

PART I: INTRODUCTION	1
1. FORMAT OF THE REJOINDER.....	1
2. THE RELEVANCE OF METALCLAD'S PRE-COTERIN ACTIVITIES IN MEXICO	2
3. THE WITNESSES	4
PART II: EXECUTIVE SUMMARY	7
1. CHRONOLOGY	7
2. METALCLAD'S ACCOUNT OF THE FACTS HAS BEEN DISPROVEN	11
3. METALCLAD'S CLAIM FAILS TO ESTABLISH A NAFTA BREACH.....	12
PART III: THE ADMITTED FACTS AND FACTS TAKEN FROM METALCLAD'S OWN DOCUMENTS	14
PART IV: ADMISSIONS AND DENIALS: DETAILED ACCOUNT OF THE FACTS AFTER TWO ROUNDS OF PLEADINGS.....	20
1. THERE WAS PRE-EXISTING CONTAMINATION AT THE SITE.....	20
2. THE SITE'S CONTAMINATION GENERATED LOCAL OPPOSITION.....	21
3. METALCLAD HAD NO EXPERIENCE IN THE HAZARDOUS WASTE BUSINESS	24
4. THE CLAIMANT WAS INTRODUCED TO THE MEXICAN INVESTMENTS BY A NEIGHBOUR, NOT BY MEXICO	27
5. THE CLAIMANT HAD A RELATIONSHIP WITH HUMBERTO RODARTE RAMÓN WHILE HE WAS A FEDERAL OFFICIAL.....	30
6. METALCLAD HAD BEEN ACTIVE IN MEXICO SINCE 1991	34
7. AFTER METALCLAD TOOK OVER ETI, MR. KESLER STEERED ECO-ADMINISTRACIÓN TOWARD AN UNSUCCESSFUL RELATIONSHIP WITH MOLTEN METAL TECHNOLOGY, INC. (MMT).....	36
8. METALCLAD BECAME A COMPANY PROMOTED BY PRESS RELEASE	41
9. THERE WAS A DISAGREEMENT ARISING FROM METALCLAD'S INITIAL ATTEMPT TO BUY OUT THE MEXICAN GROUP THAT ASSISTS IN EXPLAINING THE PUSH TO OPEN COTERIN.....	46
10. METALCLAD FAILED TO MAKE PROGRESS IN 1992 TO MATCH ITS PUBLIC ANNOUNCEMENTS.....	47
11. THE BUY OUT OF THE MEXICAN GROUP.....	49
12. MR. KESLER ARRANGED FOR DIRECT PAYMENTS TO MR. RODARTE'S WIFE ON THE ISSUANCE OF FEDERAL PERMITS.....	51
13. METALCLAD WAS INTRODUCED TO THE COTERIN OPPORTUNITY BY MR. RODARTE IN 1993	61
14. ON JUNE 11, 1993 METALCLAD HAD ITS FIRST MEETING WITH THE NEW GOVERNOR.....	63
15. METALCLAD WAS WELL AWARE OF THE MUNICIPAL PERMIT ISSUE.....	73
16. THERE WAS NO GOOD FAITH RELIANCE ON ALLEGED REPRESENTATIONS OF FEDERAL PRIMACY BY FEDERAL OFFICIALS.....	77
17. METALCLAD ACQUIRED COTERIN WITH FULL KNOWLEDGE OF THE RISKS INVOLVED	79
18. THERE WAS NO COMMISSION CREATED BY THE GOVERNOR IN JANUARY 1994.....	82
19. DR. MEDELLÍN DID NOT REACH AN UNCONDITIONAL AGREEMENT WITH METALCLAD IN APRIL 1994	88
20. THERE WERE CONFLICTING ANNOUNCEMENTS MADE IN MAY 1994 RESPECTING THE AGREEMENT.....	92
21. METALCLAD UNSUCCESSFULLY ATTEMPTED TO SECURE COMMUNITY SUPPORT	95
22. METALCLAD RESORTED TO U.S. DIPLOMATIC PRESSURE TO ATTEMPT TO FORCE THE OPENING.....	98
23. THE MUNICIPALITY ISSUED A STOP WORK ORDER IN OCTOBER 1994	101
24. THE MARCH 10 TH DEMONSTRATION WAS A GENUINE EXPRESSION OF LOCAL OPPOSITION	103
25. METALCLAD'S RELATIONS WITH ITS LOCAL SAN LUIS POTOSÍ LAW FIRM IN APRIL 1995.....	105
26. METALCLAD ALLEGED A CONSPIRACY TO ESTABLISH A COMPETING LANDFILL.....	108
27. U.S. PRESSURE INCREASED TO FORCE THE LANDFILL'S OPENING	109
28. TWO SEPARATE AMPARO PROCEEDINGS FOLLOWED THE <i>CONVENIO DE CONCERTACION</i>	111
29. IN FEBRUARY 1996 THE MUNICIPALITY OBTAINED AN INJUNCTION AGAINST THE FEDERAL GOVERNMENT.....	113
30. THE MUNICIPALITY AND METALCLAD WERE UNABLE TO REACH AN AGREEMENT.....	114
31. THE ENVIRONMENTAL DECREE HAS NOT BEEN SHOWN TO AFFECT METALCLAD AS ALLEGED	115
PART V: EVIDENCE RELATING TO OTHER FACTORS THAT AFFECTED THE PROJECT	119

1.	THERE IS NO EVIDENCE OF CORRUPTION FOMENTED BY RIMSA.....	119
2.	THE LOCAL OPPOSITION BY NGO'S WAS GENUINE AND REFLECTED PRE-EXISTING OPPOSITION IN THE MUNICIPALITY	121
3.	THERE WERE JURISDICTIONAL DISPUTES AMONG LEVELS OF GOVERNMENT.....	124
PART VI: METALCLAD CORPORATE ISSUES		126
1.	METALCLAD MADE MISSTATEMENTS TO THE MARKET	126
2.	METALCLAD HAS NOT ADDUCED SPECIFIC EVIDENCE OF ITS EXPENDITURES ON THE COTERIN LANDFILL.....	131

PART I: INTRODUCTION

1. The Government of Mexico hereby submits this Rejoinder to Metalclad's Reply submitted on September 28, 1998.

1. Format Of The Rejoinder

2. In a case which was fully presented in the Memorial and Counter-Memorial, the Reply and the Respondent's Rejoinder would be limited documents. In this case, this has not occurred, and accordingly, this Rejoinder takes a different form. This is necessary for four reasons.

3. First, Metalclad changed the case as presented in the Memorial and presented a substituted case in its Reply. These changes appear to have been prompted by the Counter-Memorial's disclosure of facts that were well known to Metalclad but were omitted in its Memorial, most are now admitted. The Reply was also considerably longer than the Memorial. A total of 10 new witnesses were introduced, including four officers or directors of Metalclad Corporation. Rather than narrowing the facts, the Reply introduced new ones. In fairness, this necessitates a complete response.

4. Second, other than to proffer what it calls "common ground" the Reply does not contain a statement of additional facts. New facts are intermingled with legal submissions. Moreover, the Reply's Admissions and Denials are unresponsive in many cases, frequently refusing to admit facts taken from Metalclad's own SEC filings¹. For this reason Parts IV, V, an dVI of this Rejoinder are structured so as to present the Respondent's admissions or denials of the last previously-pleaded facts.

5. Third, the Memorial made a number of serious and inflammatory accusations against private citizens and officials of the Mexican State. The Respondent wishes to demonstrate how the Claimant reacted to evidence submitted to rebut such accusations.

6. Fourth, additional evidence has been discovered by the Respondent. This is evidence that was not available to it, or was not fully appreciated, when the Counter-Memorial was filed, or is necessary to respond to changes made by the Claimant in its Reply. This new evidence relates to, *inter alia*: (1) direct payments by Metalclad to at least one federal official who was directly and contemporaneously involved in the events that ultimately led to the filing of this Claim, and in particular with the issue of federal permits; (2) the June 11th meeting with the Governor; and (3) the municipal permit issue; and (4) the origins and extent of local opposition.

7. The Counter-Memorial submitted that the Memorial presented a misleading account of the material facts. Although the Reply adjusted Metalclad's account of the events in question, it

¹ The Respondent has also found that in some instances the facts as pleaded in the Reply's Admissions and Denials differ from the facts as alleged in the body of the Reply.

PART I: INTRODUCTION 1

1. **FORMAT OF THE REJOINDER**..... 1

2. **THE RELEVANCE OF METALCLAD'S PRE-COTERIN ACTIVITIES IN MEXICO** 2

3. **THE WITNESSES** 4

PART II: EXECUTIVE SUMMARY 7

1. **CHRONOLOGY** 7

2. **METALCLAD'S ACCOUNT OF THE FACTS HAS BEEN DISPROVEN** 11

3. **METALCLAD'S CLAIM FAILS TO ESTABLISH A NAFTA BREACH**..... 12

PART III: THE ADMITTED FACTS AND FACTS TAKEN FROM METALCLAD'S OWN DOCUMENTS 14

PART IV: ADMISSIONS AND DENIALS: DETAILED ACCOUNT OF THE FACTS AFTER TWO ROUNDS OF PLEADINGS..... 20

1. **THERE WAS PRE-EXISTING CONTAMINATION AT THE SITE** 20

2. **THE SITE'S CONTAMINATION GENERATED LOCAL OPPOSITION**..... 21

3. **METALCLAD HAD NO EXPERIENCE IN THE HAZARDOUS WASTE BUSINESS** 24

4. **THE CLAIMANT WAS INTRODUCED TO THE MEXICAN INVESTMENTS BY A NEIGHBOUR, NOT BY MEXICO**..... 27

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8. **METALCLAD BECAME A COMPANY PROMOTED BY PRESS RELEASE** 41

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12. **MR. KESLER ARRANGED FOR DIRECT PAYMENTS TO MR. RODARTE'S WIFE ON THE ISSUANCE OF FEDERAL PERMITS**..... 51

13. **METALCLAD WAS INTRODUCED TO THE COTERIN OPPORTUNITY BY MR. RODARTE IN 1993**..... 61

14. **ON JUNE 11, 1993 METALCLAD HAD ITS FIRST MEETING WITH THE NEW GOVERNOR**..... 63

15. **METALCLAD WAS WELL AWARE OF THE MUNICIPAL PERMIT ISSUE**..... 73

16. **THERE WAS NO GOOD FAITH RELIANCE ON ALLEGED REPRESENTATIONS OF FEDERAL PRIMACY BY FEDERAL OFFICIALS**..... 77

17. **METALCLAD ACQUIRED COTERIN WITH FULL KNOWLEDGE OF THE RISKS INVOLVED** 79

18. **THERE WAS NO COMMISSION CREATED BY THE GOVERNOR IN JANUARY 1994**..... 82

19. **DR. MEDELLÍN DID NOT REACH AN UNCONDITIONAL AGREEMENT WITH METALCLAD IN APRIL 1994** 88

20. **THERE WERE CONFLICTING ANNOUNCEMENTS MADE IN MAY 1994 RESPECTING THE AGREEMENT**..... 92

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22. **METALCLAD RESORTED TO U.S. DIPLOMATIC PRESSURE TO ATTEMPT TO FORCE THE OPENING**..... 98

23. **THE MUNICIPALITY ISSUED A STOP WORK ORDER IN OCTOBER 1994**..... 101

24. **THE MARCH 10TH DEMONSTRATION WAS A GENUINE EXPRESSION OF LOCAL OPPOSITION** 103

25. **METALCLAD'S RELATIONS WITH ITS LOCAL SAN LUIS POTOSÍ LAW FIRM IN APRIL 1995**..... 105

26. **METALCLAD ALLEGED A CONSPIRACY TO ESTABLISH A COMPETING LANDFILL**..... 108

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30. **THE MUNICIPALITY AND METALCLAD WERE UNABLE TO REACH AN AGREEMENT**..... 114

31. **THE ENVIRONMENTAL DECREE HAS NOT BEEN SHOWN TO AFFECT METALCLAD AS ALLEGED** 115

PART V: EVIDENCE RELATING TO OTHER FACTORS THAT AFFECTED THE PROJECT 119

1.	THERE IS NO EVIDENCE OF CORRUPTION FOMENTED BY RIMSA	119
2.	THE LOCAL OPPOSITION BY NGO'S WAS GENUINE AND REFLECTED PRE-EXISTING OPPOSITION IN THE MUNICIPALITY	121
3.	THERE WERE JURISDICTIONAL DISPUTES AMONG LEVELS OF GOVERNMENT.....	124
PART VI: METALCLAD CORPORATE ISSUES		126
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is still misleading. This new evidence, uncovered during the course of preparing the Rejoinder, will demonstrate that neither version is credible.

8. The new evidence illuminates why the case, as originally presented, was filled with omissions. It is important to understand the changes between the Claim as initially misrepresented and as now presented, by a comparison of the two.

9. For these reasons, Parts IV, V and VI of the Rejoinder will include references to the original pleadings in the Memorial and the Counter-Memorial, not just the Reply. It will also set out the evidence of additional facts.

2. The Relevance of Metalclad's Pre-COTERIN Activities in Mexico

10. The Respondent observes that in its order of April 27, 1999, directing the Claimant to provide documents (and videotapes) previously requested by the Respondent, the Tribunal observed that the "propriety of the Respondent's requests can best be judged when the materials are read in the context to which the Respondent seeks precisely to relate them".²

11. The Respondent considers that the requested documents and the pre-COTERIN events to which they relate go to the very basis of the Claim as presented. They are highly relevant for both credibility and substantive reasons.

12. The Tribunal will see that the Respondent traces the history of the Claimant's activities in Mexico from 1991 and Mr. Kesler's personal involvement since 1990. Evidence of Metalclad's own making as to its first three Mexican projects and the relationship between Mr. Kesler and Mr. Rodarte is adduced. For the following reasons this evidence will assist the Tribunal's appreciation of the factual context of the Claim and its evaluation of the witness' credibility:

The pre-existing relationship between Mr. Kesler and Mr. Rodarte contradicts both witnesses' testimony in this proceeding: The evidence shows that Mr. Kesler's and Mr. Rodarte's evidence in this proceeding is false on material points. It belies Mr. Kesler's claims, *inter alia*, about how Metalclad came to invest in Mexico, Metalclad's pre-COTERIN experience, and the company's professed "good faith" reliance on alleged statements by federal officials. The evidence also casts Mr. Rodarte's role in, and testimony about, the "pivotal" June 11, 1994 meeting with the Governor in a completely different light.

The evidence of pre-COTERIN activities goes directly to the credibility of Metalclad's principal witnesses: When the Tribunal has seen the new evidence and then reviews the Claim as originally presented and even as amended by the Reply, it will appreciate how misleading Metalclad's account has been. Its account is contradicted by Metalclad's own documents. Thus, the evidence is necessary to meet a case that was falsely presented.

² Letter from Mr. Alejandro A. Escobar, Secretary of the Tribunal to the parties, dated April 27, 1999.

The pre-existing relationship between Mr. Kesler and Mr. Rodarte also undermines the representations that Mr. Kesler made to the United States authorities: Metalclad has relied upon statements and documents produced by the United States Embassy and United States officials. The evidence shows that the Embassy was not aware of material facts. The Respondent considers that the propensity for omitting material facts, shading the truth, and misrepresenting events was also exhibited in the company's dealings with the United States Embassy and United States legislators. The evidence will show that Embassy officials were misled and did not conduct a thorough investigation of the facts.

Metalclad has sought to include most of the pre-COTERIN expenses in its damages claim: The pre-COTERIN evidence has also been made relevant by Metalclad's attempt to include expenditures incurred in 1991 and 1992, before the COTERIN opportunity arose as a possibility, in its claim for lost expenditures. Mr. Dages' two reports dissect the AAA reports and the witness statement of Anthony Dabbene, Metalclad's Chief Financial Officer, to demonstrate this fact. The Respondent repeatedly requested copies of Metalclad's affiliated subsidiaries audited financial statements in order to scrutinize the Claimant's allocation of expenses as between the different Mexican ventures and as between those companies and Metalclad itself. After being rebuffed, the Respondent requested the Tribunal to order this disclosure.³

The fate of the three previous Mexican projects explains the company's subsequent conduct: Metalclad's announcements concerning its first three pre-COTERIN projects gave the impression to its investors that the company was making impressive strides in becoming the "market leader" in the Mexican hazardous waste disposal business. In fact, its first project ended in disarray and the second and third projects, although announced with fanfare in 1992, remained undeveloped shells.

*CF -
Proof to?
ask Glad.*

This created a business imperative: Metalclad was a "small cap" speculative venture that needed to show its investors results in order to survive on the NASDAQ stock exchange. However, after close to two years in Mexico pursuing its three projects, and no progress having been realized, Mr. Kesler, who authored the company's many optimistic press releases, was under considerable pressure to have some kind of project actually in operation.

The pre-existing relationship between Mr. Kesler and Mr. Rodarte explains Metalclad's actions with respect to the COTERIN project: From the beginning of Mr. Kesler's involvement in Mexico (which pre-dated Metalclad's first investment), he and other investors were improperly associated with Humberto Rodarte Ramon, then a senior federal environmental official in San Luis Potosí. Having allied itself with Mr. Rodarte since the beginning, Metalclad sought to orchestrate a "top down" solution to the local opposition to the opening of the contaminated Site. Metalclad used Mr. Rodarte to communicate with his former colleagues at the INE. Moreover, the evidence dating back

³

The Respondent's experts have been obliged to complete their reports in order to meet the May 3, 1999 deadline for filing this Rejoinder. The Respondent reserves the right to make additional comments on the audited financial statements once provided.

to 1990 explains why Mr. Rodarte's involvement in the COTERIN project actually intensified the local opposition.

13. The Respondent's April 14, 1999 request for a direction that Metalclad produce certain documents was intended to allow it to file as complete an evidentiary record as possible. As the Respondent must file this Rejoinder before Metalclad complies with the Tribunal's order, it has found it necessary to qualify its allegations on certain matters⁴.

3. The Witnesses

14. The Respondent has sought evidence of witnesses who are in a position to respond to the Claimant's allegations in the Reply. It has not filed statements from witnesses who would merely affirm their earlier evidence. The Respondent has obtained witness statements from:

- Ronald E. Robertson, the former Chairman of the Board of Metalclad Corporation. Mr. Robertson testifies as to the origins of Metalclad's entry into Mexico, the company's attempts to find a joint venture partner, its financial difficulties, the meeting with the Governor on June 11, 1993, his doubts about Mr. Kesler's business practices, and his reasons for leaving Metalclad;
- Alan Borner, also a former Board member of Metalclad, testifies as to his concerns about the acquisition of COTERIN and why he voted against it. Mr. Borner also testifies that the Board was not informed of the new contingencies added to the Amended Option to Purchase Agreement in September 1993;
- Jorge Hermosillo, a former Metalclad Board member (for a short time) and the original proponent of Metalclad's incinerator project in San Luis Potosí testifies as to the origins of Mr. Kesler's involvement in the Mexican hazardous waste business, the incorporation of the next two joint venture companies, his dispute with Mr. Kesler when Eco-Metalclad sought to assume control of the three Mexican joint venture companies, what occurred in Metalclad's first three Mexican projects, and his eventual expulsion by Mr. Kesler;
- Dr. Fernando Díaz Barriga, the State environmental official who set up the June 11th meeting with the Governor testifies as to the reason for the meeting, Humberto Rodarte's role in setting it up, what transpired there, and his views of the local opposition to the Site.
- Manuel Abella Armella, a Potosinian industrialist and former State Government advisor on business affairs, testifies as to the January 28, 1994 meeting between

⁴ The Respondent is investigating further lines of inquiry and considers that the requested documents will be of assistance in those lines of inquiry. The Respondent reserves the right to submit additional material in conjunction with its review of the documents that the Tribunal has ordered Metalclad to provide. It will do so in the memorandum on the marshalling of evidence due on June 18, 1999.

Metalclad and the Governor. He also testifies that, contrary to a Metalclad document, he never consented to act as a director of a Mexican subsidiary of Metalclad;

- Lic. José Mario de la Garza provides a supplementary witness statement to respond to allegations made in the Reply;
- Lic. Héctor Raúl García Leos, also a lawyer with Bufete de la Garza, testifies, *inter alia*, as to the advice that he gave to Metalclad on the municipal construction permit issue and Mr. Neveau's written response thereto⁵;
- Father Aurelio Romo Navarette, the former Priest of the parish of Guadalcázar, testifies as to the depth of the local opposition and why, as a community leader, he decided to oppose the landfill's reopening. Father Romo attended the March 10, 1995 demonstration;
- Juan Romo, the father of the encephalitic infant whom Metalclad alleged Governor Sánchez Unzueta used to incite a crowd against Metalclad, provides a statement. He testifies that although the child was born at the Matchuala hospital, he and his wife lived in El Entronque, seven kilometers away from the site. He testifies further that three other children were born with the same condition around that time. He affirms that he did indeed show the Governor the child, but that:

If they say that the Governor held the baby up in the air and said something against the foreigners, I can declare that this is not true. I showed him my sick daughter and he promised to help me in the hospitals of SLP. That is all.

- Praxedis Palomo, also a local resident, was the President of *Bienes Ejidales* of Los Amoles. He testifies as to the division of opinion within the small communities located near the site. He states that:

Although they promised to remediate the work done by the former owners, we *ejidatorios* were already too distrustful and we did not accept.

He also testifies that Metalclad collected signatures in support of the delivery of potable water and that he signed the petition for that. However, he did not support the landfill.

- Rogelio Orta testifies that Metalclad's representative Salomon Leyva came to the *ejido* of Los Amoles and told the villagers that Metalclad would do things differently. He testifies that:

⁵ On February 2, 1999, the Respondent requested that Metalclad provide copies of advice on the municipal permit issue from its former law firm, Bufete de la Garza. On March 19, 1999, Metalclad replied that: "Any references made by Mr. de la Garza to advice or documents should be produced by him." The Respondent has acted in accordance with this response.

I personally understood their proposal, but the community was already too much against [the Site] and they did not believe them. What we demanded was to clean up the site. They explained to us that, in order to remediate it, they needed to receive more waste. The majority did not agree with this proposition, and so we continued to oppose the landfill...

The counsel showed me a list with names on which my name also appears. I want to state that I never gave my name to support the opening of the landfill. If my name is on the list, I do not know how the plaintiff (Metalclad) can present it as support, because I was always against it. I do remember that at this time (in 1995) they were requesting our signatures for water trucks.

- Leonel Romo, the former Municipal President, testifies as to the signing of the Agreement of Understanding on January 8, 1997 and his conversation with Metalclad's counsel Gustavo Carvajal the day after the agreement was signed. He testifies that he signed a second version on January 9th after Mr. Carvajal informed him that he had spoken to the municipality's legal counsel, Lic. Serrato, and that Serrato had stated that he had no objection to the change in the language;
- Lic. Serrato testifies that he did not agree with Lic. Carvajal to eliminate the term "non-hazardous" from the Agreement and therefore Lic. Carvajal's statement to Leonel Romo was false;
- Secretary Julia Carabias provides a supplementary witness statement in which she expresses her concern that a federal official acted as an agent for Metalclad in Mexico and received payments through his wife, who was a shareholder in one of Metalclad's affiliates in Mexico. She considers that this is a very serious matter that requires further investigation by the competent authorities; and
- Dr. Pedro Medellín provides supplementary evidence in response to the Reply.

PART II: EXECUTIVE SUMMARY

1. Chronology

15. A brief summary of the material facts follows:

- a) In 1990, Metalclad was a small, publicly traded industrial insulation contractor that installed industrial insulation and removed asbestos from buildings. The corporation had no background or expertise in hazardous waste disposal or treatment.
- b) In 1990, Grant Kesler got the idea of promoting a Mexican hazardous waste disposal business from Reed Warnick, one of his neighbors in Salt Lake City, Utah. Mr. Kesler (and Daniel Neveau, his colleague in another publicly traded and financially distressed company called California Properties Fund, Inc.) then acquired a controlling interest in Metalclad in February 1991.
- c) In July 1991, after taking control of Metalclad, Mr. Kesler joined Mr. Warnick and two other individuals as shareholders in a Utah company called Environ Technologies, Inc. (ETI), which in turn joined with four Mexican citizens to establish a Mexican joint venture company called Eco-Administración. The joint venture company was to build a hazardous waste incinerator in Santa Maria del Rio, San Luis Potosí.
- d) In November 1991, Mr. Kesler arranged for Metalclad to purchase ETI (whose assets, according to Metalclad's auditors, were "insignificant") at a cost to Metalclad of over 5 million dollars⁶. Having acquired ETI's interest in Eco-Administración, Metalclad began to make public announcements about Metalclad's prospects in the Mexican hazardous waste disposal business.
- e) After pursuing Eco-Administración's hazardous waste incinerator for two years and announcing two more incinerator projects in two other Mexican states, Metalclad then switched to a completely different project in San Luis Potosí – the construction of a hazardous waste landfill at the site known as La Pedrera (the "Site"), which was owned by COTERIN, a Mexican-owned company. The Site had been operated briefly as a hazardous waste transfer station by COTERIN, and had been shut down by federal environmental authorities after large volumes of hazardous wastes were unlawfully dumped at the Site⁷. They were then buried

⁶ All references are to US dollars unless otherwise indicated.

⁷ Over 20,000 tons of waste was dumped. To give the Tribunal a sense of the scale of this problem, the Tribunal should keep in mind the following: In the 1930s and early 1940s, the Hooker Chemicals & Plastics Corporation dumped 21,800 tons of hazardous waste into a large ditch. The ditch was simply covered over. Later a residential neighborhood and a school were built on top of the ditch. When residents began complaining of illness, officials performed studies that ultimately led to the evacuation of the entire neighborhood—the Love Canal neighborhood of the city of Niagara Falls, declared by New York state to

B/ without proper segregation and treatment. The misconduct of the prior owners and the presence of untreated hazardous wastes at the Site (which remain to this day) generated substantial resentment and suspicion within the municipality of Guadalcázar and the neighboring municipalities.

f) Metalclad was introduced to the COTERIN purchase by Dr. Humberto Rodarte Ramon, who at that time was the Special Advisor to the President of the federal permitting agency, the INE.

Q- g) Metalclad completed its purchase of COTERIN on October 7, 1993. At the time Metalclad was aware that it was acquiring a contaminated site and that the potential opening of the Site as a landfill was a controversial political issue.

Q- But need more COM CT- h) Metalclad also knew that there was a legal requirement to obtain a municipal construction permit to build the landfill facility, having been so advised by its local legal counsel, and having included in its contract for the acquisition of COTERIN an express provision waiving three-quarters of the purchase price if the municipal permit was not obtained or relief from that requirement was not obtained in a federal *amparo* proceeding. In fact, just before starting construction in earnest in September 1994 (a year later), Metalclad's then Chairman and Senior Vice President wrote to the company's local counsel stating that Metalclad would not apply for the municipal construction permit because, as he put it, he "would rather ignore the problem than raise it to a level of awareness." *

i) After purchasing COTERIN, Metalclad engaged in ill-advised public relations tactics – for example, announcing the imminent opening of its San Luis Potosi "facility" in trade publications before the informing the community of its intentions, placing advertisements in newspapers in which it criticized State officials when they reacted adversely to such announcements, commencing construction of the landfill without municipal approval after assuring the municipal council that only maintenance work would be carried out at the site, and unilaterally holding a grand opening/facilities tour ceremony for the facility after giving assurances that the facility would not be opened without the consent of the community. These actions and others served to intensify and solidify public opposition to the landfill.

j) Metalclad entered into negotiations with the State government authorities who encouraged it to consider alternative locations for the landfill due to the Site's history of opposition, and emphasized the need for Metalclad to remediate the

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be a public health emergency in 1978. The massive publicity generated by the Love Canal incident led to the U.S. "Superfund" law and the elaborate process of investigation and remediation there prescribed. See Michael Gerrard, Fear and Loathing in the Siting of Hazardous and Radioactive Waste Facilities: A comprehensive Approach to a Misperceived Crisis" 68 Tulane Law Review (May 1994) 1047, 1060. Rejoinder Exhibit 30.

contamination at the Site. After an agreement to that effect was announced by the State, Metalclad issued a press release in the United States claiming that the State had agreed to assist it in developing *additional* sites, rather than *an alternative site*. Metalclad also proceeded with construction at La Pedrera without obtaining a municipal construction permit, representing to the federal, state and local governments that it was performing "maintenance work." At the same time, it was telling investors that construction was underway and that it intended to commence commercial operations shortly.

- k) During the summer of 1994 Metalclad convinced the U.S. Embassy in Mexico to pressure the Mexican federal and state authorities on Metalclad's behalf. The U.S. Embassy was not made fully aware of the Site's history, nor of Metalclad's state of knowledge of the various permitting issues, or its relationship with Mr. Rodarte.
- l) Well aware of the municipal construction permit issue, Metalclad nevertheless decided to commence construction without applying for the permit. When it received a shut down order from the Municipality, it then applied for a permit, but resumed construction before the permit application was decided.
- m) Metalclad then organized a "grand opening" ceremony in March 1995 against the express advice of both the federal and state authorities, and notwithstanding that the company had not obtained the required municipal permits nor completed a federal environmental audit of the Site. In reaction to the ceremony and the company's announcement of the commencement of commercial operations, there was a spontaneous local protest.
- n) The notoriety of the contaminated Site attracted the interest of Greenpeace, which aligned itself with the pre-existing opposition efforts of other, smaller local citizens groups.
- o) Metalclad's then legal counsel in San Luis Potosí, Lic. de la Garza, testifies that after the failed opening, in late April 1995, Grant Kesler raised with him the idea of offering a bribe of 1 million dollars to the Governor in exchange for his support in opening the landfill. Lic. de la Garza refused and then resigned from representing Metalclad.
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- p) In October 1995, Metalclad began to circulate a draft NAFTA complaint in which it accused Dr. Medellín (the State Ecology coordinator) of breaches of NAFTA (going so far as to purport to name him personally as a respondent). No accusations were made against the Governor in that draft.⁸
- q) In November 1995, the federal government entered into an agreement (the "Convenio") with Metalclad. It did not purport to bind the State and local

⁸ Later, according to the Memorial, the project's failure is said to be the result of the actions of "a single man, the Governor" of San Luis Potosí.

governments. The *Convenio* was challenged in legal proceedings brought by the Municipality against SEMARNAP and a final interlocutory injunction against the landfill's commercial operations was obtained pending a decision on the merits of the Municipality's claim.

- r) After the municipal construction permit was denied, COTERIN initiated an *amparo* proceeding (a federal remedy) appealing the rejection. As COTERIN failed to exhaust the available state law remedy by first appealing to the State Administrative Tribunal, the *amparo* was rejected by the federal court.
- s) In 1996-97, other domestic litigation ensued. The Municipality's lawsuit against SEMARNAP continued and COTERIN initiated an appeal against the dismissal of its *amparo* proceeding, but later withdrew the appeal. COTERIN made no effort to remedy the procedural deficiencies in its case so that it could bring another *amparo* challenge, and has never put itself in a position to apply for a municipal *operating* permit. COTERIN also took part as a third party in the *amparo* initiated by the municipality against SEMARNAP, and the appeal therefrom.
- t) During this period, at Mr. Kesler's behest, the U.S. Embassy in Mexico intensified its advocacy in support of Metalclad. The U.S. Ambassador threatened to "blacklist" the State of San Luis Potosí.
- u) Further negotiations between Metalclad, the State and the municipality took place.
- v) On October 2, 1996, Metalclad filed its Notice of Intent to Submit a Claim to Arbitration.
- w) On January 2, 1997, Metalclad filed its Notice of Claim with the ICSID Secretariat.
- x) On January 8, 1997, a non-binding "agreement of understanding" between the company and the Municipality was signed by representatives of both parties. The municipal authorities were prepared to discuss allowing Metalclad to operate the Site as a "non-hazardous" industrial waste landfill. The following day, one of Metalclad's lawyers persuaded the Municipal president to sign a different version of the agreement (one which deleted the words "non-hazardous" from the text) representing (incorrectly) that he had discussed the matter with the Municipality's legal counsel and that he had agreed to the change⁹.
- y) Two weeks later, the parties met again. This time, Metalclad requested that the Municipality agree to issue the construction permit in exchange for the company's commitment that it would not operate the Site. On the advice of its legal counsel, the Municipal *Ayuntamiento* refused.

⁹ The Municipality's legal counsel disputes this claim. He testifies that he did not agree to deletion of the word's "non-hazardous waste" from the text.

- z) On May 19, 1997, the Tribunal was formally constituted.
- aa) Among the new evidence recently discovered by the Respondent are documents showing that when Eco-Administración (the first Mexican project in which Metalclad acquired an interest when it purchased ETI) was incorporated in August 1991, shares were issued to one Lucía Ratner Díaz González. Ms. Ratner was married to Humberto Rodarte Ramón, who at that time was the local representative of the federal environmental agency, SEDUE, in the state of San Luis Potosí, and later a Special Advisor to the president of the federal permitting agency, the INE.
- bb) A year and a half later, when her husband was Special Advisor to the President of INE, Ms. Ratner exchanged her shares in Eco-Administración for Metalclad stock. Metalclad's payments of stock and cash to Ms. Ratner were triggered by, *inter alia*, the issuance of federal permits. Mr. Rodarte also negotiated a 100,000 dollar "commission" with the vendors of COTERIN to arrange a successful sale of the company (which commission Metalclad later agreed to protect). Later, Metalclad hired Mr. Rodarte on a full-time basis when he left the agency in the spring of 1993. He was associated with Mr. Kesler and Metalclad therefore, both directly and through his wife, since at least August 14, 1991. Mr. Rodarte was one of the federal officials on whose "advice" Metalclad claims to have relied.
- cc) Mr. Rodarte was widely mistrusted by the local people. He was suspected (it turns out, correctly) of taking improper payments and was considered to be arrogant. The evidence is that the Municipal authorities and the local people considered that he ignored their interests when the problems with the transfer station arose in 1990-91. He was well aware of the Site's history and of the local opposition that it engendered.
- dd) Mr. Rodarte left the federal government in 1993 to run Metalclad's new consulting firm, CATSA. He is one of Metalclad's principal witnesses in this proceeding.

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2. Metalclad's Account of the Facts Has Been Disproven

16. Metalclad's account of the events is contradicted by the evidence. The facts demonstrate that:

- a) Metalclad was not "invited" by Mexico to invest in a hazardous waste business, as it claims. Mr. Kesler was introduced to the idea by one of his neighbors in Salt Lake City.
- b) The Governor of San Luis Potosí never committed to support a specific project in his state, and indeed warned the company that its proposal to construct a hazardous waste landfill at La Padrera would be controversial and resisted by the municipality.
- c) From the beginning of its investment activities in Mexico, Metalclad was affiliated with a federal official, and made payments of stock and cash to that

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official's wife that were linked to the issuance of federal permits. Metalclad's claim that, before making this investment, it "relied" on the "advice" of this official and others with whom this person was affiliated, is not credible.

- d) Having represented to its shareholders and lenders that it had all of the necessary permits –notwithstanding contrary advice from its own local Mexican legal counsel and auditors– Metalclad could not acknowledge that municipal permits were indeed required. It continued its "top-down" strategy under which it attempted to enlist the support of the U.S. Embassy, and through it, the Mexican federal government, to force the opening of the landfill in the face of local opposition.
- e) When its "top down" strategy failed, Metalclad tried to deflect blame away from itself. First, it asserted that Dr. Pedro Medellin, the State's General Coordinator of Ecology, was responsible for its problems. It then asserted that RIMSA, a Mexican operator of an established landfill, paid bribes to prevent Metalclad's landfill from opening as a competitor, although it could produce no evidence of this¹⁰. Later, it seems to have abandoned those theories and claims that the Governor, motivated by political concerns, had deceived it. Alternatively, it argues that Mexico sponsored Greenpeace's opposition to the landfill, and that an alleged vagueness in Mexico's legal system operated to impair its rights of ownership.
- f) In fact, Metalclad's claims to investors that it already owned "fully permitted" hazardous waste treatment facilities in Mexico, and that the opening of those facilities was imminent, created pressure to (i) open a facility quickly or (ii) identify someone else to blame for the failure to open consistent with the representations made to investors. Metalclad's overly optimistic and often plainly false statements to investors had left the company, Mr. Kesler, and several of his colleagues exposed to significant liability.

