

## DECLARATION OF GRANT S. KESLER

August 10, 1998

1. My name is Grant S. Kesler. I gave a declaration in the case of Metalclad vs. the United Mexican States dated September 30, 1997 and am providing the following in response to Mexico's Counter-Memorial and in supplement of my original statement in an effort to assist the Tribunal in reaching a correct result in the present arbitration.

### Corrections to Initial Declaration

2. First, I would like to correct three factual errors and make one comment about a criticism that are contained in my original declaration dated September 30, 1997.
  - A. It was the fall of 1990, not 1991, that I began first to explore opportunities in Mexico with the firm of Ford, Bacon and Davis.
  - B. As Mexico's attorneys correctly point out, it was not Ambassador Negroponte attending the Border Conference in July 1993 (indeed, he was the United States Ambassador to Mexico), but rather it was Jorge Montano, Mexico's Ambassador to the United States at the time, who attended the meeting with me, Luis Donaldo Colosio Murrieta, Santiago Oñate and another individual who was with Mr. Colosio, Luis Raul Dominguez Terrazas. The title on his business card is General Director of Finance for Urban Development, Ministry of Social Development.
  - C. The September, 1994 press conference in Mexico City attended by U.S. Ambassador James Jones, Dr. Pedro Medellin from the State of San Luis Potosi, Mr. T. Daniel Neveau and others was presided over by the then head of PROFEPA, Miguel Limón Rojas. It was only later that Antonio Azuela was made the Attorney General and head of PROFEPA, replacing Mr. Limón. My original declaration is incorrect in that respect. *See* Memorial Ex. 16.
  - D. A criticism was raised over my use of "we" and "us" in my Declaration. As I used those plural forms then, and again in this Declaration, I am speaking as the CEO of the Company in reference to the Company, or its Board, its officers, or all of them.

### Policy Against Political Activity

3. At several places in the Counter-Memorial there is reference to Metalclad engaging in political activity. In particular, it has been alleged that we attempted to influence various elections at the local level in the community of Guadalupe.

4. At no time did anyone in this Company, to my knowledge or under my direction, engage in any activity to influence any election, whether it be federal, state or local.
5. From our first entry into the Country of Mexico, it was the stated policy of the Company to respect the fact that we are "guests" in Mexico and should always conform our behavior in the Company not only to the legal requirements of Mexico, but also to conform with and respect the customs, traditions, and policies of Mexico.

**June 11, 1993 Meeting with Governor Horacio Sanchez Unzueta.**

6. The meeting held with Governor Horacio Sanchez Unzueta on June 11, 1993 was an extremely important event for the Company. The letter that came out of that meeting was taken to be the creation of a general agreement with the government of the State of San Luis Potosi and a specific endorsement for the development of the La Pedrera landfill project.
7. My first personal meeting with Horacio Sanchez Unzueta was after his election but before his inauguration in May 1993 at the Fiesta Americana Hotel lobby in downtown Mexico City. Salvador Aldrett Leon introduced me to Governor-elect Sanchez Unzueta and the three of us held a conversation in perfect English. After the meeting, Governor Sanchez Unzueta suggested that I contact his secretary and arrange a formal meeting after his inauguration. A meeting with Sanchez Unzueta was also sought by others from the federal government, concerning our projects. The preparation for the meeting was extensive. This is evidenced by the booklet with information on the Company and its business for San Luis Potosi that Company representatives gave to the Governor at the time—I was unable to attend the meeting because of family illness.

**San Antonio, Texas Announcement—July 1993**

8. Approximately two weeks prior to the Border Conference in San Antonio, I wrote a letter to Governor Horacio Sanchez Unzueta explaining that the purpose of the conference was to promote and announce the successful relationships between U.S. firms and Mexico in developing infrastructure projects to be protected by the provisions of the NAFTA. I enclosed a copy of the proposed press release announcing the agreement that had been made between the Company and the Governor on June 11, 1993. See Ex. 1 to this declaration. I asked for his comments, suggestions and input and I invited him to join us at the conference in announcing our agreement.
9. Dr. Pedro Medellin went to the conference at our invitation as our guest, and participated with us in meetings, discussions, and other activities. We showed him a copy of the proposed press release. He suggested some changes to it, which we made, and the final press release was published with his blessing on the last day of the

conference. At no time did either he or Governor Sanchez Unzueta make any objection, whatsoever, about the content of the press release, nor did they comment on my letter that was sent to the Governor about two weeks before.

### Local Construction Permit

10. As I read the Counter-Memorial, I was struck by how Respondent characterized the issue of the municipal construction permit. If that characterization is to be believed, Mexican law set out a clearly defined statutory scheme identifying the autonomous but concurrent powers of the federal, state and local governments. It argues that Metalclad cannot be heard to complain of being victim to a system in place when the Company arrived, and if its structure were undiscovered it was because of the Company's ignorance. And ignorance of the law is no excuse.
11. I can underscore the fact that such was not the statutory environment Metalclad sailed into. It was, rather, much like that described in Mr. Altamirano's testimony. Our due diligence turned up the fact that municipalities can issue construction permits. But nothing indicated that it was a prerequisite to constructing and operating a federally approved hazardous waste landfill. Certainly the 1988 LGEEPA made it clear that hazardous waste authority reside in the federal government. Matters of non-hazardous waste are within the authority of state and local governments.
12. Federal officials confirmed this to us when we raised the question of the municipal construction permit with them in September of 1993. They (Dr. Reyes Lujan) instructed us that federal authority was primary in matters of hazardous waste, that a municipal construction permit was not necessary. They (Mr. Jaime de la Cruz) confirmed this in October 1994 when the Municipality purported to shut down our construction because we had no construction permit. It was reconfirmed in January 1995 when INE authorized more construction at the site, which was carried out under PROFEPA supervision. It was ratified in November 1995 in an agreement with SEMARNAP (the *Covenio*), and again in February 1996 with another authorization from INE, this one increasing our landfill capacity by a factor of ten.
13. In what I have heard called the "Guadalcazar provision," SEMARNAP now requires that an applicant for the federal permits must bring evidence of an agreement for its project among the company, the state, and the pertinent municipality. This is the procedure the Company followed in its CIMARI project in Aguascalientes. It is obvious that the new requirement admits that such was not the case for La Pedrera.
14. Landfills that deal with hazardous waste are typically located in areas that are sparsely populated. Because of the hydrogeology requirements, the seismic requirements, and the need for evaporation, they need to be in locations that are arid and remote. La Pedrera met all of those scientific characteristics and more.
15. By definition, a good environment for a hazardous waste landfill is automatically a

harsh environment for the residents living in the area. In this particular area, there are a few micro-communities with a total of approximately 800 adults spread among a handful of small villages. Most of the members of these communities can neither read nor write and look to elected authority to advise them on the safety aspects of these kinds of projects. That is why everyone from the federal government and Metalclad attempted to get the approval of Sanchez Unzueta. His public endorsement of the project and the federal government's plans to solve the problem of hazardous waste disposal in Mexico was critical because members of the local community had neither the training nor the experience to evaluate such a project.

