

**INTERNATIONAL CENTRE FOR  
SETTLEMENT OF INVESTMENT DISPUTES  
(ADDITIONAL FACILITY)  
BETWEEN**

**ROBERT AZINIAN, KENNETH DAVITIAN, &  
ELLEN BACA  
(CLAIMANTS)**

**-AND-**

**THE UNITED MEXICAN STATES  
(RESPONDENT)**

**AWARD  
BEFORE THE ARBITRAL TRIBUNAL  
CONSTITUTED UNDER CHAPTER ELEVEN OF  
THE NORTH AMERICAN FREE TRADE  
AGREEMENT, AND COMPRISED OF:**

Mr. Benjamin R. Civiletti  
Mr. Claus von Wobeser  
&  
Mr. Jan Paulsson (President)

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**I. THE PARTIES**

**A. The Claimants**

The Claimants, Mr. Robert Azinian of Los Angeles, California, Mr. Kenneth Davitian of Burbank, California, and Ms Ellen Baca of Sherman Oaks, California, have initiated these proceedings as United States (hereinafter "U.S.") citizens and shareholders of a Mexican corporate entity named Desechos Solidos de Naucalpan S.A. de C.V. (hereinafter "DESONA"). DESONA was the holder of a concession contract entered into on 15 November 1993 (hereinafter "the Concession Contract") relating to waste collection and disposal in the city of Naucalpan de Juarez.

2. In these proceedings, the Claimants are represented by:

David J. St. Louis, Esq.  
Law Offices of David J. St. Louis, Inc.  
575 East Alluvial  
Suite 102  
Fresno, California 93720  
USA

## **B. The Respondent**

In these proceedings the Respondent, the Government of the United Mexican States, is represented by:

Lic. Hugo Perezcano Díaz  
Consultor Jurídico  
Subsecretaría de Negociaciones Comerciales Internacionales  
Dirección General de Consultoría Jurídica de Negociaciones  
Secretaría de Comercio y Fomento Industrial  
Alfonso Reyes No.30, Piso 17  
Colonia Condesa  
México, Distrito Federal, C.P.06149  
México.

## **II. ESSENTIAL CHRONOLOGY**

**I**N EARLY 1992, the Mayor of Naucalpan and other members of its Ayuntamiento (City Council) visited Los Angeles at the invitation of the Claimants to observe the operations of Global Waste Industries, Inc., a company said by the latter to be controlled by them.

On 7 October 1992, Mr. Azinian, writing under the letterhead of Global Waste Industries Inc. (hereinafter “Global Waste”) as its “President,” sent a letter to the Mayor of Naucalpan containing a summary of the way “we expect to implement ... the integral solution proposed for the solid waste problem” of the city. The following representations were made:

- (1) “The company will replace all the current collection equipment for advanced technology in the area of solid wastes” – specifically including watertight vehicles and metal bins.
- (2) “The necessary investment to implement an efficient and hygienic solid waste collection, transportation and processing system is approximately US \$20,000,000,” of which 50% “will be directed to the acquisition of collection equipment.”
- (3) “GLOBAL WASTE INDUSTRIES, INC. is a company specialized in the collection and reduction of solid wastes. With more than 40 years of

experience, GLOBAL WASTE provides collection services to residences, businesses and industry in the Los Angeles area.”

In the course of a session of the Ayuntamiento on 4 November 1992, the “Integrated Solution Project” was presented. It was described as involving a consortium including Sunlaw Energy Inc., a U.S. corporation experienced in the conversion of bio-mass to energy, and an investment of US \$20 million.

However attractive it found this proposal, the Ayuntamiento was not in a position to grant the envisaged 15-year Concession Contract due to its own limited mandate; Mexican law requires, in such a context, approval from the relevant State legislature. Accordingly the project was presented in late July 1993 to a legislative committee. In support of the project, Mr. Ariel Goldenstein, a close business associate of the Claimants, and the future general manager of DESONA, said that “our company has been working in the U.S. for more than 40 years.” Naucalpan’s Director of Economic Development said “that’s why we chose Global Waste.” Naucalpan’s Mayor referred to the Claimants’ “more than 40 years experience in this area, in the city of Los Angeles, in a county that as you know has more than 21 million inhabitants.”<sup>1</sup>

On 15 August, legislative approval of the proposed Concession Contract was published in the official gazette, triggering a 90-day limit for its signature.

On 15 November, the Concession Contract was signed. Two days later DESONA commenced its commercial and industrial waste collection, using two reconditioned front-load vehicles.

On 13 December, DESONA commenced residential waste collection for the Satélite section of Naucalpan but did not supply the five rear-load vehicles as provided for by the schedule of operations under the Concession Contract. Until the termination of the Concession Contract, the two initial front-loaders remained the only units of the 70 “state-of-the-art” vehicles called for under the Concession Contract to be put into service by DESONA.

On 1 January 1994, a new administration took over the Naucalpan Ayuntamiento. (It represented the same political party.)

In January and February, there were a number of meetings between the personnel of DESONA and the Ayuntamiento concerning implementation of the Concession Contract. The Ayuntamiento was particularly concerned by the absence of new vehicles, which DESONA explained was due to difficulties in obtaining import permits for which it could not be faulted.

In mid-February, the Ayuntamiento sought independent legal advice about the Concession Contract. It was advised that there were 27

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<sup>1</sup> Respondent’s translation of the United Legislature Committee Meeting, 22 July 1993, Annex One, Respondent’s Rejoinder, pp. 1, 4 and 10.

“irregularities” in connection with the conclusion and performance of the Concession Contract.

On 7 March, the Ayuntamiento decided to disclose the perceived irregularities to DESONA and to give it an opportunity to respond.