3. Metalclad's Claim Fails to Establish a NAFTA Breach

17. The Respondent submits that Metalclad's Claim fails on a number of grounds:

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- a) Mexico does not have any obligation to ensure foreign investors against normal business risks. Metalclad does not provide any legal authority to establish an obligation under the NAFTA to ensure that a company will be granted the necessary permits to build and operate a hazardous waste landfill on a specific site, especially where the Site is contaminated and the surrounding municipality is opposed to the project.
 - b) Metalclad has not presented *prima facie* evidence that it had property, or a property right, that has been taken. It still has full ownership of COTERIN and

¹⁰ RIMSA is a subsidiary of the U.S. company, ChemWaste.

the landfill site in La Pedrera. It was advised before it purchased COTERIN of the legal requirement to obtain the municipal permits and has failed to meet that requirement.

- c) Metalclad has failed—and in fact has refused—to produce evidence of the actual financial expenditures associated with its investment in Guadalcázar¹¹. On two occasions, it refused to provide a detailed listing of its expenditures. Its initial claim that it expended over 20 million dollars on the acquisition and construction of its facility is false. In its first set of experts' reports, the Respondent established that Metalclad's assertions regarding the size of its investment in the landfill were grossly inflated, and probably amounted to a total of less than 3.7 million dollars—although the Respondent is not prepared to concede that even that much was invested, because it has not been given access to all of the audited financial statements for COTERIN, despite repeated requests¹².
- d) Metalclad made irregular payments to a federal government official contemporaneous with the issuance of federal permits. Metalclad's claim of good faith reliance cannot be maintained.
- e) Metalclad has misrepresented the facts in this proceeding—omitting key facts from its filings, submitting false and misleading testimony to the Tribunal, and has refused to respond to requests for documents central to the case. On many issues of fact, Metalclad's pleadings and witness statements are contradicted by its own documents and by the evidence adduced by the Respondent. In this Rejoinder, for example, the Tribunal will see that on what Metalclad called the "pivotal" meeting of June 11, 1993 with Governor Sanchez Unzueta, Metalclad's evidence is contradicted by its former Chairman of the Board who attended the meeting as the company's senior representative.

¹¹ It twice refused to have its CFO prepare a list of expenditures relating to the investment it says has been expropriated.

¹² Metalclad also has not offered plausible evidence that any potential purchaser would be willing to make a cash offer to acquire COTERIN.

PART III: THE ADMITTED FACTS AND FACTS TAKEN FROM METALCLAD'S OWN DOCUMENTS

18. The following is a list of the facts that now seem to be admitted:

- a) ***The particular project that gives rise to this Claim was, at the time that it was acquired, Metalclad's fourth Mexican venture:*** The Counter-Memorial pointed out that while Metalclad may have been introduced to the COTERIN deal in February 1993, prior to that time, Metalclad had announced in the United States that it was going to construct and operate hazardous waste incinerators at Santa María del Río, San Luis Potosí, (Eco-Administración), Veracruz (Descontaminadora Industrial de Veracruz S.A. de C.V.), and Tamaulipas (Eliminación de Contaminantes S.A. de C.V.).

The Reply admitted this¹³.

- b) ***At the time that the COTERIN deal was pursued, none of the previous three investments had come to fruition:*** The Counter-Memorial pointed out that a number of press releases were issued by Mr. Kesler after Metalclad acquired its interest in Eco-Administración on November 20, 1991. Despite the company's predictions of financing and the commencement of construction of the above facilities, none were built when Metalclad completed its purchase of COTERIN.

The Reply admitted this¹⁴.

- c) ***The landfill site at La Pedrera was contaminated by COTERIN's previous owners:*** The Counter-Memorial adduced evidence as to the contamination caused by the former owners of COTERIN. The Respondent also submitted as exhibits, the advertisements warning of the environmental disaster at La Pedrera that Metalclad itself had placed in local newspapers.

The Reply admitted the Site was contaminated¹⁵.

- d) ***There was pre-existing opposition:*** Quite apart from the controversial nature of hazardous waste landfills generally, the Counter-Memorial pointed out that, given the existing contamination, it was understandable why the local community would oppose the further dumping of hazardous wastes at the site. Numerous letters

¹³ Reply, Admissions and Denials, paragraphs 252 to 261.

¹⁴ Ibid, paragraphs 258 to 268.

¹⁵ As was typical in its Admissions and Denials, Metalclad actually denied the allegation that the site was contaminated but then provided comments to the pleading and following paragraphs that acknowledged that the site was indeed contaminated: "Respondent attempts throughout its Counter-Memorial to paint the transfer station with a brush of systemic depiction. And it further blurs the distinction between the Aldretts and Metalclad ownership." Response to paragraph 39 of the Counter-Memorial.

from surrounding municipalities to the federal and State authorities were filed to demonstrate the widespread nature of the opposition¹⁶.

The Reply admitted that there was pre-existing opposition but sought to deflect it as being directed to the previous owners of COTERIN, rather than towards the site or to it¹⁷.

- e) ***The Claimant was aware of the municipal permit issue:*** The Counter-Memorial adduced evidence of the Claimant's own making showing that it was aware of the municipal permit issue prior to exercising its option. It pointed out that Metalclad had amended the purchase agreement to make payment of three-quarters of the purchase price contingent upon the resolution of that issue.

The Reply admitted the Claimant knew of the permit issue from the beginning. In this regard, it adduced a letter dated September 16, 1993, from Lee Deets to Dr. Reyes Luján, the President of the INE, in which Mr. Deets stated:

“We are prepared to begin construction immediately upon receiving the authorization from Governor Sánchez Unzueta, but are not sure if a manifest is necessary from the Guadalcázar municipality. Our law firm in San Luis Potosí believes that a municipal manifest may be needed for construction. If you believe it is appropriate, we would appreciate your discussing the municipal permit with Governor Sánchez Unzueta.”¹⁸

The Reply also claimed that its original argument was not that it did not know about the permit issue, but that no one from the government had made it an issue.

This refinement on the Claimant's theory of the case will be explored in cross-examination. For the present, it is enough to note that it fails to explain why the factual predicate of the Claimant's expert's report on Mexican law was that Metalclad did not and could not have known about the municipal permit issue due to the alleged opacity of the Mexican legal system¹⁹.

As for the amendment to the option agreement, Metalclad downplayed its significance, describing it as a “useful prophylactic measure by Claimant's

¹⁶ Counter-Memorial Exhibits 9, 28-29, 38, 77, 80, 97, 100.

¹⁷ It states “Denied” in respect to the allegation that the Municipality and eleven other *Altiplano* municipalities expressed clear and consistent concerns about the site. Even though the Respondent proffered numerous letters from the municipalities to support this, Metalclad termed this “argument not fact” but did not purport to deny the existence or authenticity of the letters. See “Admissions and Denials”, paragraph 206.

¹⁸ Reply, Exhibit 9, Exhibit 5 to the witness statement of Lee Deets.

¹⁹ Memorial, Exhibit 34 Report of Centre JURICI at pages 1 and 8. It is noted that Metalclad did not file any expert rebuttal evidence in response to the Respondent's expert reports on Mexican law.

management and [which] reflected the vendor's confidence in the successful conclusion of the permitting process"²⁰.

⑤

- f) ***The Claimant was aware that the municipal permit had been denied previously:*** The Counter-Memorial pointed out that the issue had arisen with the previous owners' application for a construction permit. Far from arising for the first time in late 1994 (over a year after the company was purchased) as pleaded by the Memorial, the municipal permit was denied for the first time in 1991.

The Reply admitted this²¹.

- g) ***At the time of COTERIN's acquisition, the Ayuntamiento, led by the Municipal President, continued to oppose the landfill's opening:*** The Counter-Memorial adduced evidence that the municipal administration had been opposed to the landfill's opening. It also showed that in elections in which the landfill figured, those who supported it lost and those who opposed it won.

The Reply seemed to admit this²². In fact, it adduced Mr. Deets' September 16, 1993 letter to Dr. Reyes Luján after it exercised its option to purchase COTERIN, in which he stated that "[u]nfortunately, we have been unable to secure the support from the municipal president of Guadalcázar"²³.

- h) ***Each of the succeeding municipal administrations opposed the project:*** The Counter-Memorial pointed out that not only did the municipal council in power in 1991 oppose COTERIN's landfill, but every successive council did as well.

The Reply admitted this²⁴.

- i) ***Neighboring municipalities opposed the landfill as well:*** The Respondent adduced evidence of numerous letters sent to State officials requesting the permanent closure of the site.

The Reply admitted this but denied its relevancy²⁵.

- j) ***There was opposition not only from the municipal council, but from non-governmental organizations as well:*** The Counter-Memorial pointed out

²⁰ At paragraph 353 of the Reply.

²¹ Reply, Exhibit 9, witness statement of Lee Deets at paragraph 72. See also Admissions to paragraphs 44 and 229 of the Counter-Memorial.

²² See for example paragraphs 24, 66 and 206-207 of the Reply, Admissions and Denials.

²³ Reply, Exhibit 9, witness statement of Lee Deets, Exhibit 5.

²⁴ See for example, paragraphs 24, 66 and 206-207 of the Reply, Admissions and Denials.

²⁵ Admission to paragraph 235 of the Counter-Memorial.

that there was strong opposition to the project by Pro San Luis Ecológico and Greenpeace. The Reply admitted this²⁶, stating:

“There is first the strong pressure upon officials applied through the well-documented efforts of Greenpeace and one other NGO. The Greenpeace initiatives are noteworthy because they left sympathetic officials no room to maneuver; Greenpeace it is said to have offered no room to compromise —whether based upon scientific aptness or related site attributes— to its no-landfill policy.”²⁷

Indeed, as the Tribunal will see, new evidence filed with this Rejoinder shows that not only did citizens’ groups oppose the landfill, but the Priest of the parish of Guadalcázar counseled against it as well. The evidence is that Metalclad sought to have him stop criticizing the landfill because he was considered to be an effective opponent²⁸.

- k) ***There were disagreements between different levels of government as to the desirability of the project at the particular Site:*** The Counter-Memorial adduced the evidence of Ms. Williams, a former senior EPA official, who testified that jurisdictional disputes are common to these types of projects.

The Reply, while rejecting her evidence, nevertheless argues that: “the federal operational style contributed to local suspicion and resentment”²⁹.

The Claimant also conceded that:

“...the pro-centralization policies driving state officials and the federal-state tension ...became increasingly manifest and... culminated in a protracted train of *amparo*-related court proceedings. These elements intermingled and were in part exacerbated by federal policies which evolved during the approximately six years spanned by Claimant’s investment activity in San Luis Potosí.”³⁰

1)

The Claimant had no previous experience in the hazardous waste disposal business: The Counter-Memorial demonstrated that Metalclad turned out to have had no experience in the construction and operation of a hazardous waste landfill.

²⁶ It made a novel attempt to attribute the actions of one of these non-governmental organizations who were opposed to the federal government’s position on the project, to the Mexican State. This will be addressed in the Legal Submissions section.

²⁷ Reply at paragraph 334.

²⁸ Rejoinder, witness statements of Héctor Raúl García Leos at paragraphs 38-46 and Father Romo Navarro at paragraph 24.

²⁹ Reply at page 101, Section 2 (heading).

³⁰ Reply at paragraphs 334 and 337.

The Reply admitted this in part. The Admissions and Denials showed that the Respondent's allegation was true:

"Mr. Kesler did not say —nor did he intend to imply— that Metalclad had operated landfills or that it had hazardous waste projects around the world"³¹.

19. In addition to the above admitted facts, the Respondent has obtained documents of the Claimant's own making that directly contradict certain of its key pleadings:

- a) ~~†~~ ***The Claimant did not suffer from "regulatory ambiguity"***: Far from suffering from "regulatory ambiguity" that clouded its understanding of the municipal permit issue, in August 1994, Metalclad was advised by its local counsel on the need and the means for applying for a municipal construction permit³².

Rather than apply for such a permit, Metalclad's Chairman, Daniel Neveau, wrote back to counsel and stated:

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"Regarding the application for the building license in La Pedrera. I am of the opinion that we should probably not apply for the permit. We have the authority from PROFEPA to construct and maintain this project. I would like your opinion whether or not this authority supercedes the license to construct. I don't know that it does us any good to go before a body such as the City Council and know that we are going to obtain a negative result. I think I would rather ignore the problem rather than raise it to a level of awareness. I think we need to discuss this further"³³.

- b) ***Metalclad did not meet Dr. Rodarte for the first time when he introduced it to the COTERIN opportunity***: The Memorial, the witness statements of both Grant Kesler and Humberto Rodarte, and the Reply all implied that Metalclad met Dr. Humberto Rodarte Ramón for the first time in February 1993, when in the exercise of his official duties, he introduced it to the Aldretts, the owners of COTERIN.

This is false. As the Tribunal will see, Metalclad's own documents demonstrate conclusively that Rodarte was associated with Mr. Kesler and other investors from August 14, 1991, the date that Metalclad's first venture, Eco-Administración, was incorporated.

³¹ Reply, Admissions and Denials, response to paragraph 86 of the Counter-Memorial.

³² Rejoinder, Exhibit 3 to the witness statement of Héctor Raúl García Leos.

³³ Rejoinder, Exhibit 2 to the witness statement of Héctor Raúl García Leos. Lic. Garcia Leos testifies that he told Mr. Neveau that whomever had informed him that a municipal permit was not required was incorrect.

- c) ***Metalclad sought to align itself with individuals who it thought could ensure the proper outcome of various proceedings:*** The Tribunal will recall that in the Counter-Memorial, the Respondent adduced evidence proving that Metalclad sought to appoint the head of the audit team to its Board of Directors while he was undertaking the audit of the Site. The Reply described this as a mere failure of communication³⁴.

The Respondent has obtained further evidence of this practice.

The Tribunal will recall the group of UASLP professors that also reviewed the site in 1994-95. Metalclad asserted that Dr. Roberto Leyva was a member of the committee and that he resigned in protest when the UASLP committee's work was allegedly quashed³⁵.

The Respondent obtained a series of corporate documents showing that during this time, Metalclad sought to appoint Dr. Leyva to the Board of Directors of ECOPSA, its subsidiary that was planning to operate the landfill if it opened.

The Respondent has obtained a copy of two notarized records of ECOPSA's shareholders meetings. At the first meeting, held on May 7, 1994, ECOPSA is said to have appointed Dr. Leyva to its Board along with Manuel Abella (the local businessman who set up the January 28, 1994 meeting with the Governor), and one of its counsel, Lic. de la Garza. Both of the latter deny having acted as directors.

Dr. Leyva has declined to cooperate with the Respondent. Whether he acted as a director or not, the *modus operandi* is the same as the attempt to appoint the Dr. Ortega to Metalclad's Board when he was overseeing the audit. Once again, Metalclad sought to influence the UASLP committee whose *imprimatur* was being sought.

³⁴ The Reply devotes 3 pages to explaining why appointing Dr. Ortega to the Board was not a breach of ethics. Yet the issue seemed clear to Dr. Ortega, who asserted at the time that "due to the work that I am currently conducting, it is impossible for me to accept such position..." (See Counter-Memorial witness statement of Dr. Ortega at paragraph 8 and exhibit 1).

³⁵ Memorial, Summary of Facts at page 72.

PART IV: ADMISSIONS AND DENIALS: DETAILED ACCOUNT OF THE FACTS AFTER TWO ROUNDS OF PLEADINGS

1. There was Pre-existing Contamination at the Site

Memorial: Metalclad minimized the extent of the site's contamination

20. The Memorial minimized the serious issue of the existing contamination, stating tersely that the site had been operated 'in excess of [the] permit' and noting that "some 55,000 drums of diverse waste —approximately 20 thousand tons— were stored at La Pedrera"³⁶ (emphasis added). The Summary of Facts stated likewise³⁷.

Counter-Memorial: The Respondent adduced evidence of the extensive contamination

21. Far from this "diverse waste" being "stored" at La Pedrera, as the Respondent pointed out in the Counter-Memorial and Metalclad's own public statements show, it was mixed together and simply buried, thus creating a major source of contamination with the potential for explosion.³⁸

22. Public concern about the serious environmental hazard which had been created at La Pedrera led to the eventual closure of the facility by federal order on September 25, 1991.

Reply: The Claimant denied the relevance of the prior contamination

23. In the Admissions and Denials section of the Reply, the Claimant consistently denied the relevancy of the existing contamination on the grounds that it occurred whilst the Aldretts owned COTERIN. The Reply also accused the Respondent of trying to mislead the Tribunal by the emphasis it placed in the Counter-Memorial on the existing contamination, stating that:

the pre-Metalclad situation] cannot be fairly used to intimate that Claimant caused the problem or to suggest that Metalclad in any way subscribes to substandard or careless approaches to the handling of hazardous waste.³⁹

³⁶ Memorial, Summary of Facts at paragraph 19.

³⁷ It described what it called two distinct Sites: the transfer station "whereon is confined approximately 20,000 tons of previously stored hazardous waste" and its "state-of-the-art facility". Memorial at paragraph 6, page 42.

³⁸ See Counter-Memorial at paragraph 42. Metalclad's "letters to the public" produced by the Respondent, described the "serious danger" that existed and that "close to 30,000 tons of dangerous and toxic waste deposited only in ditches that do not meet the construction standards and are only covered with dirt, without complying with the minimum safety conditions and standards and which may pose a great danger to the health of the inhabitants of the communities...."

³⁹ See Reply at paragraph 97.

Rejoinder: Counter-Memorial reaffirmed

24. The Respondent did not allege that Metalclad itself had contaminated the site; rather, it pointed out that it purchased a site with an unfortunate history. It acquired an environmental liability against which substantial local opposition had coalesced⁴⁰.

25. The evidence of contamination was adduced not to imply that Metalclad was responsible for causing it, but rather to make the obvious point that a change in COTERIN's ownership would not necessarily be seen by the Municipality as a resolution of the prior problem or lead the local citizens to soften their opposition to a hazardous waste landfill being located in their Municipality.

26. Mr. Robertson, the former Chairman of Metalclad, testifies that Metalclad acquired COTERIN aware that the site may have been contaminated by the previous owners:

76... We were aware that allegations had been made that the owners of COTERIN may have contaminated the site. I recall discussing this with Mr. Deets and asking him how much it would cost to clean up a site like this if that had to be done. In response, he said, 'You don't want to know'⁴¹.

2. The Site's Contamination Generated Local Opposition

Memorial: No mention of pre-existing local opposition

27. There was no mention of pre-existing local opposition. To the contrary, the Memorial alleged that the State government artificially contrived opposition to the landfill.

Counter-Memorial: The Site's contamination generated considerable local opposition

28. The Respondent observed that, consistent with the Memorial's attempt to portray the local opposition as being contrived and ill-motivated, Metalclad did not fully apprise the Tribunal of the fact that the prior contamination of the Site had stimulated local opposition⁴².

⁴⁰ See Counter-Memorial at paragraphs 65-70. Also, witness statements of Salomon Ávila Perez, Hermilo Méndez Aguilar and Leonel Ramos Torres. The amount of waste improperly buried at the site is significant. It is the same as the amount of waste buried at Love Canal, the notorious site in New York that gave impetus to the decision to enact the "Superfund" legislation in the United States. Michael Gerrard, *supra* note 4.

⁴¹ Rejoinder, witness statement of Ron Robertson at paragraph 76.

⁴² The Respondent therefore adduced extensive evidence of local opposition to the use of La Pedrera as a hazardous waste landfill, which led eventually to the Site's closure in September 1991. The evidence proved that the unlawful deposit and retention of this hazardous waste caused fear, concern and anger on the part of the local people. Long before Metalclad arrived in Guadalcázar, the Municipality and the eleven other municipalities of the *altiplano* (the highlands) region of San Luis Potosí expressed consistent

29. The then local SEDUE sub-delegate in San Luis Potosí, Humberto Rodarte, knew full well of the local opposition. He testified in his first witness statement that he was the official who shut down the transfer station⁴³.

Reply: Admits that its due diligence disclosed local opposition prior to purchasing COTERIN

30. The Reply demonstrated that the Claimant was aware that it was purchasing a contaminated site which had already been closed down by the federal authorities in 1991 due to extensive local opposition. The Reply also castigated the Respondent for omitting to include evidence relating to President Salinas' statement that the Site would be closed down:

“Treated here for convenience is a separate averment that adds to the patchwork of inaccuracies which Respondent offers as fact. Claimant presumes that Respondent reconstructs pertinent history carelessly and not intentionally. But the result, nevertheless, misleads the Tribunal. [The Reply refers to the assertion that the Respondent made concerning President Salinas' declaration and the fact that the Counter-Memorial omitted to include the evidence intended to support the allegation]...The bracketed question is well put. Respondent provides no evidence. In fact, President Salinas did not so publicly declare. But Respondent leaves the unfounded assertion in its factual pronouncements”⁴⁴.

Rejoinder: Metalclad and its Agent, Rodarte, were Particularly Aware of the Opposition

31. The Respondent acknowledges that it omitted to include the evidence of President Salinas' statement (however, the Counter-Memorial *did* contain the testimony of the former municipal Ecology Regidor, Mr. Hermilo Mendéz Aguilar, who recounted this event⁴⁵, a point that Metalclad omitted to note when criticizing the Respondent).

32. Contrary to the pleading in paragraph 174 of the Reply, the President of the Republic did indeed make the statement alleged. On April 29, 1992, during a visit to Núñez, President Salinas stated that he had spoken to the then-governor of the State and supported his position against the reopening of the Site:

Footnote continued from previous page

opposition to the Site. Exhibit 9 to the Counter-Memorial contains letters written by regional authorities and community leaders between 1991 and 1995 requesting that the site be cleaned and not re-opened.

⁴³ Memorial, witness statement of Humberto Rodarte Ramon at page 4.

⁴⁴ Reply at paragraph 174.

⁴⁵ See Counter Memorial, witness statement of Hermilio Mendéz Aguilar at paragraph 13.

“...after today the landfill of La Pedrera will be closed in order to protect the people that live around Guadalcázar”⁴⁶.

33. In its Admissions and Denials to the Respondent’s allegations of fact regarding this pre-existing opposition, Metalclad admitted certain indisputable facts, but denied their relevance⁴⁷.

34. The Claimant admitted in the Reply that it included a provision in the purchase agreement that it could defer payment of the balance of the purchase price in the event that:

“...The construction of the confinement indicated in section b) above is suspended by order of the authority or the operation of such confinement is suspended, or the foregoing occurs by reason of the physical situation or situation of violence of the neighbors of the location of the confinement.”⁴⁸ [emphasis added]

35. Metalclad described this as being akin to a *force majeure* clause⁴⁹.

36. Instead of disclosing to the Tribunal its actual knowledge of the local opposition, which went directly to the issue of the high risk associated with the venture (a point entirely consistent with Marcia Williams’ expert evidence on the normal business risks associated with hazardous waste disposal facilities generally), the Claimant sought to discount and discredit the understandable substantial local opposition that was created by the prior contamination and attributed it instead to *sub rosa* corruption allegedly caused by RIMSA.

37. The Respondent notes that if there was a single person amongst all of the witnesses who have been called by either party to this dispute who knew about the local opposition, it is the local senior federal official in San Luis Potosí at the time the Site was shut down, Humberto Rodarte.

⁴⁶ Rejoinder, Exhibit 1. The Tribunal can appreciate how the President’s statement would be received by the residents of Guadalcázar.

⁴⁷ See, for example, the admissions to paragraphs 235-236. Other examples of this can be found at paragraphs 44 and 229, with respect to the earlier denial of the municipal permit in 1991, and at paragraphs 225-228 which describe events leading to the closure of the transfer station by the federal authorities in 1991.

⁴⁸ The Claimant explains this clause as being “a standard contract clause in foreign investment transactions, and is meant to provide general protection for the investor should any external political situation arise not unlike force majeure provisions”. See the admission to paragraph 23 of the Counter-Memorial. The Respondent will address this characterization at the hearing.

⁴⁹ Reply, Admissions and Denials, response to paragraph 23.

3. Metalclad had No Experience in the Hazardous Waste Business

Memorial: Metalclad had "completed more than One Billion Dollars worth of environmental construction"⁵⁰

38. Mr. Kesler began his testimony with this claim. However, no evidence was adduced to support his allegation of experience in the hazardous waste disposal business⁵¹.

Counter-Memorial: Metalclad had no experience in the hazardous waste disposal business

39. At paragraphs 85-97 of the Counter-Memorial, the Respondent reviewed Metalclad's own documents filed with the SEC and pointed out that it had no previous experience in the hazardous waste disposal business.

Reply: Claims that Metalclad acquired expertise that it did not have before and argues that the Respondent is estopped from making this allegation

40. The Reply proffered the testimony of Mr. Leland Sweetser, Metalclad's former Chairman of the Board before Mr. Kesler (and Mr. Neveau) acquired control of Metalclad to testify as to the company's environmental credentials⁵².

41. The Reply also proffers the evidence of Mr. Deets who testifies that he brought together "firms that are unquestionably some of the most knowledgeable leaders within all functional and executive levels of the hazardous waste industry"⁵³.

42. In addition, at paragraph 91, the Reply asserts:

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

⁵⁰ Memorial witness statement of Grant Kesler at page 1.

⁵¹ Ibid. at page 2.

⁵² It is obvious from the face of Mr. Sweetser's statement that he was not fully apprised of the specifics of the Respondent's criticisms of Mr. Kesler's claim.

⁵³ Reply, Exhibit 9, witness statement of Lee Deets at paragraph 47.

Chapter 5, the matters raised by Respondent have been exaggerated and distorted in the Counter-Memorial. [emphasis added]

Rejoinder: Metalclad's Former Chairman Confirms Lack of Experience

43. The Respondent found nothing in the Reply to lead it to change its earlier evidence. The facts are that when ETI, and then Metalclad, moved into the Mexican hazardous waste business in 1991, none of Mr. Kesler and the other Board members had any experience in the business.

44. Only after the company had begun its stock promotion activities and had announced three separate ventures (Eco-Administración, Descontaminadora, and Eliminación) in three different Mexican states did it hire Mr. Deets (in June of 1992). He was the only Metalclad officer and director at that time to have any experience⁵⁴ (Mr. Deets testifies that he commenced the preparation of a detailed market study upon joining the company. Yet the study followed the company's already announced projects in Santa María del Río, Veracruz, and Tamaulipas⁵⁵).

45. Mr. Alan Borner also joined the Board in November of 1992. He was also experienced in the hazardous waste business. He lasted for one year before he resigned (two months after voting against the COTERIN acquisition)⁵⁶.

46. Mr. Robertson, the former Chairman of Metalclad's Board, testifies in this regard:

19. I have been directed by counsel for the United Mexican States to Mr. Kesler's claim in his first witness statement that Metalclad had done over "One Billion Dollars worth of environmental contracting". However, Metalclad was not a waste management company or a developer of environmental projects as such. Its only connection with environmental contracting experience was its asbestos abatement work which had little to do with waste management or developing and operating hazardous waste facilities.

⁵⁴ Mr. Fahs (the company's "Director of Development") and Mr. Tuckett ("Director of Engineering"), both of whom were hired before Deets, were Mr. Kesler's old business associates from "Development Associates", a real estate development company they operated in Salt Lake City. See Exhibit 2 which identifies Messrs. Kesler, Fahs, Tuckett and Development Associates Inc. (among others) as co-defendants in a civil action for "fraud in connection with sale of securities and real estate investment." Also see Exhibit 3 where Kesler, Fahs, Tuckett and Development Associates Management, Inc. (among others) are named as co-defendants in a civil action for "breach of contract and damages". Mr. Elgin Williams, Metalclad's Director of Investor Relations, was another of Mr. Kesler's long-standing associates, knowledgeable in the art of stock promotion.

⁵⁵ Mr. Deets' claim that he performed the market study is inconsistent with the evidence of Mr. Hermosillo who testifies that it was he and his staff who did extensive market studies in connection with Eco-Administración.

⁵⁶ Rejoinder witness statement of Alan Borner.

20. With respect to the projects in Mexico, I advocated that the best approach would be for Metalclad to enter into a joint venture with a larger company with experience in the area. In my view, Metalclad had neither the financial strength nor the experience necessary to undertake the project. For that reason, for much of the time that I was associated with Metalclad, I worked on identifying and negotiating with potential joint venture partners.

21. After Lee Deets joined the company in the summer of 1992, I tended to defer to his approach due to his apparent experience in developing similar businesses. However, I recall that, at the outset, he shared my view that we should seek an experienced joint venture rather than do it alone⁵⁷. [emphasis added]

47. With respect to the argument made in paragraph 91 of the Reply that it “can reasonably be assumed that Respondent undertook... an investigation” (of Metalclad) and that “it expressed no serious misgivings at those earlier, more apropos junctures and continues presently to deal with Claimant in other projects” and therefore it acquiesced and should be estopped from raising these matters, the Respondent has the following observations:

- First, newly discovered evidence explains why the company’s *bona fides* were not explored at the outset.
- Second, the officials who inherited the file, such as Secretary Carabias and Attorney General Azuela, had no reason to believe that Metalclad was not as it had represented itself to be⁵⁸.
- Third, the State did attempt, albeit without much success, to determine how Metalclad obtained its permits and did try to ascertain the company’s experience and *bona fides*⁵⁹. The Governor raised these matters with the United States Ambassador.

⁵⁷ Rejoinder witness statement of Ronald Robertson at paragraphs 19-21.

⁵⁸ In both of their first statements, Secretary Carabias and Attorney General Azuela testified that they thought Metalclad was an experienced hazardous waste disposal operation.

⁵⁹ See for example the Counter-Memorial witness statement of Horacio Sánchez Unzueta at page 6. The Respondent notes that the availability of information which “would have made Respondent’s inquiry relatively effortless” implies that it was the Respondent’s responsibility to conduct its own inquiries, rather than Claimant’s obligation to have appropriately informed the relevant authorities as to these issues. It also implies that the Respondent was somehow bound to conduct such inquiries in another country and pursuant to foreign law, given “the high degree of disclosure required by U.S. law”, and assumes a greater sophistication of foreign corporate and securities law that foreign non-lawyers unaccustomed to performing due diligence in the U.S. would possess. Indeed the Claimant makes these allegations after having intentionally misled Mexican officials (just as it has attempted mislead this Tribunal), as to its experience and expertise.

48. It was not until the Claim was filed that the Respondent scrutinized the company's claimed experience in greater depth.

4. The Claimant was Introduced to the Mexican Investments by a Neighbour, not by Mexico

*Memorial: Metalclad invested in Mexico after being invited to do so by senior Mexican officials*⁶⁰

49. The Memorial made repeated references to invitations allegedly made at the highest levels of the federal government⁶¹. It implied strongly that COTERIN was Metalclad's first major Mexican investment.

Counter-Memorial: Mr. Kesler and Mr. Robertson invested in Mexico in July 1991 (and Metalclad acquired their investment four months later), over two years before Metalclad acquired COTERIN

50. The Counter-Memorial demonstrated that Metalclad's acquisition of its interest in COTERIN was preceded by its acquisition of an interest in Eco-Administración on November 20, 1991 and interests in Descontaminadora and Eliminación in 1992⁶².

*Reply: Acknowledged that Metalclad had invested in Eco-Administración, Descontaminadora, and Eliminación prior to acquiring COTERIN but reaffirmed that senior officials encouraged Metalclad to invest in COTERIN*⁶³

51. Mr. Kesler admitted to some earlier involvement in the hazardous waste projects (he corrected his first statement to admit that he developed his interest in the fall of 1990) and states that some work was done with the engineering firm of Ford, Bacon & Davis⁶⁴.

⁶⁰ Memorial, Summary of Facts, p. 49: "...the federal government invited, encouraged, promised, assured, licensed and permitted Metalclad's landfill project".

⁶¹ Memorial at paragraph 13. Note that the assertion that Metalclad had "studied the hazardous waste needs with a view toward entering the market under appropriate conditions" is misleading. By October 1992, Metalclad had already announced Eco-Administración, Descontaminadora, and Eliminación to investors.

⁶² Mr. Kesler and three other Americans became shareholders in Environ Technologies, Inc. (ETI) on July 17, 1991. ETI was subsequently sold to Metalclad on November 20th. It was later renamed Eco-Metalclad.

⁶³ Memorial, Declaration of Grant Kesler; p. 1:

"During 1992 we attended a conference in New York City sponsored by Mexico. One of the primary speakers was Santiago Oñate, who invited us to come to Mexico to make investments in the environmental field."

In the same statement, Kesler also states that in the same year during the course of a conference in Boston, Dr. Reyes Luján and René Altamirano invited Metalclad to come to Mexico and offered their support and help to do so.

⁶⁴ Reply, Exhibit 15, witness statement of Grant Kesler at paragraph 24.

52. The Reply continued to plead that invitations were made. Lee Deets testified, for example:

“In the Spring of 1993, after numerous meetings with federal environmental officials, Metalclad signed an option agreement for the purchase of COTERIN and La Pedrera. COTERIN had already acquired the federal operating permit and state use of land permit by that time. Federal officials encouraged Metalclad’s efforts to establish a hazardous waste management facilities [sic] in Mexico, and especially in San Luis Potosí, and we consulted them on every step of the way.”⁶⁵

Rejoinder: Metalclad’s Chairman Confirms that Metalclad was Not Invited by Mexico

53. The evidence of Metalclad’s former Chairman of the Board is that Mr. Kesler became interested in the Mexican hazardous waste business *not* because of the blandishments of senior officials, but rather because of the fact that his neighbor, Reed Warnick⁶⁶ in Salt Lake City, who had worked for the engineering firm Ford, Bacon & Davis (which had earlier considered entering into a joint venture with Jorge Hermosillo and the other Mexican investors) introduced him to the idea⁶⁷.

54. Mr. Robertson testifies:

14. Mr. Kesler became aware of what would become Metalclad’s first step into the Mexican hazardous waste business from Terry Douglas and Reed Warnick, two acquaintances of his from Salt Lake City. Both had worked for the engineering consulting firm Ford, Bacon & Davis. I was advised that Ford, Bacon & Davis had considered the possibility of a joint venture in Mexico for Mr. Jorge Hermosillo (a future shareholder of what would become Eco-Administración) and Mr. Douglas and Mr. Warnick were convinced that there was a market for hazardous waste incinerating services.

15. Ford Bacon & Davis declined to pursue the opportunity. Douglas and Warnick subsequently left the company and pursued the opportunity themselves.

16. At this time, to my knowledge, Mr. Kesler had no previous experience in the hazardous waste disposal industry at all. Nor did I. However, given his

⁶⁵ Reply, Exhibit 9, witness statement of Lee Deets at paragraph 53.

⁶⁶ See Rejoinder Exhibit 4, which shows where they lived in relation to each other.

⁶⁷ Rejoinder witness statement of Ron Robertson.

background, he considered himself to be skilled at raising money.

17. In the spring of 1991, Warnick and Douglas visited our offices in Anaheim, California, and elaborated upon their plans for the construction of a hazardous waste incinerator in San Luis Potosí. To the best of my recollection, Ron Helm may have attended one or two of the meetings but he did not share the excitement about the project's potential in Mexico and decided not to participate in Environ Technologies, Inc. (ETI), a company that Douglas and Warnick incorporated in May 1991 together with their wives. At this time, the project was viewed as a potential Merchant House project.