16. Prior to acquiring COTERIN, we carefully evaluated the need for a local construction permit and determined that for some purposes — like excavation using material for the landfill — a local construction permit was required. But, for the development, construction and operation of a hazardous waste landfill on property completely owned by the Company, having all of the federal permits and the appropriate state land-use approvals for the entire site, no such permit was required.
17. When the Municipality raised the issue of a construction permit in the Fall of 1994, the whole issue was reviewed again with federal authority and the determination was that the Municipality did not have the right to demand a construction permit. But, if it did, it had no right to deny a construction permit upon the appropriate filing and payment of a few pesos in fees. We therefore accepted the advice of federal officials and applied for a construction permit. Construction went on without the permit, however, and the issue wasn't even raised again with us until after the PROFEPA agreement was signed in November 1995. Then, and only then, the Ayuntamiento took a vote to deny the construction permit, over a year after we applied, and during which time, we constructed the landfill.
18. I have read the Counter-Memorial and all of the witness statements, and I notice with great interest that while all of the federal witnesses talked in platitudes about the need to obey state and local law — not Julia Carabias, Antonio Azuela, or Rene Altamirano — say a local construction permit is a condition precedent to the construction and operation of a hazardous waste landfill.

#### **Claim that the Company Violated U.S. Securities Law**

19. *The United Mexican States has hired U.S. consultants to opine that the Company, rather than having a serious intent to build hazardous waste infrastructure and operate in Mexico, was engaged in securities fraud in the United States and Europe in an attempt to enrich the principals of the Company at the expense of its shareholders and with no serious intent of going beyond that. Such a claim is an insult to many sincere, hard-working and honest people and I sincerely regret the United Mexican States stooped to such a tactic.*
20. I must admit that studying the Respondent's reports and charts attempting to show

a case of securities fraud left me completely baffled. I will leave it to others to deal with some of the insinuations that Respondent advances, but I can provide the Tribunal with information to aid them in making a judgment as to whether or not a fraud has been perpetrated and whether it has any bearing on the claim at hand.

21. I am personally familiar with the securities laws in the United States. I have both prosecuted and defended securities cases as a Special Assistant Attorney General and as a lawyer in private practice. I have been licensed by the Securities and Exchange Commission as a Securities Principal and as a Financial Principal and had authorization at one time to conduct a securities business in all 50 states plus the federal district of Washington, D.C. and the district of Puerto Rico.
22. I was the Chief Executive Officer of a securities firm that operated in the United States for several years, having been licensed by the Securities and Exchange Commission, all 52 state and district jurisdictions, the National Association of Securities Dealers (NASD), and the Securities Investors Protection Corporation (SIPC). In that context, I raised capital from 41 states and successfully completed 13 securities offerings, both public and private.
23. I have been the Chief Executive Officer of Metalclad Corporation since June 1991, where I have presided over a series of private placements of securities in both the United States and Europe totaling more than \$45 million dollars.
24. I have presided over the preparation of every annual 10-K report and quarterly 10-Q report and periodic 8-K report filed by the Company since June 1991.
25. At no time during my career, spanning almost 28 years, as a financial or securities principal of a registered and licensed broker dealer, nor at any time while I have been the Chief Executive Officer of Metalclad Corporation have I ever been the subject of a complaint or investigation by the SEC, NASD, NASDAQ, SIPC or any state or foreign regulatory authority.
26. Metalclad has undergone periodic reviews of its filings with the SEC, NASD, and the state jurisdictions having regulatory authority over the trading of Metalclad stock. Never have the Company or any of its principals been found to be in violation of a state or federal law or regulation.
27. The United States is known for its litigious securities bar with investors and shareholders seeking any opportunity to claim violations of securities laws that impose almost strict liability on publicly traded companies and their officers and directors. In spite of this, no shareholder, no institutional investor, no broker dealer and no regulatory authority of any kind has ever filed so much as a formal complaint against the Company, let alone a legal action or a legal claim. And this is in spite of the fact that the market capitalization of this Company was absolutely decimated by Mexico's refusal to allow our project to operate.

28. Many investors watched the price of stock they purchased for \$6.00-\$6.50 a share drop to \$.85 a share. This is the kind of experience that typically provokes derivative suits, shareholder actions, claims of fraud and misrepresentation and the like. Yet this did not happen in the case of Metalclad. In my opinion, the main reason is that the majority of our shares are owned by very sophisticated European institutions that closely followed the events of the Company and correctly and appropriately attributed the fall in the share price to the United Mexican States and not to any misbehavior on the part of the Company and its officials.
29. One particular Company transaction in February 1996 seems to have caught the fascination and attention of the United Mexican States. It concerned the private placement of securities which had the effect of retiring all of the Company's remaining debt and leaving approximately \$9 million in additional available capital which was meant to be used for the operating and working capital for the La Pedrera landfill and other additional projects to be undertaken in Mexico. As part of that transaction, Dan Neveau and I (and to a very small extent, Javier Guerra Cisneros) exercised options and placed the shares resulting from the exercise with European institutions. The result was a cash payment to Messrs. Neveau, Guerra and me. The United Mexican States would have the Tribunal believe that the motivation in this offering was simply an exercise in personal greed among the Company's insiders. This insult could not further from the truth.
30. On March 1, 1991, T. Daniel Neveau and I purchased one million shares of Metalclad Corporation at \$1.42 a share for cash. We also borrowed sufficient monies to create a two and one-half year interest reserve, which was the life of the loan, and to pay the investment banking expenses associated with the transaction of acquiring our interest in the Company. We believed two and one-half years would be sufficient to accomplish our objectives in Mexico at which time, had we been successful, we could have sold a small amount of our shares for a substantial profit, retire the obligation to the lender and have the remaining shares for our own use.
31. The lender was very cooperative with Mr. Neveau and me when the loan became due in September 1993, and agreed to extensions from year to year, provided we paid the appropriate interest in advance.
32. As we contemplated doing a financing in February 1996, Mr. Neveau and I indicated to our investment bankers the need to exercise certain options which were about to expire and the need to repay as much as possible on the loan that we made in 1991. Together, we agreed with our investment banker to exercise those options and place the resulting shares for sale as part of the private placement being done with a group of European institutions. Therefore, a total of 950,000 shares at \$2.25 per share exercise price were placed in the offering for exercise and sale. Ownership was as follows:

Javier Guerra Cisneros	100,000
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T. Daniel Neveau	425,000	
Grant S. Kesler	<u>425,000</u>	
Total	<u>950,000</u>	options exercisable at \$2.25/share

33. The offering was being made to the institutions at \$4.00 per share, less a 10 percent commission to the selling broker, for total net proceeds of \$3.60 per share. The total proceeds from selling the 950,000 shares resulting from the exercise of the options above was therefore \$3,420,000. The amount paid to Metalclad for the exercise of the options was \$2,135,500. The balance of \$1,282,500 was distributed as follows:

Javier Guerra Cisneros	\$135,000
T. Daniel Neveau	573,750
Grant S. Kesler	<u>573,750</u>
Total	<u>\$1,282,500</u>