On 10 March, in the presence of Mr. Davitian and local counsel to DESONA, the charges were read out and DESONA was directed to respond to them by 17 March.

On 15 March, DESONA initiated proceedings before the State Administrative Tribunal seeking nullification of the Ayuntamiento’s decision (of 7 March) to question the Concession Contract.

On 21 March, despite a protest from DESONA on 16 March, the Ayuntamiento decided to annul the Concession Contract. The Claimants were notified of this decision two days later.

On 11 April, DESONA amended its claim before the State Administrative Tribunal to include nullification of the Ayuntamiento’s decision of 21 March.

On 1 June, DESONA was given an opportunity to present its case to an extraordinary session of the Ayuntamiento. Mr. Goldenstein appeared on behalf of DESONA.

On 14 June, the Administrative Tribunal heard DESONA’s claims, and dismissed it by a judgment of 4 July.

On 13 July, DESONA appealed to the Superior Chamber of the Administrative Tribunal, which upheld the Ayuntamiento’s annulment of the Concession Contract by a judgment dated 17 November. The Superior Chamber held that of the 27 alleged irregularities, nine had been demonstrated. Of these, seven related to various perceived misrepresentations by the Claimants in connection with the conclusion of the Concession Contract.

On 10 December, DESONA lodged a further appeal, in the form of a so-called *amparo* petition, to the Federal Circuit Court.

On 18 May 1995, the Federal Circuit Court ruled in favour of the Naucalpan Ayuntamiento, specifically upholding the Superior Chamber’s judgment as to the legality of the nine bases accepted for the annulment.

On 17 March 1997, the Claimant shareholders of DESONA initiated the present arbitral proceedings against the Government of Mexico under Chapter Eleven of the North American Free Trade Agreement (hereinafter “NAFTA”), by submitting a claim to arbitration pursuant to Article 1137(1)(b) thereof.

### III. OVERVIEW OF THE DISPUTE

**N**AUCALPAN IS AN IMPORTANT and heavily industrialised suburb of Mexico City. In 1993, when the Concession Contract was signed, it had a population of nearly two million, and 21,800 commercial or industrial establishments. Residential and business waste

management was, and remains, an important function of the municipal authorities. Somewhat more than 900 tonnes per day of residential waste were collected, and somewhat less than 900 tonnes per day of commercial and industrial waste. (The latter generates higher revenues for the provider of collection and disposal services.) When DESONA entered the scene, collection, treatment, and disposal left much to be desired. The municipality's equipment was inadequate and obsolete.

As conceived, the Claimants' project in fact aimed at a far greater prize than earnings from local waste disposal services. Their ambition was that this would be a pilot project which would ultimately spawn major industries, beginning with the modernisation of waste disposal throughout Mexico and extending to important profitable sidelines:

- the manufacture in Mexico of modern specialised vehicles, not only for the Mexican market but also Central and South America,
- the recycling of waste, notably to produce cardboard, and
- the erection of power generation plants to convert landfill bio-gases into electricity; revenues from these plants would be used in part to finance the improvement of the waste disposal infrastructure.

Once armed with a long-term contract with one important Mexican city, the Claimants hoped to interest third parties having greater financial resources and expertise to join forces with them, thus allowing the Claimants to leverage their modest means into a profitable position within a grand scheme. In some correspondence, this was referred to as a "Newco" to which DESONA would somehow assign its operations in Naucalpan. During the hearings before the Arbitral Tribunal, the plan to use the initial concession to entice new participants was referred to on a number of occasions as "taking the show on the road." In his oral testimony, Mr. Goldenstein explained that the Claimants' anticipated US \$20 million investment should have been understood as funded by Sunlaw Energy.<sup>2</sup> He did not explain how US \$20 million could suffice to build a 200 megawatt power generating plant. More importantly, he could not point to any evidence that any Mexican authority had been appraised prior to signature of the Concession Contract that Sunlaw had lost interest in the project, with the result that it would no longer provide a source of funding. To the contrary, the Concession Contract retained the provision about the generating plant, which appears in Article 11 of the signed document.

Today, as a result of the cancellation by the City of Naucalpan of DESONA's Concession Contract, the Claimants, as shareholders in DESONA, are seeking recovery of the loss of the "value of the concession as an ongoing enterprise." The highest of their alternative methods of evaluation<sup>3</sup> results in a figure of some US \$19.2 million. The Claimants

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<sup>2</sup> English Transcript 21.6.99, p. 296, 1.8 and p. 298, 1.9-10.

<sup>3</sup> See Section V.

allege that the actions of the Ayuntamiento of Naucalpan resulted in a violation of NAFTA, attributable to the Government of Mexico.

There are some immediately apparent difficulties with the claim. It must be said that this was not an inherently plausible group of investors. They had presented themselves as principals in Global Waste, with approximately 40 years' experience in the industry. In fact Global Waste had been incorporated in Los Angeles in March 1991, but put into bankruptcy in May 1992 – 14 months later. Global Waste owned no vehicles, and in the year preceding its bankruptcy had had revenues of only US \$30,000. The only Claimant who could be said to have experience in the industry was Mr. Davitian, whose family had been in the business of waste disposal in the Los Angeles area. In reality, Mr. Davitian was the only Claimant to hold shares (15%) in Global Waste. Even in the case of Mr. Davitian personally, since he was precisely 40 years old in 1993, a claim of 40 years' experience was preposterous.