18. I understood that Jorge Herмосillo, the man who led the group of Mexican investors (whom I had not yet met), had worked with an investor from Texas who decided to withdraw from the project. Mr. Herмосillo needed to purchase a site which could be designated as the place at which the incinerator would be located (for permitting purposes) and needed additional funds for studies necessary to obtain the permits⁶⁸.

55. Robertson's evidence is echoed by that of Jorge Herмосillo:

4. The joint venture was between two groups: (1) the "Mexican Group", consisting of myself, Jaime de la Fuente Mora, José Rodríguez, and Luis Javier Campos Herмосillo which held 51%; and (2) the "American Group", consisting of Terry Douglas, Reed Warnick, Grant Kesler and Ronald Robertson. The American Group also subscribed for 49% of the shares in Eco through a company called Environ Technologies, Inc. ("ETI") which they had incorporated in the State of Utah. Two percent of the shares were put in a trust. The American group later sold their shares in ETI to Metalclad and ETI's name was changed to Eco-Metalclad. Soon after the ETI shareholders sold their shares to Metalclad, Terry Douglas and Reed Warnick had a disagreement with Grant Kesler and left the company.

7. I had met with a number of other potential joint venture partners before entering into the joint venture

⁶⁸ Ibid.

agreement with the American Group. They included Peyton McKnight (an investor from Texas), Tyler Environmental Inc., and the engineering firm of Ford, Bacon & Davis. Terry Douglas and Reed Warnick were employees of Ford, Bacon & Davis. They introduced me to Grant Kesler. They told me that Mr. Kesler was interested in the project and had the capital that we required⁶⁹.

56. Exhibit 4, a map of their neighborhood in Salt Lake City, demonstrates that Messrs. Warnick and Kesler were (and remain) neighbors.

57. Eco-Administración's creation was the first step into the hazardous waste disposal business by Mr. Kesler and his colleagues. As the Tribunal will see, from the very beginning Mr. Kesler and his colleagues were improperly associated with the permitting process through a senior Mexican environmental official.

5. The Claimant had a Relationship With Humberto Rodarte Ramón While he was a Federal Official

Memorial: Metalclad at all times conducted itself in an ethical and lawful fashion

58. The Memorial emphasized the lawfulness of the company's conduct: "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 Potosí, have confiscated Claimant's investment"⁷⁰. It portrayed itself as a victim of "artifice, obloquy, prejudice, misrepresentation and duress to deny the Company's lawful rights"⁷¹.

Counter-Memorial: Metalclad misled the Tribunal and its investors and engaged in unethical acts

59. The Counter-Memorial asserted that Metalclad misled the Tribunal on material facts both through misstatement of facts and through the omission of material evidence.

60. The Counter-Memorial set out a number of examples where Metalclad's pleadings were contradicted by documents of its own making, where its Memorial had mixed together discrete events in order to support its story, and where misstatements and material omissions of fact were made⁷².

⁶⁹ Rejoinder witness statement of Jorge Hermosillo.

⁷⁰ Memorial at paragraph 5, page 41.

⁷¹ Memorial at paragraph 3, page 41.

⁷² See Counter-Memorial paragraphs 140 to 153.

61. However, at the time that the Counter-Memorial was finalized, the Respondent was unaware of the true nature of Metalclad's relationship with certain federal officials.

Reply: Reaffirmed Metalclad's high standard of conduct and portrayed itself as an innocent victim of corruption

62. The Reply declared that the Respondent's contentions that:

“...Claimant was insufficiently experienced, financially incapacitated, provocative, daring and corrupt are falsehoods offered by Respondent directly or by insinuation.”⁷³

63. The Rejoinder will prove that, if the Counter-Memorial had a shortcoming, it was that it failed to link together different pieces of damaging evidence whose relationship is now much clearer.

64. The Reply went on to state in even stronger terms:

“92. Respondent's pretext for sponsoring its wide-ranging defamation of Claimant's officers apparently is that the otherwise substandard treatment which Claimant has received is, as a matter of legal causation, attributable to Claimant's own desperate and unscrupulous deeds. Presumably, if Claimant's officers are shown to have acted dishonestly, then it can be moreover asserted that their accounts generally should be discredited.

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

‘It can be said with some certainty... that the more startling the proposition that a party seeks to prove, the more rigorous the arbitral tribunal will be in requiring the proposition to be fully established. [citing Redfern & Hunter]’⁷⁴ [emphasis added]

⁷³ Reply at paragraph 14.

⁷⁴ Reply at paragraphs 92 and 93.

65. The Respondent is fully prepared to have the evidence that follows evaluated in accordance with the standard set out by Redfern & Hunter (since most of the evidence is of Metalclad's own making, this is not difficult to do).

66. In response to the evidence of its former legal counsel (whom it had accused of a serious conflict of interest) that Grant Kesler had asked him to bribe Governor Sánchez Unzueta to solve the problem of local opposition, the Reply declared:

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

116. By contrast, if the literature concerning Mexico is to be credited, a preponderance of anecdotal data suggests that the solicitation of bribes and similar inducements alleged by Claimant are all too plausible. [emphasis added]

67. The Tribunal should take note of the wording of Reply paragraph 116 which implies that Metalclad's experience with corruption is derived from its review of the World Bank Study.

Rejoinder: Evidence of Metalclad's own making shows payments based on the Mexican Federal permitting process.

68. The Respondent observes that Reply paragraph 115 cited above does not deny the Respondent's allegation but rather describes Mr. Kesler as being "unlikely" to take the risk of offering a bribe.

69. While preparing the Rejoinder, the Respondent discovered documentary evidence indicating that Metalclad effected payments to a Mexican official or persons with close ties to them, contemporaneously with the issuance of federal permits. The documents are signed by Grant Kesler.

70. The relationship with the Mexican official actually pre-dated Metalclad's involvement in COTERIN and was established when Grant Kesler and his "American Group" invested in Eco-Administración in the summer of 1991.

71. Jorge Hermosillo was one of the original investors in Eco-Administración as well as two other companies that would become Metalclad affiliates, Descontaminadora de Veracruz, S.A. de C.V. and Eliminación de Contaminantes Industriales, S.A. de C.V. He was General Director of the latter companies, and for a short time, a director of Metalclad. Mr. Hermosillo and Mr. Kesler disagreed over a number of issues relating to the Mexican projects. The evidence is that as Mr. Kesler sought to acquire control of Eco-Administración and the other two companies, he

accused Mr. Hermosillo of embezzlement and, with the assistance of his Mexico City legal counsel, Manuel García Barragán, ousted him from the companies⁷⁵.

72. As the Tribunal knows, Metalclad's first investment in Mexico was the acquisition of a 49% interest in a company called Eco-Administración. This interest was acquired as follows:

- Mr. Kesler acquired control of Metalclad on February 28, 1991. On July 17, 1991, he, together with Reed Warnick, Terry Douglas, and Ronald Robertson, became shareholders in a Utah corporation called Environ Technologies, Inc. (ETI)⁷⁶.
- ETI entered into a Joint Venture Agreement with Mexican investors on July 25-26, 1991⁷⁷. Mr. Kesler and Mr. Warnick and a group of individuals known as the "Mexican Group" (Jorge Hermosillo, Jaime de la Fuente, Javier Campos Hermosillo, and José Rodríguez Rodríguez) signed the Joint Venture Agreement.
- One of the American Group's express obligations was to finance the joint venture. It agreed to pay a company called Grupo CIMA \$65,000 (US) for the preparation of an environmental impact study⁷⁸.
- On August 14, 1991, the company contemplated by the Joint Venture Agreement, Eco-Administración, was incorporated. Eco-Administración was to develop a hazardous waste incinerator in Santa María del Río, San Luis Potosí⁷⁹.
- When Eco-Administración was incorporated by the Notary Public, a Ms. Lucía Rátner Díaz González joined as a subscribing shareholder⁸⁰.

⁷⁵ Rejoinder witness statements of Jorge Hermosillo and Ronald Robertson. In response to the Respondent's March 24, 1999 request for documents relating to the allegations of embezzlement made against Hermosillo (such as instructions to counsel, civil or criminal complaints, reports to auditors, etc.), Metalclad responded on April 8, 1999 that: "This statement is false. The request is, therefore, irrelevant." It appears therefore that there was no basis to the allegation of embezzlement.

⁷⁶ Warnick and Douglas incorporated ETI on May 21, 1991. Mr. Kesler and Mr. Robertson became shareholders on July 17, 1991. Warnick and Douglas had worked for Ford, Bacon & Davis, an engineering firm that did some work on the ECO project in Mexico. Douglas, who lived at 3666 Brighton Point Drive, was a neighbor of Mr. Kesler who lived at 3739 Brighton Point Drive. See Exhibit 4.

⁷⁷ Rejoinder, Exhibit 1 to the witness statement of Jorge Hermosillo – Joint Venture Agreement, July 25-26, 1991.

⁷⁸ The Respondent observed that in a Metalclad document entitled "CONFIDENTIAL PROJECT TEAM AMANGEMENT REPORT, DECEMBER 1992", the company spoke of the way in which CIMA was assisting it in dealing with permit issues with SEDESOL. The Respondent requested production of "all written communications to and from Grupo CIMA by Metalclad or by any of its Mexican subsidiaries/affiliates (including ETI) from August 14, 1991 to December 31, 1997." Metalclad claimed not to have heard of Grupo CIMA. It was for this reason that the Respondent refreshed Metalclad's recollection and on April 14, 1999 requested the Tribunal to direct Metalclad to produce the documents related to Grupo CIMA.

⁷⁹ Rejoinder, Exhibit 2 to the witness statement of Jorge Hermosillo – Deed of Incorporation of Eco Administración, S.A. de C.V.

⁸⁰ Ibid, pp. 1, 23-4.

73. At the time that Eco-Administración was incorporated, Dr. Humberto Rodarte Ramón was the sub-delegate for the federal environmental agency SEDUE in the State of San Luis Potosí.

74. In December 1998, the Respondent discovered that Lucía Rátner is Mr. Rodarte's wife⁸¹.

75. The Tribunal will recall that the Memorial, the Reply, and Messrs. Rodarte's and Kesler's witness statements all leave the impression that Mr. Kesler met Mr. Rodarte for the first time in early 1993 (this evidence will be examined in greater detail below).

76. The evidence now shows that from the beginning, *before Metalclad even acquired ETI*, Mr. Kesler and his associates were associated with Mr. Rodarte (the Respondent will adduce evidence of further payments by Metalclad to Ms. Rátner below.)

6. Metalclad had been Active in Mexico Since 1991

Memorial: Downplayed its previous activities

77. The Memorial implied that the COTERIN investment was Metalclad's first:

13. Metalclad officers first met Mexican federal officials at a conference in New York City in October of 1992. Sr. Sergio Reyes Luján, 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 towards 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)⁸². [emphasis added]

78. Mr. Kesler went somewhat further, testifying that the company's interest in Mexico "began in the Fall of 1991". He stated that for the remainder of that year and 1992, the company "worked on a project with some executives at Ford, Bacon and Davis... who wanted to build a

⁸¹ In his witness statement to the Memorial, Mr. Humberto Rodarte Ramón states that he was employed by SEDUE in 1986 (p.1) until February 1992, when he went to Mexico City to serve as the Technical Coordinator of the Integrated Border Environmental Plan.

⁸² This is false. By October 1992, Mr. Rodarte, a senior Mexican federal official, was already associated with Mr. Kesler/Metalclad for over a year. It is also contradicted by Dr. Reyes Luján's statement which states that he met Metalclad representatives starting in 1991.

hazardous waste incinerator at San Luis Potosí, Mexico”⁸³. He then goes on to note that he met with high-ranking officials who “invited us to come to Mexico and offered their support and help if we would do so”⁸⁴.

Counter-Memorial: Pointed out that Mr. Kesler had been active in Mexico since July 1991

79. The Counter-Memorial adduced evidence that three months after Eco-Administración was incorporated in August 1991 (following the July signing of the Joint Venture Agreement), Mr. Kesler arranged for the sale of ETI to Metalclad. This occurred by an agreement, dated November 20, 1991, whereby Messrs. Kesler, Douglas, Warnick and Robertson exchanged their shares of ETI stock for Metalclad shares. Mr. Kesler obtained 860,000 shares, Warnick and Douglas received 100,000 each and Robertson received 140,000 shares. As Mr. Dages noted in his first report, a lucrative consulting contract was also entered into by these four individuals and Daniel Neveau (who had joined Metalclad’s Board on July 30, 1991 but had no involvement with ETI). Mr. Dages calculated that the acquisition cost Metalclad over 5 million dollars even though Metalclad’s auditors later concluded that ETI’s assets and liabilities were “insignificant”⁸⁵.

80. The Counter-Memorial also noted that Metalclad obtained interests in two Mexican corporations proposing to develop hazardous waste facilities in the States of Veracruz and Tamaulipas: known, respectively as Descontaminadora and Eliminación.⁸⁶

Reply: Admitted that Mr. Kesler and Metalclad had been active in Mexico from 1990

81. Mr. Kesler corrected his witness statement at the outset to note that he had actually been interested in the Mexican hazardous waste business dating back to 1990⁸⁷.

82. The Reply itself did not address this issue. In its Admissions and Denials, however, the Claimant responded paradoxically thus:

Pleading from Counter-Memorial:

Prior to joining Metalclad, Mr. Kesler, another Metalclad director, Mr. Ronald Robertson, and two other individuals were shareholders in a privately held company called Environ Technologies Inc. (ETI). On July 21, 1991, ETI, together with Mr. Kesler and another shareholder, Reed T. Warnick, entered into a contract

⁸³ Note the implication that it was the Ford, Bacon executives only who wanted to build an incinerator. In fact, he was the dominant shareholder in the American Group which included the two former Ford, Bacon associates.

⁸⁴ Memorial witness statement of Grant Kesler at pages 1-2.

⁸⁵ Counter-Memorial, Expert Report of Kevin Dages at paragraph 6.14 and Exhibit 10(A) to the Counter-Memorial at page F-9 (10K for the year ended December 31, 1991).

⁸⁶ Counter-Memorial at paragraph 255.

⁸⁷ Reply, Exhibit 16, witness statement of Grant Kesler at paragraph 2A .

with a group of Mexican investors to form a company called Eco-Administración S.A. de C.V. The Mexican investors had been applying for the necessary federal permits for a hazardous waste treatment facility including an incinerator, to be located in Santa María del Río, SLP. They had also applied for the local and municipal permits for the facility. Eco-Administración was duly incorporated on August 14, 1991.

Metalclad's Response: Admitted in part.

Pleading from Counter-Memorial:

Thus, contrary to Mr. Kesler's implication that Metalclad invested in Mexico after Mexican officials invited it to do so in 1992-93, ETI and Mr. Kesler personally had already invested in Mexico as of July 1991. Mr. Kesler then arranged to sell his and ETI's interest in Eco-Administración to Metalclad four months later.

Metalclad's Response: Denied.

Rejoinder: The Metalclad Reply is still misleading

83. The Claimant's admissions and denials quoted above illustrate how Metalclad still seeks to mislead the Tribunal.

84. The Tribunal can see from the evidence in the Counter-Memorial and the additional evidence set out in the following sections that the Memorial and Mr. Kesler's accounts were misleading. It will see that by October of 1992—the month that Mr. Kesler claims to have met Dr. Reyes Luján for the first time—Metalclad had 49% interests in Eco-Administración, Descontaminadora, and Eliminación, and was seeking to buy out its Mexican shareholders in those companies.

85. Metalclad's efforts in Mexico from November 1991 until it acquired the COTERIN option on April 23, 1993, were concerned entirely with the promotion of these three projects.

7. After Metalclad Took Over ETI, Mr. Kesler Steered Eco-Administración Toward an Unsuccessful Relationship with Molten Metal Technology, Inc. (MMT)

Memorial: There was no mention of this

86. As it downplayed Metalclad's activities in Mexico prior to its acquisition of COTERIN, there is no mention of this.

Counter-Memorial: Pointed out that Metalclad established a relationship with MMT

87. The Respondent considered that Metalclad's activities in Mexico in the period November 1991-April 1993 were highly relevant because during this time, Mr. Kesler made repeated announcements about the excellent prospects for the company's various projects⁸⁸. Such announcements reasonably could be expected to have increased investor interest in the company's stock⁸⁹.

Reply: Denied the relevance of Metalclad's other Mexican projects

88. The Reply did not address this either. However, in its Admissions and Denials, the Claimant, although admitting the involvement in other projects, denied their relevance⁹⁰.

89. At the same time, the Reply argues that virtually all of the moneys allegedly spent by Metalclad in connection with those projects should be considered as pre-acquisition or project development costs associated with COTERIN⁹¹.

Rejoinder: The new evidence assists in explaining why, after over two years of promotion, Metalclad proceeded with the COTERIN project even though its management was fully aware of the site's troubled past

90. As originally conceived, the Santa María del Río project was to use the proven rotary slagging kiln technology. However, after Metalclad acquired its interest in ETI, disagreements arose over the technology to be used. Douglas, Warnick and Hermosillo wanted to stick with the rotary slag kiln⁹².

91. The evidence is that Mr. Kesler considered that a new and commercially untested "catalytic extraction processing" (CEP) technology under development by Molten Metal Technology (MMT) of Massachusetts was superior to the proven rotary slagging kiln technology. MMT's promise was not unlike alchemy: out of hazardous waste, its technology

⁸⁸ In addition, Mr. Dabbene now claims that Metalclad was a project development company and hence claims virtually all of the expenses associated with the three pre-COTERIN companies as lost expenditures in the proceeding. See Dabbene statement at pages 2 - 4.

⁸⁹ Mr. Kevin Dages' first report listed the press releases that Kesler issued about the many Mexican projects, proposed financing arrangements and joint ventures that Metalclad announced beginning in November of 1991 but which did not transpire. An understanding of these events assists in explaining why Metalclad later pressed to open the La Pedrera site. First Dages Report at paragraph 1.5 and paragraphs 9.4 and 9.7.

⁹⁰ See, for example, paragraph 255. Mr. Dabbene however considers them relevant enough to include them in the alleged expenditures.

⁹¹ See the Reply witness statement of Anthony Dabbene at pages 2-4 and the Reply AAA Report at paragraphs 244-253. See also Mr. Dages second expert report for a detailed analysis of the claimed expenditures.

⁹² Rejoinder witness statement of Jorge Hermosillo at paragraph 18.

would recover valuable products such as precious metals⁹³. Mr. Robertson testifies that Kesler stated that he thought that MMT's technology was superior to that of the rotary slag kiln⁹⁴.

92. Thus, in December, days after the ETI shares were exchanged for Metalclad stock and Mr. Kesler (and Mr. Neveau) thereby gained control over ETI and its 49% interest in Eco-Administración, he pushed for the use of Molten Metal's technology. On December 6, 1991, Mr. Kesler wrote to Mr. Hermosillo (on Metalclad letterhead) stating:

It is extremely important that our agreement with MMT be split into two parts: one for San Luis Potosí and one for everywhere else. The reason is we did not agree to give Metalclad anything except San Luis Potosí and we want to keep the potential of MMT to ourselves, as I believe it will have enormous value in the future⁹⁵. [emphasis in the first part in the original; emphasis in the latter added]

93. There was a subsequent letter from Mr. Kesler to Mr. Hermosillo on January 3, 1992 concerning the appropriateness of this agreement. Mr. Hermosillo testifies that he thought that the company, rather than he and Mr. Kesler, should enter into the agreement. Mr. Kesler responded that, pursuant "to your request, Ron Robertson has reviewed this letter and confirms his agreement with and approval of its terms"⁹⁶.

94. Mr. Robertson testifies that:

46. I have no recollection of reviewing this letter or approving of its terms. I did not even know of the existence of the second MMT agreement until some time later.

47. In any event, Metalclad's relationship with Molten Metal did not stay positive for very long. The technology was not as well developed as they had represented to Metalclad and we were not paying their bills for the market studies that they were undertaking. I recall that prior to entering into the Eco-Administración/MMT agreement, I had heard that MMT had a working prototype in operation somewhere. I had urged that we visit the site and inspect it. Jorge Hermosillo advised me that there was a demonstration

⁹³ MMT's stock promotion turned out to be as ill-founded as Metalclad's. The company went into bankruptcy and gave rise to a political scandal in Washington.

⁹⁴ Rejoinder witness statement of Ronald Robertson at paragraph 43.

⁹⁵ Rejoinder, Exhibit 7 to the witness statement of Jorge Hermosillo.

⁹⁶ Rejoinder witness statement of Jorge Hermosillo at Exhibit 8.

for investors at a location in Houston and that, in his view, it was a failure.⁹⁷

95. Mr. Hermosillo testifies as to the same events:

19. I have been asked to explain the circumstances surrounding the execution of a licensing agreement with Molten Metal Technology, Inc. ("MMT") that counsel has shown to me (Exhibit 5). In the latter part of 1991, Mr. Kesler proposed that Eco use a new process under development by MMT that, if it worked, would enable us to recover and recycle various waste products and reduce or eliminate emissions that would otherwise be produced by an incinerator. Mr. Kesler repeatedly told me that he thought this technology was very promising and could be extremely valuable once it had been successfully used in a commercial hazardous waste facility.

20. Terry Douglas and Reed Warnick opposed using the MMT process because it was still under development. They preferred to use rotary slagging kiln technology because it had been used for years in the U.S. and Europe and its capabilities and costs were well known. As indicated in the minutes of a meeting we held with them in late November 1991, in the absence of Mr. Kesler (Exhibit 6), I initially agreed with them.

21. Mr. Kesler later persuaded me that the MMT process had enough potential value that we should enter into an agreement to try it at Santa María del Río to see if it was commercially viable. However, as indicated in his letter to me dated December 6, 1991 (Exhibit 7), he also wanted me to sign a licensing agreement whereby he and I would become the licensees of the technology for projects other than Santa María del Río.

22. I had some concerns about this and requested that he consult with Ron Robertson about the idea. I later received a letter dated January 3, 1992 which stated that Mr. Kesler had cleared the matter with Ron Robertson addressed my concerns (Exhibit 8). However, I do not know whether Ron Robertson actually reviewed the agreements as Mr. Kesler claimed at the end to the letter. As I recall, Terry Douglas and

⁹⁷ Rejoinder witness statement of Ronald Robertson at paragraphs 42-43.

Reed Warnick had by then severed their relationship with ETI.

23. In early January, I participated in a press conference in Washington D.C. where we announced the formation of Eco-Administración. At the time that this event was held, we had not seen MMT's technology actually operate. Shortly after the press conference in Washington, D.C. in January 1992, we went to Houston, Texas to see a pilot test of MMT's technology on a small scale. The demonstration was a complete failure⁹⁸.

96. Thus, in January of 1992, even though Metalclad had not yet viewed MMT's technology, Mr. Kesler and Mr. Hermosillo entered into two contracts (and an amendment contract) with Molten Metal Technologies.

97. The first, a January 7th agreement between Eco-Administración and MMT, was for a "concept design program" which would determine how MMT's technology could be applied to processing wastes at the proposed Santa María del Río facility. If the proposed facility was commercially feasible, the parties would negotiate an agreement between MMT and "ECO" (or its affiliated designee). In such event, ECO would pay a license fee, a tolling charge, and a resource recovery fee of 50% of gross revenues from the sale of recovered resources⁹⁹ (the January 7th agreement was amended on January 19th to make it clear that MMT would undertake "sales and market research regarding the nation of Mexico")¹⁰⁰.

98. The second agreement, between Mr. Kesler, Mr. Hermosillo, a yet to be formed company ("MEX") and Molten Metal, noted that under the January 7th agreement, if successful, the parties thereto would sign a "site License Agreement". If that occurred, the parties to the January 19th agreement would execute a "Master Agreement" between MMT and "MEX" (ten days after signing the January 7th MMT agreement, Mr. Kesler and Mr. Hermosillo entered into a separate agreement "on behalf of each of them (collectively the "Principals") and a yet to be formed corporation controlled by them ("MEX")"¹⁰¹). The purpose of this agreement was to allow Kesler, Hermosillo and "MEX" to interpose themselves between any facility that used MMT's technology in Mexico and MMT) and thereby extract a licensing fee.

⁹⁸ Rejoinder witness statement of Jorge Hermosillo.

⁹⁹ Clause 2(d)(iii) of "Agreement for Conceptual Design Program" (Exhibit 5(a) to the witness statement of Jorge Hermosillo).

¹⁰⁰ Rejoinder, Exhibit 5(b) to the witness statement of Jorge Hermosillo.

¹⁰¹ Rejoinder, Exhibit 5(c) to the witness statement of Jorge Hermosillo.

8. **Metalclad Became a Company Promoted By Press Release**

Memorial: The Memorial did not allude to the Company's statements to the market in 1991-92

99. Since the Memorial did not inform the Tribunal of the company's previous development efforts in Mexico, it did not address this issue.

Counter-Memorial: The Respondent pointed out the many misstatements that Metalclad made to the public and to investors

100. The Respondent found that when the documented events in Mexico were compared to the company's press releases issued in the United States, there was a pattern of misstatement. Metalclad regularly exaggerated and misrepresented the progress of its Mexican projects. The Respondent asserted that this explained why Metalclad persistently forced matters in Guadalcázar¹⁰².

Reply: Rejected this assertion and accused the Respondent of accusing Metalclad of securities fraud

101. The Reply alleged that:

Respondent avows that Claimant has manipulated the markets by issuing materially false press releases in an effort to drive its stock prices up, in part so that so-called "insiders" could redeem their holdings at inflated prices¹⁰³.

Rejoinder: In fact, there is extensive prima facie evidence of misstatements to the public markets

102. By issuing a stream of press releases promoting the company's Mexican ventures commencing in November 1991, Grant Kesler increased the company's stock price even though the vast majority of the initiatives that he announced never came to fruition¹⁰⁴.

103. From the beginning, Mr. Kesler was selective in his disclosure of the facts. For example, his announcement of Metalclad's November 20, 1991 ETI share acquisition was false. The Metalclad press release reporting the ETI-Metalclad deal reported:

The shareholders of ETI include Grant S. Kesler and Ronald E. Robertson, officers, directors and shareholders of Metalclad. Mr. Kesler, who became a director and shareholder of Metalclad in March 1991,

¹⁰² Counter-memorial at paragraphs 106-109 and 727.

¹⁰³ Reply at paragraph 121.

¹⁰⁴ Counter-Memorial, Expert Report of Kevin Dages

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and Robertson, who became an officer and director of Metalclad in July 1991, co-founded ETI prior to joining Metalclad with Reed T. Warnick and J. Terry Douglas¹⁰⁵.
[emphasis added]

104. While true in relation to Robertson (who joined Metalclad's Board after he became an ETI shareholder), the statement was false with respect to Mr. Kesler. He had been an officer, director, and shareholder of Metalclad for two and a half months before ETI was even incorporated and for five and a half months before he acquired his interest¹⁰⁶.

105. Starting in January 1992, Metalclad, under Mr. Kesler's direction, began to make a series of optimistic announcements to the market. The Respondent observes that during 1992, the Bush Administration was concluding the NAFTA negotiations and trade-related environmental issues were already being debated in the U.S. Congress and amongst U.S. opponents to the NAFTA. Mexico and the United States were involved in discussions about joint cooperation on environmental matters. Mr. Kesler repeatedly portrayed Metalclad as one of the answers to the problem. The evidence shows that this was an effective stock promotion¹⁰⁷.

106. On January 9, 1992, after signing the first MMT agreement, Metalclad and MMT held a press conference at the National Press Club in Washington, D.C. to announce its proposed 25 million dollar incinerator project at Santa María del Río. Mr. Kesler stated that the facility was expected to generate 150 million dollars annually. It was to be the first of ten plants, according to him, and the ten plants "will not even scratch the surface" of wastes that could be treated¹⁰⁸.

107. Mr. Kesler and MMT's representative both made expansive claims about the state of MMT's technology¹⁰⁹. The presentation informed the audience that CEP's technology was far advanced.

108. At the same press conference, Mr. Kesler also announced that Eco-Administración had, after four months of work, received a proposal from Chase Manhattan Bank to provide a 250 million dollars loan¹¹⁰.

¹⁰⁵ PRNewswire October 18, 1991, Exhibit 5.

¹⁰⁶ Similarly, in an interview with the Orange County Register, Kesler was reported to have said that "Environ Technologies has been working for two years with ECO, a Mexican corporation, to negotiate rights to build an industrial waste site near Mexico City." (Dow Jones News/retrieval October 19, 1991. Exhibit 19 to the Counter-Memorial). This too was false. Environ Technologies had been in existence for only five months and Eco-Administración for a little over two months when Kesler made this statement. This is strong evidence of a breach of fiduciary duty: Kesler misappropriated a corporate opportunity that should have accrued to Metalclad (this was not the only time that he did so).

¹⁰⁷ For example, Mr. Kesler stated in the interview with the Orange County Register (Exhibit 19 to the Counter-Memorial) on the ETI share acquisition that: "You only have to breathe deep around Mexico City to know they need help. The free-trade agreement is really propelling this because Mexico is realizing that unless they enforce their environmental laws there won't be free trade with the US and Canada".

¹⁰⁸ American Metal Market, January 14, 1992, Exhibit 6.

¹⁰⁹ Earlier correspondence from Kesler to Hermosillo stated: "By going forward with MMT, we will be able to discover whether or not the technology will work and obtain guarantees from Davy Dravo before we begin construction. We risk about \$300,000-\$500,000, but I am willing to take the risk."

109. Mr. Robertson was the Metalclad officer who was involved in the Chase Manhattan financing application. He testifies that:

52. Mr. Kesler also announced that [Metalclad] had "almost secured \$250 million in financing from Chase Manhattan Bank".

53. It is true that the company had put a proposal before the bank. I was in charge of doing so and worked with a Beverly Hills-based investment bank called Euro American Financial Corp. to put the proposal forward to the bank. Euro American submitted the proposal to Chase Manhattan in very broad conceptual form and got an initial favorable response. The bank said that this type of project was something that it might be interested in pursuing, assuming that the company met its lending requirements.

54. I recall receiving a lengthy document from the bank which we were required to complete. This was the first step to the formal consideration of the proposal. It was clear that in addition to having to provide large volumes of information, if the bank was to become involved, it was going to insist on assuming considerable control. Moreover, Mr. Kesler concluded that the financing terms were unattractive. Mr. Kesler then suggested that the Chase Manhattan Bank financing not be pursued for the time being.

55. Mr. Kesler's decision with respect to this initiative was typical of several proposed financings and joint ventures. These included Hughes Environmental Systems, Inc., McEwan & Shanks (a U.K.-based operator of hazardous waste facilities), Ensco, and Amoco. All were companies with whom I and other officers of Metalclad negotiated with a view to securing the access to capital and industry-specific expertise that Lee Deets and I believed Metalclad needed to develop hazardous waste facilities in Mexico.

56. Our January press conference on Eco-Administración was followed by announcements of two more joint ventures to build hazardous waste

Footnote continued from previous page

¹¹⁰ Rejoinder, Exhibit 7 (transcript of the press conference). See also Rejoinder, Exhibit 8, (Hazardous Waste News, January 13, 1992).

treatment facilities at Veracruz and Tamaulipas. Both companies, Descontaminadora Industrial de Veracruz, and Eliminación de Contaminantes Industriales, were also going to use MMT's CEP technology¹¹¹.

110. No press release was issued to inform the investment community that the 250 million dollar financing from Chase Manhattan Bank was not going to be completed.

111. This press conference received considerable press attention and, the company's stock price reacted accordingly. After the National Press Club announcement, Metalclad's stock jumped from 3.00 to over 5.00 dollars (it had moved up to the 3 dollar range after Metalclad's November 1991 announcement that it had acquired ETI).

112. For example, an article with the Orange County Register reported that Alexander L. Cappello, an "investment banker involved in the project... confirmed that a \$250 million [financing] proposal is in the final stages"¹¹².

113. One week following the press conference, Metalclad issued a press release stating that:

"ECO and Molten Metal Technology anticipate using CEP [Catalytic Extraction Technology] at up to seven central sites in Mexico, in order to address that nation's critical environmental priorities. The site in San Luis Potosí is the first newly permitted central site in Mexico, since Mexico adopted U.S. environmental standards, which establishes ECO as the premier new environmental firm in Mexico."¹¹³ [emphasis added]

114. On February 28, 1992, Metalclad issued another press release announcing its second "state-of-the-art-processing venture." This company, Descontaminadora Industrial de Veracruz, S.A. de C.V., according to the press release, would also use MMT's "cutting edge" CEP technology and "solidifies Metalclad's foothold in Mexico's promising hazardous waste processing industry"¹¹⁴. This was announced just days after the U.S. and Mexico announced a 1 billion dollar plan to clean up the border area environment¹¹⁵.

¹¹¹ Rejoinder witness statement of Ron Robertson at paragraphs 52-56.

¹¹² Orange County Register, January 10, 1992, Exhibit 16 to the Counter-Memorial. American Metal Market reported: "'Eco Administración will build the facility at a time when North American free-trade agreement talks have focused attention on Mexico's environmental protection record,' Grant S. Kesler, Metalclad's chief executive officer, told reporters. He said the waste-processing facility will be the 'first of its kind' in Mexico and 'will definitely meet U.S. environmental standards.'" American Metal Market, January 14, 1992, Exhibit 6.

¹¹³ Rejoinder, Exhibit 9, PRNewswire, January 15, 1992. Note that at the time this statement was made, ECO did not have all the necessary permits.

¹¹⁴ Rejoinder, Exhibit 10, PRNewswire March 2, 1992.

¹¹⁵ In this release, Metalclad also announced the change of ETI's name to Eco-Metalclad.

115. Mr. Hermosillo's testimony is that the demonstration of the CEP pilot project had been held by this time and it had been a "complete failure"¹¹⁶. Yet Mr. Kesler announced that the "revolutionary" CEP technology would be used by Descontaminadora as well as at Eco-Administración.

116. On April 20, 1992, Metalclad announced its third facility in the State of Tamaulipas (Eliminación de Contaminantes S.A. de C.V.)¹¹⁷.

117. While these three projects were being announced, Mr. Robertson was trying to find a joint venture partner. Mr. Robertson testifies that he believed (a view shared later by Lee Deets) that the company had insufficient experience and capital to be able to properly undertake the construction and operation of a hazardous waste incinerator. Therefore he advocated that a larger and experienced joint venture partner be found so that Metalclad could do a "lash up" agreement (and make use of the larger company's depth and greater resources)¹¹⁸.

118. Mr. Robertson spent much of his time in 1992 engaged in negotiations with a number of potential partners. He states that in each case, when the joint venture agreement began to take shape, he would report the emerging deal to Mr. Kesler and Kesler would conclude that the terms were not beneficial enough to Metalclad and he would instruct him to terminate the negotiations¹¹⁹.

119. During this time, Mr. Robertson testifies, he began to develop doubts about Mr. Kesler's business practices:

57. During this time, although I was developing misgivings about Mr. Kesler's way of doing business, I thought that the Mexican hazardous waste business had great potential. The environmental issue was front page news because of the NAFTA negotiations and there was considerable interest in a company that had big plans for Mexico.

58. As 1992 went on, however, I began to find that I would be asked to edit press releases, SEC filings, and so on, but after I made substantial edits, they would be ignored. I also found that I was more and more "out of the loop" as to what was really going on in the company¹²⁰.

¹¹⁶ Rejoinder witness statement of Jorge Hermosillo at paragraph 21.

¹¹⁷ Rejoinder, Exhibit 11, PRNewswire, April 20, 1992.

¹¹⁸ Rejoinder witness statement of Ronald Robertson at paragraph 41.

¹¹⁹ Ibid.

¹²⁰ Rejoinder witness statement of Ronald Robertson at paragraphs 57-58.