34. Mr. Neveau and I both paid \$150,000 each to Metalclad to reduce a prior obligation and therefore we each received net proceeds of \$423,750, all of which was then used to make an interest payment and a partial reduction of the obligation outstanding to the initial lender.
35. The Tribunal now needs to know something that counsel for the United Mexican States should already know. That is, this entire transaction could have been done another way. Rather than exercising our options and selling them through this offering to institutions in Europe through a fully disclosed confidential private placement memorandum, Messrs. Guerra, Neveau and I could have simply exercised our options and sold into the open market. The resulting transaction would have increased the proceeds to the three of us by more than \$1,000,000. Here is how: Average trading price for the stock during the month of February 1996 was \$4.8472 per share. The customary commission for a market transaction like this in the United States is approximately four percent. Therefore, the price from the shares, had we sold in the open market, would have netted us \$4.66 per share instead of \$3.60 per share that we received from the private placement. The difference is exactly \$1,007,000.
36. The reason the three of us agreed to give up the right to more than \$1,000,000 in cash was to ensure that the resulting shares were placed in the hands of true long-term investors and to avoid the appearance among all the other shareholders and brokers involved in the Company that the insiders were selling out. It is a signal to the public market place that when insiders start selling their stock, something may be wrong. Either way, insider transactions are fully and publicly disclosed. But when those supporting the Company see insiders "place" their stock with long-term investors who have been fully informed of the entire transactions and all of the risks attending the investment, it is normally not seen as negative. In this way, the insiders, retain the

- respect of the market-makers and brokers who support the Company on a daily basis and would not support insiders taking advantage of it.
37. If the three of us were simply looking out for our own interests at the expense of the Company, we would not have foregone \$1,000,000.
  38. The February 1996 placement occurred approximately one month before we announced the creation of a joint venture with the second largest waste management company in the world, Browning-Ferris Industries (BFI). The BFI joint venture had been in the planning stage since June 1995 and was about to come to fruition. Even though the offering memorandum and all of the public disclosures contained very negative warnings so that the investment community understood the high degree of risk associated with any developmental company, and particularly one trying to create a new industry in a foreign country. In fact, all of us on the inside of Metalclad were extremely optimistic about our potential for growth and success in Mexico as a result of being able to obtain new capital and to create an operating joint venture with a company such as BFI. We honestly believed that the stock price would rise dramatically after the BFI announcement. We felt that we were making an additional compromise to sell our shares from options exercised in the February offering, knowing that there was some very positive news ahead.
  39. I think it needs to be pointed out here that the United Mexican States has drawn all of their conclusions about the insiders behavior from public documents on file with the Securities and Exchange Commission. Their conclusions are not shared by the Securities and Exchange Commission, by the NASD, by NASDAQ, by shareholders, by brokers or market-makers that regularly review our public filings. None of these entities has ever made the slightest comment or criticism about any of the transactions that the United Mexican States seem to find so objectionable.
  40. Regrettably, a short time after we completed the February 1996 offering, a Mexican court awarded an amparo on behalf of the Community of Guadalcazar against SEMARNAP which had the effect of preventing the enforcement of the agreement between SEMARNAP and the Company executed on November 24, 1995. The Mexican court took this action in spite of the fact that three different Mexican attorneys opined that such an action was illegal under the Mexican Constitution and would be defeated. Those three attorneys were Otto Sasapavon, our local counsel in San Luis Potosi; Manuel Garcia Barragan, our counsel in Mexico City who opined prior to the conclusion of the offering that it would be "outrageous" for any court to award an amparo on behalf of a Municipality since it is a remedy reserved to individuals, not governmental bodies; and the third opinion we got at that time was from Attorney General Antonio Azuela, the head of PROFEPA. I understand that over the past two and a half years at least two courts have ruled against the Municipality. But the amparo continues through appeal.



## **"Going Concern" Qualifications**

41. The United Mexican States attempt to portray Metalclad as woefully undercapitalized during the time in question. I do not believe being properly capitalized is a requirement to receive fair and equitable treatment and the benefits available to investors under the NAFTA. It is, nevertheless, a charge I will respond to.
42. If we were undercapitalized from time to time, it was only because Governor Horacio Sanchez Unzueta used the power of his office to unlawfully delay a qualified, permitted project. Our original plans were to begin construction of the La Pedrera landfill in September 1993. He delayed us until May 1994 and then imposed additional requirements that delayed the opening until March 1995. Without any impediment, the entire project could have been built in approximately sixteen to twenty weeks.
43. Admittedly, there have been times when it has been extremely difficult to raise additional capital to invest in Mexico. There are two occasions I recall in particular. The first one was in the Summer of 1995, when our planned opening had been again delayed and our investors were losing confidence in our ability to successfully open the project. The other was just recently in the Spring and Summer of 1998, when it became apparent to the marketplace that there was little hope of resolving our dispute with Mexico and, as a consequence, many investors abandoned their investments at significant losses. This depressed the price of the stock and further hampered our efforts in raising the capital needed to defend this action and to accomplish further development in Mexico.
44. We had expected the Federal Development Bank, known as BANOBRAS, to finance a project we are doing in the State of Aguascalientes, and indeed had been told that the positive approval would come in February 1998. But, with a recent linkage of this case with the BANOBRAS charter to make loans for environmental infrastructure, the loan has not been approved and is instead being officially "reviewed". This new disappointment has further depressed Metalclad stock and has created an obstacle toward raising additional capital.
45. If a U.S. operating public company finds it necessary to raise additional capital, U.S. law requires that it make a full disclosure to its potential investors. Because of the strict liability associated with the securities laws in the United States, most companies are extremely conservative to state their financial position as negatively as possible for the purpose of warning potential investors that the enterprise is risky and that there is no recourse if the investment is not successful. This is a policy Metalclad has followed from the beginning. Our disclosures have always been full, open and proper under the law. We always advised investors of every potential and possible downside. The United Mexican States wants to take some of our disclosures as evidence that we knew this was a risky venture. Of course we did. But we have always believed — and we still believe — that we will succeed in Mexico.

46. In this light, On August 15, 1995, our auditors, Grant Thornton, suggested that they include in the financial statements accompanying our 10-K for the year ending May 31, 1995 a qualification called "going concern". This qualification serves to advise the investment community — both existing stockholders and potential new stockholders — that there is serious question about whether or not the entity can survive as a going business for want of capital, recurring losses, or excessive debt, and so forth. Therefore, the institutions that invested in Metalclad in February 1996 were adequately advised there was a potential capitalization problem. Because it was an all-or-none offering, it also served to assure those investing that the capital invested would be enough to pay all remaining debt of the Company and leave in excess of \$9,000,000 in cash available for operations or further investment.
47. A short time after completing the offering, Arthur Andersen offered to become our auditors both in Mexico and the United States. Because Arthur Andersen is one of the most respected accounting firms in America, we accepted their offer and made the switch from Grant Thornton to Arthur Andersen. The Company had no disputes with Grant Thornton. See Ex. 2 attached hereto. The Company took Arthur Andersen's offer to take on such a small company as a client and to put their strength and ability behind our financial statements as a testament to our Company's financial and integral strength.
48. Shortly after hiring Arthur Andersen, we changed our fiscal year to calendar year so that our reporting was on a more standardized quarter basis. On March 15, 1998, we filed our annual 10-K report with the accompanying audited financial statements prepared by Arthur Andersen with the Securities and Exchange Commission. That opinion for the second time in the Company's history has the qualification of "going concern". It was done by Arthur Andersen with our full support and with the full support of our investment banking firm in Great Britain, known as Oakes, Fitzwilliams. We agreed to this knowing that we were going to have to go back into the securities markets and raise additional capital to complete our developmental projects in Mexico and to pay the expenses associated with this litigation. Consequently, for the first time since 1996, we prepared disclosure documents in effect warning potential investors that we would be asking them to invest in our enterprise when there was a significant risk associated with this investment; that the success of the investment may turn out to be dependent upon the success of our litigation; and upon the success of further efforts to develop projects in Mexico.
49. As of the filing of this document with the Tribunal, we will have accomplished raising an additional \$6,000,000 in capital and converting the remaining debt of the Company to equity, therefore assuring there will be no qualified opinion for the financial statements ending December 31, 1998. In addition, our operations in seven other Mexican states are becoming quite successful. They doubled in size last year and they will likely double in size this year. They are now profitable. Let me be perfectly clear: Metalclad has developed projects in eight Mexican states. Seven of these have been very positive experiences.