As for the other Claimants: Mr. Azinian had no relevant experience, had a long record of unsuccessful commercial litigation, and had been declared personally bankrupt in 1991. Mr. Goldenstein had a background in a family property business in Argentina and in restaurant management in the U.S., and claims expertise in the financing of major motion picture projects as a result of his studies in Los Angeles. Mr. Goldenstein was never a shareholder in Global Waste<sup>4</sup> but addressed Mexican authorities on its behalf. He was described by the Claimants' counsel as "the person that is most knowledgeable from Claimants' point of view as to all of the transactions that are involved here."<sup>5</sup>

None of this background was disclosed to the Naucalpan authorities. The Naucalpan authorities thus entrusted a public service to foreign individuals whom they were falsely led to believe were part of an experienced concern possessed of financial and technological resources adequate for the job.

Nor were there, as of the date the Concession Contract was concluded, firm commitments from the various third parties whose involvement was necessary if the venture was to evolve from a pilot project to achieve grandiose further objectives – or even if the basic engineering services and equipment under the Concession Contract were to be provided. The landfill gas conversion scheme appears to have been

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<sup>4</sup> Mr. Goldenstein testified that there was an understanding that he, Mr. Davitian, and Mr. Azinian were each to be treated as one-third beneficial owners of Global Waste, but this was not reflected in formal ownership because it was a so-called Subchapter S corporation and for U.S. tax purposes could not include foreign shareholders; English Transcript, 21.6.99, p. 294, l.2.

<sup>5</sup> Mr. Goldenstein is not one of the Claimants because as an Argentine national he has no standing under NAFTA. Ms. Baca, on the other hand, is a Claimant as a result of a property settlement in her divorce from Mr. Davitian, and appears to have had no substantive role in the project. English Transcript, 21.6.99, p. 21, l.12.

a fantasy, for a number of elementary practical reasons including the fact that landfill gases could not supply more than a fraction of the required raw materials.<sup>6</sup> The capacity of the power plant contemplated under the Concession Contract was astonishing. To generate 200 megawatts would likely have required investments far in excess of US \$100 million. Such a plant would have been four times the size of the largest landfill-connected power plant in the U.S. In fact Sunlaw Energy, the U.S. corporation which was to finance the acquisition of a new waste collection fleet through the power generation project, backed away from the project shortly before the Concession Contract was signed, thus apparently leaving the Claimants with few sources of funds other than the anticipated revenues from the rate-payers of Naucalpan. Given that the city budget had no provision for the acquisition of new equipment, this can hardly be viewed as a healthy situation.

During the brief period of putative performance of the Concession Contract, the Claimants gave every impression of living hand to mouth, barely able to finance the acquisition of merely two vehicles (and reconditioned at that, not new), or even meeting a payroll. And yet, on the very day when the Concession Contract was presented to the Naucalpan City Council for approval, Mr. Goldenstein had reaffirmed that the project investment would be approximately US \$20 million. The evidence compels the conclusion that the Claimants entered into the Concession Contract on false pretences, and lacked the capacity to perform it.

The new city authorities who took over on 1 January 1994 exhibited little inclination to work things out with DESONA or its principals, but instead handed them a list of 27 putative grounds of termination. It should be made clear that the Arbitral Tribunal makes no criticism of Mr. Francesco Piazzesi, who became Naucalpan's Director of Economic Development in January 1994. Mr. Piazzesi appeared before the Arbitral Tribunal and gave a credible account of his actions. Indeed, Mr. Piazzesi testified that his personal recommendation in March 1994 was that the Concession Contract should *not* be annulled at that time.<sup>7</sup> The reason this recommendation was not followed remains unexplained, understandably leading Mr. St. Louis, for the Claimants, to castigate the Respondent for having adopted an "empty chair" policy in not producing other officials as witnesses. The list itself ignores the 30-day cure period defined in the Concession Contract. The Claimants insist that they were in a position to remedy the shortcomings and to perform their obligations.

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<sup>6</sup> As much as 95% of the natural gas would have to be *purchased* from PEMEX, whose attitude toward the prospect of this new source of electric energy may have been hostile.

<sup>7</sup> English Transcript, 23.6.99, p. 130, l. 5-6.

The summary above explains the background of the Claimants' challenge to the validity of the purported termination of the Concession Contract, as well as the opposing thesis of the Ayuntamiento of Naucalpan to the effect that the Concession Contract was either void for misrepresentations, or rescindable for failure of performance. Before going any further, the Arbitral Tribunal must satisfy itself that this debate may be subjected to a full substantive review before a NAFTA Tribunal. The Arbitral Tribunal is not so satisfied, and that, in the circumstances more fully described and for reasons stated in Section VI, suffices to resolve this case.

#### **IV. THE PROCEDURE**

ON 24 NOVEMBER 1996, the Claimants sent to the Respondent a "Preliminary Notice of Intention to File a Claim and Consent of Investors" which recited that it was made "under Part 5, Chapter 11, Subchapter B of NAFTA as a result of an expropriation of a business venture by the City of Naucalpan de Juarez, Estado de Mexico and against the Federal Government of Mexico." The Claimants thereby explicitly waived their rights to "further court or administrative proceedings regarding this claim pursuant to [NAFTA] Article 1121(1) and (2)."

A more detailed document from the Claimants entitled "Notice of Intent to Submit a Claim to Arbitration" was received by the Respondent on 10 December 1996; on 16 December, it received a slightly modified version, entitled "Amended Notice of Intent to Submit a Claim to Arbitration."

By a Notice of Claim dated 10 March 1997, submitted as of 17 March, the Claimants requested the Secretary-General of the International Centre for Settlement of Investment Disputes (hereinafter "ICSID") to approve and register their application for access to the ICSID Additional Facility, and submitted their claim to arbitration under ICSID Additional Facility Rules.

On 24 March 1997, the Acting Secretary-General of ICSID informed the Parties that the requirements of Article 4(2) of the ICSID Additional Facility Rules had been fulfilled and that the Claimants' application for access to the Additional Facility was approved, and issued a Certificate of Registration of the case.