9. There was a Disagreement Arising from Metalclad's Initial Attempt to Buy Out the Mexican Group that Assists in Explaining the Push to Open COTERIN

Memorial: No mention

120. For the reasons set out above, there was no mention of these events.

Counter-Memorial: No mention

121. At the time that it filed the Counter-Memorial, the Respondent was unaware of the dispute between Metalclad and the leader of the Mexican Group, Jorge Hermosillo. There was no mention of this dispute and the related litigation in Metalclad's SEC filings that would have directed the Respondent to these events.

Reply: No mention

122. As the Respondent was unaware of the dispute, the Reply witnesses did not address the issue.

Rejoinder: The dispute between Messrs. Hermosillo and Kesler assists in explaining why Metalclad eventually decided to push the opening of COTERIN

123. As noted earlier, the November 1991 ETI acquisition gave Metalclad a 49% interest in Eco-Administración. In 1992, Mr. Kesler then sought to acquire the remaining 51% of the shares held by Mr. Hermosillo and his partners.

124. In May 1992, Metalclad announced that it had entered into an agreement in principle to acquire all stock not already owned in Eco-Administración¹²¹. Jorge Hermosillo, Jaime de la Fuente, and José Rodríguez "and certain other shareholders"¹²² reached an agreement in principle for the sale and purchase of 100% of the shares in Eco-Administración and subject to its completion, the three major Mexican shareholders were all to join Metalclad's Board of Directors¹²³.

¹²¹ Rejoinder, Exhibit 12, PRNewswire, May 19, 1992.

¹²² An oblique reference to Lucía Rátner and another shareholder, Javier Campos Hermosillo.

¹²³ The agreement in principle provided that: "Jorge Hermosillo Silva, Jaime de la Fuente, and José Rodríguez, who along with certain other minority shareholders own an aggregate of 51% of each of the Mexican Corporations, to acquire 100% of the shares of the Mexican Corporations in consideration of the payment of \$2,000,000 and the issuance of 2,000,000 shares of the Common Stock of the Company. The \$2,000,000 is payable \$500,000 at the closing of the stock acquisition, \$500,000 at the time construction of the San Luis Potosí plant is commenced, \$500,000 upon the commencement of commercial operations at the San Luis Potosí plant, and \$500,000 upon the commencement of commercial operations at the Veracruz plant... Upon the closing, which is expected to occur within six months, it is anticipated that Messrs. Hermosillo, de la Fuente, and Rodríguez will be elected to fill vacancies on the Company's Board of Directors." Counter-Memorial, Exhibit 10[B], Amendment No. 2 to application or report, dated July 8, 1992 at page 7.

125. The announcement that Metalclad had reached agreement to acquire 100% of Eco-Administración was false.

126. Jorge Hermosillo testifies that he did not agree to the proposal. He attaches to his statement a June 24, 1992 letter to the Mexican Group shareholders in which, subject to certain conditions, Metalclad proposed to buy them out. However, as the person who conceived the incinerator project, Mr. Hermosillo was not interested in the proposal and told Mr. Kesler so¹²⁴

127. As the Tribunal will see, the Kesler-Hermosillo dispute came to a head at the end of 1992.

10. Metalclad Failed to Make Progress in 1992 to Match its Public Announcements

Memorial: No mention

128. For the reasons set out above, there was no mention of this.

Counter-Memorial: Metalclad was unable to commence construction on any of the other plants that it announced.

129. The Counter-Memorial recounted the announcements made during 1992. Metalclad predicted that it would break ground for the construction of Eco-Administración's facility in Santa María del Río in September 1992 and would begin providing hazardous waste management services in late 1992. Construction at the Veracruz site would commence "as soon thereafter as the required permits are obtained"¹²⁵.

130. By mid-1992, instead of the "revolutionary CEP technology", Santa María del Río was back to using the rotary slagging kiln incinerator originally championed by ETI¹²⁶. The "newly developed, state-of-the-art, non-burn technologies such as the 'catalytic extraction process' developed by MMT" was now said to be planned for the third phase of the project¹²⁷. Disagreements arose with MMT over the Conceptual Design Program. MMT found that its bills were not being paid and Metalclad found that MMT's technology was not as developed as originally represented. Thus, the January 19th amendment agreement was suspended¹²⁸.

131. The Counter-Memorial pointed out that the company had financial problems during this time. The previously announced 250 million dollar Chase Manhattan Bank financing had been

¹²⁴ Hermosillo testifies that he agreed to transfer his shares only after Metalclad's lawyer organized an unlawful shareholders meeting and set in motion a series of actions intended to force him out of the company. This is discussed further below.

¹²⁵ Counter-Memorial, Exhibit 10[B], Form 8 dated July 8, 1992, at page 8.

¹²⁶ Ibid.

¹²⁷ Ibid, at page 9.

¹²⁸ Letter dated October 22, 1992 from Ethan Jacks to Grant Kesler; letter dated October 28, 1992 from Grant Kesler to Ethan Jacks, Exhibit 13.

abandoned and the company announced that: "Ground breaking is subject to developmental financing, which is currently being pursued with a major international financial institution"¹²⁹.

Reply: Did not respond directly to this evidence

132. The Reply did not deal directly with this evidence of Metalclad's three other projects that pre-dated COTERIN. Rather, the Claimant confined its response to admitting these facts, but denying their relevance¹³⁰.

Rejoinder: Metalclad failed to develop any of its three pre-COTERIN Mexican projects and had difficulties obtaining financing

133. The company was poorly financed. At June 30, 1992 it had working capital of only 88,000 dollars as compared to 1,925,000 dollars one year earlier¹³¹.

134. Mr. Robertson testifies that:

59. During 1992, Metalclad had serious financial problems. The company's bank, City National Bank, informed us in May that it intended to cut the existing credit facility. In addition, much larger losses were being generated. (By the end of September of that year, for example, the company's working capital was \$(678,000) as compared to \$1,215,000 the previous year. See Exhibit 5.)

60. During 1992, Metalclad sought to move up from its investment banker, Dickinson & Co. to what we considered to be a more prestigious firm. The Florida-based firm, Raymond Jones & Associates¹³² was approached. They did a lot of due diligence. Eventually they declined to do business with Metalclad. I was told by one of their people that they were concerned about the origins and circumstances surrounding Mr. Kesler's loan from the Glaziers Union Pension Fund. This only

¹²⁹ Rejoinder, Exhibit 12, PRNewswire, May 19, 1992.

¹³⁰ See, for example, the responses to paragraphs 252-261 of the Counter-Memorial.

¹³¹ In May, Metalclad's bank, City National Bank, informed it of its intention to withdraw from its credit arrangement with the company. Its June 30, 1990 accounts receivable loan, which gave the company a line of credit for 3,000,000 dollars at prime plus 1.625%, was reduced (the arrangement was extended to October 1992 with new terms: a reduction in the credit facility to 1,500,000 dollars on July 1, with further reductions on July 31, August 31, and September 30. In addition, the interest rate was raised to prime plus 3.625%). Exhibit 10[B] to the Counter-Memorial (Form 8 dated July 8, 1992) at page 5.

¹³² The firm's name is actually Raymond James & Associates.

served to increase my concern about my involvement with the company.¹³³

135. By September, 1992, the company's working capital was down even further. It was (678,000) dollars at September 30th as compared to 1,215,000 dollars one year earlier¹³⁴.

11. The Buy out of the Mexican Group

Memorial: No mention

136. The Memorial did not provide any evidence on this.

Counter-Memorial: No Mention

137. At the time of the filing of its first pleading, the Respondent was unaware of the significance of this event. Therefore, it did not adduce evidence on this matter.

Reply: No mention

138. The Reply did not provide any evidence on this.

Rejoinder: The buy out of the Mexican Group provoked a crisis and led Mr. Kesler to forge a closer relationship with Humberto Rodarte

139. Towards the end of 1992, Metalclad moved to acquire majority control of the Mexican affiliates in the hopes of being able to deliver three wholly-owned subsidiaries to a joint venture partner or to a company that would buy out the major Metalclad shareholders altogether.¹³⁵

140. In doing so, Metalclad faced a problem: in the bylaws of each of the three companies, the shareholders had divided the shares into two classes (series A for the Mexican Group and series B for the American Group) and there were restrictions on share transfers. Thus, the consent of the other shareholders and approval of each Mexican company's Board of Directors was required before shares could be transferred.

141. In addition to being the originator of Eco-Administración, Mr. Hermosillo incorporated Descontaminadora and Eliminación (this will assume greater importance below).

142. In late 1992, over Mr. Hermosillo's objections, Metalclad began buying out the Mexican shareholders in order to acquire control of Eco-Administración, Descontaminadora and Eliminación. Its subsidiary, Eco-Metalclad (the renamed ETI) entered into certain agreements.

¹³³ Rejoinder witness statement of Ronald Robertson.

¹³⁴ Form 10-Q for the quarterly period ended September 30, 1992 at page 5, Exhibit 14.

¹³⁵ Rejoinder witness statement of Jorge Hermosillo.

143. On November 23, 1992, Eco-Metalclad through its President, Grant Kesler, agreed to purchase 1,700 shares of Eco-Administración, 2,350 shares of Descontaminadora and 1,550 shares of Eliminación stock from a member of the Mexican Group, Jaime de la Fuente¹³⁶. De la Fuente thus became the first Mexican shareholder to sell his interest in the three companies¹³⁷.

144. Mr. Hermosillo testifies that he opposed the sale because it would effect a change in control and the company's bylaws restricted share transfers from the Mexican shareholders to the American shareholders without having first offering them to another Mexican shareholder¹³⁸.

145. Eco-Metalclad, through Metalclad's Mexico City counsel, Manuel García Barragán, then sought to convene a shareholders meeting to amend Eco-Administración's bylaws and approve the sale of the shares¹³⁹.

146. Mr. Hermosillo responded by filing a civil suit against ETI (Eco-Metalclad), seeking an injunction against alteration of Eco-Administración's bylaws, as well as damages and other relief. He also filed a criminal complaint against Mr. de la Fuente for purporting to sell his shares in unlawful circumstances¹⁴⁰. One or two days later, on Grant Kesler's instructions, he was expelled from Eco-Administración's office and the locks were changed¹⁴¹.

147. On January 5, 1993, Eco-Metalclad, through Grant Kesler, agreed to purchase 800 shares of Eco-Administración stock, 800 shares of Descontaminadora stock, and 800 shares of Eliminación stock from another member of the Mexican Group, José Rodríguez¹⁴².

148. On January 6, 1993, the Director of the Public Registry of Property and Commerce endorsed Eco-Administración's certificate of registration with a notice stating that the company was engaged in a lawsuit and that no changes could be made to the original terms of the company's deed of incorporation pending resolution of the lawsuit¹⁴³.

149. Mr. Hermosillo then received a letter from Metalclad's legal counsel, Bruce Haglund, accusing him, *inter alia*, of breaching his fiduciary duties to the company¹⁴⁴.

¹³⁶ Exhibit 15, Stock Exchange Agreement dated November 23, 1992. Eco-Metalclad was then renamed ETI.

¹³⁷ Rejoinder witness statement of Jorge Hermosillo at paragraph 32.

¹³⁸ Ibid.

¹³⁹ Rejoinder, Exhibit 18 to witness statement of Jorge Hermosillo.

¹⁴⁰ Rejoinder, Exhibit 19 to witness statement of Jorge Hermosillo.

¹⁴¹ Rejoinder witness statement of Jorge Hermosillo at paragraph 37. The Respondent observes that none of these events were disclosed to Metalclad's investors.

¹⁴² Rejoinder, Exhibit 16.

¹⁴³ Rejoinder, Exhibit 20 to the witness statement of Jorge Hermosillo.

¹⁴⁴ Rejoinder, Exhibit 21 to the witness statement of Jorge Hermosillo.

12. ^Q **Mr. Kesler Arranged for Direct Payments to Mr. Rodarte's Wife on the Issuance of Federal Permits**

Memorial: No mention

150. From what will be seen below, for obvious reasons, there was no mention of these transactions.

Counter-Memorial: The Respondent was unaware of these payments

151. At the time of the filing of the Counter-Memorial, the Respondent was unaware of the evidence which follows. It was not until December 1998 that the evidence was discovered.

Reply: No mention

152. The Reply did not address this evidence as it had not been included in the Counter-Memorial. However, the Reply devoted a chapter to defending the Claimant's *bona fides* and criticizing the Respondent for having the temerity to suggest that it had misrepresented its activities both to its investors and to the Tribunal.

Rejoinder: The new evidence of payments to Humberto Rodarte's wife and another individual

153. The two transactions unfold as follows: Towards the end of February 1993 (as the COTERIN opportunity arose), Grant Kesler entered into two share transactions.

154. First, on February 23, 1993, Eco-Metalclad, through Mr. Kesler, purportedly agreed to purchase from one José de Jesús de la Torre y Ortega 800 shares of Descontaminadora stock (400 of which were stated to be held by Jorge Hermosillo on his behalf and 400 of which were stated to be held by Jaime Antonio de la Fuente on his behalf) and 800 shares of Eliminación stock (stated to be held by Mr. Hermosillo on his behalf)¹⁴⁵.

155. As noted above, Mr. Hermosillo was involved in the incorporation of Descontaminadora and Eliminación. He testifies that José de Jesús de la Torre y Ortega was not a shareholder of either company and did not hold shares in either company for him¹⁴⁶, and therefore was not in a position to be able to sell shares in those companies¹⁴⁷.

14. I have been asked whether I know the identity of José de Jesús de la Torre y Ortega who, as indicated in a

¹⁴⁵ Rejoinder, Exhibit 4 to the witness statement of Jorge Hermosillo.

¹⁴⁶ Mexican law requires that shares be issued in the name of the holder, and that shareholders be registered in a shareholders' registry. It also requires that any transfer of shares be inscribed in the shareholders' registry and in the share certificate. Thus, as a matter of law, a person may not hold shares on behalf of another person. Mr. Hermosillo also testifies that he personally kept all share certificates, and only surrendered them to the administration upon transferring his own shares.

¹⁴⁷ Rejoinder witness statement of Jorge Hermosillo. See also the corporate records of Descontaminadora and Eliminación attached thereto as Exhibit 3.

share purchase agreement dated February 23, 1993 that counsel has shown to me (Exhibit 4), purported to sell to Metalclad 800 shares in Descontaminadora – consisting of 400 shares he claimed to hold on my behalf and 400 shares he claimed to hold on behalf of Mr. Jaime de la Fuente – and 800 shares in Eliminación that he claimed to own in his own right.

15. I state that I do not know who Mr. José de Jesús de la Torre y Ortega is. During the time that I was associated with the companies, there was no shareholder by that name in Eco-Administración, Descontaminadora, or Eliminación, nor did any person with that name have any connection, that I am aware of, with any of the three companies.

16. The deeds of incorporation of all three companies contained restrictions against the sale of shares without first offering such shares to the other shareholders holding the same series of shares. Moreover, the bylaws of each company also required the approval Board of Directors prior to the transfer of shares.

17. I was never asked, as a director or as a holder of Series A shares, to approve the sale or transfer of existing shares, or the issuance of new shares to Mr. José de Jesús de la Torre y Ortega or to any other person. In fact, in December 1992, just two months before the Eco-Metalclad-De la Torre share purchase agreement, in response to Metalclad's attempt to purchase the shares of the other members of the Mexican Group, I commenced a lawsuit against ETI (Eco-Metalclad) to prevent changes to the deed of incorporation, and I filed a criminal complaint against Jaime de la Fuente (a Class A shareholder of Eco-Administración) on the grounds that the purported sale of his shares to Eco-Metalclad had not been approved by the Board of Directors.

18. Moreover, to the best of my knowledge, neither Arturo de la Llave Uriarte or Juan Manuel Muñiz Navarrete (shareholders in Descontaminadora and Eliminación) sold or transferred their shares to Mr. José de Jesús de la Torre y Ortega or anyone else. I therefore believe that Exhibit 4 is a sham.¹⁴⁸

148

Rejoinder witness statement of Jorge Hermosillo.

156. It should be noted that the shares in Descontaminadora and Eliminación were worth very little. The companies were inactive shells and had virtually no assets. Yet Mr. Kesler entered into agreements whereby substantial amounts of Metalclad stock and cash would be transferred in exchange, upon the occurrence of specified events, notably the issuance of federal permits.¹⁴⁹

157. In fact, according to the deed of incorporation and the respective stock exchange agreement, Mr. Hermosillo owned 1,900 class A shares in Eco-Administración, 2,150 class A shares in Descontaminadora and 2,250 class A shares in Eliminación¹⁵⁰. He sold all of them to Eco-Metalclad on May 11, 1993, when he signed a settlement and withdrew from the various hazardous waste ventures¹⁵¹. Therefore, he did not transfer any to de la Torre prior to February 23, and de la Torre, in turn, could not have transferred them to Eco-Metalclad on that date.¹⁵²

158. At the time of the filing of this Rejoinder, the Respondent has not yet ascertained all of the facts surrounding the de la Torre transactions¹⁵³. The Respondent continues to investigate this matter.

159. In the next agreement, signed on February 24, 1993, Eco-Metalclad, through Grant Kesler, agreed to purchase 400 shares of Eco-Administración stock from Lucía Rátner.¹⁵⁴

160. At this time, Humberto Rodarte, Ms. Rátner's husband, was now the Special Advisor to Dr. Sergio Reyes Luján, the President of INE, the federal hazardous waste permitting authority¹⁵⁵.

¹⁴⁹ It was for this reason that on March 24, 1999, the Respondent requested production of "certified copies of the shareholders' registries and of all share certificates, whether provisional of (sic) final, for Eco-Administracion (and ECOPSA), Descontaminadora Industrial de Veracruz, S.A. de C.V.) Eliminacion de Contaminantes Industriales, S.A. de C.V. from their date of incorporation up to December 31, 1997. On April 8, 1999, the Claimant refused the request as "unduly burdensome, far-reaching and overly general". It also said that "Claimant cannot assure you, however, that such records exist or that they ever did." The Respondent therefore sought direction from the Tribunal on April 15, 1999. The Tribunal ordered their production on April 27, 1999.

¹⁵⁰ Rejoinder witness statement of Jorge Hermosillo, paragraphs 9 to 13.

¹⁵¹ Ibid, paragraph 44 and Exhibit 23.

¹⁵² There are other inconsistencies in the transfer of shares to the other members of the Mexican Group. For this reason too, the Respondent requested a certified copy of all shareholder registries and of all provisional and final share certificates of the three companies. After the Claimant declined to produce these, the Respondent applied to the Tribunal for directions to produce them.

¹⁵³ For this reason, on March 24, 1999, the Respondent requested production of "a complete list of all persons resident in Mexico who held an interest in registered or unregistered shares of Metalclad stock (whether restricted or freely tradable) from November 20, 1991, to December 31, 1997" in addition to documents concerning cash and share transactions involving de la Torre and the Claimant's relationship with Grupo CIMA (de la Torre was a shareholder in Group CIMA). Metalclad professed not to know of Grupo CIMA. The Respondent then directed Metalclad to its own documents which described CIMA as one of its consultants..

¹⁵⁴ Rejoinder, Exhibit 18. The Respondent has ascertained that Ms. Ratner was married to Humberto Rodarte. It requested production of her marriage certificate annexed to the Stock Exchange Agreement to prove that Grant Kesler was aware of that fact. On April 8, 1999, Metalclad informed the Respondent that it did not have a copy. On April 15, 1999, the Respondent requested the Tribunal to direct Metalclad to produce the document.

161. At the time of this transaction, Mr. Rodarte, according to Mr. Kesler's first witness statement and his own first witness statement, had just introduced Metalclad to the COTERIN opportunity¹⁵⁶.

162. By this time, Mr. Rodarte—who, the Tribunal will recall, was the official whom imposed the closure order on the La Padrera Site in 1991—had also entered into an agreement with the Aldretts to obtain a 100,000 dollar commission for arranging the sale of the site¹⁵⁷. Thus, while he was an official with the federal permitting authority, he was acting as an agent for both the Aldretts and Metalclad¹⁵⁸.

Footnote continued from previous page

¹⁵⁵ Rejoinder, Exhibit 19. Note that this is when Metalclad alleges it met Rodarte.

¹⁵⁶ Given that the other three projects were in disarray due to Hermosillo's resistance to the attempted take-over and the fact that Metalclad had made numerous statements about the imminent ground breakings for its Mexican facilities but had not yet commenced construction anywhere, COTERIN presented an opportunity to Mr. Kesler. It was cheaper to build a landfill than an incinerator and if Metalclad could keep control of Eco-Administración, it would own the would-be competitor to COTERIN in San Luis Potosi.

¹⁵⁷ In his first witness statement, Rodarte claimed that in February 1992, he became the Technical Coordinator of the Integrated Environmental Border Plan. He stated that his superior at the time was the Secretary of Social Development, initially Patricio Chirinos who was later substituted by Luis Donald Colosio. He claims to have sought the direction of both on promoting the sale of Aldrett's enterprise to U.S. investors, and the construction of a hazardous waste treatment site with state-of-the-art technology. He testifies: "Three or four different companies met with Aldrett as a result of my official efforts... I recommended Metalclad officers to meet with the Undersecretary and the Secretary of SEDESOL, who encouraged Metalclad to 'buy (this project)...". Memorial, declaration of Humberto Rodarte Ramón.

¹⁵⁸ Notwithstanding that in his first witness statement Mr. Rodarte claimed to have been working directly under the Secretary of Social Development, in his second witness statement he attempted to downplay his role as a federal official by "clarifying" the dates of employment and positions he held: "Prior to working for Metalclad, I held the position of Technical Coordinator for the Integrated Environmental Border Plan from September 1991 through May 1992. [This job was created through a plan called PAM (Environmental Program for Mexico), administered by SEDESOL through INE, funded through a World Bank concession]. Beginning on June 1992, I served as external consultant and special advisor to the president of INE. I held this position until May 1993" (the Tribunal will recall that in his first declaration he claimed that "In June 1993, Colosio and Governor Sánchez [sic] Unzueta met with Metalclad officers... SEDESOL sent me to the meeting between Metalclad and Governor Unzueta [sic]..."). In his second declaration he continued: "I am aware of the law and policy of the government of Mexico precluding employees from working for private companies. At no time did I violate this policy or law. While I worked as an external consultant for the INE, my position was consolidated not by the Mexican federal government, but through an external concession of the World Bank".

Regardless of how Mr. Rodarte now chooses to characterize his employment, the fact is that he was a federal official employed by a government agency, and working with its President. Indeed the Mexican Constitution defines public servant as: "officers and employees, and in general, any person being employed, holding office or commission of any nature in the Federal Public Administration" (see Article 108). Mr. Rodarte's own letter of resignation, submitted to Dr. Reyes Luján, indicates that he was an internal advisor to him; and the INE employment registries leave no doubt that he was employed by INE directly (not hired as an external consultant), and officially held the position of "Assistant Secretary" to the President (Rejoinder, Exhibit 19). Moreover, although Mr. Rodarte claims to know the "federal law and policy of the government of Mexico excluding employees from working for private companies", he was

Footnote continued on next page

163. Two days after Lucía Rátner signed her agreement and three days after de la Torre signed his agreement, the INE issued a permit for the Santa María del Río facility¹⁵⁹.

164. Both the Rátner and the de la Torre agreements employed a graduated formula for the payment of cash and/or stock to the sellers. They were conditioned upon the occurrence of certain events.

165. The payment schedules are of particular importance. The contracts state¹⁶⁰:

“FOURTH. – PRICE, MANNER OF PAYMENT AND DATES IN WHICH IT SHALL BE PAID. The BUYER agrees to pay to the SELLER the price in U.S. dollars and in restricted, non-registered, non-assessable shares of the capital stock of METALCLAD, pursuant to what is mentioned below, being subject to such payment, in addition to the conditions precedent set forth in Clause Third, to the fulfillment of the conditions that for the payment of each portion of the price are set forth below:

	U.S. DOLLARS		SHARES OF METALCLAD	
	Rátner	de la Torre	Rátner	de la Torre
a) On the date on which it is delivered to Eco Administración, S.A. de C.V. <u>the Final Permit for the Construction of Plant No. 1 and copy of such Permit is delivered to the BUYER:</u>	0	0	30,000	60,000
b) On the date on which				

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apparently unaware of the provision contained in Article 47, section XV of the Federal Act on Liabilities of Federal Public Servants, prohibiting federal officials, during the discharge of their duties and a year afterwards, from “soliciting, accepting or receiving, directly or through a third person, money... or any donation, employment, assignment, or commission, for him or herself, or any of the persons referred to in section XIII [including spouses], from any natural or juridical person whose professional, commercial or industrial activities are directly linked, regulated or supervised by the public servant in question in discharge of his or her employment, office or commission, and that imply a conflict of interests”.

¹⁵⁹ Reference to the ledger excerpts produced by Anthony Dabbene at Exhibit 15 to his statement, shows that the issuance of this permit triggered the payment to Kesler, Neveau and Robertson of 60,000 dollars each under their November 20, 1991 consulting contract.

¹⁶⁰ The Rátner and de la Torre schedules are combined for purposes of comparison.

	U.S. DOLLARS		SHARES OF METALCLAD	
	Rátner	de la Torre	Rátner	de la Torre
the necessary financing for construction of Plant No. 1 is granted:	60,000 and	120,000 and	30,000	60,000
c) On the date on which it is delivered to Eco Administración <u>the permit to operate Plant No. 1 and copy of such Permit is delivered to the BUYER:</u>	\$30,000 and	\$60,000 and	30,000	60,000
d) On the date on which it is delivered to any of the Eco Administración, S.A. de C.V. or to Descontaminadora Industrial de Veracruz, S.A. de C.V. or to Eliminación de Contaminantes Industriales, S.A. de C.V. or to any of the other corporations mentioned in Statement III the <u>Final Permit for the Construction of Plant No. 2 and copy of such Permit is delivered to the BUYER:</u>	15,000 and	30,000 and	15,000	30,000
e) On the date on which the necessary financing for construction of Plant No. 2 is granted:	\$15,000 and	\$30,000 and	15,000	30,000

	U.S. DOLLARS		SHARES OF METALCLAD	
	Rátner	de la Torre	Rátner	de la Torre
f) On the date on which it is delivered to Eco Administración, S.A. de C.V. or to Descontaminadora Industrial de Veracruz, S.A. de C.V. or to Eliminación de Contaminantes Industriales, S.A. de C.V. or to any of the other corporations mentioned in Statement III the <u>Permit to Operate Plant No. 2 and copy of such Permit is delivered to the BUYER:</u>	15,000 and	30,000 and	15,000	30,000
g) On the date on which it is delivered to Eco Administración, S.A. de C.V. or to Descontaminadora Industrial de Veracruz, S.A. de C.V. or to Eliminación de Contaminantes Industriales, S.A. de C.V. or to any of the other corporations mentioned in Statement III the <u>Final Permit for the Construction of Plant No. 3 and copy of such Permit is delivered to the BUYER:</u>	10,000 and	20,000 and	10,000	20,000
h) On the date on which the necessary financing for construction of Plant No. 3 is granted:	10,000 and	20,000 and	10,000	20,000

	U.S. DOLLARS		SHARES OF METALCLAD	
	Rátner	de la Torre	Rátner	de la Torre
i) On the date on which it is delivered to Eco Administración, S.A. de C.V. or to Descontaminadora Industrial de Veracruz, S.A. de C.V. or to Eliminación de Contaminantes Industriales, S.A. de C.V. or to any of the other corporations mentioned in Statement III the <u>Permit to Operate Plant No. 3 and copy of such Permit is delivered to the BUYER:</u>	5,000 and	10,000 and	5,000	10,000

166. In addition to signing the Stock Exchange Agreements, on April 16, 1993, Mr. Kesler instructed the company's Mexican counsel, Manuel García Barragán, to pay additional sums of money to Lucía Rátner and de la Torre. In his letter, he stated:

“With respect to the Agreements to exchange stock in Eco Administración, S.A. de C.V. for stock in Metalclad Corporation with Lucía Rátner Díaz González and Arq. José de Jesús de la Torre y Ortega, it is my suggestion that we advance \$10,000.00 in the case of Lucía and \$20,000.00 in the case of Arq. José de Jesús de la Torre y Ortega from payment forthbe, so that a certain amount of cash is paid along with the delivery of shares in Metalclad Corporation.

This would mean a total payment of \$30,000.00 which would deduct from the payment due at the next event which is the date of construction financing.

Would you kindly include this change as part of the Stock Exchange Agreement, or simply reflect it in a

receipt or some other simplified way, as you finish the documentation for the exchange of stock.”¹⁶¹

167. There is evidence of additional payments to Mr. Rodarte and his wife. In Exhibit 15 to the witness statement of Metalclad’s CFO, Anthony Dabbene, filed with the Reply, the excerpts from the company’s handwritten ledger setting out “Legal expenses” for 1993 contains two additional entries for Ms. Rátner. On May 17, 1993, she was paid 10,000 dollars and on September 9, 1993, she was paid another 10,000 dollars¹⁶².

168. There is no specific record of the 20,000 dollar payment to de la Torre authorized by Mr. Kesler on April 16, 1993. However, on May 26, 1993, there is a 20,000 dollar payment to Metalclad’s Mexico City counsel, Manuel García Barragán, also recorded in the “Legal expenses” ledger¹⁶³.

169. The extract from the “Consulting expenses” ledger for 1993 attached to Mr. Dabbene’s witness statement also records another payment of 22,500 dollars to “Fuente & Rodarte” on July 31, 1993.¹⁶⁴

170. Mr. Dages’ second report notes that there are numerous other examples of other questionable payments listed in the ledgers attached to Mr. Dabbene’s statement.

171. Thus, the evidence from documents of Metalclad’s own making is that:

- Mr. Rodarte’s wife, Lucía Rátner, was made a shareholder in Eco-Administración from the outset of Mr. Kesler’s involvement in Mexico (August 14, 1991).
- Mr. Rodarte entered into an agreement with the Aldretts to secure the sale of COTERIN, for which he was to collect a 100,000 dollar commission.
- Ms. Rátner’s Eco-Administración shares were exchanged for Metalclad stock on February 24, 1993, in an agreement signed by Mr. Kesler alone.
- De la Torre, who according to Mr. Hermosillo was not a shareholder of Descontaminadora and Eliminación, nevertheless purported to sell shares in these companies to Metalclad on the same basis as Lucía Rátner the day before (in another agreement signed by Mr. Kesler alone). The de la Torre contract is worth precisely

¹⁶¹ Rejoinder, Exhibit 20.

¹⁶² See Reply, Exhibit 6-15(c), witness statement of Anthony Dabbene (Exhibit 15(c)). This is a likely offence under the accounting provisions of the Foreign Corrupt Practices Act.

¹⁶³ Ibid.

¹⁶⁴ The Dabbene exhibit also records a payment of 150,000 dollars to Metalclad’s legal counsel, Garcia Barragan for “Jorge Nego”. This large rounded figure stands out from the other payments. For that reason, on March 24, 1999, the Respondent asked Metalclad to provide the documents relating to the 150,000 dollar payment. On April 8, 1999, Metalclad responded that: “Claimant cannot identify ‘Jorge Nego’ nor does it have control over or access to any payment records of Mr. Garcia Barragan”. On April 14, 1999, the Respondent requested that the Tribunal direct Metalclad to produce documents relating to “Jorge Nego”.

twice as much as the Rátner contract and the milestones for payments of cash and shares are identical.

- The issuance of the Santa María del Río federal permit immediately after the signing of these contracts triggered the payment of 30,000 Metalclad shares to Lucía Rátner and 60,000 shares to de la Torre (then valued at 150,000 dollars and 300,000 dollars, respectively).
- Both Stock Exchange Agreements were drafted by Mr. García Barragán and signed by Mr. Kesler personally.
- Thereafter, on April 16, 1993, Mr. Kesler directly authorized Mr. García Barragán to make cash payments to Messrs. Rodarte and de la Torre. Thus, as of that date, as a result of the issuance of a federal permit, Mr. Rodarte's wife either received or was to receive approximately 160,000 dollars and de la Torre received 320,000 dollars.
- The 10,000 dollar payment was made to Lucía Rátner on May 17, 1993.
- In either May, June, or September (there is a Metalclad internal document that speaks of CATSA being formed in May; on this point, Mr. Rodarte changes his testimony) Rodarte was appointed the General Director of Metalclad's consulting company, CATSA¹⁶⁵.
- On September 9, Lucía Rátner received a further payment of 10,000 dollars. The Tribunal will note that although Lucía Rátner was a shareholder in Eco-Administración alone, her agreement entitled her to payments of cash and Metalclad stock when permits were issued and financing was obtained for the Descontaminadora and Eliminación facilities.

172. Since de la Torre apparently had no shareholding interest in Descontaminadora and Eliminación, he was not in a position to convey shares in exchange for Metalclad shares. Even if he did own shares in the other two companies, like Rátner, de la Torre was stated to be entitled to payments for events that were connected to Eco-Administración but unconnected to either of the other two companies¹⁶⁶.

173. Just as the Reply's claims of ethical conduct have been disproved by Metalclad's own documents, the Claimant's major witness statements are materially undermined. Like Grant Kesler, Humberto Rodarte testified in his second witness statement:

¹⁶⁵ Oddly, however, Rodarte's severance agreement documents with Metalclad record that although appointed to act as General Director of CATSA, Rodarte never assumed the position. He did, however, apparently get paid as if he had. See Exhibit 21.

¹⁶⁶ He was entitled to shares and cash for events relating to Eco-Administración even though he was not a shareholder in that company. [Reference to Mr. Kesler's letter of April 16, 1993 (Exhibit 20) shows that Mexican counsel was instructed to facilitate a payment to de la Torre at the same time as the payment to Ms. Rátner was made].

“2. ...I have read pertinent parts of the Respondent’s Counter-Memorial and make this additional declaration to respond to certain of Respondent’s misstatements, accusations and falsehoods against me and against Metalclad...

3. ...I am aware of the law and policy of the government of Mexico precluding employees from working for private companies. At no time did I violate this policy or law.” [emphasis added]

174. Mr. Rodarte’s testimony is contradicted by Metalclad’s own evidence of his actions. Moreover, Metalclad’s other key witnesses: Daniel Neveau (the Senior Vice President and Chairman of the Board) and Lee Deets (the Chief Executive Officer of the Mexican subsidiaries) are implicated in these acts. So too, are the financial officers of Metalclad who authorized the recording of payments to Lucía Rátner, for example, as “Legal Expenses” in Metalclad’s books¹⁶⁷.

13. Metalclad was introduced to the COTERIN opportunity by Mr. Rodarte in 1993

Memorial: Metalclad was introduced to COTERIN by Dr. Rodarte acting in his “official” capacity in early 1993

175. In his witness statement, Humberto Rodarte claimed that he met representatives of Metalclad, among other American companies, to introduce them to the COTERIN investment opportunity in the discharge of his official duties:

This was a comprehensive border plan for Mexico and the United States, with respect to environmental issues and I was appointed as the coordinator in Mexico. This was a plan under SEDESOL (successor agency to SEDUE). In this capacity, I met with Metalclad among many meetings with various United States businessmen who wanted to bring environmental business to Mexico... Three or four different companies met with Aldrett as a result of my official efforts...¹⁶⁸ [emphasis added]

176. Similarly, Mr. Kesler testified that:

In early 1993, we met with Humberto Rodarte, who at that time was an official in the Mexican federal government, working in the area of environment. He

¹⁶⁷ This may be a breach of the Foreign Corrupt Practices Act’s accounting provisions.