50. In addition, we have now been able to pay for the costs associated with developing another landfill in the State of Aguascalientes which we expect to open for commercial operations prior to the end of this calendar year.
51. Taken together, I believe that the Company's operations in Mexico will be profitable for the calendar year 1999, and going forward, even with nothing attributed to the San Luis Potosi project.
52. I would also like to point out to the Tribunal that our financial statements show very little value attached to the San Luis Potosi project, because, with the exception of the actual cost of the land and a few other things, we have written off everything associated with the project — which is the conservative way to approach the subject in any developmental endeavor and especially in Mexico. We have followed the same procedure in our Aguascalientes project and our additional landfill projects in Mexico. It is these kind of policies that ensure our continued representation from the largest accounting and auditing firm in the world and continue to have the respect of some 35-40 institutional investors, primarily in Europe, that believe Metalclad will ultimately be successful in developing our projects in Mexico.

#### **Amendment to the COTERIN Purchase Agreement**

53. The United Mexican States focus on our amendment to the Aldrett contract in September 1993 to include additional provisions making contingent certain payments upon approval of the state and local governments. They argue that we knew from the beginning there was a problem with support from the state and local governments; therefore, we went forward at our peril, having been fully warned.
54. Metalclad never underestimated the importance of having the state and local political support for our project. We made enormous efforts to gain that support. This should be painfully clear to anyone who has read all of the material submitted with our Memorial and now with our Reply. We had met with Governor Sanchez Unzueta, presented to him information about our Company and about our plans for environmental projects in his state, including our hazardous waste landfill at La Pedrera. We received a letter of support from him. Other contacts and indications from his administration were positive. We were always aware, however, of the possibility of change. In fact, in the month of September Dr. Reyes Lujan met with Governor Sanchez Unzueta to emphasize federal support for the project. It was then that we learned of the Governor's questions about the geological adequacy of the site as raised by certain UASLP professors. That occasion generated the formation of the UASLP committee whose purpose was to evaluate the site for scientific propriety. With respect to the municipality politics, we always knew that what the Governor told us was true: they would follow the Governor's leadership.
55. We were all well aware of what I have stated earlier. The political influence of the state governor in a municipality like Guadalcazar is enormous. Where nearly all of

the revenues received by Guadalucazar are parceled out by the Governor, this influence is redoubled. I had no doubt that if we could maintain the Governor's support for our project, and get him to publicly endorse it, our project would be built and successfully operated. Certainly the opposite of that has produced a contrary result.

56. The conditions placed in the Aldrett contract, therefore, were those deemed legally protective, in keeping with our policy of being careful and conservative, while at the same time approaching the work of development in Mexico with the highest degree of confidence and enthusiasm.
57. Finally on this issue, I call attention to my letter dated February 2, 1994 to Horacio Sanchez Unzueta. The United Mexican States want to point out as laughable my claim that Metalclad had done a billion dollars in environmental work worldwide. The claim is absolutely true, but, in addition, if one reads the entire letter, I also explain to the Governor our limitations, our capital funding, and fairly and accurately present the position of the Company that "[w]e are not the biggest company in the area of waste management but we are very capable of making the San Luis Potosi project very successful."

#### Executive Compensation

58. The Company and its executives have been criticized by the United Mexican States for the amount and frequency of executive bonuses. They have accused the Board of altering the criteria for bonuses in midstream and have attributed improper motives to the Company because of it.
59. It is hard to see what executive compensation has to do with protecting foreign investment, but in the spirit of cooperation and of a more complete response, I will address the point.
60. The Tribunal should know it is extremely difficult to find qualified industry specialists willing to undergo the burden associated with, travel to and working in Mexico. Witness simply the number of ex-employees and associates who refused to do it any longer:

Reed Warnick (Director)  
Terry Douglas (Director)  
Ronald Robertson (Chairman)  
T. Daniel Neveau (Chairman)  
Lee Deets (Director)  
George Baucom  
Sandra Ray  
John Clayton  
James Fahs  
Anthony Wood

Anthony Talamantez

61. There is no question the Metalclad Board has encouraged some people to stay and compensated them generously in the effort, setting reasonable criteria for achieving awards after certain accomplishments.
62. United States law and regulations for publicly traded companies requires that all executive compensation be first approved by a compensation committee made up of independent (non-executive) board members. This policy has always been followed by the Company.
63. Many times, compensation committee members will seek counsel from outside professional experts to assist them in determining the awards to be made. Such has been the case with Metalclad. Experts such as Arthur Andersen have been engaged to prepare research on industry standards to be used as a guide for awarding compensation, bonuses, and the like.
64. For example, this past year the Company's Compensation Committee hired Arthur Andersen to do such a study, which disclosed that current compensation—salary, bonuses, stock options, etc.—was between the 50th and 75th percentile on compensation for our industry in all categories. In addition to Arthur Andersen, the Compensation Committee engaged a Mexican expert to review the findings of Arthur Andersen. Its findings confirm those of Arthur Andersen.
65. At no time has the Compensation Committee or the Board exceeded any reasonable industry standard for the awarding of compensation.

Jose Mario de la Garza

66. If Jose Mario de la Garza's conduct had occurred in the United States, he would be both disbarred and liable for civil and criminal prosecution. The fact is that Mexico has no bar association, no canons of ethics and no obligation to maintain confidentiality between lawyer and client, which account for the fact that even though this man cannot distinguish between truth and fiction, he remains in business as a practicing attorney. Unfortunately for him, his own statement is contradicted by Horacio Sanchez Unzueta and Pedro Medellin. He is also contradicted by his own secretary.
67. Mr. de la Garza says that we had a meeting at his office during the "last days" of April 1995. He says that at that meeting, I attempted to induce him to bribe Horacio Sanchez Unzueta, and that with indignance he resigned the employ of the Company and immediately wrote a letter to the Governor indicating that was the case. He claims our own letter, dated April 28, 1995, firing him was a fabrication, done after the fact, to make our story look consistent.