Following appointments in due course, the Acting Secretary-General of ICSID informed the Parties that the Arbitral Tribunal was "deemed to have been constituted and the proceedings to have begun" on 9 July 1997, and that Mr. Alejandro A. Escobar, ICSID, would serve as Secretary of the Arbitral Tribunal. All subsequent written

communications between the Arbitral Tribunal and the parties were made through the ICSID Secretariat.<sup>8</sup>

The first session of the Arbitral Tribunal was held, with the Parties' agreement, in Washington D.C. on 26 September 1997. It resulted in further agreement on a number of procedural matters reflected in written minutes signed by the President and Secretary of the Tribunal. Toronto was selected as the formal seat of arbitration by agreement among the Parties and the Arbitral Tribunal.

During the course of the procedural hearing, the Respondent questioned the standing of the Claimants. The Arbitral Tribunal indicated that this matter should be resolved before the consideration of the merits. It was agreed that the Respondent would submit by 6 October 1997 a written motion regarding the issue of the Claimants' standing. The Claimants would then submit a written answer, and the Respondent would then be given an opportunity to present a final written reply thereto.

ICSID received the Respondent's Motion for Directions (hereinafter "the Motion") on 6 October 1997. Therein the Respondent challenged the Claimants' standing under NAFTA. Specifically, the Respondent requested that the Claimants demonstrate:

- (i) *for each of them*, their standing to invoke Section B of Chapter Eleven; (ii) if they have such standing, whether they are advancing a claim under Article 1116 (...) or Article 1117; (iii) if the claim is being asserted under Article 1117, whether it is being asserted by the investor who owns or controls the enterprise; and (iv) in either event, that the enterprise which any of them claim to own or control, or in which any of them claim to have an equity, security or other interest was, at the material times, a valid and subsisting corporate entity, duly incorporated under applicable Mexican law.

The Motion also stated that it was critical that the enterprise alleged to have been harmed "has validly authorised the submission of the claim to arbitration."

In response, the Claimants submitted their Reply to the Motion for Directions dated 5 November 1997 in which they sought to demonstrate that: Article 1117(3) of NAFTA "expressly contemplates" that an investor may bring a claim under Article 1116 *and* 1117; that the Claimants have standing as per Article 1139's definition of "investor" and "investment;" and that the "valid subsisting" corporate entity referred to in the Respondent's Motion held the concession at the material times, and duly authorised the submission of the claim.

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<sup>8</sup> All references to "ICSID" below are to the ICSID Secretariat.

The “Respondent’s Response to Claimants’ Reply to the Mexican Government’s Motion for Directions Regarding Standing to Submit a Claim to Arbitration” (hereinafter “the Response”) was received by ICSID on 12 December 1997. Therein the Respondent reiterated its claim to have the issues concerning the nature of the claim and of the Claimants’ respective standing resolved prior to the consideration of the merits. Furthermore, the Respondent questioned the adequacy of the evidence submitted by the Claimants purporting to support their right to invoke Section B of NAFTA.

By letter dated 16 December 1997, the Claimants requested an extension of a month in which to submit the Memorial. The Tribunal acceded by letter of 17 December 1997.

In an “Interim Decision Concerning Respondent’s Motion for Directions” (hereinafter “the Interim Decision”) dated 22 January 1998, the Arbitral Tribunal ruled that although:

the pleadings (...) raise a number of complex issues which may have the effect of restricting the competence of the Tribunal (...) they seem unlikely to eliminate altogether the need to consider the merits,

and thus the issue of standing would be dealt with in the pleadings on the merits. In particular, the Tribunal made the following four observations: that if part of Mr. Azinian’s claim was made by him as an “impermissible surrogate” for Mr. Goldenstein, this could be determined by the Tribunal at a later stage as it would affect the quantum but not Mr. Azinian’s standing *pro se*; that if it was true that Mr. Davitian was not a shareholder at the material time(s) this might defeat his standing but would not obviate the consideration of the merits, nor would his “provisional presence” as a claimant complicate the facts to be tried on the merits; that if Messrs Azinian and Davitian were trying to introduce claims outside the jurisdiction of the Tribunal as established by the NAFTA, this could be dealt with in due course; and that although the Claimants have identified “DESONA B” as the entity harmed by the allegedly wrongful actions of the Respondent and although the complications relating to the various forms of “DESONA” will form part of the merits, neither “DESONA A” nor “DESONA B” is a claimant.

On 28 January 1998, the Claimants submitted their Memorial which the Respondent received on 10 February 1998.

On 1 April 1998, the Respondent filed a second Motion for Directions (hereinafter “the Second Motion”) seeking further particulars and the production of additional documents. The Respondent also requested the Tribunal to direct that the running of time for the filing of the Counter-Memorial be suspended until the Claimants produced the particulars and documents detailed in the Second Motion.

The Claimants, by letter dated 9 April 1998, declared themselves amenable to producing the documents sought and “the documentary evidence called for by Mexico’s Request for Particulars (...) without the necessity of a ruling by the Tribunal.”

The Arbitral Tribunal ruled on the Second Motion by letter dated 27 April 1998, stating that it would:

await the production of information voluntarily proposed by the Claimants. Upon receipt thereof, the Respondent is invited forthwith to inform the Arbitral Tribunal whether it still considers it necessary to apply for any additional ruling(s), and to request a reasonable adjustment of the time-limit for its Counter-Memorial.

The Claimants complained by letter dated 5 May 1998 that the Respondent was violating Rule 43 of the ICSID Additional Facilities Rules by contacting the Claimants’ witnesses. The Claimants asked the Tribunal to establish an understanding to the effect that witnesses cited by one side should not be contacted unilaterally by the other side. By letter dated 6 May 1998, the Tribunal inquired if the Respondent had any objection to complying with the understanding proposed by the Claimants.