¹⁶⁸ Memorial witness statement of Mr. Rodarte Ramón at pages 4-5.

indicated that one of his responsibilities was to encourage U.S. investment in Mexican environmental projects and that Mexico needed both capital and technology from the United States to make its environmental program a success. He wanted to introduce us to some gentlemen who had been working on a hazardous waste landfill and had received a permit to construct such a landfill, but did not have either the capital or the technology to complete one according to the new standards in Mexico, which are very similar to the standards that have been in effect in the United States for some time¹⁶⁹. [emphasis added]

Counter-Memorial: The Respondent did not take issue with this evidence

177. At the time that the Respondent filed its Counter-Memorial, it had no reason to disbelieve these claims¹⁷⁰.

Reply: The testimony remained unchanged but the federal role shifted

178. The Reply (especially the Admissions and Denials) did nothing to change the earlier testimony¹⁷¹. However, Chapter 7 shifted ground away from the assurances given in the discharge of official duties (upon which Metalclad had earlier claimed it “in good faith” had “detrimentally relied”) to assert very different themes, namely, that: federal officials were “learning-by-doing”, that federal operational style contributed to local suspicion and resentments, the federal government had changed its approach after the Guadalcázar experiences, and that the regime promoted by federal officials created confusion and contradiction¹⁷².

Rejoinder: While Rodarte may have introduced Metalclad to COTERIN in February 1993, the evidence set out above shows that he had been secretly affiliated with Metalclad for 19 months at that time

179. It is now evident why the main body of the Reply does not touch on the circumstances in which Rodarte introduced COTERIN to Metalclad and shifts the claim to other grounds¹⁷³.

¹⁶⁹ Memorial witness statement of Grant Kesler at page 2. Note the implication (“we met with Humberto Rodarte, who at that time was an official in the Mexican federal government, working in the area of environment. He indicated that one of his responsibilities was to encourage U.S. investment...”) that this was the first time that Metalclad had met Humberto Rodarte.

¹⁷⁰ Metalclad “admitted” the pleading of fact in the Counter-Memorial when the Respondent did not take issue with its implication that Rodarte met Metalclad for the first time in February 1993.

¹⁷¹ Metalclad’s Admissions and Denials contain many references to the alleged statements of primacy. See, for example, the responses to paragraph 658 and 659 of the Counter-Memorial.

¹⁷² See Chapter 7 of the Reply.

¹⁷³ Note also how the criticisms against the actions of federal officials assume new prominence when the Memorial was highly complimentary of them. See also the Claimant’s Admissions of paragraph 262 of the Counter-Memorial.

180. Assuming that Rodarte did introduce COTERIN to Metalclad, he did so, not in the discharge of his official capacity as a federal official, but rather, as a collaborator of Metalclad and through his wife a shareholder in Eco-Administración, and as an agent to the Aldretts (COTERIN's then-owners) with an interest in securing a sale of La Pedrera¹⁷⁴.

181. With respect to the new allegations made against the federal government in the Reply, it is conceded that:

- The lack of cooperation and collaboration in 1990-91 by federal officials (when Rodarte himself was the SEDUE sub-delegate in San Luis Potosí) with respect to the permitting of the COTERIN transfer station did cause distrust in the State and local community.
- Disagreements as to the merits of the landfill did arise between different levels of government and the State and local governments did oppose certain federal acts and policies.
- Finally, as Secretary Carabias testifies, the opposition engendered by the landfill did lead SEMARNAP to try to first develop local support for the siting of hazardous waste landfills.

14. On June 11, 1993 Metalclad Had its First Meeting with the New Governor

Memorial: At this "pivotal" meeting, the Governor gave his unconditional support.

182. The Memorial stated emphatically that the Governor was fully briefed at the June 11, 1993 meeting with company representatives. Mr. Kesler testified that he was not present at the meeting but that he was so advised by persons who were at the meeting¹⁷⁵.

183. Rodarte testified that:

SEDESOL sent me to the meeting with Metalclad and governor Sánchez Unzueta at which time Sánchez Unzueta expressed his support and issued to Metalclad an invitation letter¹⁷⁶. [emphasis added]

184. The result was, according to the Memorial, and to Rodarte, that the Governor gave his unconditional support to the project¹⁷⁷.

185. This is described in the Memorial as a "pivotal" event¹⁷⁸.

¹⁷⁴ See Rejoinder, Exhibit 21 . In this document, Metalclad acknowledges the obligation to pay Rodarte up to 100,000 dollars out of its payments to the Aldretts as his "commission" for arranging the COTERIN sale.

¹⁷⁵ Memorial witness statement of Grant Kesler at page 3.

¹⁷⁶ Memorial witness statement of Grant Kesler at page 6.

¹⁷⁷ Memorial, Summary of Facts at paragraph 49.

Counter-Memorial: The Governor was not briefed on the specifics of the La Pedrera project, if at all, and did not give unconditional support to that site.

186. Former Governor Sánchez Unzueta testified that the June 11th meeting was a general one that took less than thirty minutes. He said that he was not briefed about La Pedrera, that he gave only a general expression of support, and that while he did sign a letter as requested, it did not express support for La Pedrera. He told the Metalclad representatives that they were welcome as investors and that he would view their projects favorably, provided that they complied with the laws of all levels of government and were supported by the local community. Mr. Sánchez Unzueta states that:

...What I did visit upon was that it was fundamental that any initiative involving this or any other similar project had to comply with the requirements and decisions of the three levels of government and also had to respect the genuine interests of the community¹⁷⁹.

187. The Respondent adduced evidence that, at the time of the meeting, Rodarte was already working for Metalclad and that on the basis of his status as described in his witness statement, he attended the meeting in a conflict of interest (the Respondent did not understand the full extent of that conflict of interest at that time).

188. The Respondent also pointed to Metalclad's September 7th amendment to the purchase agreement wherein it inserted the contingency clause that allowed it to withhold three-quarters of the purchase price until the Governor gave his support to the landfill's construction.

Reply: The Reply sought to buttress the Memorial's allegations concerning the June 11th meeting.

189. Lee Deets testified that he was present at the meeting and that it lasted over an hour. He states categorically that during the meeting, both projects at La Pedrera and Santa María del Río were discussed at length, as well as Metalclad's plans to acquire COTERIN. According to Mr. Deets, the discussion covered all of the technical evaluations and tests done to site both projects and to obtain their federal authorizations and the state land use permit. Furthermore, the Metalclad representative informed the Governor that INE was about to issue the 'final permit for operation' and claimed to have presented him with the booklet attached as Exhibit 3 to Mr. Deets' statement¹⁸⁰.

190. Mr. Rodarte also testified at length about the meeting in his witness statement filed with the Reply:

Footnote continued from previous page

¹⁷⁸ Memorial at paragraph 9.

¹⁷⁹ Counter-Memorial witness statement of Horacio Sánchez Unzueta at pages 3-4.

¹⁸⁰ Reply witness statement of Lee Deets at paragraph 56.

THE JUNE 11, 1993 MEETING WITH THE
GOVERNOR AND THE PURCHASE OF COTERIN

5. On June 11, 1993, I attended a meeting at the Governor's palace with Dr. Fernando Díaz Barriga, acting state ecology coordinator, and Ron Robertson, Lee Deets, and Antonio Soto Ravize of Metalclad.

6. The meeting had been arranged by the president of the INE as a way for Metalclad officials to introduce the company to Governor Sánchez Unzueta who had just recently been elected. Metalclad had just purchased an option to buy COTERIN, the Mexican company that owned La Pedrera. COTERIN had already obtained the federal construction permit, and INE was well-aware of Metalclad's intentions to buy COTERIN based on SEDESOL's invitation to invest in Mexico's environmental infrastructure. INE set up this meeting because they wanted Metalclad to get the new governor's political support before authorizing the federal operating permit.

7. The Metalclad representatives presented the project for the hazardous waste landfill at La Pedrera in full detail, including design scope, operations, and community awareness program. The representatives of the company also demonstrated the economic benefits that would be created by the construction and operation of a landfill at La Pedrera, which is in one of the poorest parts of Mexico. All of this was shown to the Governor in the form of a bound booklet which encapsulated and expanded upon the presentation. While I worked with Metalclad, it was often a point of reference for our dealings with the community and the programs we later implemented. (See exhibit 1 attached to this declaration).

8. They also explained that they had purchased an option to buy COTERIN, and then elaborated on the tests that were done in order to obtain the state congress's approval of the environmental impact statement and the state use land permit.

9. The Governor stated that Metalclad's plans for La Pedrera were well-suited for inclusion in his state developmental plan and industrial park. He never mentioned that the Company would have to procure a municipal construction permit in addition to the federal and state permits already obtained. I recall that he said all of the local issues would be handled by his staff.

10. One of the Metalclad representatives then asked Governor Sánchez Unzueta to sign a letter of support for the project. Sánchez Unzueta agreed to sign a letter, which is a rare thing for a Mexican government official. Dr. Díaz Barriga then took the draft letter brought by Metalclad and had it prepared for the Governor's signature.

11. Governor Sánchez Unzueta's testimony that Metalclad never showed him any projects, plans, or any other documents with regard to La Pedrera and never informed him of its option to purchase COTERIN is completely false. On the contrary, the presentation of the project for La Pedrera was one of the main reasons for holding the meeting¹⁸¹. [emphasis added]

Rejoinder: Metalclad's former Chairman of the Board and another independent witness confirms the Governor's account of the June 11, 1993 meeting

191. In preparing its Rejoinder, the Respondent observed that of the three Metalclad representatives who attended the meeting—leaving aside the precise capacity in which Rodarte represented himself as attending¹⁸²—Metalclad did not provide a witness statement from Ronald Robertson, then the company's Chairman of the Board (and a former senior official in the Reagan Administration), or one from Antonio Soto.

192. The Respondent contacted both Mr. Robertson and Mr. Soto. Mr. Robertson agreed to cooperate.

193. Mr. Soto initially stated that he would respond to questions if officially requested to do so. On December 11, 1998 a letter was sent to him by Lic. Perezcano Díaz¹⁸³. On January 7, 1999, Mr. Soto replied by letter, this time refusing to cooperate with the Respondent¹⁸⁴.

194. The Respondent also contacted Dr. Fernando Díaz Barriga, the UASLP professor who temporarily occupied the position of State Ecology Coordinator before Dr. Medellín. He agreed to cooperate in providing a witness statement.

¹⁸¹ Reply, Exhibit 20, witness statement of Humberto Rodarte Ramón at paragraphs 5-11. Note Rodarte's evidence in paragraph 9 that the Governor spoke of his state development plan and industrial park. The evidence is that his plan for the industrial park was to have a hazardous waste disposal facility situated there. However, the park was planned to be located not at Santa María del Río or Guadalcázar, but at Charcas. See the witness statement of Dr. Fernando Díaz Barriga at paragraph 9.

¹⁸² His witness statement in the Memorial says that he was sent by SEDESOL but the evidence is that he had been improperly associated with Metalclad for almost two years as well as the as yet unannounced General Director of CATSA.

¹⁸³ Exhibit 22.

¹⁸⁴ Exhibit 23.

195. Both Mr. Robertson's and Dr. Díaz Barriga's recollections of the meeting confirm Governor Sánchez Unzueta's account.

196. With respect to Rodarte's claim that the meeting was set up by the INE, Mr. Robertson testifies that he believes that this was not the case.

77. To the best of my knowledge, the meeting with the Governor was arranged by Humberto Rodarte Ramón, or at least he took credit for arranging it. Mr. Rodarte Ramón apparently prevailed upon a friend who was the outgoing or acting state environment official to arrange the meeting with the new Governor. I have been asked by counsel whether this individual was Dr. Fernando Díaz Barriga. I do not recall his name. I only remember that he was either the departing state environmental official from the previous administration, or that he was serving as the head environmental official on a *pro tem* basis. In any case, he was apparently acquainted with Mr. Rodarte Ramón¹⁸⁵.

197. Dr. Díaz Barriga's testimony in this regard is consistent with Mr. Robertson's. He testifies similarly that:

10. In late May or early June I was approached by Dr. Rodarte Ramón who asked if I could arrange a meeting with Governor Sánchez Unzueta. He told me he was advising a U.S. company that wanted to develop hazardous waste facilities in the State. I remember that he wanted me to arrange a meeting with the governor for the purpose of officially introducing his client, in order to establish a first contact for the company. Rodarte Ramón and I did not talk much about the identity of the U.S. company but I recall that he assured me it was a reputable company. Due to our long relationship, I trusted him and agreed to arrange the meeting.

11. I agreed to promote the meeting because I saw this as a good opportunity to encourage the kinds of projects that I felt were necessary for the State, and because the environmental action plan of the state government of Mr. Sánchez Unzueta that contemplated the general need for these kinds of facilities. In fact, I told Rodarte Ramón in confidence about the plan to establish an industrial park near Charcas that would have its own hazardous waste disposal facilities.

¹⁸⁵ Rejoinder witness statement of Ronald Robertson at paragraph 77.

12. During our conversation, Rodarte Ramón never mentioned anything regarding La Pedrera. This was a case well known to both of us and, if he had mentioned it, it is certain that we would have argued about it¹⁸⁶.
[emphasis added]

198. Contrary to Metalclad's claim that it fully briefed the Governor about the COTERIN project with "maps, drawings, and plans", Mr. Robertson testifies that:

84. I have been asked by counsel whether the Governor was shown any maps, plans, photographs or similar documents. To the best of my recollection, representatives of the company intended to provide some documents to the environmental staffer. I do not know whether they actually did or not. I do not recall any documents being presented to the Governor himself, other than a copy of the company's latest annual report and 10K which I presented to him. I do not recall any other documents being shown or given to him in my presence¹⁸⁷.

199. Dr. Díaz Barriga, the environmental staffer to whom Mr. Robertson refers, testifies likewise that:

14. I have been asked whether the Metalclad representatives gave any documents, plans, photographs or maps to me or the Governor at the meeting. As far as I remember, the company did not give any written information to either of us. If they had given documents to the Governor it would be natural that he would give them to me, as his Ecology Coordinator, but I do not recall receiving or seeing anything like that¹⁸⁸.

200. As to the length of the meeting and what was discussed at it, Mr. Robertson testifies further:

80. The meeting with the Governor began in English. The Governor was accompanied by one or two staffers. I recall that, after the introductions were completed, the Governor made a remark or apology to the effect that he had just taken office and that he and his staff were working hard to get up to speed on the affairs of the state government. After that, we congratulated the Governor on his election to office and I gave a short

¹⁸⁶ Rejoinder witness statement of Fernando Díaz Barriga at paragraphs 10-12.

¹⁸⁷ Rejoinder witness statement of Ronald Robertson at paragraph 84.

¹⁸⁸ Rejoinder witness statement of Fernando Díaz Barriga at paragraph 14.

statement on behalf of the company. Thereafter, the meeting was conducted in Spanish, with partial translation into English.

81. I believe that Mr. Rodarte did most of the talking for the Metalclad delegation. He may have made the point that the federal government supported Metalclad's efforts to establish hazardous waste recycling and disposal facilities in Mexico. I was also advised that there was a discussion about the company's desire to participate in the Governor's environmental program, which included the establishment of an industrial park that would include hazardous waste recycling and disposal facility.

82. As the meeting was partly in Spanish, I cannot say with any certainty the extent to which the COTERIN acquisition or the Santa María del Río incinerator project were discussed. Based upon the fact that the Governor had just come into office and the fact that this was our first meeting with the Governor, I feel it would have been premature to conclude that the Governor had agreed to give his personal support to the company's plan to establish a landfill at La Pedrera, or its plan to build an incinerator at Santa María del Río¹⁸⁹.

201. Contrary to Metalclad's contention in its Reply that the meeting with the Governor lasted over an hour, Mr. Robertson recalls that:

83. To the best of my recollection, the meeting lasted approximately thirty minutes. I perceived it to be a "getting to know you" session and nothing more. To my mind, given the context of this meeting, it is unrealistic to think that the Governor would have been in a position to give Metalclad his personal approval for any particular project or his agreement to support Metalclad in any particular project. Rather, it seemed to me that we had succeeded in conveying a positive image in introducing the company to the Governor and in establishing the basis of a relationship the company could build on during his tenure in office¹⁹⁰.

202. Dr. Díaz Barriga testifies similarly that:

¹⁸⁹ Rejoinder witness statement of Ronald Robertson at paragraphs 80-82.

¹⁹⁰ Ibid. at paragraph 83.

13. The June 11, 1993 meeting was held in the *Casa de Gobierno*. It was attended by Mr. Horacio Sánchez Unzueta and myself on behalf of the State Government of SLP. To the best of my recollection, four or five persons attended on behalf of Metalclad. In addition to Rodarte Ramón, there were two tall, well dressed Americans, but I do not remember their names.

...

15. It is difficult for me to say precisely what was said at the meeting because it happened a long time ago. However, I can state with certainty that I understood the purpose of the meeting was to introduce Mr. Rodarte's client to the Governor, not to present a project to the Governor for his consideration and approval. I recall that it was a brief courtesy meeting, that Metalclad's interests and intentions were discussed only in general terms, and that La Pedrera was not mentioned then as an investment option. I also recall that there was discussion of the Governor's plan to establish an industrial park at Charcas that would incorporate an incinerator and associated landfill as part of the facility, and that Metalclad's representatives expressed an interest in participating in the project¹⁹¹. [emphasis added]

203. Both witnesses' testimony is consistent with the Governor's recollection that he expressed general interest in projects that Metalclad might undertake in the State but went no further. Mr. Robertson testifies:

84. I should add that during my years as General Counsel of American Cement and as General Counsel of the Department of Health and Human Services, I attended many meetings of the type that we had with Governor Sánchez Unzueta, in some cases as the party seeking to establish good relations with a government entity and in other cases as the party being courted. I have no hesitation in saying that the meeting of June 11, 1993 was typical of that kind of introductory courtesy meeting. To the best of my knowledge, it was not a meeting that was represented by or to anyone in attendance as being intended to secure the administration's approval of either or both of the

¹⁹¹ Rejoinder witness statement of Fernando Díaz Barriga at paragraphs 13 and 15.

company's highly technical and possibly controversial projects¹⁹².

204. There was some discussion of the possibility of siting a hazardous waste landfill at another location. Dr. Díaz Barriga testifies:

8. During the election campaign, and during my brief tenure as Ecology Coordinator, I gave Mr. Sánchez Unzueta advice on many environmental matters, including the need to establish proper hazardous waste disposal facilities in the state. In particular, I recommended the idea of establishing an industrial park designed especially for industries that generate hazardous waste that would include a hazardous waste incinerator and associated landfill as part of the overall facility.

9. The Governor and I thought that the industrial park should be located in remote area to keep the social impact of the project to a minimum. We thought that Charcas, a sparsely populated area in the north of the state, would be an ideal location. We had canvassed a number of companies that produced hazardous waste and they expressed interest in the idea¹⁹³.

205. Metalclad was aware of this plan. Exhibit 12 of the Rejoinder Chronology is a facsimile from Jim Fahs to Metalclad's office dated, July 8, 1993. It can be seen from Grant Kesler's subsequent letter to the Governor that the company knew that the Governor's idea was to build an industrial park in which a hazardous waste disposal facility would be sited.

206. In summary, the evidence of Dr. Díaz Barriga and Mr. Robertson is to be preferred to that of Mr. Deets and Mr. Rodarte.

207. Dr. Díaz Barriga is certain that La Pedrera was not on the agenda of the Governor's meeting because, in his temporary position, he was well aware of the local opposition and the constant demands for the site's remediation:

17. I was informed months later that Metalclad had merged with the Aldretts and acquired La Pedrera. In fact, during my short tenure as State Ecology Coordinator, I organized a meeting to discuss the La Pedrera problem. The purpose of the meeting was to discuss remediation of the site which had been an ongoing demand of the Municipality of Guadalcázar

¹⁹² Rejoinder witness statement of Ronald Robertson at paragraph 84.

¹⁹³ Rejoinder witness statement of Fernando Díaz Barriga at paragraphs 8-9.

ever since the Aldrett's transfer station had been shut down.

18. This meeting took place about two weeks before the June 11th meeting. I recall that I contacted the Aldretts to request their presence at the meeting. However, Mr. Antonio Soto appeared at the meeting on their behalf. I had known him to be connected with a hazardous waste incinerator project that Ing. Jorge Hermosillo Silva had tried to establish at Santa María del Río but I did not know, at the time, that he was associated with Metalclad. There was no resolution of the La Pedrera remediation problem at the meeting. At the end of the meeting, the local head of the PRI announced that her party would never support the re-opening of the landfill.

19. Sometime after I learned of the merger between Metalclad and the Aldretts, which was some time after the June 11th meeting, I attended a meeting where Lee Deets explained how to safely operate a hazardous waste landfill. I recall that Deets said that there was nothing wrong at La Pedrera and that it was a suitable site. I publicly contested that and mentioned that the site had been contaminated when the Aldretts had operated it and that remediation was necessary. Deets could tell people who had no knowledge of the La Pedrera site that everything was alright, but I had carefully studied and documented the case. Thereafter, I started the debate about the necessity for serious geo-hydrologic studies¹⁹⁴.

208. This evidence is consistent with Dr. Medellín's testimony that he did not initially know that it was Metalclad's intention to purchase COTERIN with a view to re-opening La Pedrera¹⁹⁵. (Dr. Medellín was not present at the June 11th meeting because he was not yet working for the State government.)

209. The one piece of documentary evidence that exists concerning the company's relations with the State during that time, namely, the Governor's letter, stated that:

"... proposals submitted to my consideration, that comply with the environmental regulations of the different levels of government, and that show genuine respect to the interests of the community, will benefit from the necessary support to carry them through successfully."

¹⁹⁴ Ibid. at paragraphs 17-19.

¹⁹⁵ Counter-Memorial witness statement of Dr. Medellín at paragraphs 38 and 86.

210. The letter is worded in a future sense: It does not speak of projects that have been submitted, that have complied with environmental regulations, and that have showed genuine respect; it speaks of these things occurring in the future, which, provided they address two specific concerns, “will benefit from the necessary support to carry them through successfully...”

211. Dr. Díaz Barriga testifies:

16. Regarding the letter that the Governor gave to the company, I state that it was requested by Metalclad’s officials, and to the best of my recollection, that it was presented for his signature there at the meeting, or they had a draft that was modified by the Governor then or the next day. I recall that Rodarte Ramón appeared to me to be very happy with the letter because he could show his clients that the Governor was interested in them. He stated that it was good evidence of his diligent work¹⁹⁶.

212. Finally, the September 7th amendments to the option agreement show that the company itself had concluded that the Governor’s unconditional support had not been obtained on June 11th. Otherwise, it would not have made his support for the landfill’s construction a condition precedent for the payment of the remaining three-quarters of the purchase price.

15. Metalclad was Well Aware of the Municipal Permit Issue

Memorial: Metalclad did not know of the municipal permit issue until a federal official mentioned it for the first time in November 1994.

213. A cornerstone of the Memorial was that Metalclad was unaware of the municipal permit issue. The Memorial did not include copies of the original option agreement or the amendments thereto. Metalclad pleaded that the issue never arose in the first year that it was involved with COTERIN.

214. Metalclad also instructed its Mexican law expert on the basis that it had no knowledge about the municipal construction permit issue at the time it acquired COTERIN¹⁹⁷.

¹⁹⁶ Rejoinder witness statement of Fernando Díaz Barriga at paragraph 16.

¹⁹⁷ Metalclad filed the “expert” report that stated:

“It is not clear that a local construction permit was required for the La Pedrera landfill. But given these facts, we opine that, if it was required, it was reasonable and even highly likely that METALCLAD, diligently acting in good faith, would have been unaware of this requirement.” [emphasis added]

Report of Centro Juridico, Lack of Clarity in Mexican Environmental Legislation 1988 to 1996, at page 8.

Counter-Memorial: This pleading was false.

215. After doing due diligence, Metalclad amended the Option Agreement. The September 5, 1993 amendment inserted language to address the municipal permit issue. It made the payment of three-quarters of the purchase price contingent on: (i) obtaining authorization from the government of San Luis Potosí through the Governor to proceed with construction; and (ii) after “the Municipal permit for the building of the aforementioned confinement has been obtained by COTERIN, or as the case may be, definitive judgment in a writ of *amparo* that allows [the company] to legally proceed with the building of such confinement...”¹⁹⁸.

216. Metalclad omitted this evidence and misrepresented its knowledge of the municipal permit issue to its own “expert” on Mexican law.

Reply: Admits Metalclad was aware of the municipal permit issue in 1993 but says that it raised it with federal officials early on and they gave assurances to it.

217. Confronted with its own documents, Metalclad admitted that it had been fully aware of the municipal permit issue long before November 1994¹⁹⁹. As noted earlier, Mr. Deets, for example, attached to his statement a letter to Sergio Reyes Luján of the INE on September 16, 1993 showing that Metalclad’s local legal counsel had informed it that the “municipal manifest” may be required. Mr. Deets concluded his letter to Dr. Reyes Luján by stating: “I will ask Humberto Rodarte to contact you regarding this matter and I look forward to seeing you soon.”

218. In paragraph 11 of his second statement, Mr. Kesler admitted that, “Our due diligence turned up the fact that municipalities can issue construction permits”. Moreover, in paragraph 12, he stated that the Claimant raised the question of the municipal construction permit with federal officials in September 1993. These officials were the same ones who had worked closely with Humberto Rodarte.

219. The Reply distanced itself from the Memorial. In the response to paragraph 19 of the Counter-Memorial (dealing with its state of knowledge), Metalclad claimed that, “Claimant’s facts are not that it did not know of a municipal construction permit. Rather, its position is that federal officials...assured the Company that a municipal permit was not necessary...”²⁰⁰.

220. The Reply also makes a great deal about the alleged opacity of the Mexican legal system and the problems that Metalclade might have had in seeking to file an application for the permit

¹⁹⁸ See Exhibit 3 to the Counter-Memorial at page 7.

¹⁹⁹ The Respondent directs the Tribunal to Metalclad’s Admissions and Denials in the Reply concerning the Respondent’s allegation that it tendered an expert report based on an improper factual premise. The denials are typical of the Reply: They address everything but the central fact, namely, what Metalclad instructed the expert as to its state of knowledge of the permit issue. See the denials to paragraphs 130-132 of the Counter-Memorial.

²⁰⁰ Reply at Appendix 1, Claimant’s Admissions and Denials at page 3.

(ignoring its own evidence that under two sets of owners, and with the advice of at least two sets of local lawyers, COTERIN did so twice²⁰¹).

Rejoinder: New evidence confirms that Metalclad was well aware of, and deliberately ignored, the municipal permit requirement

221. The new claim that the Memorial's point was not that the company did not know of the municipal permit issue, but rather that no government official brought it to the company's attention, is completely inconsistent with:

- the pleading that “[n]o construction permit from the Municipality of Guadalcázar was sought or required, nor has the lack of such a permit been timely raised by any government authority”²⁰², and
- the factual premise of the alleged expert report on Mexican law that Metalclad filed with the Memorial²⁰³.

222. With respect to the events in question, Mr. Robertson testifies that there was a debate within Metalclad as to whether it should risk buying the landfill. He recalls Lee Deets and Michael Tuckett asking him how to deal with the municipal permit issue as a matter of contract²⁰⁴. It is evident that Robertson's advice to make the payments of the purchase price contingent upon the resolution of the municipal permit issue was followed.

223. Mr. Robertson testifies that although he was not closely involved in the COTERIN acquisition:

76. Although I was not actively involved in the COTERIN deal, I discuss its merits with other Metalclad personnel on occasion. We were aware of the municipal permit issue and that there may be some local opposition. I recall Mr. Fahs and Mr. Deets asking my advice on how to structure the purchase agreement to address the permit issue. We were also aware that allegations had been made that the owners of COTERIN may have contaminated the site. I recall discussing this with Mr. Deets and asking him how much it would cost to clean up a site like this if that had to be done. In response, he said, ‘You don’t want to know’²⁰⁵.

²⁰¹ In 1993, according to the Deets' letter, the Torres Corzo law firm advised that a municipal permit may be necessary and in 1993-94, the Bufete de la Garza firm similarly advised the company. In 1991, COTERIN applied for the permit, and in 1994, its ECOPSA did likewise.

²⁰² Memorial at paragraph 17.

²⁰³ To the effect that, acting reasonably, it would not have known about the permit issue after having done its due diligence.

²⁰⁴ Rejoinder witness statement of Ronald Robertson at paragraph 76.

²⁰⁵ Ibid.

224. In its Legal Submissions, the Reply asserted that the Mexican legal system is opaque. Evidence of Metalclad's own making contradicts its latest contention about the opacity of the Mexican legal system. The evidence is the following:

- Metalclad's joint venture partner, Jorge Herмосillo, applied for and obtained municipal permits on two occasions for two different sites in connection with the Eco-Administración incinerator²⁰⁶.
- The amended purchase agreement shows a full awareness of the issue after performing due diligence.
- Mr. Deets' letter to Reyes Luján dated September 16, 1993, after Metalclad exercised its option to purchase COTERIN, shows that the company was advised by its local law firm in San Luis Potosí (a firm that preceded Bufete de la Garza as Metalclad's local counsel) that, to use Deets' own words, "a municipal manifest may be required"²⁰⁷.
- A letter from Metalclad's local counsel, Lic. García Leos (of Bufete de la Garza), dated August 17, 1994, set out the need for and means for applying for a municipal permit²⁰⁸.
- A Memorandum from Metalclad's then-Chairman, Daniel Neveau, replying to Mr. Héctor Raúl García Leos on September 9, 1994, shows that Metalclad decided not to apply for the permit before commencing construction because, knowing of its likely refusal, he "would rather ignore the problem than raise it to a level of awareness"²⁰⁹.
- At the same time, Neveau asked García for his advice on whether a municipal permit was required.

²⁰⁶ Rejoinder witness statement of Jorge Herмосillo at paragraphs 45-46 and Exhibits 23 and 24 thereto.

²⁰⁷ Reply Exhibit 9, witness statement of Lee Deets, Exhibit 5.

²⁰⁸ The Respondent requested production of documents concerning the need for a Municipal Construction Permit, and the Municipality's unwillingness to issue such permit. On March 19, 1999, Mr. Pearce advised that the Respondent should seek such documents from Metalclad's former legal counsel.

²⁰⁹ Mr. Neveau wrote:

"Regarding the application for the building license in La Pedrera, I am of the opinion that we should probably not apply for the permit. We have the authority from PROFEPA to construct and maintain the project. I would like your opinion whether or not this supersedes the license to construct. I don't know that it does us any good to go before a body such as the City Council and know that we are going to obtain a negative result. I think I would rather ignore the problem rather than raise it to a level of awareness. I think we need to discuss this further."

- Q
- Lic. García testifies that he advised Neveau that a permit was required and whomever had said that it was not was mistaken (thus, both local firms advised Metalclad to this effect.)²¹⁰
 - After Metalclad proceeded with construction in late September of 1994, and it was issued a shut down order by the municipality, its counsel was able to prepare the application and find the appropriate place to deliver it²¹¹.
 - When the *Ayuntamiento* denied the construction permit, COTERIN did not challenge the applicability of the requirement via *amparo*, based on the primacy of federal law as allegedly asserted by federal officials. Instead, it explicitly recognized the jurisdictions of the three levels of government and challenged the grounds on which the permit was denied, requesting, instead, that it be issued.

225. In addition, Lic. García Leos was instructed *not* to initiate an *amparo* against the municipal shut down order because the company's Mexico City counsel, Manuel García Barragán, advised against it²¹².

16. **There was No Good Faith Reliance on Alleged Representations of Federal Primacy by Federal Officials**

Memorial: Metalclad would not have invested but for strong and repeated assertions on federal jurisdiction by the responsible officials

226. The Memorial asserted that statements of federal primacy, upon which the Claimant "in good faith detrimentally relied", were made by senior federal officials. Much was made by Metalclad about the repeated assertions of federal primacy that were made by federal officials. The Claimant seems to have identified principally Sergio Reyes Luján, former President of the INE, and the following officials: the late Luis Donald Colosio, then Secretary of SEDESOL; Ambassador Santiago Oñate, at the relevant time Attorney General for the Protection of the Environment, then Head of the Institutional Revolutionary Party and Secretary of Labor; Ignacio Zaragoza García, then local representative of PROFEPA; and Julia Carabias, Secretary of the Environment, Natural Resources and Fisheries²¹³.

227. All other references are vague general references to unidentified "federal officials"²¹⁴.

²¹⁰ See the witness statement of Héctor García Leos.

²¹¹ Ibid.

²¹² Ibid.

²¹³ See Memorial Chronology at p. 3, and paragraphs 13, 21, 24, 81, 166 and 168.

²¹⁴ The Memorial emphasized the central role of these alleged assertions of primacy:

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. [emphasis added]. Memorial at paragraph 179.

Counter-Memorial: The Respondent relied on the wording of the permits and the evidence of René Altamirano

228. In response, the Respondent interviewed René Altamirano, the senior official who actually issued the federal permits. Mr. Altamirano testified that the permits stated on their face that they did not purport to bind the other levels of government. He also denied making the statements attributed to him.

229. The Respondent also asserted that Mr. Rodarte was wearing two hats during the critical time (June of 1993). The full extent of his relationship with Metalclad was not yet known at the time of the Counter-Memorial's filing. However, based on what it did know, the Respondent asserted that Mr. Rodarte's evidence could not be credited.

Reply: Reaffirmed the earlier claims that federal officials had made about the primacy of federal jurisdiction.

230. The Reply repeated the story that federal officials acting in their official capacity made such statements and that in good faith Metalclad detrimentally relied upon them²¹⁵.

231. The Reply adduced evidence of one such statement alleged to have been made by Jaime de la Cruz. It also alleged (especially in its Admissions and Denials) that Dr. Reyes Lujan made such representations. However, no such statement from Dr. Reyes Luján was filed with the Reply²¹⁶.

Rejoinder: The new evidence demonstrates that any such statements, if in fact made, cannot be imputed to the Respondent

232. It is now clear that, if statements of federal primacy were made by Mr. Rodarte, they were not made acting in good faith and in the exercise of official duties, but rather in pursuit of personal financial interests. It is equally clear that Metalclad could not have relied in good faith upon any such statements.

X 233. Given his 100,000 dollar commission and his wife's shareholdings, it was in Rodarte's financial interest to exaggerate the extent of the federal powers and authority in order to demonstrate his 'ability to deliver' and thereby justify payments he was receiving from Metalclad.

²¹⁵ See the introductory paragraphs of Rodarte's second witness statement.

²¹⁶ At the request of the Respondent, the Claimant recently produced a copy of a declaration by Dr. Reyes Lujan that it obtained prior to filing the Memorial. The statement refers to the need to comply with federal and state law, but does not address the relationship between the two.

234. On March 19, 1999, after it filed its two sets of pleadings, in response to a request by the Respondent, Metalclad provided a statement by the former President of the INE, Dr. Reyes Luján²¹⁷.

235. Mr. Reyes Luján's statement (produced after the Respondent directed the Claimant to reference to it in the Memorial) is terse. It points to René Altamirano as the official who issued the federal permits. It says nothing about giving oral assurances about federal primacy; to the contrary, it refers to the need to obtain "all licenses, permits and authorizations required by the corresponding Federal and State laws"²¹⁸.

17. Metalclad Acquired COTERIN with Full Knowledge of the Risks Involved

Memorial: It was only after obtaining the expressions of support from federal and State officials and the federal expressions of primacy that Metalclad exercised its option to purchase COTERIN

236. The Memorial made much of the expressions of primacy and the Governor's alleged unconditional support for the landfill. For example, in his witness statement, Mr. Kesler stated that in September 1993:

Now that we had received all of the legal permits required to construct and operate and assurances of the political support necessary, we exercised our option to purchase the site and went forward with the exchange of cash for property. But for the strong and repeated assertions from both federal and state governmental officials, we would not have exercised our option²¹⁹.

Counter-Memorial: Metalclad acquired COTERIN aware that it did not have the Governor's support

237. The Counter-Memorial observed that the Governor's letter did not express unconditional support. It also referred to the purchase agreement's amendments which made three-quarters of the purchase price contingent on resolving the municipal permit issue and obtaining the Governor's support to construct the landfill. This was evidence that Metalclad itself at the time did not think that it had the necessary support.