68. There was no meeting with this man during the "last days" of April 1995. The last meeting any of us had, including me, occurred the first week of April—either the 4th or the 5th. It was out of frustration of being unable to reach him that we finally gave up and fired him on April 28th. Fortunately, when we did so, we followed standard procedure and had our Director General take two copies of the letter to Mr. de la Garza's law firm. One letter was left for him. You will find a copy of this letter in the Counter-Memorial near de la Garza's sworn statement. The second copy was given to de la Garza's secretary and asked to be stamped or otherwise receipted. She accommodated us and wrote with her own handwriting at the bottom of the letter that the letter was received at the offices of Jose Mario de la Garza on April 28th at 4:00 PM. *See* Ex. 3 attached hereto. Please note that de la Garza's letter to Sanchez Unzueta is not on letterhead, is not signed and shows no proof of receipt. It is dated April 29th (which was a Saturday), the day after he was fired.
69. Two other events should make obvious who is telling the truth in this dispute.
70. Mr. de la Garza agrees that his firm represented the company known as PRODIN, and even provides documents indicating invitations to meetings in December 1994 through the first quarter of 1995. He admits that his office prepared the incorporation documents and provides a copy of them. But he then says that this company was not competing with Metalclad and had no intention of building a project in competition with Metalclad.
71. Pedro Medellin, on the other hand, speaks of this issue in his sworn statement and says yes, the Governor did encourage other companies to enter this field of building industrial and hazardous waste landfills in San Luis Potosi; and yes, one of those companies was PRODIN. He even says that he is aware that they acquired a piece of land to build such a facility, but when local opposition was encountered, later on abandoned the project.
72. This action on the part of de la Garza's firm in the fall of 1994 and the spring of 1995 was the very time we were completing construction and working toward a grand opening. Without any disclosure to us whatsoever, this man — our attorney — represented another group of Potosinean industrialists intent upon building a competing facility. If there is no law in Mexico that precludes and prevents that kind of misbehavior, there certainly ought to be.
73. We have stated that Jose Mario de la Garza had a pre-existing relationship with Horacio Sanchez Unzueta, which he vehemently denies and says that the only way he was able to arrange our meeting with the Governor was through a friend of his, who was a long-standing client, who was a friend of the Governor, by the name of Luis Manuel Abella. He says the very first time he ever met Horacio Sanchez Unzueta was at the meeting he attended with us in January 1994.
74. If we take de la Garza's claim that this was his first contact with the Governor ever

and that we were his only client with respect to relationships with the state government of San Luis Potosi, why—without disclosing to us—would he accept an appointment from the Governor as the state electoral judge on November 24, 1994?

75. De la Garza is quoted in the newspaper he provides us (so we must assume it is correct) on November 30, 1994. In that article he is quoted as saying, "I received the invitation from the State Governor last week. He contacted me one evening in my office and invited me to discuss a matter with him. He invited me to accept this position *which distinguishes me professionally*, that's how I see it" (emphasis added).
76. Can there be any doubt whose interests de la Garza had in mind when he accepted this position of great distinction and prestige at the very time the Company was approaching the completion of construction and the proposed opening of the landfill at La Pedrera?
77. This is the very same man who wrote to Metalclad indicating his pique and asking for additional compensation.
78. This is the very same man who is the author of the idea that the Company send the Governor a written apology in January 1994 (see his Declaration, sub-paragraph 7.iv.).
79. This is the same man that accuses me of falsely stating in my first declaration that Dr. Medellin encouraged a group of local construction companies to establish a competing company. In the next paragraph he lists seven companies that formed the company known as PRODIN. (OK, I was off by two.) Medellin then lets the cat out of the bag by indicating this is the very company that did, in fact, attempt to build a competing facility.

#### **Dr. Pedro Medellin Milan**

80. We learn from our years of experience with this man that he has a very weak personality who will do almost anything to avoid controversy. He would like to please everyone and, consequently, I believe he consistently finds himself telling different things to different people, only to be found out after-the-fact. I believe he was telling us one thing and the Governor something else all the way along.
81. There was a time when Pedro believed in what we were doing and supported it, but there were other pressures at work that ultimately prevailed.
82. The classic example is reflected in the letter that Medellin sent to Sergio Reyes Lujan in November 30, 1993. In this letter he calls into question the technical soundness of the La Pedrera landfill project and challenges the science that was done prior to the issuance of the federal permit authorizing construction and operation. This letter was

first revealed to us in the Counter-Memorial.

83. The letter referred to above was sent to the federal government at a time when Medellín was personally working with us on almost a daily basis to gain support in the local community and to gain the support of the University of San Luis Potosi and other groups around the state.
84. He does now, finally, admit that he and the Governor encouraged local Potosinean businessmen to build a competing facility to Metalclad and a legal entity was actually formed. This is in direct contradiction to what Jose Mario de la Garza says.
85. One of the most amazing admissions of all made by Medellín is that he still believes the La Pedrera site is a bad site for a hazardous waste landfill because of bad geology, underground water, and earthquake faults. This is in spite of the scientific studies that were done to support the original issuance of the permit at the federal level in 1991 and 1992. This is in spite of the studies we did for the University of San Luis Potosi which are extensive and exhaustive. This is in spite of the PROFEPA audit which resulted in a 2,000-page report. This is in spite of the five additional experts that opined on the site at the request of Julia Carabias and Antonio Azuela (many times referred to as the audit of the audit). Medellín has a Master's Degree from the University of Houston and he has a Doctorate in Chemistry from the Washington University in St. Louis, Missouri. Yet, in spite of all the scientific studies done, he continues to stick with the conclusions of Sergio Alemán who did his study in the summer of 1991 basically without ever leaving his office. He never drilled a hole, he never did a seismic test, he never dug a pit, he never performed any tests on site and yet drew all these various negative conclusions still believed today by Pedro Medellín.
86. I personally showed Medellín documents revealing that Sergio Alemán had a family relationship with Hector Vargas Garza, the Director General of the only competing landfill in Mexico, known as RIMSA. He indicated he and Sergio Alemán were classmates, they had taught together at the University, and Medellín couldn't believe that Alemán would fabricate a geology report just to serve his or someone else's needs.
87. Medellín admits to going to San Antonio in July 1993. He admits to seeing the press release. He does not mention any objection to it. He only indicates that when he got back to Mexico, he showed it to the Governor and that it was at that time that they had some objection to it. This, however, was not communicated to Metalclad, or anyone else that I am aware of, until the filing of the Counter-Memorial.
88. The press release couldn't be more clear in stating the fact that the Company and the state government had achieved an agreement whereby La Pedrera would be developed and opened and other environmental projects would also be developed in the state through this on-going partnership with the government and our Company.



89. Medellin claims that he told the Company La Pedrera was a bad idea according to the UASLP study. The UASLP study does not mention La Pedrera and makes no evaluation or judgment about La Pedrera whatsoever.
90. Medellin and the Governor allege that we advertised in the United States. The implication is that we were advertising in the United States for services to be performed in Mexico on a facility that was not yet opened. The truth of the matter is we did not place any such advertisement, and this article that appeared in some journal was simply used as the pretext by the Governor to make a public challenge of La Pedrera.
91. For the three-month period before the Governor's public challenge of the project in January of 1994, we tried to meet with him. Deets and Neveau spoke with Medellin on almost a daily basis. Yet, without any provocation whatsoever, and without meeting with the Company in person or dealing with us through Medellin as would have normally been the case, the State Governor made the public declaration that he is the final word and that word is "No."
92. I believe a lot can be learned from the tone of the Medellin witness statement. It takes no stretch of the imagination at all to be able to know that the state government is challenging the federal government. Medellin lectures about landfill technology as though he were an expert all of which is a repudiation of the dominant federal authority which was meant to be in place at that time.
93. Medellin and the Governor both play with words when it comes to discussing the involvement of the University of San Luis Potosi. The Tribunal will be able to see from the enormous amount of documentary evidence and the studies conducted by the Company to please the University Commission and the Minutes of the University Commission that there was, indeed, a very formal group whose job it was to evaluate the landfill and its technology. All of which was pursuant to an agreement with the Governor that if the University were satisfied with its scientific findings, then he could also publicly get behind it because of the respect the University held in the community.
94. The Governor denies there ever was a University Commission, and Pedro Medellin says there was no commission, but there was an "informal group". The interesting admission, however, is that this "informal group" was to study the La Pedrera site. Yet, the Governor says that the purpose of the group was to find the Company a new site somewhere in the state in lieu of La Pedrera. If this is true, then what on earth is this informal group doing studying the La Pedrera landfill? Why was the Company required to spend hundreds of thousands of dollars in studies done for geology, hydrogeology and seismic conditions if it was simply using this group, (or commission or committee), to find a different site? And what about the studies that Medellin says had already been done identifying 30 potential sites in San Luis Potosi? Wouldn't these new studies be redundant?