The Respondent replied by letter dated 12 May 1998, contending that interviewing non-party witnesses about statements made in the Claimants’ Memorial in no way contravened the Additional Facility Rules of ICSID and that the Respondent “should be free to gather information from non-party witnesses as it sees fit” given that “it is a well-established principle that a party has no property in a witness.” With regard to Rule 43, the Respondent submitted that it regulates questions arising during the oral procedure only.

By letter dated 18 May 1998, the Claimants answered the Respondent’s letter of 12 May 1998, conceding that a party has no property in a witness but reaffirming their initial point that “such contact [that of the Respondent with regard to the Claimants’ non-party witnesses] is designed to develop impeaching information as to the sworn statements obtained without the presence of opposing counsel.” The Claimants went on to state that

(i)t is quite clear that (sic) Respondent is attempting to adduce extra-judicial evidence through ‘other means’ and, therefore, these extra judicial examinations do fall (...) under Article 43, which confirms authority on the panel to issue protective orders. It is a fundamental rule of law that the Tribunal does have the power and the authority to conduct its proceedings in an orderly fashion with a view towards fairness to both sides.

The Respondent replied by letter on 20 May 1998, reiterating the points made in its communication of 12 May 1998.

The Arbitral Tribunal ruled, by letter dated 19 June 1998, on the complaint concerning interviews by one Party of witnesses whose written statements have been introduced by its opponent, as follows:

The Arbitral Tribunal considers that the issues raised by the Claimants are not dealt with by the ICSID Additional Facility Rules. Nor is the Arbitral Tribunal aware of any basis on which it could preclude communications between a party and a third-party witness. The Arbitral Tribunal accordingly advises the parties as follows:

1. The Arbitral Tribunal declines to restrict any party's ability to interview witnesses who freely choose to meet with that party's representative(s).
2. During any such interview, the witness is (as far as the Arbitral Tribunal is concerned) free to answer or decline to answer individual questions as he or she sees fit.
3. The Arbitral Tribunal expects that any such witnesses would be informed, in advance, by the party seeking to meet him or her that his or her legal counsel may be present at any interview.
4. Statements made by a witness during any such interview shall not be received into evidence.
5. The only testimony to be given probative value is that contained in signed written statements or given orally in the presence of the Arbitral Tribunal.
6. The Arbitral Tribunal does not require that any party which secures the agreement of a witness to a meeting give the other side an opportunity to be present during that meeting; whether a witness makes the presence of both sides a condition for accepting such a meeting is not a matter for the Arbitral Tribunal.

In the interim, on 18 May 1998, ICSID had received the Claimants' Response to the Respondent's second Motion for Directions of 1 April 1998.

On 8 June 1998, the Respondent filed a "Motion for Directions to Answer Request for Particulars and Produce Documents" in which it renewed the demands of its Second Motion for Directions. It requested that the Arbitral Tribunal direct the Claimants to give further particulars and produce additional documents; and that the time for filing the Counter-Memorial be suspended until the Claimants complied with the requested direction of the Tribunal. On 18 June 1998, the Claimants replied to this third Motion for Directions by letter. They claimed that

they had responded to the best of their ability to the prior Motion for Directions and requested that the Tribunal direct the Respondent to submit their Counter-Memorial.

The Arbitral Tribunal, by letter dated 22 July 1998, declined to rule on the Respondent's Motion for Directions of 8 June 1998, noting that the Respondent would have a full opportunity to comment on "perceived deficiencies" in its Counter-Memorial. Furthermore, it instructed the Respondent to submit its Counter-Memorial by 1 October 1998.

On 5 October 1998, ICSID received a partial version of the Respondent's Counter-Memorial. It received the remaining portions on 23 October 1998, following a letter from the Claimants dated 20 October 1998, complaining of the delay and requesting a 45-day period for the Reply and an additional 30 days for the Rejoinder. The Respondent objected to a second round of written pleadings by letter dated 28 October 1998 and requested that the Claimants "express in detail its reasons that would justify submitting a reply and [a] rejoinder."

By letter of 30 October 1998, the Claimants responded on the issue of further written pleadings, invoking Article 38(3) of the ICSID Rules as grounds for a second round of pleadings and describing their purpose as follows:

- (a) Identify matters of common ground in submissions both as to law and fact;
- (b) Respond to the Government of Mexico's characterization of pertinent law and its application to the issues in this case;
- (c) Address specific considerations bearing upon the respective parties' burden of proof with reference to competent evidence; and
- (d) Reply to the accusations of bias, lack of creditability and outright wrongdoing directed at the majority of the Claimants' witnesses.

By letter dated 10 November 1998, the Respondent rebutted the Claimants' letter of 30 October 1998, stating that the Claimants had not demonstrated that a second round of written pleadings was necessary, the reasons given being just as easily capable of being addressed in the oral proceedings. It went on to demand that, in the event the Arbitral Tribunal were to deem that a Reply and a Rejoinder are necessary, such a Reply be limited to issues that "the Tribunal agrees are properly the subject of a Reply to the Counter-Memorial in the circumstances of this case." Furthermore, the Respondent opposed the Claimants' earlier request to tender "DESONA's operating journals, reconstructed from old records, which the Claimants refused to produce in response to the Respondent's repeated requests." In paragraph 18 of this letter, the Respondent stated in particular:

If the Tribunal determines to allow any type of Reply relating to this category of information, it should

(i) require the Claimants to describe with particularity which issues they wish to address, (ii) ensure that the list includes only matters that the Tribunal deems as “new” issues raised for the first time in the Counter-Memorial, and (iii) expressly forbid the Claimants from including other issues or legal argumentation in their Reply.

