side Accord on the Environment), the predictability of the demand for Claimant's landfill services is reasonably certain.

- 261. The Claimant's facility is state-of-the-art, in some cases even exceeding the standards of the Mexican regulations, obviating foreseeable obsolesence.
- 262. Recent elections in Mexico evidence a stable political climate, at peace with democratic transitions.

## 263. In brief:

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- 1. the cumulative actions of Respondent, all of which have combined to deprive Claimant of its rights, including the recent eleventh-hour decree by the Governor creating an ecological preserve totally circumscribing the 814 hectare landfill property, constitute an expropriation of Claimant's investment under Article 1110 and international law;
- the expropriation has been discriminatory; it has been without due process; Claimant is wholly uncompensated; and,
- 3. the standard of fair market value which includes "going concern value" includes future profits.
- 7. As a direct result of Respondent's breaches of its obligations under the NAFTA, Claimant has been damaged in excess of \$90 million and is entitled to a judgment in its favor for \$90 million, plus costs of this action and attorney fees.
- 264. Respondent's breach of its obligations under Chapter Eleven, Section A of the NAFTA are the direct cause of Claimant's damages in this case. But for Respondent's breaches, Claimant would be in possession of its investment and receiving the benefits thereof.

265. The expert opinion rendered by American Appraisal Associates, included herewith in Volume III, employing standard and appropriate principles, methodologies and analysis, conservatively concludes Claimant's damages at U.S.\$90 million.

266. In accordance with Article 1135 of the NAFTA, and Articles 53, 55 and 59 of Arbitration (Additional Facility) Rules of ICSID, Claimant is entitled to an award in the amount of U.S.\$90 million plus costs of this arbitration including attorneys' fees.

## CONCLUSION

Claimant respectfully requests that the honorable Tribunal will be pleased to find:

that Respondent has directly or indirectly nationalized or expropriated Claimant's investment in Respondent's territory;

that Respondent has taken a measure or measures tantamount to nationalization or expropriation of Claimant's investment;

that Respondent's expropriation of Claimant's investment has been without due process and the provisions of Article 1105(1);

that Respondent's expropriation of Claimant's investment was not for a public purpose and without payment of fair market value compensation;

that Respondent has failed to accord to Claimant treatment no less favorable than it accords, in like

circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct and operation of Claimant's investment;

that with respect to the State of San Luis Potosi, it has failed to accord Claimant treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that State to investors, and to the investment of investors, of Mexico, for which Respondent is responsible;

that Respondent has breached its obligation to accord to the investments of Claimant treatment in accordance with international law, including fair and equitable treatment and full protection and security;

that Respondent breached its obligations to provide Claimant and its investment treatment no less favorable than Respondent accords, in like circumstances, to investors and the investments of investors of any other Party of the NAFTA, or non-Party, with respect to the establishment, acquisition, expansion, management, conduct or operation of Claimant's investments:

that Respondent failed to provide Claimant the better of the treatment required by Articles 1102 (National Treatment) and 1103 (Most-Favored-Nation-Treatment) of the NAFTA;

that Respondent breached the prohibition of

performance requirements in Article 1106 of the NAFTA, and specifically paragraph 1(f) by requiring that Claimant transfer technology and other proprietary knowledge to persons in Respondent's territory; that the breaches of Respondent's obligations, separately or in their aggregation, have directly caused Claimant damage; and

that Claimant be awarded compensation of U.S.\$90 million in monetary damages, plus applicable interest at the rate of 9% per annum, said compensation to be paid by Respondent without delay and be fully realizable and fully transferrable.

Respectfully submitted this 8 day of October, 1997.

LAW OFFICES OF CLYDE C. PEARCE

Clyde/C Pearce, Esq. Counsel for Claimant, METALCLAD CORPORATION

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