95. In Medellin's witness statement at paragraph 60, he, himself, gives a personal example of his lack of integrity. He admits to being in Orange County, California; he admits to being at the offices of Metalclad after having reviewed the technology of the Orange County landfill site; after having been to the offices of Harding Lawson Associates for a full-blown presentation on landfill design and development; he admits to being in an office alone with Hector Raul Garcia (a legal assistant and associate of Jose Mario de la Garza) but when it comes to the actual event of announcing that an agreement has been reached between the State of San Luis Potosi and Metalclad—which was then energetically applauded by all of the members of the commission in attendance and all of the other experts and professionals there—Medellin simply says he didn't agree but didn't think it was *appropriate* to publicly contradict Mr. Neveau.
96. For the San Luis Potosi Ecology Coordinator, it was OK to allow the University Commission and all of Metalclad's attending officers, experts, and professionals to believe there was an agreement between the State of San Luis Potosi and the Company for the opening and the operation of the landfill, but not appropriate to contradict Mr. Neveau.
97. Medellin admits he received a written agreement on April 25th after he had been in the Newport Beach office. He says he did not respond, but later sent a letter on May 26th to Jose Mario de la Garza admitting the "possible operation of La Pedrera". I believe he purposely sent this letter to de la Garza instead of the Company so that the Company could not have a chance to review the letter before the press conference he called on the next day. When we asked him why he had not announced the same agreement to the press that he had announced in Newport Beach, he obliquely stated that he wanted to emphasize remediation over operation as a way of getting things started. In the end, he was honest with no one.
98. Medellin finally admits that he reached an agreement with Metalclad but refused to sign anything in writing. He wants the Tribunal to believe that the Company would agree to remediate La Pedrera without operating the landfill. He knows that is a physical impossibility where there is *in situ* remediation. It was also financially unacceptable.
99. Paragraph 67 of Medellin's statement is another example of his personality and his weakness in administration and decision-making. In it he tells of the press conference called by the Environmental Attorney General in Mexico City, Miguel Limón. It was attended by Medellin, United States Ambassador Jones, and officials of the Company. The Attorney General announced to the world that an agreement had been reached between the State of San Luis Potosi and the Company for the "construction and operation of a controlled landfill at La Pedrera." Medellin makes it sound like he had no idea that this announcement by the Attorney General was going to be made, when the truth is that this was the only purpose of the meeting, which he had been apprized of well in advance. Medellin then saw the press release that was issued in conjunction

with it AND APPARENTLY SAID NOTHING. Was this another situation where he didn't think it was *appropriate* at the time to object to the public announcement? After two days had passed, Medellin made a public statement to the effect that the state has not consented to the opening of the landfill.

100. Medellin indicates that in August 1994, PROFEPA made a decision to conduct an environmental audit. The truth of the matter is that the Company requested the audit from PROFEPA under their voluntary audit program. We welcomed their review and involvement and won their respect to the point they signed an agreement with us in November of 1995 ensuring that Metalclad would be able to operate and remediate at the same time.
101. I find it curious that there is no statement by Medellin covering the time period from October 1994 to March 10, 1995. During this period of time there were millions of dollars worth of public improvements being installed; tours were being conducted for the members of the community, members of the University, and various University classes; a model of the project was placed at a mall in downtown San Luis Potosi to show people how the technology worked and what was being built; the construction was open for anyone to see; and Medellin was physically at the landfill site, along with Sergio Alemán, on October 26, 1994 upon the issuance of the stop work order. Yet, Medellin has no comment about this time period.
102. Medellin comments on the audit, but mentions only that there was a suggestion for additional regional water flow studies. What he refuses to admit, however, is that PROFEPA found the site to meet or exceed all national norms for the location of a hazardous waste landfill.
103. Medellin has tried on a number of occasions to mislead the Tribunal in his sworn statement. One example is in paragraphs 77 to 83 where he discusses the involvement of a doctor from the Geology Institute at the National Autonomous University of Mexico. If one were to believe his sworn statement, one would believe this doctor was opposed to the landfill. But a look at paragraph 2 of the doctor's letter to Attorney General Antonio Azuela reveals that he concludes: "We consider that the site is appropriate for the construction of a controlled landfill." Yet, Medellin wants the Tribunal to believe this is additional evidence that the site was not appropriate.

#### **Professor Joel Milan**

104. Professor Milan finally admits that he was part of a "committee" formed at the University composed of David Atisha, Guillermo Labarthe, Fernando Diaz Barriga and headed by Dr. Roberto Leyva Ramos.
105. Aleman says, "The committee's objective was to provide an opinion as to whether the technical studies submitted by Metalclad were sufficient to guarantee both that the landfill complied with the existing national and international standards and with the

technical characteristics that would ensure that there would not be any environmental impact.”

106. This is the third witness for the United Mexican States to talk about the UASLP Commission. The foregoing statement is in direct opposition to that of the Governor who said the “commission” never existed and who also says the purpose of the committee or commission was only to find an alternate site to the La Pedrera location.
107. The real question is why the Company went through the exercise of dealing with this committee or commission at all. Why — having received all of the necessary permits to build and operate — would it spend time, energy and money to try to satisfy a group of university professors who have absolutely zero experience in the siting of a hazardous waste facility? Particularly when the Company was also expending hundreds of thousands of dollars paying for the Radian audit for PROFEPA. The reason was that Governor Horacio Sanchez Unzueta promised his support if we got the University’s support. His support was translated to mean he would give the community his assurance that the project would operate safely and successfully, which was the kind of political support needed at the local level for this type of a project.
108. Joel Milan says at paragraph 7 of his statement that Metalclad did not carry out all the studies, and that the committee’s only role was to provide an opinion. One has to ask, after looking at the submissions made in November 1994 and February 1995, what on earth could be left?
109. One also has to ask why wasn’t the committee’s opinion given? If the Company didn’t submit all of the necessary reports, then the committee could submit its opinion to that effect. Or, if the reports indicated that the site was bad, it could indicate that. Or, whatever the circumstance was, it could comment on it. Why was the committee completely and utterly silent after more than a year of involvement and review? The reason, of course, is that the Governor told the President of the University not to make anything public. The Governor denies it, but what other reason would there be for the silence?
110. I note with particular attention, Professor Milan’s paragraph 10 where he indicates that he learned from verbal communications with both the Company and the state government that the Company was committed to alternative sites and remediation. *Is this not an admission that the committee’s purpose had nothing to do with either alternative sites or remediation?* Otherwise, he could simply say it was part of their stated objective. The truth is the committee’s purpose was to review the technical studies that support the La Pedrera landfill and opine whether or not it met Mexican norms. And that they never did, even though the company hired to do the studies, GYMSA, produced a final report.
111. In Milan’s paragraph 11, he says the geological and geohydrological conditions were not the most suitable and therefore the committee never provided a final conclusion

to the Company. If that was indeed their belief, why didn't they simply make that statement public? Why were they just simply silent until producing testimony in Mexico's defense?