The decision of the Arbitral Tribunal concerning the filing of a Reply and a Rejoinder was given by letter dated 24 November 1998. It directed the parties to prepare a further round of written pleadings as “the oral phase of the proceedings is likely to be better focussed by allowing Reply and Rejoinder Memorials,” and stated that:

(a)t the same time, the Tribunal acknowledges that many of the observations made in the Respondent’s letter of 10 November are pertinent in principle, such as the restrictive criteria listed in paragraph 18. It would not, however, be efficient to initiate a separate preliminary debate over the permissible scope of a Reply which is yet to be submitted. It should be enough for the Tribunal to exhort the parties to ensure that their respective final Memorials are responsive to their opponent’s previous submissions, and be organised in such a way that this responsive character is plain to see.

The same reasoning applies to evidence in support of a Reply or Rejoinder, including the DESONA operating journals. The Tribunal notes that the Respondent at one point called for the production of such evidence, and still suggests that it was not previously produced because it “would severely undermine the validity of [the Claimants’] experts’ so-called ‘indications of value’.” (Paragraph 34 of 10 November letter.) While the Respondent asserts that it would at this stage suffer prejudice if such materials are produced, because it may have to develop new counter-arguments and indeed new analyses to serve as support for those counter-arguments, the Tribunal does not view this objection as decisive. In the first place, in as much as it could be raised against any evidence accompanying any Reply the objection goes too far to be acceptable in principle. Secondly, there is no basis to rule *a priori* that it would be particularly burdensome to deal with the materials the Claimants wish to produce. (With respect to operating logs, it is the experience of the Tribunal that notwithstanding their typical bulkiness they are not

necessarily difficult to interpret with respect to basic information such as productivity and downtime.)

In view of the above, and having furthermore regard to the fact the Claimants have had time to consider the Counter-Memorial, the Tribunal instructs the parties to proceed as follows:

- (1) The Claimants to file their Reply by 19 January 1999
- (2) The Respondent to file its Rejoinder by 19 April 1999.  
(Emphasis in original.)

By letter dated 12 January 1999, the Claimants requested permission to file their Reply on 20 January 1999 due to a national holiday on 18 January 1999. The extension was granted by letter of 13 January 1999 in which the Tribunal also fixed the week of 21 June 1999 for the hearing in Washington D.C. in accordance with Article 39 of the Additional Facility Arbitration Rules.

The Claimants submitted the English version of their Reply on 20 January 1999. The members of the Tribunal, unlike the Respondent and ICSID, did not receive sets of the Annex containing, according to the Claimants, "approximately two thousand pages of checks and invoices."

The Spanish version of the Reply was received by ICSID on 9 February 1999. Given the delay in filing the Claimants agreed to an extension of the time period for filing the Rejoinder for the period that the Claimants were delayed in completing the filing of their Reply. Thus, the Tribunal informed the parties by letter dated 17 March 1999, that the Rejoinder was due by 10 May 1999. The Respondent requested an extension by letter dated 3 May 1999, in order to file the Rejoinder on 17 May 1999. By letter of 7 May 1999, the Tribunal decided that the English version of the Rejoinder and its accompanying documentation should be filed by 14 May 1999, and the Spanish version by 17 May 1999. ICSID received the Rejoinder, in both its English and Spanish versions with their accompanying documentation, on 17 May 1999.

During the written phase of the pleadings, written statements from the following persons were submitted by the parties: by the Claimants, Robert Azinian, Kenneth Davitian, Ellen Baca, Ariel Goldenstein, Basil Carter, Ted Guth, Bryan A. Stirrat, David S. Page, William Rothrock, Richard Carvell, Ernst & Young, and Robert E. Proctor; by the Respondent, Raúl Romo Velázquez, James Hodge, J. Cameron Mowatt, Carlos Felipe Dávalos, Francesco Piazzesi di Villamosa, Patricia Tejada, Emilio Sánchez Serrano, Oscar Palacios Gómez, and David A. Schwickerath. The Claimants' Reply, at Section V, contained responses to the witness statement and expert reports submitted by the Respondent in its Counter-Memorial. In addition to offering such responses as rebuttal of certain of the Respondent's witness statements (namely, those made by Mr. Romo Velázquez, by Mr. Hodge, by Mr. Piazzesi, by Ms Tejada, by Mr. Sánchez Serrano and by Dr Palacios

Gómez), Claimants argued that the statement made by Mr. Mowatt was legally objectionable and inadmissible in view of the Tribunal's directions of 19 June 1998. In the event, the Arbitral Tribunal has not had regard to Mr. Mowatt's statement.

By letter of 19 May 1999, the Tribunal informed the parties of the procedural arrangements for the hearing on the merits, and asked the Parties to provide a list of the witnesses and experts that they wished to examine.

By letter of 24 May 1999, the Respondent stated that it would require the following witnesses to be available for cross-examination: Ariel Goldenstein; Bryan A. Stirrat; Kenneth Davitian; Robert Azinian; Ronald Proctor; David S. Page; William Rothrock; and Basil Carter.

By letter of the same date, the Claimants requested that the Respondent make available for cross-examination the following witnesses: Oscar Palacios; Francesco Piazzesi di Villamosa; and Raul Romo Velázquez.

The Claimants, by letter of 2 June 1999, responded to the Respondent's earlier request and stated that Basil Carter and William Rothrock would be unable to attend the scheduled hearings in person but that they could be cross-examined by videoconference or telephone. Furthermore, Bryan A. Serrat would only be able to attend on 21 June 1999. The Claimants expressed their intention to have the following individuals attend on their behalf to conduct cross-examination: David J. St. Louis; Clyde C. Pearce; Jack C. Coe; Peter Cling; and William S. Dodge. The Respondent replied by letter dated 4 June 1999 and suggested that it contact the Claimants to discuss alternative arrangements for those witnesses unable to attend the hearings. For example, it proposed that the individuals in question be excused from the hearings on the condition that they answer a limited list of admissions to be provided by the Respondent. The Claimants answered by letter of 8 June 1999 and stated that they would solicit the approval of David Page, Basil Carter and William Rothrock to the Respondent's suggestion regarding the witnesses' answers to written questions.