²¹⁷ This one page statement from the President of INE was not filed by the Claimant in two sets of filings (where one of the central underpinnings of its case is that he, among others, repeatedly assured the company that it had all necessary permits and that federal law took primacy).

²¹⁸ Municipalities have no legislative powers; laws applicable at the municipal level are issued by either the Federal or State Congress. Municipal construction permits in the state of San Luis Potosí, are regulated by the Federal Constitution, the San Luis Potosí Constitution, the Ecological and Urban Code of the State of San Luis Potosí (which also regulates the state land use license) and the Treasury Act for the Municipalities of the State of San Luis Potosí, that is by federal and state law.

²¹⁹ Memorial witness statement of Grant Kesler at page 4.

238. The Counter-Memorial observed that the September amendment to the option to purchase agreement showed that the Claimant was well aware of the municipal permit issue, the contamination of the site, and the local opposition.

Reply: The amendments to the contract were just standard contract language.

239. The Reply characterized its own contractual provisions as “a useful prophylactic measure by Claimant’s management and reflected the vendor’s confidence in the successful conclusion of the permitting process”²²⁰.

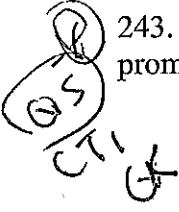
240. Elsewhere in the Reply, the Claimant characterized these provisions as mere ‘legal precautions as advised by counsel,’ ‘standard contract clause[s] in foreign investment transactions,’ ‘prescient legal advice’ and ‘force majeure provisions’²²¹.

Rejoinder: Metalclad acquired COTERIN believing that, with Mr. Rodarte affiliated with it, and possessing the federal permits, it could force the landfill’s opening.

241. It is now clear that, with Mr. Rodarte acting on Metalclad’s behalf for over two years, and with the federal permits, Metalclad gambled that pressure could be exerted, and that the Governor would be persuaded to in turn force the local community to accept the hazardous waste landfill. Mr. Rodarte enlisted the support of Messrs. Altamirano and Reyes Luján. As Deets’ September 16, 1993 letter to Mr. Reyes Lujan shows, the company anticipated that he would visit the Governor and would induce him to override any opposition from the municipal president and the local community.

242. In addition, the specificity of the amendments to the purchase agreement, relating as they did to the situation prevailing at the time, belies the Claimant’s assertion that they were “standard” in nature.

243. By the time that Metalclad exercised the option to purchase COTERIN, it had been promoting its Mexican hazardous waste business for almost two years with no results:

- 
- It had abandoned the 250 million dollar financing that it had announced it was about to conclude with Chase Manhattan Bank and had not found alternative project financing.
 - It had not obtained project financing for Santa María del Río.
 - It had not closed any of the different incipient joint ventures that had been announced in the press.
 - It had not achieved financing for Descontaminadora or Eliminación. In fact, both of those projects were further behind than even Santa María del Río.

²²⁰ Reply, Vol. I, paragraph 353

²²¹ Reply, Admissions and Denials, paragraphs 16, 23, 58 and 313

244. The cheaper cost of acquiring COTERIN looked attractive to Metalclad, especially when it is recalled that it conditioned the payment of three-quarters of the purchase price upon resolving the municipal permit issue and obtaining the Governor's support for construction, and in light of its long standing association with Humberto Rodarte. Moreover, given its rosy predictions of new projects, joint ventures, ground breaking, and financing over the previous two years, Metalclad had to show its investors some kind of progress.

245. Contrary to the allegations made in the Memorial, Metalclad's Reply evidence confirms the Respondent's position that it was fully aware of the investment's risk at the time that it acquired COTERIN. In September 16th, after the company amended the option agreement and agreed to complete the purchase, Mr. Deets prepared two letters: one to Sergio Reyes Luján at INE, and a second to the Governor.

246. The Tribunal will see the contrasting tone and content of the two letters. In contrast to his letter to Mr. Reyes Luján, Mr. Deets' letter to the Governor did not raise either the municipal president's opposition or the municipal permit issue. It did not raise the issue of community opposition and simply asked for the Governor's consent to begin construction. Mr. Deets stated that: "the assurance we ask is to be granted the authority to begin construction and to operate the facility". Yet Mr. Deets' letter of the same date to Reyes Luján (to which the letter to the Governor was attached), addressed both issues more frankly. This letter says that:

Unfortunately, we have not been able to secure the support from the municipal president of Guadalcázar...

and that:

We are prepared to begin construction immediately upon receiving the authorization from Governor Sánchez Unzueta (sic), but are not sure if a manifest is necessary from the Guadalcázar municipality. Our law firm in San Luis Potosí believes that a municipal manifest may be needed for construction. If you believe that it is appropriate, we would appreciate your discussing the municipal permit with Governor Sánchez Unzueta.
[emphasis added]

247. Mr. Deets' letter confirms that Metalclad exercised the option knowing of the municipal president's opposition and of the municipal permit issue, and hoping that Dr. Reyes Luján could convince the Governor to lend his support. His letter concludes by noting that Mr. Rodarte will follow up with Reyes Luján.

248. Mr. Deets testifies that Dr. Reyes Luján told Metalclad that a municipal permit was not necessary²²². Metalclad has not adduced further evidence to support this. In fact, Mr. Reyes

²²² He does not say when or exactly what he claims Dr. Reyes Luján is supposed to have said. Moreover, he does not testify whether he believes that Dr. Reyes Luján raised the "municipal manifest" issue with the Governor as requested in his letter.

Luján's declaration, submitted by the Claimant itself, does not state that. The recently filed Reyes Luján statement is silent on the assurance that Mr. Deets' claims was made. Moreover, it is clear from Metalclad's own evidence that, even if Mr. Reyes Luján did make that statement (there is no evidence on the point other than Mr. Deets' claim), the option was exercised before he did so. In other words, even if he did make the statement, Mr. Reyes Luján did not make a statement that induced Metalclad to enter into the purchase agreement.

249. Mr. Alan Borner, a former Metalclad director, testifies that the new "contingencies" were never disclosed to the companies' Board of Directors when it was called upon to ratify the exercise of the option²²³.

250. Finally, no evidence was adduced in the Memorial (because Metalclad initially represented to the Tribunal that it did not know about the local permitting issue) or in the Reply, that Metalclad ever approached the municipal government and asked it whether, in its opinion, the company needed a permit during the time leading up to the exercise of its option to purchase COTERIN. This is because the evidence shows that Metalclad knew from its due diligence that the permit was required, and that the municipal government was opposed to the project and had denied COTERIN's previous permit application. All of this was known to Metalclad's collaborator, Mr. Humberto Rodarte as he had been made aware of the original permit denial by the *Ayuntamiento* of Guadalupe.

18. There was No Commission Created by the Governor in January 1994

Memorial: The Governor created a Commission to study La Pedrera and agreed to be bound by its findings

251. In the Memorial the Claimant asserted that the on January 28, 1994 "the Governor met with the 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 political and social tasks necessary for opening the landfill"²²⁴ and that "[s]hortly thereafter, February 3, 1994, the UASLP group of three professors, appointed by the Governor, (hereafter the "University Commission"), met with Claimant and set forth a procedure of various tests and studies to be supervised by the University Commission and funded by Metalclad"²²⁵.

Counter-Memorial: No such "Commission" was created by the Governor

252. The Counter-Memorial responded that the Governor did not create such a commission:

²²³ Rejoinder witness statement of Alan Borner at paragraph 11.

²²⁴ Memorial, paragraph 63.

²²⁵ Ibid, paragraph 64. It continues: "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...".

367. The Claimant alleges that the Governor set up the "University Commission" to which three UASLP professors, Roberto Leyva, Joel Milán and David Atisha were appointed. The Commission would be in charge of conducting and supervising various tests and studies.

368. Governor Sánchez Unzueta testifies that he suggested engaging university investigators to assist in locating a new site. He advised against conducting further studies at La Pedrera because "even if La Pedrera were confirmed as a safe site, this would not solve the opposition of the municipal authorities and the community *per se*." Both Governor Sánchez Unzueta and Dr. Medellín testify that no "Commission" was ever established. The establishment of a University State Government Commission would have required a formal agreement with the university authorities, and this did not occur.

Reply: Mr. Kesler alleges that the Governor "lies about the existence of the UASLP Commission"²²⁶

253. The Reply itself states:

43. A committee was formed and held its first meeting in January 1994; it was comprised of UASLP faculty members who agreed to collaborate with Metalclad representatives and the company GYMSA to pursue a technical investigation of La Pedrera²²⁷.
[Emphasis added]

254. Footnote 38 of the Reply stated:

Respondent objects to the nomenclature 'Commission' for the UASLP body referred to here. It presumably does not deny that this entity functioned and produced findings²²⁸.

255. Mr. Neveau also testifies to the events surrounding the establishment of a "Commission" (although his evidence is unattributed hearsay)²²⁹. He testifies that:

²²⁶ Second witness statement of Grant Kesler at paragraph 114.

²²⁷ Reply at paragraph 43

²²⁸ Reply at page 22.

²²⁹ Witness statement of T. Daniel Neveau at paragraphs 4,17.

The Governor formally made a request for the university commission to the president of the UASLP, Dr. Lastras. Dr. Lastras in turn appointed Dr. Roberto Leyva, Director of the Chemical Sciences Department, to head the commission. The first meeting of the commission and Metalclad took place on January 11, 1994²³⁰.

256. However, Mr. Neveau's testimony in the Reply presents an account that is inconsistent with what is alleged in the Memorial. Mr. Neveau testifies that Mr. Kesler and others (Mr. Neveau apparently was not present) were told by Dr. Reyes Lujan and Mr. Altimirano, immediately following their October 1993 meeting with Governor Sanchez Unzueta, that "the Governor wanted to establish a committee of UALSP professors to study the geology of La Pedrera and that he wanted Metalclad to fund the studies".

257. This is a slight but important deviation from the earlier testimony of Mr. Kesler that, after the October 1993 meeting, they were told by Dr. Reyes Lujan that the Governor had asked for two things – that Metalclad should work to generate support for the project in the community and "[secondly], he wanted the University of San Luis Potosi to review the technology of the project and give it their approval". Significantly, Mr. Kesler did not refer to the establishment of a commission or committee, nor did he refer to a study of the geology of the site.

Rejoinder: Counter-Memorial re-affirmed

258. The Respondent re-affirms its earlier submissions that no formal Commission was ever established by the Governor. There was no agreement among the parties that the informal technical group, which was created by Metalclad, would issue a report concerning the feasibility of the project or that such a report would in any way bind the Governor.

259. Indeed, it strains credulity for the Claimant to suggest that it relied on the Governor's alleged undertaking of support – that was subject to Metalclad obtaining a favorable opinion from the UASLP professors – given that it proceeded with construction of the facility long before the studies recommended by the UASLP professors were completed. Put another way, it cannot be said that Metalclad's management would not have proceeded "but for" this alleged promise of support because they proceeded to develop the landfill before they knew whether what it now calls a condition precedent to the Governor's alleged promise of support could be fulfilled.

260. When the facts and relevant documents are examined carefully, it is evident that the group of UASLP professors that engaged in discussions with Metalclad and recommended that certain tests and studies be carried out, did so at the instance of Metalclad, not the Governor.

261. The minutes of the meeting held on January 11, 1994 are entitled "Minutes, Technical Meeting, UALSP-Metalclad". The meeting was attended by four UASLP professors and eight Metalclad representatives. Among the Metalclad representatives were four company officials – Mr. Deets, Mr. Rodarte, Mr. Miranda, and Jose Rodriguez. Also in attendance for Metalclad

²³⁰ Ibid.

were three engineering consultants and Salomon Leyva, Metalclad's public relations consultant. They discussed the technology proposed for landfill, the geological features of the site, and the question of public opposition to the landfill²³¹.

262. Two of the UASLP professors (Eng. Atisha and Eng. Milan) expressed the view that there was insufficient information to determine whether the geology of the site was suitable. One of the professors (Dr. Diaz Barriga) expressed the view that there was great public opposition in the Municipality to the establishment of a landfill. However, Salomon Leyva claimed that polls done in the Municipality revealed the opposite to be true.

263. The UASLP professors concluded that the proposed technology was adequate but the region of the site was not the most adequate and the existing geological and hydrological information was insufficient to determine whether the site was an appropriate one. They recommended that the Metalclad's geological experts prepare a proposal describing the geological and hydrological tests that would be done, to be presented to Eng. Milan and Eng. Atisha at a later meeting.

264. The minutes of the next meeting, held on February 3, 1994, are also entitled "Minutes, Technical Meeting, UALSPP-Metalclad". On this occasion two UALSPP professors, Dr. Leyva and Eng. Milan, attended the meeting. Metalclad was represented by four engineers, three of whom were outside consultants. No company officials were present. The minutes refer back to the previous meeting and record a "schedule of indispensable activities" that describes specific geological and hydrological tests that the UASLP professors thought should be carried out in order to assess the suitability of the La Pedrera site²³².

265. It can thus be seen that the first meeting of the group of professors occurred more than two weeks before the January 28th meeting when, according to the Memorial, the Governor is alleged to have created the so-called "UASLP Commission". It also occurred the same day that Metalclad published its announcement entitled "Enormous Misinformation", wherein it publicly challenged the state government. It can also be seen that the second meeting arose out of the first.

266. Mr. Neveau's explanation of the genesis of the alleged commission/committee (that it arose from a request made by the Governor to Dr. Reyes Lujan in October 1993) is contradicted by the contents of a letter dated January 21, 1994 – addressed to the Secretary of State for San Luis Potosi – bearing Mr. Neveau's signature. The letter encloses a copy of a letter purportedly written to Lic. Santiago Onate which attaches a "confidential report" dated January 6, 1994 that was apparently intended for presentation to Lic. Donald Colosio Murrieta (then Secretary of SEDESOL). The confidential report states in relevant part²³³:

At the suggestion of Arq. Rene Altamirano, Director
General of Regulation of INE, and in coordination with
Dr. Medellín Milan, between the 12th and 23rd of

²³¹ Rejoinder Exhibit 34.

²³² Rejoinder Exhibit 35.

²³³ Rejoinder Exhibit 33.

November of this year, Metalclad Corporation brought about a series of meetings with professors and investigators of UASLP that ... [according to Dr. Medellin] had doubt or objections surrounding the investment projects of Metalclad Corporation in the state. Interviews were achieved with the following members of the academic community of UASLP:

Ing. David Atisha Castillo, Director of the Faculty of Engineering

Dr. Roberto Leyva, Director of the Faculty of Chemical Engineering

Ing. Guillermo Labarthe, Director of the Institute of Geology and Metallurgy

Ing. Gilberto Humara, Professor of Geo-hydrology of the Faculty of Engineering

Ing. Victor Julian Martinez, Investigator of the Institute of Geology and Metallurgy

Ing. Roberto Jimenez, Investigator of the Institute of Geology and Metallurgy

Dr. Fernando Diaz Barriga, Investigator in Toxicology of the Faculty of Medicine

Ing. Joel Milan, Chief in the Area of Earth Sciences

Dr. Pedro Medellin Milan, Coordinator of Ecology and Environmental Protection for the State Government

Each interviewed academic was presented in detail with the design, construction and operation plans of the Controlled Landfill. All of the doubts and objections that existed were analyzed and discussed. At the end of each interview the professors and investigators showed their satisfaction and approval of the project of Metalclad Corporation. Only Dr. Medellin Milan abstained from making comment. He informed us that subsequently he was going to bring about another meeting, on the 11th of January of the present year, between all the academics interested in the matter for the purpose of elaborating an internal document that was to be sent to the Rector of UASLP in which will be expressed the position of the professors and investigators in relation to the

advisability of opening a Controlled Landfill in the
Municipality of Guadalcazar. [emphasis added]

267. If one accepts the veracity of this document, it refutes Mr. Neveau's account of the genesis of the commission/committee as follows:

- a) it was Mr. Altimirano, not the Governor, who suggested that Metalclad explain the project to professors at the UALSP;
- b) it was Metalclad, not the Governor, who sought the opinion of the UASLP professors;
- c) the professors were interviewed individually, at the instance of Metalclad, not as part of a commission or committee established by the University and not at the instance of the Governor;
- d) at some date prior to January 6, 1994, a meeting to be held on January 11, 1994 was arranged for "all academics interested in the matter"; and
- e) the purpose of the meeting was to prepare an internal document for the Rector of the UALSP expressing the opinion of the professors and investigators as to the advisability of opening a controlled landfill in Guadalcazar.

268. Significantly, the confidential report does not suggest that a commission or committee was established at the instance of the Governor.

269. Mr. Neveau also testifies that, at the January 28th meeting, Governor Sanchez Unzueta said "if Metalclad would address the specific technical concerns raised by the UASLP professors and make them comfortable with the technical aspects of the site, he would support the project". This allegation is contradicted by the testimony of Manuel Abella, the person who actually set up the January 28th meeting. He says that the Governor did not agree to establish a "Commission" to study or approve the La Pedrera site. Rather, he says that the Governor recommended that Metalclad consider one of the sites that had already been identified in a study by the investigators from the UASLP as being suitable for a hazardous waste landfill²³⁴.

270. The Respondent submits that the weight of the evidence as to what occurred at the January 28th meeting supports the testimony of Governor Sanchez Unzueta: he did not call for the establishment of a commission or committee to study La Pedrera, nor did he agree to be bound by the opinions of the UASLP professors who were considering the suitability of establishing a hazardous waste landfill at La Pedrera.

271. With respect to the work that the committee of professors did (which Metalclad claims fully supported the site), the Reply mentions that:

²³⁴ Witness statement of Manuel Abella. He also reviewed a letter, dated April 6, 1994, subsequently written by Grant Kesler in which Kesler claimed that "under the direction of Licenciado Luis Manuel Abella Armella a commission was formed to study the "La Pedrera" site and to determine if it was both secure and suitable" (Exhibit 1 to his statement). Mr. Abella testifies that he did not agree to chair such a commission.

In December 1995, taking into account a study made by GYMSA the committee proposed further tests²³⁵.

272. However, it fails to elaborate that the Executive Synthesis of the Committee Evaluation Meeting stated at that time that:

The studies that the company presented to PROFEPA as a report of the audit to justify the hazardous waste deposit of La Pedrera are insufficient and inconsistent as well as methodologically obsolete, reason for which they do not support the viability or aptitude of the site for these purposes²³⁶. [Emphasis added]

273. It is to be noted that by December 1995, Metalclad had already completed construction of the landfill some nine months earlier.

274. The Respondent also notes that the witness statement of Eng. Joel Milan²³⁷ confirms that the UASLP professors did not issue a final opinion because the necessary studies to determine the geological-hydrological characteristics of the site were never completed. Exhibit 2 to his statement is a report to Dr. Leyva dated February 27, 1995 which provides details of the unresolved points of contention from his perspective as an expert in geo-hydrological issues. The Claimant has not adduced evidence to establish that the studies in the "schedule of indispensable activities", as described in the minutes of the meeting held on February 3, 1994, were completed to the satisfaction of the UASLP professors.

19. Dr. Medellín Did Not Reach an Unconditional Agreement with Metalclad in April 1994

Memorial: During a visit to Newport Beach by Dr. Medellín, Metalclad and the State reached an agreement on the construction and operation of a hazardous waste landfill at the Site

275. Grant Kesler also testified in his first statement that an agreement with the State was reached during a visit to a municipal landfill and Metalclad's offices. He testified further that a draft of the agreement reached that day with Dr. Medellín was attached to his statement²³⁸.

Counter-Memorial: Commercial operation of the landfill was contingent on compliance with legal requirements at all levels of government and community support

276. The Respondent submitted testimony of Dr. Medellín to the effect that State support would be forthcoming, provided that the above-mentioned conditions were fulfilled. Dr.

²³⁵ Reply, paragraph 43.

²³⁶ Reply, Exhibit 28, p. 1

²³⁷ Filed with the Counter-Memorial

²³⁸ Memorial witness statement of Grant Kesler at page 7.

Medellín later confirmed his position in writing in a letter dated May 26, 1994 to the Claimant's local counsel, Mr. José Mario de la Garza.

Reply: Memorial re-affirmed

277. The Respondent adduced for the first time evidence from Messrs. Neveau, Rodarte Ramón, Ramón Chávez and Guerra to support its version of events advanced in the Memorial. (However, of those witnesses, only Mr. Neveau testifies that Dr. Medellín specifically agreed to the simultaneous remediation and operation of the hazardous waste management facility)²³⁹.

278. Mr. Neveau attached to his witness statement a copy of the same document that Mr. Kesler earlier testified related to the April 22nd meeting with Dr. Medellín. This time, the document is said to have a different genesis:

During February 1994, I drafted an initial agreement reflective of our discussions. In March, I continued my discussions with Dr. Medellín, and Mr. Kesler revised the agreement²⁴⁰.

Rejoinder: New evidence confirms Dr. Medellín's account

279. Lic. Héctor Raúl García Leos, one of the Claimant's former counsel, also went on the trip to Newport Beach. He testifies that:

After we concluded the visit to the landfill and to Harding Lawson, I believe it was around lunch time, we returned to the Meridian Hotel (where we were staying), and in the lobby of the hotel I had an opportunity to exchange comments with Dr. Medellín. He told me that he had found the landfill very interesting, and in his opinion, if Metalclad carried out the sufficient and necessary works in order to protect against any problems with the land, and built a landfill according to the recommended specifications, Metalclad could achieve its purpose. He went on to state that if the legal requirements of all levels of government were complied with, he would support it with the condition that Metalclad carried out the remediation of the site²⁴¹.

²³⁹ Reply, Exhibit 18, witness statement of T. Daniel Neveau, paragraph 22.

²⁴⁰ Reply, witness statement of T. Daniel Neveau at paragraph 19.

²⁴¹ Rejoinder, witness statement of Héctor Raúl García Leos at paragraph 27.

280. Mr. García Leos testifies that Dr. Medellín confirmed what he had said to him in a subsequent meeting with Metalclad officers. He also testifies that that it was Mr. Neveau who made the announcement that Dr. Medellín had agreed to support the project²⁴².

281. He also testifies that Metalclad then sought to have Dr. Medellín sign an agreement “on the spot”:

31. Mr. Kesler requested me to set down what Dr. Medellín had stated during the meeting, I did so dictating a letter of commitment that was directly transcribed on a computer by Humberto Rodarte. This letter was very concise and short and in a few paragraphs repeated Pedro Medellín’s statement.

32. I have been directed to the first witness statement of Mr. Grant Kesler at paragraph 5 on page 7 where he states ‘during that trip, yet another draft of an agreement between us and the State was agreed to by Dr. Pedro Medellín and the company. The fact of the agreement (though unsigned) was announced by Dr. Pedro Medellín himself in Metalclad’s conference room in Newport Beach California. A copy is attached to this declaration’.

33. I can affirm that the Exhibit provided was *not* the letter that I dictated during the visit to California.

34. The Exhibit attached to Grant Kesler’s statement does not have anything in common with the short letter which I dictated. I note that Exhibit 2 of Mr. Dan Neveau’s statement refers to the same exhibit presented by Grant Kesler, and Dan Neveau provides this Exhibit with a different explanation than Mr. Kesler’s. Thus, I believe that neither of them remember the details of what was recorded in the document that I dictated.²⁴³.
[emphasis added]

282. In any event, Mr. Kesler requested that Dr. Medellín sign the letter that Lic. García Leos had dictated. He declined to do so:

35. Mr. Kesler later requested Dr. Medellín to sign the letter, but he responded that it was not appropriate and that he would inform the Governor of its content.

²⁴² Ibid.

²⁴³ Ibid.

36. Since Dr. Medellín did not sign the letter, we did not achieve the objective of obtaining the desired commitment in Newport Beach. After we returned to San Luis Potosí, in order to get the necessary commitment, a letter dated April 25 was drafted and sent to Dr. Medellín. Ariel Miranda signed Kesler's name. The letter proposed a program of activities and had as attachment a proposed response from Dr. Medellín. The letter was taken to Dr. Medellín's office on April 26, 1994. Dr. Medellín did not answer in the form proposed by Mr. Kesler.

35. On May 26, 1994, Dr. Medellín sent his reply to Bufete de la Garza. I recall that when the letter arrived, we contacted Ariel Miranda at Metalclad's local office, and he immediately sent Mr. Salomón Leyva over to pick it up at our office. My impression is that Salomón Leyva wanted to be the person who delivered the news to Metalclad's head office²⁴⁴.

283. Thus, no final agreement was reached in Newport Beach on April 22, 1994. The evidence is that from March through May of 1994, discussions were held between the State and Metalclad. During this period, at least four versions of an "agreement" were in play: Mr. Neveau's version, the short agreement dictated by Héctor García Leos at Newport Beach, the longer version signed on Grant Kesler's behalf by Ariel Miranda and sent to Dr. Medellín by Bufete de la Garza along with a proposed response by Dr. Medellín, and Dr. Medellín's reply of May 26, 1994. None were ever signed, but Dr. Medellín's version was the version that was announced at the press conference held at the State capital on May 27, 1994.

284. The Respondent observed that Exhibit 3 to Javier Guerra's witness statement contains an excerpt from a videotape of the visit to Newport Beach in which Dr. Medellín is quoted. It therefore requested production of the tape on February 2, 1999. Metalclad refused to produce it on the ground that the Respondent was engaged in a fishing expedition. The Respondent then requested that the Tribunal order it to disclose the tape. On April 27, 1999, the Tribunal ordered the Claimant to produce the requested videotapes. The Respondent has not had an opportunity to review the tape at the time of the filing of this Rejoinder.

²⁴⁴

Ibid.

20. There Were Conflicting Announcements Made in May 1994 Respecting the Agreement

Memorial: The State reneged on the May 27, 1994 agreement

285. In its Memorial, Metalclad did not take issue with the way in which the May 27th agreement was described by Dr. Medellín during the press conference²⁴⁵. Rather, it accused the Governor and Medellín of repudiating it²⁴⁶.

Counter-Memorial: The State did not repudiate the agreement; Metalclad misrepresented its contents to its investors

286. Dr. Medellín testified that, consistent with a letter he sent to Metalclad's local counsel, Bufete de la Garza, on May 26, 1994, the day before the press conference, the State proposed to assist Metalclad to find an alternative site and that is what he announced at the press conference²⁴⁷. His May 26, 1994, letter to counsel was filed as Exhibit 72 to the Counter-Memorial.

287. The Respondent also filed the contemporaneous newspaper reports as evidence of what had been stated at the press conference. The newspapers' reports were consistent with what Dr. Medellín had stated in his letter. The State agreed to assist Metalclad in finding an alternative site to the La Pedrera site and La Pedrera could be operated on condition that it secured the community's support²⁴⁸.

²⁴⁵ Mr. Kesler merely mentions at page 8 of his first statement that:

Dr. Pedro Medellín did, in fact, along with our chairman, announce publicly at the Governor's Palace the start of construction. But his public comments gave emphasis to the fact that we would be remediating the old Aldrett transfer station site and not that we would be building and operating the first hazardous waste treatment facility in Mexico."

²⁴⁶ Memorial, Statement of Facts, paragraphs 69-70:

69. On May 27, 1994, in a ceremony at the State Palace in San Luis Potosí, with the press in attendance, the accord between Metalclad and the State Government (achieved during Medellín Milán's visit to Orange County), was publicly announced...

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."

²⁴⁷ Counter-Memorial at Medellín witness statement at paragraph 64.

²⁴⁸ Counter-Memorial at paragraphs 398-400.

288. The Respondent then compared the local news reports to Metalclad's press release on the May 27th press conference issued in the United States four days later²⁴⁹. The company's press release announced the agreement in different terms.

Reply: Criticized Dr. Medellín's original statement and the May 26th letter to Metalclad's counsel

289. In its Reply, Metalclad asserted, first, that it had never received the May 26th letter from Dr. Medellín to its counsel, and secondly, that Medellín had misrepresented the agreement at the press conference.

290. With respect to the first claim, Mr. Neveau testified that:

I have been made aware that Dr. Medellín wrote to our Mexican counsel, Mr. de la Garza, on May 26, 1994, one day before said press conference, attempting to qualify his earlier public consent to the terms of our agreement and interjecting some additional terms that we had not agreed upon. Neither I, nor to the best of my knowledge, did anyone at Metalclad ever see the May 26, 1994 letter until it was submitted in the Counter-Memorial²⁵⁰. [emphasis added]

291. As for the second assertion, Mr. Neveau accused Dr. Medellín of misrepresenting the contents of the agreement:

In the press conference, however, Medellín announced that Metalclad would remediate La Pedrera and not operate, but rather find an alternative site to build and operate a hazardous waste landfill. This was never contemplated, and Metalclad issued a press release reporting the terms that had been agreed to, and announced by Medellín, at Newport Beach²⁵¹. [first emphasis in original]

Rejoinder: Metalclad's denial of the receipt of the May 26th letter is contradicted by its own previous account; Metalclad's press release was misleading in either event

292. Mr. Neveau's testimony that he had not seen the May 26th letter is completely at odds with an assertion made in a draft NAFTA complaint circulated in Washington, D.C. and Mexico by Metalclad in 1995²⁵². In that version of the facts, Metalclad asserted that:

²⁴⁹ Counter-Memorial at paragraphs 405-408.

²⁵⁰ Reply, Exhibit 18, witness statement of Daniel Neveau at paragraph 29.

²⁵¹ Ibid, at paragraph 28.

²⁵² Counter-Memorial, Exhibit 118

One week later, on May 23, 1994, Medellín and T. Daniel Neveau, chairman of METALCLAD, made a joint announcement of the construction commencement at La Pedrera. This announcement was followed by Medellín's letter to METALCLAD's Mexican legal counsel containing an official declaration of support from Medellín as the State Ecology Coordinator on behalf of San Luis Potosí and the local community for METALCLAD to construct and operate the Landfill facility at La Pedrera. [The draft complaint then contains a footnote that states: "A copy of Medellín's letter to Lic. De la Garza is attached as Exhibit ____."] The next day, May 27, 1994, in a ceremony at the State Palace, with the press in attendance, the agreement between METALCLAD and the State of San Luis Potosí was publicly announced²⁵³. [emphasis added]

293. Thus, Metalclad knew of the May 26th letter from Dr. Medellín. Otherwise, how could its draft NAFTA complaint have described the events and set out a draft footnote that listed the May 26th letter as an exhibit²⁵⁴?

294. When the Respondent requested production of this document, Mr. Pearce took the position that, "Any request for documents relating to the 'draft claim' is beyond the scope of appropriate discovery for this proceeding"²⁵⁵. However, in a letter from Mr. Pearce dated April 13, 1999, Metalclad at last provided a copy of the letter.

295. Despite Metalclad's own document, the Tribunal is now being asked to believe that no one at Metalclad ever saw the letter until it was submitted with the Counter-Memorial (the testimony of one of Metalclad's former counsel is that as soon as the letter arrived on May 26th, they called Metalclad's office in San Luis Potosí and Salomón Leyva picked it up²⁵⁶).

296. With respect to Mr. Neveau's second comment about releasing not what was announced on May 27th but rather what he says had been agreed previously in Newport Beach, two points can be made²⁵⁷.

297. First, there were at least four versions of a potential agreement in play at the time: the Neveau draft, the García Leos dictated version, the Kesler version and the Medellín response. Metalclad's own documents showed that there was no written agreement in Newport Beach.

²⁵³ Ibid, at page 20, paragraph 48.

²⁵⁴ Moreover, at page 5 of the Memorial's Chronology, for May 26, 1994 the Claimant refers to a "Letter from Medellín 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."

²⁵⁵ Letter from Clyde Pearce to Hugo Perezcano dated March 19, 1999.

²⁵⁶ Rejoinder witness statement of Héctor Raúl García Leos at paragraph 37.

²⁵⁷ Although Exhibit 3 to Mr. Guerra's witness statement refers to excerpts from a videotape made of the April 22, 1994 visit to Orange County, the Claimant refused to produce it upon request of the Respondent. See Mr. Pearce's letter of April 8, 1999.

298. Secondly, Metalclad's press release issued from Newport Beach did not accurately reflect what on its own evidence is now a "non-agreement" with the State government. Its press release states that Mr. Neveau was present when Dr. Medellín made the announcement. Yet neither he nor anyone else from Metalclad publicly took issue with Dr. Medellín's statements at that time. Instead, a glowing press release was issued by the company four days after the press conference (and three days after the local news reports were published in San Luis Potosí).

299. If Dr. Medellín's account, as reported in the local press, did not accurately represent the agreement with the company, Metalclad should not have issued a press release which lauded the State government and then purported to set out the "salient terms" as if there was a genuine agreement.

300. Alternatively, if it did accurately reflect the agreement, Metalclad's press release was misleading for different reasons because it stated that the parties intended to find additional sites rather than an alternative site to La Pedrera.

21. Metalclad Unsuccessfully Attempted to Secure Community Support

Memorial: Metalclad took a low-key approach at the Governor's insistence

301. The Claimant asserted that in January 1994, Governor Sánchez Unzueta requested it not to make any public statements concerning the project. However, Mr. Kesler also implied that during the period following the May announcement, the Claimant already had the support of the local community:

June To August 1994

Construction continued without interruption. There were weekly federal inspections and also additional inspections by the local community by representatives of the Town Council. We employed several hundred people from the local area, we continued the water delivery service and health care and things went fairly smoothly²⁵⁸.

302. Mr. Miranda Nieto also testified that between May 1994 and April 1995, he collected approximately 600 signatures in support of the landfill²⁵⁹.

Counter-Memorial: The Claimant attempted to secure community support but failed

303. The Counter-Memorial pointed out that (consistent with Dr. Medellín's letter and the May 27th press conference) during June 1994, the Claimant made offers to local leaders to try to secure the municipality's support to construct and operate the facility. One such offer was set

²⁵⁸ Memorial witness statement of Grant Kesler at page 8.

²⁵⁹ Memorial witness statement of Ariel Miranda Nieto at page 3.

out in a letter from Metalclad to Municipal President Carrera dated June 13, 1994, attached as Exhibit 75 to the Counter-Memorial. However, the Claimant's proposals failed to win any support.

Reply: The Claimant agreed to supervision of activities at La Pedrera by local officials

304. The Claimant admitted to having made proposals to the Municipality during the summer²⁶⁰. It also adduced evidence of an 'encounter' on June 6, 1994 among Metalclad representatives, Municipal officials and community leaders. However, the Claimant's witnesses, in particular, Mr. Miranda Nieto and Mr. Neveau, provide contradictory testimony about the outcome of the encounter.

305. Mr. Miranda Nieto states:

8. ... There was no meeting. Under the circumstances, we could not and did not reach any agreement with the municipality, and the cessation of the company's operations at the landfill or future meetings with local and state authorities were never even discussed²⁶¹.

306. Mr. Neveau, however, testifies as to the same event:

36. ... Metalclad representatives told me later that the Municipality expressed their desire to have more control over the progress of the project. One of the things they wanted was the establishment of a supervisory committee to oversee the activities at La Pedrera. We affirmed that we had voluntarily suspended all construction activities and agreed to hold a formal meeting with the officials of the municipality to discuss a proposal to the community, which would include the establishment of an oversight committee²⁶².

307. Mr. Neveau's evidence, rather than that of Mr. Miranda Nieto, is confirmed in his letter dated June 8, 1994 to Mr. Juan Carrera Mendoza, the Municipal President²⁶³:

With pleasure, we announce receipt of your memo dated June 7, 1994 in which you ask us to facilitate things so that Hermilo Méndez Aguilar, Rafael de la Rosa Rodríguez and Manuel Castro Castañón, carry out the

²⁶⁰ Reply, Admissions and Denials at paragraph 410.

²⁶¹ Reply, Exhibit 16, witness statement of Ariel Miranda Nieto at paragraph 8.

²⁶² Reply, Exhibit 18, witness statement of Daniel Neveau at paragraph 36.