112. Professor Milan made a proposal to the Company to find a new site. The quoted price was \$858,000 (N.P.). Many times you have read in the Counter-Memorial that the University has already identified 30 sites and the Company could easily have relocated to any one of them. But the superficiality of those selections is revealed by the fact that it would cost \$858,000 (N.P.) to test one of those sites for compliance.

#### **Governor Horacio Sanchez Unzueta**

113. Governor Horacio Sanchez Unzueta is a liar. I sincerely wish I didn't have to say it. I wish there was a way to be polite and diplomatic, but with this particular individual, who stands as the single reason for the failure of our investment, there is simply no way to mince words.
114. Governor Horacio Sanchez Unzueta has lied about the following:
- A. What took place at the June 11, 1993 meeting;
  - B. His knowledge about the press release, released by Metalclad in July 1993;
  - C. That the people around the landfill site that are affected negatively by its operation are against it;
  - D. When he said that there was no agreement between the state government and the Company to develop a hazardous waste landfill in San Luis Potosi;
  - E. His statement to Sergio Reyes Lujan, in October 1993, when he promised support upon certain conditions;
  - F. When he said on January 9, 1994 that he has a reliable and serious study "where it is technically demonstrated that the industrial waste landfill in Guadalucazar does not meet the minimal conditions of security for the population or for the environment";
  - G. His reason for announcing in January 1994 that "he is the final word and the word is no";
  - H. To the Company in January 1994 when he promised to support the Company's project if the Autonomous University of San Luis Potosi was satisfied the project was technically correct;
  - I. About the existence of the UASLP Commission;
  - J. About the findings of the UASLP Commission in the GYMSA report;
  - K. When he said there was no meeting with the Company on February 18, 1995;
  - L. That he was unaware of the March 10, 1995 opening until a couple of days before the event;
  - M. That the March 10, 1995 event was a local demonstration and had no outside influences;
  - N. To the Company in April 1995 when he said the landfill was technically correct and he would meet with Julia Carabias within the next few days to find a way

to support the project's opening, when at the very same time he was talking publicly and encouraging other competing companies in the local city of San Luis Potosi to build a project in opposition;

- O. To Julia Carabias in May 1995 about his willingness to participate in an agreement;
- P. In the Fall of 1995 to Senator Paul Simon, to Herbert Oakes and others in reporting alleged wrong-doing on the part of the Company;
- Q. In October 1995 about his knowledge and involvement in the agreement reached between the Company and SEMARNAP;
- R. His reasons for sending the state police to inspect vehicles coming in and out of the site in 1996;
- S. To Ambassador Jones in the Summer of 1996;
- T. To Ambassador Jones again the Fall of 1996 about the negotiations he suggested between the Company and the Municipality;
- U. To me personally in June 1996 meeting when he said we had achieved an agreement and only needed to talk about how to implement it;
- V. To Gustavo Carvajal in July 1996 in Houston when he said he was unable to open the landfill because of political reasons;
- W. To the community when he allowed the use of a deformed baby to make a point in opposition of the landfill;
- X. To the community when he allowed people from the state government to speak about the radioactivity of the site, the explosivity of the site, and the dangers to public health posed by the site without ever correcting any of these misstatements;
- Y. To the community of Guadalucazar when he incited prejudice against the United States and the U.S. company Metalclad, by the placement of the statue of Benito Juarez and the accompanying speech that went with its inauguration;
- Z. To the people of Mexico when he used his power to declare a huge area of the state an ecology preserve as a weapon for simply defeating the Metalclad project; and
- AA. To this Tribunal in his sworn statement.

### **Greenpeace—Fernando Bejarano**

116. Both Julia Carabias and Antonio Azuela discount the impact of Greenpeace because of its worldwide policy against the construction and operation of a hazardous waste landfill. Greenpeace's message is that building hazardous waste landfills encourages the production of hazardous waste and therefore should not be done. When posed the question what a country should do with existing hazardous waste that has already been produced, they simply say it never should have been produced in the first place. When it comes to this issue, they simply have no credibility and are considered extremist in the environmental community.

117. I would like to point out some activities Greenpeace conducted:

- A. They filed a complaint against the Company before the Attorney General's Office.
  - B. They filed a complaint about the Company before the Federal Comptrollership Agency.
  - C. They filed a claim against the Company with the Human Rights Commission.
  - D. They filed a claim against the Company with the General Attorney's Office for the Environmental Protection (PROFEPA).
  - E. They filed a claim against the Company with the National Ecology Institute (INE) for concealing criminal infractions committed by the Company, for abuse of power and for infringement of human rights.
118. The foregoing claims led to an investigation lasting more than 20 months and where the final report concluded:
- A. The Company had engaged in no criminal misbehavior.
  - B. The Company had engaged in no civil misbehavior.
  - C. The Company had engaged in no behavior that would even require administrative correction.

**Leonel Serrato**

119. I have no recollection of meeting this man. He claims we met and I asked him how much a Mexican attorney earned and what his income was. Having never met him, I did not say that to him or to anyone else.
120. I have been told this man only speaks Spanish. I speak only English.

**Julia Carabias Lillo**

121. Secretary Carabias has chosen her words very carefully. She has always supported the project and supported our Company, and it appears that she now finds herself in a position where she must be very careful if she is to find some way to support the position of her Government.
122. I find no place in her testimony where she says the Company failed to comply with state legislation. She simply says federal law is not enough.
123. Secretary Carabias never once says that the Company needed a Municipal construction permit.
124. In an *El Heraldo*, June 30, 1995 newspaper article, she is quoted as saying that technical reports and not political pressure will determine the landfill's fate. Why was there no discussion or mention of a municipal construction permit? She directed three and one-half months of high-level technical evaluations of the landfill that were later

made public in an 18-page newspaper article. Why was all of that done if the only issue was the lack of a municipal construction permit?

125. Why the year-long approach to defining the technical aspects of the project if her belief of the problem was social or political?
126. What did the technical aspects have to do with getting the community to grant a construction permit?
127. I find significant what Secretary Carabias does not say:
  - A. That the Company's inexperience is a factor;
  - B. That the Company's competence is a factor;
  - C. That the Company's corruption is a factor;
  - D. That the Company's under-capitalization is a factor;
  - E. Why the November 24th agreement was signed;
  - F. Why the public announcement of the agreement was made;
  - G. Why a new construction permit was issued in January 1995;
  - H. Why the permit was increased to 360,000 tons; and
  - I. Why she gave permitting authority to such a bad project.
128. No doubt the Secretary was aware that her actions were confrontational to the state and local government. Why was she doing it if she did not believe that federal law and federal protection would prevail?