Of the Claimants' witnesses, Messrs Stirrat, Proctor, Goldenstein and Carter appeared at the hearing. Mr. Davitian, although excused by the Respondent, was allowed to give direct rebuttal evidence. The Respondents excused Messrs Azinian and Page. Mr. Rothrock did not appear at the hearing and the Respondent stated that it would make submissions as to the weight to be given to his written statement. Of the Respondent's witnesses, Mr. Piazzesi appeared at the hearing. The Claimants excused Dr Palacios and agreed with Respondent to file certain written admissions in lieu of the testimony of Mr. Romo, who was not present at the hearing.

At the conclusion of the examination of witnesses, the Tribunal sought the parties' confirmation that the evidentiary phase of the

proceeding was closed to the satisfaction of each side, to which both parties agreed.<sup>9</sup>

The parties filed post-hearing submissions on 16 July 1999.

## V. RELIEF SOUGHT

THE CLAIMANTS CONTEND THAT “the City’s wrongful repudiation of the Concession Contract violates Articles 1110 (“Expropriation and Compensation”) and 1105 (“Minimum Standard of Treatment”) of NAFTA,”<sup>10</sup> and accordingly seek the following relief, as articulated in their Prayer for Relief dated 23 June 1999:

A. With respect to the enterprise, as follows:

1. The value of the concession as an ongoing enterprise on March 21, 1994, the date of the taking based upon the values obtained:

a. By applying the Discounted Cash Flow (DCF) method in the amount of US \$11,600,000 (PCV);

In the alternative,

b. By applying the Similar Transaction Method yielding an amount of US \$19,203,000 (PCV);

In the alternative,

c. Based upon the offer made by Sanifill to purchase the concession in an amount of US \$18,000,000;

In the alternative,

d. Based upon the lower range value from the fair market value analysis of the concession conducted by Richard Carvell in an amount of US \$15,500,000;

In addition:

2. Interest on the amount awarded as the value of the concession as set forth in section A above from the date of the taking at the rate of 10% per annum to the date of the award;

3. Cost of the proceedings, including but not limited to attorneys fees, experts and accounting fees and administrative fees;

4. Simple interest on the entirety of the award accruing from and after the date of the award until the date of payment at 10% per annum;

As a separate and distinct prayer, Claimants request relief as follows:

1. Out of pocket expenses in the amount of US \$3,600,000 (Memorial Section 6 Page 2);

<sup>9</sup> English Transcript, 23.6.99, p. 149 l.13 - 19

<sup>10</sup> Reply of 19 January 1999, Sec. III, p. 17.

2. Interest on the amount awarded as out of pocket expenses from the date of the taking at the rate of 10% per annum to the date of the award;
  3. Cost of the proceedings, including but not limited to attorneys fees, experts and accounting fees and administrative fees;
  4. Such additional amount as shall be fixed by the Tribunal to compensate for the loss of the chance or opportunity of making a commercial success of the project;
  5. Simple interest on the entirety of the award accruing from and after the date of the award until the date of payment at 10% per annum;
- B. NOTE: Claimants acknowledge as an offset amounts received from a partial sale of assets in the amount of US \$500,000, credit for which should be given as of the date of receipt of such funds by the claimants or on their behalf on May 20, 1994;
- C. With respect to Claimants individually, relief as requested herein should be allocated as follows:  
 To Robert Azinian 70%  
 To Ellen Baca 20%

The Respondent asks that the claim be dismissed with costs assessed against the Claimants.

## **VI. VALIDITY OF THE CLAIM UNDER NAFTA**

### **A. The general framework of investor access to international arbitration under NAFTA**

For the purposes of the present discussion, the Claimants are assumed to be “investor[s] of a Party” having made an “investment” as those two terms are defined in Article 1139 of NAFTA. The Respondent has raised questions as to the permissibility of claims being made by a formally qualified shareholder on behalf of a beneficial owner who is not a national of a NAFTA Party.<sup>11</sup> The Respondent has also challenged Mr. Davitian’s status as a shareholder of DESONA at the time material for entitlement to claim under NAFTA. In its Interim Decision of 22 January 1998,<sup>12</sup> the Arbitral Tribunal determined that those objections need only be decided if there is *some* degree of liability on the merits, for only then

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<sup>11</sup> In this case, a portion of Mr. Azinian’s shareholding in DESONA is said to be beneficially owned by Mr. Goldenstein, who is not a national of a NAFTA Party.

<sup>12</sup> See paragraph 48.

would it be necessary to decide whether recovery should be excluded on account of these allegedly non-qualified investments.

The Ayuntamiento as a body determined that it had valid grounds to annul and rescind the Concession Contract, and so declared. DESONA then failed to convince three levels of Mexican courts that the Ayuntamiento's decision was invalid. Given this fact, is there a basis for the present Arbitral Tribunal to declare that the Mexican courts were wrong to uphold the Ayuntamiento's decision and that the Government of Mexico must indemnify the Claimants?

As this is the first dispute brought by an investor under NAFTA to be resolved by an award on the merits, it is appropriate to consider first principles.

NAFTA is a treaty among three sovereign States which deals with a vast range of matters relating to the liberalisation of trade. Part Five deals with "Investment, Services and Related Matters." Chapter Eleven thereunder deals specifically with "Investment."

Section A of Chapter Eleven establishes a number of substantive obligations with respect to investments. Section B concerns jurisdiction and procedure; it defines the method by which an investor claiming a violation of the obligations established in Section A may seek redress.