²⁶³ Attached as an exhibit to the Reply witness statements of both Miranda Nieto and T. Daniel Neveau. (Reply Exhibit 18-3). Miranda Nieto also attaches a copy of the June 7, 1994 letter from Juan Carrera (Reply Exhibit 16-3) to ECOPSA referred to in the June 8th letter from Mr. Neveau.

supervision of the activities in the industrial landfill called "La Pedrera."

We anticipate giving to you all the cooperation of our company so that the councilmen and sindicato can carry out their functions.

To give compliance to the request it is necessary that the personnel of our company get together with the group of people indicated in your memo and even with you, with the effect of being able to elaborate a plan of action that will satisfy the requirements of the communities in that Municipality.

We thank you to indicate to us the day and the hour that is convenient to carry out said meeting. For this effect I am requesting Mr. Javier Guerra and Ariel Miranda to put themselves in contact with you.

We want to inform you that as a result of what is agreed between that Municipality and the Ecological Coordination and Environmental Matter of the State Government, the past June 6th, in the document attached to your memo, the activities in the site were suspended that same day, however, it is important to take notice that when the works were suspended the edge that protects the cells from the currents of rain water was left unfinished. Without this edge, the currents of water, that are abundant right now, may find their way towards the dam in El Huizache. [emphasis added]

308. Mr. Javier Guerra (who had recently joined Metalclad after it took over his company Química Omega), subsequently wrote to Mr. Carrera on July 7, 1994 setting out Metalclad's proposal to remediate and operate the La Pedrera facility²⁶⁴. (His letter does not invite any comments from the recipient. Moreover, there is no reference to the construction and operation of a *hazardous* waste landfill, only a landfill.)

Rejoinder: Metalclad quickly resorted to a "top-down" approach

309. The Respondent notes that the last paragraph of Mr. Neveau's letter quoted above confirms one of the points made elsewhere by the Respondent, namely, that during the summer of 1994, Metalclad represented to the local community that it was engaged in construction relating to maintenance and remediation rather than to the landfill *per se*. In fact, the

²⁶⁴ Reply, Exhibit 18, witness statement of T. Daniel Neveau, Exhibit 5.

municipality consented to the remediation works listed in that paragraph in order to ensure that there was no run-off of toxic wastes in the event of heavy rains (as had occurred previously)²⁶⁵.

310. During the summer of 1994, the Claimant failed to win the *Ayuntamiento's* support for the construction of a hazardous landfill at La Pedrera. It also breached the commitment made by Mr. Neveau on June 6th by preparing to construct under the guise of remediation and maintenance work.

311. The evidence also shows that at the same time as Mr. Neveau and Mr. Guerra were dealing with the municipality, Metalclad was already complaining to the U.S. Embassy. The U.S. Government Chronology shows that in June, Mr. Neveau presented Metalclad's project to the Acting Commercial Counselor and that in July, the Ambassador and the Commercial Counselor were asked "to advocate on behalf of Metalclad"²⁶⁶.

22. Metalclad Resorted To U.S. Diplomatic Pressure To Attempt to Force The Opening

Memorial: During the summer of 1994 and thereafter, Metalclad sought the assistance of the U.S. Embassy

312. The Memorial enclosed a "chronology" which had been prepared by Kevin Brennan, a Commerce Department official and two other officials posted at the United States Embassy. The chronology sets out the actions taken by the U.S. government "in the resolution of problems related to Metalclad's problems in the San Luis Potosí solid waste facility". It showed, for example, that while Messrs. Neveau and Guerra were trying to obtain support by way of a host community agreement in June-July 1994, Mr. Neveau was also presenting Metalclad's project to Embassy officials.

313. By July of 1994 (the U.S. Government Chronology does not specify precisely when):

Ambassador Jones and Commercial Counselor John Harris were asked to advocate on behalf of Metalclad to iron out potential difficulties in mustering the necessary political support so crucial for large and sensitive projects. Commercial Service Mexico organized high level meetings with the environmental attorney general's office that resulted in Federal Government expression of support for the project²⁶⁷.

²⁶⁵ Rejoinder witness statement of Juan Antonio Romo at paragraph 2.

²⁶⁶ U.S. Government Chronology, Exhibit 10 to the Memorial, at page 1.

²⁶⁷ Reply, Exhibit 2, witness statement of Kevin Brennan, Exhibit 2, U.S. Government Chronology at page 1.

Counter-Memorial: Did not appreciate the significance of the early intervention of the Embassy

314. The Counter-Memorial did not connect the activities of the United States Embassy to the federal government's "expression of support for the project" (there was such an expression after a meeting held in Mexico City on September 1, 1994 which U.S. Ambassador James Jones attended.)

315. Dr. Medellín's first witness statement acknowledged that he attended such a meeting at PROFEPA on September 1st, during which time the federal government expressed support for the 'accord recently celebrated by the State and the company'. He testified that he was puzzled at the announcement because the agreement announced at the end of May had called for the municipality to agree to the commercial operation of the site and both he and the company knew that the municipality remained opposed to the project²⁶⁸.

Reply: Reaffirmed the Embassy's support for the company

316. The Reply included witness statements by former Ambassador Jones and Mr. Brennan as well as a copy of a United States Government internal file note by the latter recounting the Ambassador's meeting with Governor Sánchez Unzueta in September 1996²⁶⁹.

✂ Rejoinder: It appears that the United States Embassy was not made aware of crucial facts

317. Although the former ambassador testifies that that his commercial office did a "thorough review" of the facts surrounding the case, it appears that the Embassy was provided a one-sided and inaccurate version of the facts.

318. For example, the Tribunal can infer that Metalclad did not inform Embassy officials of the origins of its relationship with Humberto Rodarte and his efforts whilst a federal official to advance its interests. Had it done so, as the Ambassador later informed Governor Sánchez Unzueta, presumably the U.S. officials would have been obliged to report Metalclad to the Department of Justice as they "had a sworn obligation to uphold the laws, and that includes the Foreign Corrupt Practices Act"²⁷⁰. The Tribunal can also infer that they would not have assisted Metalclad in this proceeding had they been fully apprised of the facts now before the Tribunal.

319. It can be seen that by July of 1994, the Embassy had already decided to lend its support to Metalclad. During the June-September period, the evidence shows:

²⁶⁸ Counter-Memorial, witness statement of Dr. Medellín at paragraphs 67-68.

²⁶⁹ By letter dated April 2, 1999, the United States Department of State stated that the U.S. Government "did not review the statements contained in Mr. Jones's declaration before it was signed, nor did the United States authorize Mr. Jones to sign the declaration".

Hence, the "statements in Mr. Jones's declaration can only represent his personal views and should not be construed as expressing a position of the United States Government on the issues before the arbitral tribunal." See Exhibit 26.

²⁷⁰ Ibid. at pages 2-3.

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- The agreement announced by the State on May 27, 1994 provided for the company to seek the concurrence of the *Ayuntamiento* of Guadalcázar.
- Metalclad acted consistently with the agreement as announced by Dr. Medellín. It attempted to convince the *Ayuntamiento* of the project's merits. It failed.
- Metalclad began construction at the site without applying for a local license. It was told by the municipality to stop construction. It did so and then persuaded the *Ayuntamiento* that it should be permitted to do "maintenance" and work related to "remediation".
- Since it continued to encounter resistance to the project at the local level, Metalclad convinced Ambassador Jones to lend the Embassy's support to its cause.
- During the summer, the work at the Site continued to be described to Mexican authorities as relating to remediation of the contamination and maintenance.
- On August 17th, Metalclad's local counsel, Héctor Raúl García Leos, wrote to Javier Guerra describing how the application for the municipal permit should be made.
- With the intervention of the U.S. Embassy, on September 1st, an expression of federal support was obtained. The federal Environmental Attorney General, Miguel Limón Rojas, in Ambassador Jones' presence, expressed support for "the recently celebrated agreement between the State and the company".
- The agreement to which the Attorney General of PROFEPA referred was the May 27th announcement which required local approval before the site could open as a hazardous waste landfill. However, after failing to persuade the municipality to sign a host community agreement, Metalclad resolved to simply press ahead with construction without applying for the permit. On September 9, 1994, Mr. Neveau wrote to his local counsel, stating with respect to the "application for the building license at La Pedrera", "I am of the opinion that we should probably not apply for the municipal permit... I think that I would rather ignore the problem rather than raise it to a level of awareness"²⁷¹.
- At the same time as Neveau instructed counsel not to apply for the municipal construction permit, Grant Kesler was in England overseeing another stock offering by Oakes Fitzwilliams. In the Offering Memorandum, Metalclad claimed that: "The Company believes that it has obtained the support of state and local governmental agencies to operate the facility..."²⁷².

²⁷¹ Rejoinder witness statement of Lic. García Leos, Exhibit 1.

²⁷² Counter-Memorial, Exhibit 10(I) at page 5.

- The Offering Memorandum also predicted that construction at the site would be completed and the company would be receiving wastes by the end of the calendar year²⁷³.
- However, Metalclad knew that the federal shut down seals had been lifted only on August 30, 1994 to enable the independent environmental audit to be commenced²⁷⁴. The audit had yet to commence (Metalclad notes in its Reply that the audit did not commence until December of 1994²⁷⁵) and even from the federal government's perspective, there was no way that the company could receive wastes while the site was shut down. It also knew that the "local governmental agency" had rejected its offer of a host community agreement.
- Thus, the Offering Memorandum's prediction was misleading²⁷⁶.

320. The evidence shows that during the autumn, as construction moved ahead quickly and the local municipality issued the shut down order, Metalclad "held numerous meetings" with the Embassy's Commercial Service²⁷⁷. These meetings led to increased U.S. Embassy pressure on the federal authorities to express support for the Site.

23. The Municipality Issued a Stop Work Order in October 1994

Memorial: This was the first indication from the Municipality that it did not approve of the construction activities

321. The Claimant emphasized that this was the first time that the municipality injected itself into the issue and implied that Dr. Medellín, as a State official, was behind the issuance on October 26, 1994 of a municipal shut down order requiring the cessation of construction work on the grounds that COTERIN lacked a municipal construction permit.

322. Metalclad's Memorial claimed that:

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 Municipality²⁷⁸.

²⁷³ Ibid, at page 5.

²⁷⁴ And during August, Neveau had attempted to convince the head of the audit (Dr. José Ortega Rivero) to join Metalclad's Board.

²⁷⁵ Reply at paragraph 44.

²⁷⁶ This short chronology helps to explain why State and local officials considered that Metalclad was guilty of pushing and overreaching, while paying insufficient attention to local sensitivities.

²⁷⁷ Memorial, Exhibit 10, U.S. Government Chronology.

²⁷⁸ Memorial, Summary of Facts, paragraph 80.

Counter-Memorial: The Order was issued because the Municipality objected to the landfill's construction

323. Mr. Hermilo Méndez, the Ecology *Regidor* for Guadalcázar testified that:

17. The Municipal Council continued receiving complaints from the community and, in October of 1994, I was instructed, as *Regidor* to carry out all the measures necessary to ensure the safety of all the residents of Guadalcázar, to ensure that the hazardous waste landfill never again be opened, and to see that the wastes stored in the landfill be removed. I was also instructed to advise the State's Congress and the Governor of these measures and of Guadalcázar's appreciation for all the actions undertaken for the benefit of our community. A copy of the Municipal Council Deed is attached as Exhibit 11²⁷⁹.

Reply: Re-affirms Memorial

324. The Claimant reiterated its assertion that the Municipality did not have legitimate grounds for serving the order and complained of the "inchoate" nature of the municipal permitting machinery²⁸⁰.

Rejoinder: New evidence shows Metalclad deliberately ignored the permit requirement

325. First, the evidence filed with the Reply (Mr. Neveau's letter to the Municipal President) shows that the Municipal authorities issued two shut down orders: one on June 6, 1994, and the second on October 26, 1994. Metalclad was allowed to continue work at the Site after June 6th because it represented to the Municipality that it was doing work related to maintenance and remediation.

326. Lic. García Leos testifies that in August of 1994 Metalclad was fully advised on the mechanics of applying for a municipal permit²⁸¹.

327. Moreover, the September 9, 1994 memo from Metalclad's Daniel Neveau to its counsel, Bufete de la Garza, shows that Metalclad initiated the active phase of construction fully aware of the *Ayuntamiento's* opposition and did not apply for a municipal permit because it did not want to raise public awareness of the issue and because it feared a negative response.

328. The evidence shows that Mr. Neveau declined to do so. Metalclad did not apply for the permit until after the October 26th shut down order was issued.

²⁷⁹ Counter-Memorial witness Statement of Hermilo Méndez at paragraph 17.

²⁸⁰ Reply at paragraph 47 and 371.

²⁸¹ Rejoinder witness statement of Héctor Raúl García Leos at paragraph 48.

24. The March 10th Demonstration was a Genuine Expression of Local Opposition

Memorial: The State paid individuals who were not members of the local community to protest the Grand Opening

329. The Claimant alleged, without evidence, that Dr. Medellín and Mr. Leonel Ramos, the Municipal President, organized a protest and described the events of that day in the following terms:

That day a chaotic and violent demonstration took place. The employees of the Company acted prudently and because of that a major tragedy was avoided given that among the demonstrators were professional agitators that were seeking an opportunity to cause a fight that could have had tragic consequences...

Some of the demonstrators were armed and drunk. I recognized among the demonstrators personnel which worked in the municipal palace. I also noticed that at most ten per cent of the demonstrators were residents of towns surrounding the landfill. According to residents of el Entronque those demonstrators who were residents of towns surrounding the landfill received payments and support from the Municipality²⁸².

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were people who
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Counter-Memorial: The demonstration was a spontaneous event organized by residents of the municipality

330. The Respondent adduced evidence that the demonstration was a spontaneous reaction to the news of the 'Grand Opening' ceremony. Few local residents knew anything about the event until the morning of March 10th, when journalists from the City of San Luis Potosí arrived in Guadalcázar and began to interview them on their views about the landfill's opening. Reports of the ceremony had appeared in the San Luis Potosí newspapers on March 9th.

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331. The Respondent also reviewed the Claimant's videotape evidence and found that the tape showed a heated but non-violent protest. One of the notable events was the protesters' demand that Humberto Ródarte come and meet them.

332. The Counter-Memorial also exhibited a letter from the Mexican Embassy to the United States to Metalclad instructing it not to hold a "Grand Opening" because the environmental audit had not yet been completed and the site was still officially shut down²⁸³.

²⁸² Memorial witness statement of Ariel Miranda at page 4.

²⁸³ Counter-Memorial, Exhibit 95.

Reply: Adduced further evidence on the demonstration

333. In an attempt to buttress its earlier allegations, the Claimant adduced for the first time the testimony of a number of independent witnesses of the demonstration.

334. One such witness, Mr. Anthony Talamantez described the day's events as follows:

6. At about 1:30 p.m., Tony Wood, Dan de la Torre and I tried to leave the facility in Tony's car. We were on the dirt road approaching the highway when we had to stop because the tour buses which had just left the facility had apparently been stopped and blocked in by about ten pick-up trucks. Dan de la Torre and I got out and walked towards the front of the buses where the demonstrators had gathered. At the same time, the demonstrators began yelling for Humberto Rodarte who was inside one of the buses. They looked extremely unhappy and were insistent that they speak to him immediately. They were accusing him of taking kick-backs and selling out to the Americans²⁸⁴.

9. During the first few hours of the demonstration, the protestors made a lot of noise shouting things about the landfill and carried placards which stated "no hazardous waste" and "no toxic waste," but there were no direct threats made at that time against us.

10. Until about 5:00 or 6:00 p.m., this was like most of the protests I've experienced in Mexico, it was relatively non-aggressive. Then the mood changed and the situation became more threatening. The buses had been allowed to leave at about 4:00 p.m., and all that remained were a group of about twenty-five active protestors, Javier Guerra Cisneros, Dr. de la Torre, Dan de la Torre, Chip Gordon and me. Just as with the crowd earlier, I did not recognize any of these demonstrators to be from El Huizache or Los Amoles. There was only one man I recognized from Los Amoles, and he was adamantly arguing with the demonstrators. Javier tried to reason with them, but they were getting more and more agitated; and they began to yell comments such as "Gringos go home." I became somewhat alarmed and noticed that Chip Gordon was still around and was not understanding what was being said. Chip does not speak Spanish and is light skinned. I pulled him aside and walked him down to a vehicle owned by the driller, Francisco, and said that things

284

A telling accusation, in light of the evidence recently discovered.

were beginning to get too dangerous for him to stay any longer and that he should leave. I left him there and went back to the group. The protestors continued to be agitated. Eventually, the crowd broke up; and I left to go back to San Luis Potosí with Dr. de la Torre, his son Dan, Javier Guerra, and Chip Gordon²⁸⁵. [emphasis added]

Rejoinder: New evidence confirms that the demonstration was spontaneous and legitimate

335. While the Respondent cannot adduce evidence to contradict a witness' evidence of his subjective feelings at the time of the demonstration, it observes that, after all of the evidence that Metalclad has adduced, it has not been able to show evidence of any harm to property or person as a result of the demonstration.

336. The evidence of its new witnesses, Jorge de la Torre, Dan de la Torre, Anthony Talamantez, and William E. Gordon, confirms the Respondent's assertion that the protest itself was peaceful and a legitimate manifestation of community opposition to the opening of the landfill.

337. Father Romo Navarro, the Priest of Guadalcázar, attended the demonstration. He testifies that it was agitated but peaceful. He testifies, as do some of the Metalclad witnesses, that far from inciting the demonstrators, the Municipal President convinced them to disband²⁸⁶.

338. The testimony of Juan Romo, (the father of the infant who suffered from encephalitis and who later presented his child to the Governor) is that he was also present on March 10th. He says that members of his *ejido* (located some 7 kilometers from the site) went to the site when they saw three luxury buses turn off the highway in the direction of La Pedrera²⁸⁷.

339. The Respondent also notes that, despite the Claimant's assertion of an unpleasant change in atmosphere late in the day at the site, none of its witnesses reported the incident to the authorities, nor was other legal action taken. Moreover, it appears that they resumed work at the site shortly thereafter²⁸⁸.

25. Metalclad's Relations with its Local San Luis Potosí Law Firm in April 1995

Memorial: Bufete de la Garza failed to reveal significant conflicts of interest

340. The Claimant asserted that Bufete de la Garza was in a conflict of interest and acted against Metalclad.

²⁸⁵ Reply, Exhibit 23, witness statement of Mr. Anthony Talamantez at paragraphs 6, 9 – 10.

²⁸⁶ Rejoinder witness statement of Father Romo Navarro at paragraph 23.

²⁸⁷ Rejoinder witness statement of Juan Romo at paragraph 7.

²⁸⁸ Reply, Exhibit 27, Daily Field Reports of William Gordon for Saturday, March 11 and Monday, March 13, 1995.

341. In addition, alone amongst the Metalclad witnesses, Humberto Rodarte claimed in his first witness statement that the law firm suggested to Metalclad that the Governor be bribed in order to “convince” him²⁸⁹.

Counter-Memorial: José Mario de la Garza resigned after Mr. Kesler asked him to bribe Governor Sánchez Unzueta in order to resolve the local opposition problem

342. The Respondent sought Mr. de la Garza’s response to the serious allegations of conflicts of interest and Mr. Rodarte’s allegation of attempted bribery made against his firm. He testified that the alleged conflicts of interest did not exist²⁹⁰.

343. In response to Mr. Rodarte’s accusation, Mr. de la Garza also testified that it was Grant Kesler who asked him to bribe the Governor, not the other way around²⁹¹.

344. The Respondent also filed Metalclad’s letter dated April 28, 1995 signed by Mr. Kesler and Mr. Neveau which purported to terminate the firm’s retainer. Their letter made no reference to the firm’s alleged unethical conduct, stating rather that Bufete de la Garza was not providing timely services to Metalclad²⁹².

Reply: Memorial re-affirmed

345. No new evidence was provided concerning the alleged conflicts of interest. As for responding to the allegation that Mr. Kesler suggested to de la Garza that the Governor be bribed, Mr. Kesler denied that the meeting at which this was alleged to have been suggested took place and Mr. Rodarte offered evidence as to Mr. Kesler’s character.

346. Mr. Rodarte testified:

“I have read Lic. de la Garza’s testimony and find the accusation that Mr. Kesler requested his assistance in bribing Governor Sánchez Unzueta to be unequivocally false. There never was any strategy meeting of April 28, 1995, and I can assure the Tribunal that at no time in any meeting did Grant Kesler—or anyone at Metalclad—ever ask Lic. de la Garza, or anyone else for that matter, to bribe the Governor. Unfortunately, seeking and offering bribes is too common in Mexico—especially in state and local politics and business—but this is simply out of line with everything that I know about Mr. Kesler

²⁸⁹ Memorial witness statement of Humberto Rodarte at page 7.

²⁹⁰ Counter-Memorial witness statement of José Mario de la Garza at pages 9-12.

²⁹¹ Ibid.

²⁹² Counter-Memorial witness statement of José Mario de la Garza, Exhibit 34.

and the people I worked with at Metalclad²⁹³. [emphasis added]

347. The Claimant adduced as evidence a copy of the April 28th termination letter which it alleged had been delivered on April 28th at the offices of Bufete de la Garza and which bore an acknowledgement of receipt.

Rejoinder: The new evidence confirms the Counter-Memorial

348. In light of the new evidence, as well as the buttressing evidence of Mr. García Leos, the Respondent submits that its account is to be preferred. The new evidence of Mr. Rodarte's relationship with Metalclad whilst a federal official is highly relevant to the Tribunal's consideration of the conflict between Mr. de la Garza and Mr. Kesler's testimony on whether the latter requested that a bribe be offered to the Governor²⁹⁴. Given what is now known about the Kesler/Rátner-Rodarte agreement, Mr. Rodarte's assertion of evidence on Mr. Kesler's character cannot be believed.

349. In his second witness statement, Mr. Kesler denied that the meeting at which this was said to have occurred took place (although careful scrutiny of the statement shows that he does not deny making the request to bribe the Governor that was attributed to him)²⁹⁵.

350. The Tribunal is also directed to the testimony of Lic. Héctor Raúl García, Mr. de la Garza's law partner who was also present at the meeting with the Metalclad representatives. He testifies that he was not present when Mr. Kesler and Mr. de la Garza left the meeting to meet privately, but when his partner returned to the main meeting, he was visibly upset. He testifies that the meeting concluded shortly thereafter and that Mr. de la Garza requested him to support his decision to no longer act for Metalclad in light of what had been requested of him²⁹⁶.

351. In both the Memorial and the Reply, Metalclad repeatedly emphasized how well it got along with federal officials²⁹⁷. It is now evident that Metalclad was assisted by Mr. Rodarte —

²⁹³ Reply, Exhibit 20, witness statement of Humberto Rodarte Ramon at paragraph 39.

²⁹⁴ The Reply devotes five and a half pages to excoriating Mr. de la Garza for allegedly breaching his duty of confidentiality. The Respondent concedes that Mexican law on solicitor-client privilege is not as well developed as that of its NAFTA partners. However, it notes that in both the United States and Canada, it is well-established that a client's request that his counsel assist him in engaging in illegal activity is not privileged. Similarly, where legal counsel's performance of his retainer is challenged by his client (as here, when Metalclad made serious allegations against Bufete de la Guerza in the Memorial).

²⁹⁵ Reply, Exhibit 15, witness statement of Grant Kesler at paragraphs 66-79.

²⁹⁶ Rejoinder witness statement of Héctor Raúl García at page 8.

²⁹⁷ The Reply asserts in response to the Counter-Memorial: "In some name-dropping, sophomoric way, Claimant has tried to portray a 'close personal relationship' with important Mexican officials. *But the evidence* is that Metalclad officers did meet a number of Mexican Government officials during the time stated, who encouraged the Company to bring its investment to Mexico. It is not a 'close personal relationship' that Claimant avers, but a reliance on the encouragement and solicitation of these officials to make an investment in Mexico's environmental infrastructure." See response to paragraph 659 of the Counter-Memorial.

with whom it had built a relationship in the manner described above— in dealing with other federal officials.

26. Metalclad Alleged a Conspiracy to Establish a Competing Landfill

Memorial: Bufete de la Garza and Medellín conspired to set up a competing landfill

352. The Memorial claimed that Bufete de la Garza actively assisted Dr. Medellín in the incorporation of a new company to set up a competing landfill:

“Following closely behind the meeting at INE, Medellín Milán formed a group which, on August 15, 1995, was incorporated as Promocion y Desarrollo de Infraestructura, S.A. de C.V., (hereafter IDP), with the joint participation of nine San Luis Potosí construction companies... The attorney for the new company is José Mario de la Garza Marroquín, son of José Mario de la Garza Mendizábal, former attorney for Metalclad.”²⁹⁸

Counter-Memorial: The Claimant’s allegations were false.

353. Both Dr. Medellín and Mr. de la Garza denied the allegations made against them.

354. Dr. Medellín stated:

21. The local group, PRODIN, that came forward did so without any involvement on my part whatsoever. I was later informed that the objective with which it was created did not contemplate the management and final disposition of hazardous wastes. I am acquainted with some of the members of the group, which is not surprising given the small community in which we reside. However, I played no part in organizing them or encouraging them to come forward, nor did I provide them with *any* information concerning Metalclad’s project at La Pedrera.

22. This group was not successful in establishing a hazardous waste landfill. I am only aware of the fact that they rushed into buying a property before securing local approval. Later on, they faced opposition in the community and they abandoned the project.

355. The evidence of Mr. de la Garza was that PRODIN was established to enable its incorporators, local construction companies in San Luis Potosí, to compete for large-scale

²⁹⁸ Memorial at paragraph 98.

projects with construction companies from Mexico City. Two such projects included the construction of water treatment plants in the city of San Luis Potosí and a section of road linking the city with El Huizache²⁹⁹.

356. Mr. de la Garza also testified that the construction and operation of a hazardous waste facility was not within the legal objects of the company.

Reply: No further evidence is adduced

357. Although no further evidence was adduced, the Reply repeated the allegation.³⁰⁰

Rejoinder: New evidence supports the Counter-Memorial

358. As the Tribunal can see from the corporate brochures that have been submitted as an Exhibit to the joint witness statement of Samuel González and Eugenio Sánchez Soler of PRODIN, PRODIN (as it is known in San Luis Potosí, not IDP) is a large company that has been doing business in the State for some many years. It was not incorporated to set up a competing landfill.

359. As Mr. de la Garza testified previously, his firm had acted for PRODIN, but not for the reasons ascribed by Metalclad.

360. His evidence is supported by new evidence in the form of a joint statement from members of PRODIN's Board of Directors³⁰¹.

27. U.S. Pressure Increased To Force The Landfill's Opening

The Memorial: The United States Embassy as well as members of Congress criticized the Governor of San Luis Potosí:

361. The U.S. Government chronology sets out the various actions by Embassy officials in relation to the landfill. Metalclad also provided evidence of U.S. legislators writing to Mexican officials at the company's behest. It also referred to Ambassador Jones' threat to "blacklist" the State of San Luis Potosí if the Governor did not "solve the problem."

Counter-Memorial: The Governor could reasonably be expected to respond to Metalclad's orchestrated criticism of his Administration

362. In response to Metalclad's expressions of bafflement that the Governor would respond to the campaign of pressure being orchestrated against him, the Respondent adduced evidence which showed that the Claimant had been seeking to marshal support from senior U.S.

²⁹⁹ Counter-Memorial witness statement of José Mario de la Garza at pages 11 – 12.

³⁰⁰ Reply, Chapter 5, Section 2.

³⁰¹ Rejoinder, Joint witness statement of Samuel González and Eugenio Sánchez Soler of PRODIN.

politicians since at least May 1995 when Mr. David Robinson sent Dr. Medellín a copy of a draft letter which he said he intended to send to Congressman Richard Durbin and Senator Paul Simon.

363. The Counter-Memorial pointed out that it should not have surprised Metalclad that the Governor would respond to criticisms of his Administration's handling of the case when letters of complaint accusing him of expropriating the landfill were being sent to the President of the Republic and others³⁰².

Reply: Adduced further evidence of U.S. Embassy involvement

364. Metalclad adduced the testimony of former Ambassador James R. Jones and an existing official at the Embassy, Mr. Kevin Brennan, both of whom furnished witness statements.

365. Ambassador Jones asserts:

8. ...contradictory to the Governor's witness statement, I believed at the time, and still do, that it was the Governor and his government of San Luis Potosí who was less than honest about the events surrounding the permitting of the landfill rather than Metalclad. I had spoken with Metalclad representatives on several occasions and believed that they were doing everything possible to satisfy the Governor's concerns about the technical suitability of the site, gaining the necessary permits, educating the community about the benefits of the project and so forth.

to Jones

...

a. Governor Sánchez Unzueta's assertion that in a meeting of September of 1996 I said that I would send the evidence against Metalclad regarding alleged improprieties committed by Metalclad in getting the state land use permit from his predecessor's government to the Department of Justice is incorrect. On the other hand, both I and the commercial officer present at the meeting only told him that we had a sworn obligation to uphold the laws, which included the Foreign Corrupt Practices Act. Our official obligation was to report alleged violations such as this. Notwithstanding this, as far as I know, **these allegations were found not to have any merit.**" [bolded in the original; emphasis otherwise added]³⁰³

³⁰² Counter-Memorial at paragraphs 751-755.

³⁰³ Reply, Exhibit 14, witness statement of James R. Jones at paragraphs 8 and 9a.

Rejoinder: The U.S. officials were not apprised of all material facts

366. At the hearing, it will be necessary to explore the new evidence and its impact on the assertions made by both witnesses. The Respondent will invite Mr. Jones and Mr. Brennan to review the newly discovered evidence of Metalclad's payments to officials. They will be asked whether in briefing them (or to their knowledge, other U.S. Government officials) Metalclad ever informed them that from the start, that it had made payments in connection with the issuance of federal permits. They will also be asked about the thoroughness of their investigation into Metalclad's experience and *bona fides*.

28. Two Separate *Amparo* Proceedings Followed the *Convenio de Concertacion*

Memorial: They were part of a series of "interferences" with the Claimant's investment

367. Mr. Kesler asserted:

...In December, at [the Governor's] urging and using the same law firm, the principal of whom is José Mario de la Garza, filed a lawsuit on behalf of the community against the federal government to prevent the enforcement of the agreement signed by Metalclad and the federal government on November 24, 1995. A local judge granted an *amparo* preventing the operation of the facility and the enforcement of the agreement. It was appealed to a higher court, where it sat for approximately 19 months before a decision was finally handed down in late August 1997. The decision came in favor of the federal government and against the local community and the Governor...³⁰⁴

Counter-Memorial: The allegations concerning the amparos were false and misleading

368. First, with respect to the allegation that his firm acted against Metalclad in the *amparo*, Mr. De la Garza denied it.³⁰⁵

369. Second, the Counter-memorial pointed out that the Claimant failed to describe in any detail the complex constitutional issues surrounding the *Convenio* which had prompted the Municipality to file first an administrative complaint with SEMARNAP, and then commence an *amparo* action.

370. The Municipality argued, *inter alia*, that the *Convenio* addressed matters within the Municipality's jurisdiction; therefore, it had a right to request a determination from the courts as to whether it was bound to accept the terms of the *Convenio*.

³⁰⁴ Memorial witness statement of Grant Kesler at page 16.

³⁰⁵ Counter-Memorial witness statement of José Mario de la Garza at page 22.

371. The Respondent also adduced evidence to show that, far from being a victim of a “process that took its property without hearing or just compensation,”³⁰⁶ the Claimant participated in the *amparo* proceedings, as did the federal and municipal authorities.

372. In addition, and, as contemplated by the Amended Option Agreement, the Counter-memorial adduced evidence that Metalclad itself initiated *amparo* proceedings against the Municipality arising out of the denial of COTERIN’s application for a construction permit. This *amparo* was dismissed because the company failed to properly invoke its administrative remedy by proceeding to the State Administrative Tribunal. The Claimant later abandoned its subsequent appeal against the decision to dismiss the *amparo*.

Reply: Amparo is NAFTA-inconsistent

373. This new theme is explored elsewhere in this Rejoinder (in the Legal Submissions), as is the Claimant’s assertion that the final interlocutory injunction issued against COTERIN on February 23, 1996 was a form of indirect expropriation.

Rejoinder: The claim that amparo is NAFTA-inconsistent is unsustainable

374. In its Admissions and Denials, the Claimant refused to answer the Respondent’s account of the various legal proceedings on the grounds that the Respondent had provided no support for its allegations³⁰⁷. However, in the Reply itself, the Claimant has adopted the Respondent’s description of the proceedings, challenging only the latter’s translation of the injunction³⁰⁸.

375. At page 40 the Claimant accuses the Respondent of providing a misleading translation of the injunction. It asserted that the injunction did not mandate remediation, but was merely permissive on this issue. The Claimant stated:

The court’s order *as rendered by Respondent* in essence requires specific performance of COTERIN’s obligations under the *Convenio* while suspending or extinguishing its rights under that agreement³⁰⁹.

376. The Respondent has reviewed its translation of the injunction. The Respondent concedes that the translation is somewhat summary in form and that it suggests a more mandatory sense regarding the issue of remediation than the Spanish original. The Respondent therefore examined the Claimant’s rendition. It agrees that it better captures the precise wording of the court’s order³¹⁰.

³⁰⁶ Memorial, paragraph 44.

³⁰⁷ See for example, Reply, Admissions and Denials response to Counter-memorial paragraph 606 *et seq.*

³⁰⁸ See Chapter 3, entitled “Apparent Common Ground” paragraphs 62-63.

³⁰⁹ Reply, footnote 93 on page 40.

³¹⁰ The Respondent has included a concise translation of the court order in Annex 6.

377. That being said, as shall be discussed further below, the contention that *amparo* is NAFTA-inconsistent is unsustainable.

29. In February 1996 the Municipality Obtained an Injunction Against the Federal Government

Memorial: The amparo's injunction hindered the landfill

378. The Claimant did not address the circumstances surrounding the court proceedings in which the injunction was issued. It gave the impression that the Claimant was the hapless victim of an inscrutable foreign legal system, without any means to challenge the injunction.

On February 6, 1996, the federal judge admitted the amparo [filed by the Municipality against the dismissal of its administrative petition by SEMARNAP and against the Convenio de Concertación], 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...³¹¹.

Counter-Memorial: Metalclad did not see fit to inform its investors of the injunctions

379. The Respondent observed that while Metalclad referred to the injunctions in its Memorial, a perusal of its February 1996 Offering Memorandum showed that the company had not seen fit to bring them to the attention of its would-be investors³¹².

Reply: The injunctions were further evidence of an expropriation

380. The Reply elevated the importance of the injunctions, describing them as examples of expropriation by judicial decree³¹³.

Rejoinder: Mr. Kesler's new statement is not accurate

381. The Respondent reiterates its earlier observation that what was not considered to be material enough to bring to the attention of investors at the time now becomes one of the main points of the revised legal theory of the case.

382. The Respondent earlier pointed out that Messrs. Kesler, Neveau and Guerra exercised their options and realized a substantial profit in the February 1996 offering. The Respondent

³¹¹ Memorial at paragraph 44.

³¹² See Counter-Memorial at paragraphs 596-605.

³¹³ Reply at paragraphs 443-445.

notes an interesting factual inconsistency in the Reply. Although the Reply correctly states that the preliminary and final injunctions were issued on February 6 and 23, 1996, respectively, Mr. Kesler's second witness statement incorrectly sets the dates at after the completion of the offering:

Regrettably, a short time after we completed the February 1996 offering [the offering closed on February 28, 1996], a Mexican court awarded an amparo on behalf of the Community of Guadalcázar against SEMARNAP which had the effect of preventing the enforcement of the agreement between SEMARNAP and the Company executed on November 24, 1995³¹⁴.