#### **Antonio Azuela de la Cueva**

129. Attorney General Azuela says that the La Pedrera site met of the all legal and technical requirements. I agree. So, why isn't it opened?
130. Attorney General Azuela indicates that PROFEPA decided on doing an audit. I think it is important to know that the Company requested PROFEPA to do the audit. It is probably true, as he says, they decided to do it, but he needs to add that it was based upon a request from the Company. He says the audit was made to help federal authorities decide to either "open" or "close" the site. I believe the November 24, 1995 agreement speaks for itself with respect to which decision they chose.
131. I point out that paragraph 25 of his statement refers to the state requirements but does not say we had NOT complied with state or local requirement. The statement simply begs the question as to what the state and local requirements are.
132. Attorney General Azuela in his paragraph 32 submits that the legal question presented by the amparo lawsuit brought by the community against SEMARNAP is clear and that the federal government should prevail. Well, the case is more than two and one-half years old now and there is still no final decision.



133. In Attorney General Azuela's paragraph 35, he again avoids the question as to what legal rights state and local governments have. On no occasion does he say that the community has a right to block the project by failing to give a construction permit.
134. It is gratifying that Attorney General Azuela agrees with our assessment of Greenpeace in paragraph 46 and makes it clear that no matter what we would do, or anyone else would do, we would face them as opponents.
135. In Paragraph 48 of Attorney General Azuela's statement he refers to COTERIN's past problems as "misdemeanors". The attorneys for the United Mexican States would have you believe that the Aldretts deserve capital punishment. The truth is, while I don't condone the activity they conducted at the transfer station, it pales in comparison to all of the illegal dumping that takes place on a daily basis today in the State of San Luis Potosi—and throughout Mexico, for that matter.
136. In paragraph 51, Attorney General Azuela provides corroborating evidence of the fact that Secretary Carabias did in fact and indeed use the word "economic" to describe the reason that our landfill was not open. What this means in common parlance in Mexico City is that somebody is paying somebody.

#### **Rene Altamirano**

137. Describing the permitting process, Mr. Altamirano talks about the "highly specialized studies". It is important for the Tribunal to know that all of these studies were completed prior to the construction permit that was awarded in January 1993.
138. Please note Mr. Altamirano refers to La Pedrera as "the first hazardous waste landfill permitted under the law (1988 Law on Ecology)." This interesting admission should demonstrate without any doubt to the Tribunal and the rest of the world that the only operating landfill in Mexico (RIMSA) taking hazardous waste operated without a permit until 1993 and was not permitted under the same criteria as Metalclad. Altamirano himself told me that the RIMSA permit was awarded on the very same day the La Pedrera construction permit was awarded and yet everybody in the Country of Mexico knows that RIMSA had been operating for several years before this time even though the Law on Ecology requiring permits was passed in 1988.
139. Please notice paragraph 27 of Mr. Altamirano's statement, which has been drafted very carefully. Consistent with Secretary Carabias and Attorney General Azuela, Mr. Altamirano does not say that a municipal permit is needed. He simply speaks in platitudes of federal, state and local law, but does not unequivocally say that a local construction permit is the *sine qua non* of the project because he knows that is not the case.
140. In paragraph 46 he refers to the authorizations for the operation of the transfer

station. Was there ever an issue about a construction permit for the transfer station? Did Mr. Altamirano ever require that a local construction permit be given for the transfer station? Was one ever obtained? Of course not.

141. Mr. Altamirano also refers to the criminal investigation that was instigated by Greenpeace against him, against the Company, and against several other people. He indicates that the case has been closed successfully against him and he is correct. The case was also closed against the Company and every other party investigated.
142. There is argument in the Counter-Memorial about how poorly this investigation reflected on the Company and there is the implication of guilt by association or guilt by reference. Respondent reproduces at length the allegations of the Greenpeace complaint. The truth of the matter is the investigation was concluded and absolutely no wrong-doing was found on the part of anyone except Greenpeace for having requested the investigation.

#### *The Visit of Respondent's Consultants*

143. On February 9, 1998 Kevin Dages and an associate came to our offices in Newport Beach, California. We provided them the use of our conference room to review documents they had requested to review.
144. During their visit I introduced myself, personally, and told them if they needed any assistance during their stay or if there was anything I could do for them or provide for them during their stay I would be happy to do so.
145. After a few hours they left without any further requests or further discussion.

#### *Recent Allusions on the Federal Environmental Policy*

146. That we were not able to open our facility reveals a systemic problem in Mexico. It is well known that Mexico has an inadequate number of facilities to handle the mass quantities of industrial waste it produces. Mexico's recognition of this was manifested in 1988 when it enacted its first federal environmental law and over the last several years with the initiation of the CIMARI program. But, there is an even bigger problem: politics have taken precedence over — and nearly replaced — the law, technical viability and compliance, and reason. This is why one man was able to defeat an entire cadre of technical experts and federal officials; thousands of hours and dollars spent on research; months of construction; a year and half of audit work and expert review; and countless hours of consultation within the Company and meetings with governmental officials. This view is echoed by one of the most important private sector organization in Mexico, the Business Coordination Counsel (CCE), and one of its members, the Center for Studies of the Private Sector for Sustainable Development (CESPEDES), in a position paper published on March 6, 1998. The director of CESPEDES is Gabriel Quadri de la Torre, a past President of INE. See

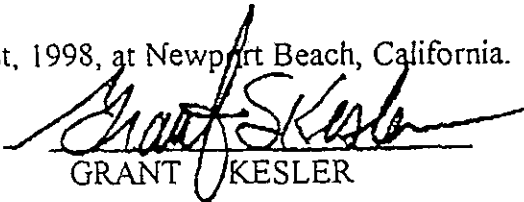
Exhibit 4 attached hereto.

147. In this paper, CESPEDES discusses the CIMARI program for handling and recycling industrial waste. Metalclad has qualified to participate in the CIMARI in the states of Mexico, Hidalgo, and Aguascalientes where we are presently under construction. Despite a favorable response from the industrial sector, only one project in eight over the last two years has not been detained. CESPEDES notes in discussing the situation at La Pedrera that the media has provoked public confusion and produced the distorted perception that landfills are problematic. When the truth is that the most widely used method of handling waste in Mexico is not to handle it all, but to dump it in the ground and streams without any treatment. They allude to the irrationality of impeding the operation of our facility at La Pedrera — which fully complies with every applicable norm — solely on the basis of a lack of a local construction license when there is an extreme need nationally for landfills and other waste management facilities. They further state that unexplained political and commercial interests have a disproportionate influence on developmental projects, and the legal power that should remain with the federal government is being dispersed among pressure groups, causing further delay and damage to the environment. Also, technical arguments are not being weighted enough in the decision-making process, whereas outside influences are penetrating the variable policies and feeding social paranoia and indirectly — or directly — promoting monopolies. This weakens investment in general and particularly foreign investment. They conclude by stating that no matter what the Tribunal decides in this case, it will impact Mexico negatively.

148. I would like to reiterate the last statement. Through all of this, Metalclad still believes that in time, reason could prevail over capricious and irrational decision-making for all environmental projects, but changes will have to be made in the system to rectify Mexico's commitment to protect foreign investors. And especially as that commitment is codified under the NAFTA.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 10th day of August, 1998, at Newport Beach, California.

  
GRANT KESLER