383. The Respondent also rejects the characterization of the *amparo* process, including the injunction, as expropriatory. The *amparo* proceeding is a fundamental judicial process established to review the constitutionality of acts of authority in order to preserve individual rights. The fact that the *Ayuntamiento* initiated an *amparo* as a legitimate means to challenge the validity of the *Convenio* and obtained an injunction in no way violates principles of international law or constitutes a deprivation of property, even if the *amparo* is ultimately resolved against the *Ayuntamiento*. Moreover, the Claimant itself initiated an *amparo* process against the *Ayuntamiento* in order to challenge the denial of the municipal permit.

30. The Municipality and Metalclad were Unable to Reach an Agreement

Memorial: No agreement was possible because of the Governor's influence

384. Throughout his statement, Mr. Carvajal, another Mexican counsel of the Claimant, implied that the Municipality agreed that the landfill, once in operation, could accept hazardous waste and that this was reflected in the *Acuerdo de Entendimiento* signed by him and the Municipal President on January 8, 1997.

385. Without adducing any evidence on the point, the Claimant also asserted that:

The Parties arrived at agreement on a number of points...[which] included the Governor's "revalidation" of the land use permit, the termination of the Municipality's *amparo* action, and issuance of the local construction permit³¹⁵.

³¹⁴ Reply, Exhibit 15, witness statement of Grant Kesler at paragraph 40. The Respondent also notes that although Mr. Kesler devotes over two pages of his second witness statement attempting to explain why he, Mr. Neveau and Mr. Guerra sold their shares off-shore, his statement is silent on the key objection raised by the Respondent: namely, the failure to include in the Offering Memorandum material information relating to an event that occurred *before* the private placement even began.

³¹⁵ Memorial, paragraph 126, at pages 98-99.

386. Negotiations came to an end when members of Guadalcázar *Cabildo* allegedly told Company representatives that the landfill would not be supported by groups outside of the communities surrounding the Site³¹⁶.

Counter-Memorial: The Acuerdo failed because of the Claimant's insistence that the facility operate as a hazardous waste landfill

387. The evidence showed that the Municipality's main concern was remediation; the consent to the landfill's operation was contingent on community support and the treatment of non-hazardous waste only³¹⁷.

Reply: Reaffirms Memorial and Mr. Carvajal's testifies to a change in the Acuerdo's terms

388. As it has done elsewhere, the Claimant denied completely the Respondent's version, either on the grounds that the Respondent's statements consisted of argument and not fact, or that assertions were made without any "appropriate evidence." However, Mr. Carvajal did not have the same reservations when he responded to statements made by Mr. Serrato.

Rejoinder: New evidence shows that the terms of the Acuerdo were changed by Metalclad unilaterally

389. Mr. Carvajal asserted that the *Acuerdo* was revised the day after its signing to delete the word "non-hazardous". Mr. Ramos Torres testifies that he did agree to sign the revised agreement because Mr. Carvajal told him that he had spoken to Mr. Serratto and that he had agreed to the modification³¹⁸.

390. Mr. Serratto testifies that he did not so agree. He says that the only agreement that he advised is client to sign was the January 8th revision that was read by all of those involved in the discussion and then signed by both sides³¹⁹. This version referred only to non-hazardous waste.

31. The Environmental Decree Has Not Been Shown to Affect Metalclad as Alleged

Memorial: It constituted an illegal expropriation of the Claimant's investment

391. The Claimant characterized the decree as the last defiant act of a Governor about to leave office and implied that it was aimed solely at the Claimant's investment.

³¹⁶ Memorial, paragraph 129 and witness statement of Gustavo Carvajal at page 35.

³¹⁷ Counter-Memorial and Rejoinder witness statements of Leone Ramos Torres and Leonel Serrato Sánchez.

³¹⁸ Rejoinder witness statement of Leone Ramos Torres at paragraph 10.

³¹⁹ Rejoinder witness statement of Leonel Serrato at paragraph 5.

Counter-Memorial: The Decree is not expropriatory

392. The terms of the Decree preserve permits and authorizations granted prior to its enactment or regularized within 90 days of the enactment date, and empowers the General Coordinator of Ecology and Environmental Proceedings to authorize public or private works within the ecological reserve, provided that projects comply with certain requirements to ensure sustainability of natural resources.

393. The Respondent also submitted that the Decree was not part of the present proceedings because it was promulgated after the Claimant had initiated its complaint under Chapter Eleven.

Reply: Reaffirms Memorial

394. The Reply argued that terms of the Decree exclude the possibility of the landfill from ever operating as such. The Claimant asserts that:

434. ... a number of the Decree's provisions seem to preclude the use of the property in the manner contemplated by the Claimant from the project's inception and disclosed to the Governor on June 11, 1993 and on numerous occasions thereafter.

435. The text itself does not promote much predictability and inspires no confidence in Claimant's ability to exempt its investment; the Decree's provisions are malleable and wide discretion can be expected to operate in its implementation, given in particular the prerogatives traditionally enjoyed by the Governor of the state.[emphasis added]

Rejoinder: Counter-Memorial reaffirmed

395. The Declaration of Natural Protected Area in the Modality of State Reserve with Biosphere Reserve Characteristics denominated Real de Guadalcazar and located in the Municipality bearing the same Name ("the Decree") is the result of a process spanning several years, that began with detailed studies of the regional flora³²⁰. Such studies concluded that the Real de Guadalcazar region is the place with the highest concentration of cacti species in the world, including several endemic and threatened species.

396. There were other such projects for decrees during the Sánchez Unzueta administration.

397. The studies contributed to increase awareness and concerns regarding the protection of the environment in a community that was already dealing with the environmental liability

³²⁰ Studies date back to the mid 1950's, but the most significant ones were performed since the early 1990's. *Technical and Supportive Study for the Declaration by the State of a protected natural area of the Region of Guadalcazar, S.L.P., January 1997, Exhibit 28.*

generated by COTERIN. Thus, based on numerous letters submitted by citizens, citizens' groups, *ejidos* and agrarian communities, non-governmental organizations, schools, etc., and following a request by the *Ayuntamiento* of Guadalcázar, the Government of the State of San Luis Potosí determined the need to protect the regional flora and fauna by establishing a state ecological reserve³²¹. The Respondent agrees that the contamination of La Padrera heightened the local interest in an ecological decree.

398. The Decree's purpose is to protect the Real de Guadalcázar region, not by precluding the development of productive activities, but rather by exercising a more stringent control, to ensure sustainability of natural resources. Such control is exercised on the different types of activities, such as productive activities, extraction and use of water or human settlements.

399. The Decree:

- forbids dumping or discharging pollutants within the protected area, as well as establishing any polluting activities (article 14).
- preserves any valid permits, licenses and authorizations previously granted (article 4 of the transitional provisions);
- granted a 90 day term to bring into order any irregular permits, licenses or authorizations(article 4 of the transitional provisions); and
- permits the establishment of new activities, provided that:
 - a) sustainability of natural resources is ensured (article 7),
 - b) environmental and other applicable laws and regulations are observed (article 7),
 - c) an environmental impact authorization in accordance with the federal environmental legislation is obtained (article 8), and
 - d) an area management plan is complied with.

400. Thus, the establishment and development of productive activities, including operations at the landfill, far from being precluded, would be consistent with the requirements set forth in the Decree, albeit subject to a more rigorous regulatory control.

401. First, a controlled landfill that meets applicable standards and complies with the relevant law is, by definition, not a polluting activity, but rather the opposite³²². Second, the decree

³²¹ Ibid, at pages 68-71.

³²² Both the federal and state environmental acts define pollution as the presence in the environment of one or more pollutants or any combination of them that causes ecological unbalance. Ecological unbalance is defined as the alteration in the relationship of interdependence between natural elements that conform the environment, such that negatively affects the existence, transformation and development of humans and other living beings (see Article 3 of the General Ecological Equilibrium and Environmental Protection Act, and Article 3 of the Environmental Protection Act of the State of San Luis Potosí).

preserved any preexisting permits (e.g. the land use license). Third, guaranteeing sustainability of natural resources³²³ is not opposed to developing a landfill³²⁴.

402. As for compliance with other laws and regulations, the Respondent confirms that the Claimant was required to obtain a municipal construction permit—which the Claimant knew full well—regardless of the Decree. The Decree in no way altered this situation: it did not create such an obligation, nor did it provide for any exemptions; it is simply a matter that falls outside the Decree's scope. Indeed, to the extent that the Claimant had valid environmental permits from the competent authorities, the Decree did not preclude the Municipality from issuing any permits.

403. The Respondent did not argue that, under the Decree, the Claimant was either fully permitted or retained the right to regularize the municipal permit that it had failed to obtain³²⁵. The Respondent submits that the Decree preserves any previously granted valid permits (or allowed previously granted permits to be regularized within a 90 day term). Otherwise, consistent with NAFTA Article 1114, it empowers the State Ecology Coordination to authorize public or private works and the development of activities, provided that certain requirements are met.

404. The Respondent will point out in its Legal Submissions that Metalclad abandoned its project long before the Decree was promulgated. Its statements in this proceeding show that it had abandoned the project in favour of resort to this claim by December 1995 (when the municipal construction permit was denied).

³²³ The General Ecological Equilibrium and Environmental Protection Act, for instance, defines sustainable development as the process that is assessable through environmental, economic and social criteria and indicators, that tends to improve the quality of life and productivity of persons, and is based on measures that are appropriate to preserve the ecological balance, protect the environment and use natural resources in a manner that does not compromise the needs of future generations.

³²⁴ Indeed, of the 814 hectares owned by COTERIN, only 20 are able to be destined for the landfill activities, the rest serving as a buffering zone. The Claimant itself established a nursery for cacti species within the landfill premises. Executive Summary of the Environmental Audit, at page 2. Exhibit 98 to the Counter-Memorial.

³²⁵ Reply at paragraph 439.

PART V: EVIDENCE RELATING TO OTHER FACTORS THAT AFFECTED THE PROJECT

1. There is No Evidence of Corruption Fomented by RIMSA

Memorial: RIMSA corrupted State and local officials in order to avoid competition from the Claimant's investment

405. The Memorial repeatedly asserted that RIMSA corrupted State and local officials as well as representatives of Pro San Luis Ecológico. The alleged corruption by RIMSA figured prominently in the Memorial and witness statements³²⁶.

Counter-Memorial: There was no evidence of such corruption

406. The Respondent was unable to find any cogent evidence that RIMSA was in any way involved in the controversy surrounding La Pedrera.

407. It interviewed all of the governmental and non-governmental persons against whom Metalclad made the allegations. Each individual made a specific and emphatic denial. Dr. Medellín's denial (his late wife was dying at the time) and Dr. Núñez's denial (she kept the evidence of the "dirty tricks" campaign) were particularly specific responses.

Reply: Metalclad's suspicions based on "information and beliefs"

408. At Chapter 11, Section 4, the Reply asserts:

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

Without retreating from the strong sense it has already shared with the Tribunal, Claimant concedes that a comprehensive view of the instant dispute may include consideration of various non-monetary factors and

³²⁶ Memorial, at paragraphs 9(3), 54, 55, 102, 209, 210, 211, witness statement of Grant Kesler at pages 17, 18, 19, witness statement of Humberto Rodarte Ramon, at pages 3 and 4, and David Robinson's entire witness statement.

influences. The Respondent's own submissions establish many of these.

409. It stated in footnote 415 that the Claimant had "reliable but mainly intangible support for its views."

410. Turning to the witness statements filed with the Reply, other than following bits of evidence, no substantive reply evidence was submitted. Mr. Guerra observed at the end of his statement that a former INE official, Mr. Efrain Rosales Aguilera left INE to form a consulting firm, SICASA, and that one of his major clients is RIMSA.³²⁷ However, Mr. Guerra does not draw any inferences or allege any connection to this case from this fact.

Rejoinder: The Respondent points out this allegation should have been abandoned

411. The Respondent observes that in contrast with Metalclad's voluminous Reply evidence on the March 10th demonstration, no significant new evidence of RIMSA's involvement was submitted.

412. There is nothing in the Reply or in the witness statements on the evidence that was said to link the State officials (and others) to RIMSA except for the following:

- an allusion by Javier Guerra that RIMSA is one of a major customer of an environmental consulting firm, SICASA, established by a former INE official who was responsible for all hazardous waste permitting³²⁸;
- Mr. Kesler's unsupported paragraph³²⁹; and
- A reference in Kevin Brennan's file note dated October 2, 1996³³⁰.

413. This was the sum total of the rebuttal evidence.

414. The Respondent observes that at all material times, RIMSA was a subsidiary of the U.S. company, Chemical Waste Management, Inc ("ChemWaste"). It also observed in an October 2, 1996 U.S. Embassy file note, Mr. Kevin Brennan records a telephone conversation held with Grant Kesler in October of 1996 in which Mr. Kesler informs Mr. Brennan that "next week he expected to have that would link the current Governor to RIMSA, the current monopoly processor of toxic waste in Mexico"³³¹.

415. No such documents have been filed by Metalclad after two rounds of pleadings.

³²⁷ Reply, Exhibit 11, witness statement of Javier Guerra at paragraphs 115-116. Given Metalclad's own in-house INE relationship, this attempt to resuscitate a RIMSA connection pales by comparison.

³²⁸ Reply witness statement of Javier Guerra at paragraphs 115-116.

³²⁹ Reply, Exhibit 15, witness statement of Grant Kesler at paragraph 138.

³³⁰ Reply, Exhibit 2, witness statement of Kevin Brennan, Exhibit 4, paragraph 10.

³³¹ Ibid.

416. Given Metalclad's demonstrated propensity to invoke governmental assistance and the fact that at the material time RIMSA was controlled by another U.S. corporation (which would be subject to the Foreign Corrupt Practices Act) the Respondent requested Metalclad to produce:

...copies of any complaint filed with law enforcement agencies or judicial authorities in Mexico or the United States concerning its allegations that RIMSA unlawfully interfered with its business objectives by corrupting officials, acting in concert with environmental groups, or otherwise.

417. Metalclad produced only a copy of a reported court decision involving ChemWaste in the United States on facts that have nothing to do with this Claim and directed the Respondent to a set of newspaper articles (that the Respondent believes Metalclad was instrumental in having written). It did not produce any of the requested documents.

418. Given that Metalclad was so quick to complain to U.S. authorities and legislators, the Respondent therefore wrote to Metalclad requesting that it confirm that:

'Metalclad does not have any copies of any complaint filed with law enforcement agencies or judicial authorities in Mexico or the United States concerning its allegations that RIMSA (a subsidiary of the U.S. company, ChemWaste) unlawfully interfered with its business objectives by corrupting officials, acting in concert with environmental groups, or otherwise.'

419. On April 8, 1999, Metalclad refused to confirm this.

2. The Local Opposition by NGO's was Genuine and Reflected Pre-existing Opposition in the Municipality

Memorial: The opposition was the result of the Governor, Dr. Medellin, and Dr. Nunez, all corrupted by RIMSA

420. The Memorial asserted that the opposition to the landfill had been generated by the Governor and Dr. Medellin with the assistance of the local NGO, Pro San Luis Ecologico.

Counter-Memorial: The opposition to the landfill was genuine and long pre-dated Metalclad's arrival

421. The Counter-Memorial adduced extensive evidence of genuine and long-standing opposition to the landfill:

- it adduced evidence of the prior contamination of the Site;
- it filed the witness statement of the Municipal president of the time and his efforts to oppose the siting of the landfill in his municipality;

- it adduced evidence of the blockading of the Site and the temporary detaining of the federal inspectors in 1990 and the eventual shut down of the Site.
- it adduced the evidence of many letters written by the municipalities surrounding Guadalcázar;
- it filed letters from private citizens, NGOs, *ejidos*, and other groups who opposed the landfill;
- it filed witness statements from Dr. Nunez, Mr. Bejerano of Greenpeace and other opponents to the project;
- it filed the statements of the governmental officials who offered their perspectives on the conflicts. Their testimony differed as to the causes but all of the witnesses agreed that the opposition was genuine and deeply rooted; and
- it filed the expert evidence of Marcia Williams who testified that in her extensive professional experience as, *inter alia*, the former head of the EPA's Office of Solid Waste, Metalclad's experience at Guadalcázar was no different than many other unsuccessful siting efforts in the United States.

422. The Counter-Memorial adduced all of this evidence, including the evidence of personal conflicts between officials of different levels of government, to demonstrate the level of emotion and frustrations and disagreements generated by this highly contentious project.

Reply: The Respondent "sponsored" the "extremist international NGO, [Greenpeace], and its local protégée, [Pro San Luis Ecológico]"

423. The Reply, as noted above, moved away from the alleged RIMSA-sponsored opposition and focused on the real villain which was, to quote Metalclad, the "extremist NGO, [Greenpeace], and its local protégée" [Pro San Luis Ecológico].³³²

424. In addition to continuing to accuse the Governor and Dr. Medellín of many acts, the Claimant also began to assert that other acts of the federal authorities (who in the Memorial were uniformly complimented) contributed to the problem:

334. ...There is first the strong pressure upon officials applied through the well-documented efforts of Greenpeace and one other NGO. The Greenpeace initiatives are noteworthy because they left sympathetic officials no room to maneuver; Greenpeace it is said offered no compromise—whether based upon scientific aptness or related site attributes—to its no-landfill policy.

³³² Reply, Admissions and Denials, paragraph 39.

425. The Claimant also asserted:

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

Rejoinder: Greenpeace became involved after the March 10th demonstration

426. Although Dra. Nunez and Pro San Luis Ecologico solicited the assistance of Greenpeace and other environmental groups in 1994, Greenpeace Mexico not become an active opponent of the La Pedrera landfill until the after the events of March 10, 1995. In the words of Mr. Bejarano, "I was shocked by the news published in the Reforma Newspaper on March 11, 1995 concerning the opening of the La Pedrera landfill"³³³.

427. In addition to participating in several demonstrations in Mexico, Greenpeace Mexico enlisted the support of Greenpeace United States in organizing demonstrations in Newport Beach, and lobbying legislators in Washington. It also provided technical support for opponents of the landfill who challenged the validity of the scientific studies of the Site and legal support to file a criminal complaint alleging environmental crimes; a human rights complaint alleging violations of the human rights of the residents of the neighboring communities; and an administrative law complaint alleging abuse of power on the part of the officials involved³³⁴.

428. In her rejoinder report, Marcia Williams observes:

The surprise would have truly been if Greenpeace were not involved in organizing the local community in opposition as they have been involved in the active opposition of virtually every hazardous waste disposal facility worldwide for many years. This is one of the factors I pointed out in my report that make siting a new facility difficult and a factor Metalclad should have anticipated and planned for if it intended to increase its chances for success³³⁵.

429. The suggestion that Greenpeace and *Pro San Luis Ecologico* were acting as *agent provocatur* of the state or municipal government is far fetched and wanting of any basis in the

³³³ Counter-Memorial, witness statement of Fernando Bejarano Gonzales at paragraph 3.

³³⁴ Ibid at paragraph 21.

³³⁵ Rejoinder, Expert Report of Marcia Williams at paragraph 17.

evidence. Indeed, witnesses knowledgeable of the environmental movement have noted that the NGO's prize their independence from government³³⁶.

3. There Were Jurisdictional Disputes Among Levels of Government

Memorial: The corrupt actions of Governor Sánchez Unzueta and Dr. Medellín took precedence over federal policy and in turn influenced local opinion

430. The Claimant asserted that the federal authorities had, at the relevant times:

...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 PROFEPA³³⁷.

431. It alleged that the landfill failed in part to the federal government's "passive concession to the Governor"³³⁸.

432. The Claimant also argued that the Governor abused his position to provoke "anti-North American and anti-Metalclad prejudice"³³⁹ in a poor community dependent upon his goodwill for financial and political support:

96. It must be emphasized that the population of Guadalcázar 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 agree³⁴⁰.

Counter-Memorial: The landfill was viewed differently by each level of government in accordance with their respective responsibilities

433. As far as successive sets of senior federal authorities were concerned, the hazardous waste that had been improperly buried prior to the Claimant acquiring COTERIN, required remediation. They apparently regarded the facility as a solution both to this problem and as a means of dealing with other hazardous waste.

³³⁶ See for example, the Memorial, witness statements of Dr. Pedro Medellín Milan, Dra. Angelina Nunez, Julia Carbias, Antonio Azuela, Ferando Bejarano, and Marcia Williams.

³³⁷ Memorial, paragraph 26.

³³⁸ Memorial, Summary of Facts at page 5.

³³⁹ Memorial, Summary of Arguments, paragraph 202.

³⁴⁰ Memorial, Summary of Facts, paragraph 96.

434. The Sánchez Unzueta administration supported the idea of a hazardous waste landfill somewhere in San Luis Potosí, but given La Pedrera's history of local opposition to the project, the Governor believed that it was not the proper site. He consistently told the Claimant that he would not give his personal support to the project as long as the community opposed the reopening. In January 1994, the Governor offered the State's support in locating an alternative site. This was reflected in the May 27th announcement.

435. Municipal officials represented the legitimate concerns of their community in opposing the project. COTERIN had created a serious environmental problem at La Pedrera, despite having had federal approval, and only after the contamination of the Site did the local community succeed in having it closed. In view of these circumstances, local opposition was entirely understandable.

Reply: Federal actions contributed to the problems

436. In the Reply, the Claimant modified its position on this issue as well, this time to seize upon the Respondent's admission that the landfill became the subject of differences between the different levels of government.

437. Under the heading, "There are Indications that the Federal Operational Style Contributed to Suspicion and Resentment on the Parts of Local Officials, NGO's and Private Citizens", the Reply asserted:

212. Claimant submits that strained relations between local and federal authorities —which have ultimately led to *amparo* proceedings of great longevity— were fueled by a *de facto* federal policy which initially discouraged consultation and collaboration with local officials and residents.³⁴¹

Rejoinder: The Respondent admits that the de facto policy of some federal officials, notably Mr. Rodarte, in 1990-93 did fuel resentment that the subsequent conduct of consultation was unable to overcome

438. The following evidence is relevant to the Tribunal's consideration of this contention:

- Even before Metalclad acquired its interest in ETI, Mr. Kesler and his fellow investors had associated themselves with Rodarte.
- As the local SEDUE representative, Rodarte ignored the complaints of local citizens about the Aldrett's transfer station until he issued a shut down order 17 days after his wife became a shareholder in COTERIN's then likely future competitor, Eco-Administración.³⁴²

³⁴¹ Reply at paragraph 212.

³⁴² See Counter-Memorial witness statement of the then-Municipal President Ávila Pérez.

- Between 1990 and 1991, in authorizing the transfer station, and in 1993 in issuing the federal permits for COTERIN, acts by federal officials did strain relations with the State and the Municipality.
- Rodarte was widely disliked in San Luis Potosí for his imperious attitude³⁴³. The Tribunal will recall that the videotape of the March 10th demonstration catches the protesters chanting that they wanted Metalclad to produce Rodarte. Similarly, Mr. Anthony Talamantez, one of the Reply witnesses testifies that during the March 10th demonstration: "the demonstrators began yelling for Humberto Rodarte who was inside one of the buses. They looked extremely unhappy and were insistent that they speak to him immediately. They were accusing him of taking kick-backs and selling out to the Americans³⁴⁴. (They were correct on the issue of improper payments.)

PART VI: METALCLAD CORPORATE ISSUES

1. Metalclad Made Misstatements to the Market

Memorial: Metalclad is a reputable publicly traded company

439. Grant Kesler started his testimony by observing that:

"I joined Metalclad on March 1, 1991 and became the President and Chief Executive Officer on June 1, 1991. Metalclad, at that time, was more than 50 years old, had completed more than One Billion Dollars worth of environmental construction projects all over the world and had a reputation with the Environmental Protection Agency and the Occupational Safety and Health Administration and other agencies that was as perfect and clean as any company in America.

The Company was public at that time, with 1,000 or so stockholders and one or two market makers. We have now grown to 4,000 shareholders with 50 market makers and have a very liquid stock that trades on the NASDAQ Exchange."³⁴⁵

³⁴³ Ibid.

³⁴⁴ Reply, Exhibit 23, witness statement of Anthony Talamantez at paragraph 6.

³⁴⁵ Memorial witness statement of Grant Kesler at page 2.

Counter-Memorial: Metalclad made numerous misstatements to investors and repeatedly misled them as to the status of its projects in Mexico

440. The Counter-Memorial characterized Metalclad's various omissions and misstatements of fact in its disclosures to investors as misrepresentations, rather than contraventions of U.S., English, or Mexican law. This was due to the fact that this Tribunal is presented with a claim under the NAFTA and applicable rules of international law and the Respondent did not regard these misrepresentations as being central to the Tribunal's mandate except insofar as they went to the credibility of Metalclad's claims and explained its actions in Mexico. In those two respects, they are of crucial importance.

Reply: The Respondent has engaged in tactics designed to besmirch the reputation of a bona fide company

441. Metalclad took umbrage with the Respondent's evidence of its misrepresentations and the actions of some of its insiders. The Reply stated in Chapter 5:

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

...

3. The Absence of Securities Violations

124. There can be little doubt the non-lawyers assigned to opine upon the legality of Claimant's securities practices suffer by comparison to Mr. Grant Kesler. His Declaration is that of an (sic) specialist whose extensive involvement in securities transactions has left him nonetheless able to truthfully assert that:

At no time during my career, spanning almost 28 years, as a financial or securities principal of a registered and licensed broker dealer, nor at any time while I have been the [CEO] of Metalclad Corporation have I ever been the subject of a complaint or investigation by the SEC,

NASD, NASDAQ, SIPC or any state or foreign regulatory authority³⁴⁶.

442. In a response to the Counter-Memorial's Summary of the Facts, Metalclad asserted:

The evidence shows that—Respondent's pernicious insinuations to the contrary—Metalclad has complied with the rigorous and complex SEC filing and disclosure requirements; that Metalclad has not been cited by the SEC, NASD, or NASDAQ, or even complained against. Respondent's proffer of non-lawyer opinions to create innuendos (sic) of serious illegality discredits its evidence. This unimaginative, banal approach by Respondent attempts to deflect analysis away from the salient NAFTA and international legal issues to a tainted Claimant undeserving of equity. The Tribunal will quickly see through this flimsy façade. First, because the charge is irrelevant to the case at hand. Second, because the allegations are facially false. And third, because the documentary and witness evidence proves otherwise. For the time and expense incurred by Claimant responding to these infamous and irrelevant allegations, Claimant will ask the Tribunal to add to the award it (sic) associated costs³⁴⁷. [emphasis in the original]

443. In his second witness statement, Mr. Kesler expressed puzzlement at any suggestion of impropriety on his part. He testified that:

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.

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

³⁴⁶ Reply, Exhibit 15, witness statement of Grant Kesler at paragraph 25. It is useful to note that the records of the states of California and Utah indicate that Mr. Kesler personally was a registered broker for only one year, 1988. His securities company, Paradigm Securities, was cited by the state of Virginia in 1984 for operating without a license.

³⁴⁷ Reply, Admission and Denials, response to paragraph 658 of the Counter-Memorial.

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.

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.

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.

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 authority³⁴⁸.

Rejoinder: There is strong evidence that Metalclad committed numerous violations of U.S. securities law

444. Contrary to Metalclad's characterization of its pleadings, the Respondent did not plead that Metalclad had violated U.S. or other law, nor did its experts so assert. Rather, the Respondent and its experts listed a number of misrepresentations that were made by Metalclad and Mr. Kesler to the public and to their investors. The identification of these misrepresentations was useful in that: (i) it demonstrated that Metalclad and Mr. Kesler lack credibility on issues relating directly to the Claim, and (ii) it provided an explanation of Metalclad's behavior in attempting to force the opening of the landfill at La Pedrera without going through all proper legal procedures, rather than take up the State's offer of support to site a landfill at any other location.

445. In the Reply, neither Metalclad, Mr. Kesler, nor Mr. Haglund (Metalclad's general counsel) answered the evidence that the company had made misrepresentations to the public and its investors. Rather, they attempted to deflect attention from the misrepresentations by castigating the Respondent's experts for opining on legal issues (something they did not do), by asserting that Messrs. Kesler and Haglund were highly knowledgeable about securities law, and by stating that the law was "complex"³⁴⁹.

³⁴⁸ Reply, Exhibit 15, Grant Kesler witness statement at paragraphs 21 to 25

³⁴⁹ For example, at paragraph 19 and 26 of his new statement (Reply, Exhibit 15), Mr. Kesler states:

446. Mr. Kesler's witness statement, in particular, devotes much attention to reviewing his experience in securities law matters, and argues that the fact that he has not so far been sued or prosecuted for securities law violations is evidence of his expertise and good character.

447. Since the Claimant has chosen to put into issue its compliance with securities law requirements, the Respondent will respond: There is substantial evidence that Metalclad, Mr. Kesler, and some of his colleagues violated the U.S. securities law³⁵⁰.

448. Volume 5 to this Rejoinder, "Detailed Prima Facie Evidence of Metalclad's Securities Law Violations", sets out the basic prohibitions of U.S. law on making misleading or false statements to investors. These requirements are not complex, but rather straightforward: the law prohibits fraud, material misstatements, and omissions of fact in connection with the sale of securities. Metalclad and Mr. Kesler frequently breached this prohibition. For example:

- Metalclad failed to correct misleading information about the 250 million dollar Chase Manhattan Bank financing that Mr. Kesler announced to the market at a press conference held at the National Press Club in Washington, D.C. on January 9, 1992 (and through a company press release issued after the press conference). Mr. Kesler stated that financing for its projects in Mexico was about to be closed. The evidence is that the financing was in its early stages and after Mr. Kesler realized that a detailed questionnaire had to be completed and that the Bank would control the project through a series of covenants, he instructed the responsible officer to stop work on the application³⁵¹. This statement of an impending substantial financing and the failure to correct it after a material event was calculated to defraud the investing public, contrary to Section 10(b) of the Exchange Act and Rule 10b-5.
- Metalclad repeatedly misled investors as to the status of the Santa María del Río and COTERIN projects by exaggerating their progress (in terms of ground breaking, construction, and likely operation and, in COTERIN's case, its problems with municipal permits, lawsuits, and injunctions) in a manner calculated to defraud the investing public, contrary to Section 10(b) of the Exchange Act and Rule 10b-5.

Footnote continued from previous page

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...'

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.'

³⁵⁰ The Respondent is being assisted in this proceeding by U.S. counsel who are well-qualified to opine on the requirements of U.S. securities law.

³⁵¹ Rejoinder witness statement of Ronald E. Robertson.

- Metalclad issued an Offering Memorandum in London in February 1996. During the offering, a preliminary injunction and then a final interlocutory injunction was issued by a Mexican court against the opening of the landfill. Metalclad failed to amend its Offering Memorandum to advise would-be investors of these material facts³⁵². This was a contravention not only of U.S. law (because it was calculated to defraud the investing public, contrary to Section 10(b) of the Exchange Act and Rule 10b-5).

449. The Tribunal is directed to Annex I (in Volume 5) for a fuller discussion of the evidence of securities law violations.

2. Metalclad Has Not Adduced Specific Evidence of its Expenditures on the COTERIN Landfill

Memorial: Metalclad spent 20.5 million dollars on building the landfill

450. Metalclad repeatedly asserted that a 20 million dollar “state-of-the-art” facility had been constructed in Guadalcázar.

451. Its expert, American Appraisal Associates, included a one page schedule of expenditures in its report which it accepted as proof of the company’s expenditures. Its report stated that: “The 1,151,500 dollars was the purchase price for COTERIN. The balance of 19,323,028 dollars represents the Metalclad expenditures for the analysis of the site and the development and construction of the La Pedrera facility as it exists today. The total cost to Metalclad was almost 20,500,000 dollars”³⁵³.

452. The entire 20 million dollars was claimed to have been spent on La Pedrera. The Memorial asserted: “...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 dollars into the Mexican economy for the labor, equipment and materials to construct the landfill...”

Counter-Memorial: The evidence did not support the claimed expenditures

453. In preparation for the filing of its Counter-Memorial, the Respondent instructed one of its experts, Mr. Kevin Dages, to review the claimed expenditures. At his request, the Respondent asked Metalclad to have its Chief Financial Officer prepare a detailed list of expenditures. Metalclad refused to do so.

454. The Respondent also requested that Metalclad produce audited financial statements for COTERIN and Metalclad’s other Mexican subsidiaries/affiliates. It supplied the companies’ tax returns but produced only two of the audited financial statements for its subsidiary Eco-Administracion.

³⁵² The injunctions are now stated to be expropriatory acts. Yet Metalclad did not see fit to disclose them to would-be investors at the time.

³⁵³ Memorial, AAA Report, page 74, paragraph 176.

455. Mr. Dages then requested an opportunity to visit the Claimant's offices and examine the records that were said to underlie the claimed expenditure. He was permitted to do so. Before visiting Metalclad's office, he wrote to Mr. Dabbene setting out his request to examine the supporting documentation for Metalclad's tables. His first report describes at paragraphs 10.14-10.19 what he was shown.

456. On the basis of the financial information that was supplied to him, Mr. Dages concluded that the vast majority of the 20.5 million dollars claimed expense was not related to COTERIN.

457. Mr. Dages concluded that the "best estimate of Metalclad's investment in the La Pedrera landfill would be the audited property, plant and equipment balance for all Metalclad's hazardous waste treatment facilities as disclosed in its 10-K filings (\$3.875 million) LESS amounts in that total attributable to Metalclad's other non-La Pedrera developmental sites (including Santa María del Rio, Veracruz, Torroslipas and the Torango water treatment pilot)".³⁵⁴

Reply: The Claimant spent the 20.5 million dollars on its "Mexican investment"

458. The Reply adduced the evidence of Metalclad's Chief Financial Officer, Mr. Anthony Dabbene, who now described the 20.5 million dollars as expenditures incurred in "development activities in Mexico"³⁵⁵.

459. The Reply also provided a second report from AAA. The AAA Reply Report described the 20.5 million dollars as "Metalclad's sunk costs in Mexico, 1991-1997"³⁵⁶ rather than the direct costs of acquiring the Site and building the landfill.

Rejoinder: Metalclad has made a fundamental shift in the way described its claimed expenditures

460. The shift in the Reply evidence demonstrates that Mr. Dages' original analysis was correct. Mr. Dabbene did not address the sum of money that was claimed to have been spent on La Pedrera specifically. Instead, he testified as to the "development of the Mexican business", "Metalclad's investment in pre-acquisition activities", "costs incurred for project development in Mexico", costs "related to Mexican operations" "its total investment", etc.

461. Mr. Dages' second report contains a list of the various descriptions used by Mr. Dabbene and in the AAA Reply report. The Tribunal is directed to the section of Mr. Dages' second report entitled, "Claimants have significantly altered their representations concerning the nature of their \$20.5 million alleged investment in COTERIN."³⁵⁷

³⁵⁴ First Dages Report at paragraph 10.18.

³⁵⁵ Reply witness statement of Anthony Dabbene, Exhibit 6 at page 13.

³⁵⁶ AAA Reply Report at page 16.

³⁵⁷ Second Dages Report at paragraphs 11-43.

462. Mr. Dages reiterates his earlier conclusion as to the likely amount of money actually expended on La Pedrera.³⁵⁸

463. The Respondent concludes this part by observing that it repeatedly requested the audited financial statements of Metalclad's Mexican subsidiaries/affiliates. Metalclad repeatedly declined to provide the statements. Accordingly, on April 14, 1999, the Respondent requested that the Tribunal order Metalclad to produce the documents. On April 27, 1999, the Tribunal issued the requested order.

464. Mr. Dages was obliged to finalize the Respondent's Rejoinder report without the benefit of reviewing the audited financial statements. The Respondent therefore reserves the right to file additional comments after the Claimant complies with the Tribunal's order.

³⁵⁸ Ibid. at paragraphs 175-181.