Arbitral jurisdiction under Section B is limited not only as to the persons who may invoke it (they must be nationals of a State signatory to NAFTA), but also as to subject matter: claims may not be submitted to investor-state arbitration under Chapter Eleven unless they are founded upon the violation of an obligation established in Section A.

To put it another way, a foreign investor entitled in principle to protection under NAFTA may enter into contractual relations with a public authority, and may suffer a breach by that authority, and *still not be in a position to state a claim under NAFTA*. It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints. It may safely be assumed that many *Mexican* parties can be found who had business dealings with governmental entities which were not to their satisfaction; Mexico is unlikely to be different from other countries in this respect. NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides.

It therefore would not be sufficient for the Claimants to convince the present Arbitral Tribunal that the actions or motivations of the Naucalpan Ayuntamiento are to be disapproved, or that the reasons given by the Mexican courts in their three judgements are unpersuasive. Such considerations are unavailing unless the Claimants can point to a violation of an obligation established in Section A of Chapter Eleven attributable to the Government of Mexico.

## B. Grounds invoked by the Claimants

The Claimants have alleged violations of the following two provisions of NAFTA:

### Article 1110(1)

No party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such investment (“expropriation”) except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law and Article 1105(1); and
- (d) on payment of compensation in accordance with paragraphs 2 through 6.

### Article 1105(1)

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

Although the parties to the Concession Contract accepted the jurisdiction of the Mexican courts, the Claimants correctly point out that they did not exclude recourse to other courts or arbitral tribunals – such as this one – having jurisdiction on another foundation. Nor is the fact that the Claimants took the initiative before the Mexican courts fatal to the jurisdiction of the present Arbitral Tribunal. The Claimants have cited a number of cases where international arbitral tribunals did not consider themselves bound by decisions of national courts. Professor Dodge, in his oral argument, stressed the following sentence from the well-known ICSID case of *Amco v. Indonesia*: “An international tribunal is not bound to follow the result of a national court.” As the Claimants argue persuasively, it would be unfortunate if potential claimants under NAFTA were dissuaded from seeking relief under domestic law from national courts, because such actions might have the salutary effect of resolving the dispute without resorting to investor-state arbitration under NAFTA. Nor finally has the Respondent argued that it cannot be held responsible for the actions of a local governmental authority like the Ayuntamiento of Naucalpan.

The problem is that the Claimants’ fundamental complaint is that they are the victims of a breach of the Concession Contract. NAFTA does not, however, allow investors to seek international arbitration for mere

contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes. *The Claimants simply could not prevail merely by persuading the Arbitral Tribunal that the Ayuntamiento of Naucalpan breached the Concession Contract.*

Understanding this proposition perfectly well, Professor Dodge insisted that the claims are not simply for breach of contract, but involve “the direct expropriation of DESONA’s contractual rights” and “the indirect expropriation of DESONA itself.”<sup>13</sup>

Professor Dodge then argued that a breach of contract constitutes an expropriation “if it is confiscatory,” or, quoting Professor Brownlie, *Principles of Public International Law*, 5th edition at 550, if “the state exercises its executive or legislative authority to destroy the contractual rights as an asset.” Specifically, he invoked a “wealth of authority treating the repudiation of concession agreements as an expropriation of contractual rights.”

Labelling is, however, no substitute for analysis. The words “confiscatory,” “destroy contractual rights as an asset,” or “repudiation” may serve as a way to describe breaches which are to be treated as extraordinary, and therefore as acts of expropriation, but they certainly do not indicate on what basis the critical distinction between expropriation and an ordinary breach of contract is to be made. The egregiousness of any breach is in the eye of the beholder – and that is not satisfactory for present purposes.

It is therefore necessary to examine whether the annulment of the Concession Contract may be considered to be an act of expropriation violating NAFTA Article 1110. If not, the claim must fail. The question cannot be more central.

Before examining this crucial issue, it should be recalled that the Claimants originally grounded their claim on an alleged violation of Article 1105 as well as one of Article 1110. While they have never abandoned the ground of Article 1105, it figured very fleetingly in their later pleadings, and not at all in Professor Dodge’s final arguments. This is hardly surprising. The only conceivably relevant substantive principle of Article 1105 is that a NAFTA investor should not be dealt with in a manner that contravenes international law. There has not been a claim of such a violation of international law other than the one more specifically covered by Article 1110. In a feeble attempt to maintain Article 1105, the Claimants’ Reply Memorial affirms that the breach of the Concession Contract violated international law because it was “motivated by noncommercial considerations, and compensatory damages were not paid.” This is but a paraphrase of a complaint more specifically covered by Article 1110. For the avoidance of doubt, the

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<sup>13</sup> English Transcript, 24.6.99, p. 23, 1.9-11.

Arbitral Tribunal therefore holds that under the circumstances of this case if there was no violation of Article 1110, there was none of Article 1105 either.

### **C. The contention that the annulment was an act of expropriation**

The Respondent argues that the Concession Contract came to an end on two independently justified grounds: invalidity and rescission.

The second is the more complex. It postulates that the Ayuntamiento was entitled to rescind the Concession Contract due to DESONA's failure of performance. If the Ayuntamiento was not so entitled, its termination of the Concession Contract was itself a breach. Most of the evidence and debate in these proceedings have focused on this issue: was DESONA in substantial non-compliance with the Concession Contract? The subject is complicated by the fact that DESONA was apparently not given the benefit of the 30-day cure period defined in Article 31 of the Concession Contract.

The logical starting point is to examine the asserted original invalidity of the Concession Contract. If this assertion was founded, there is no need to make findings with respect to performance; nor can there be a question of curing original invalidity.

From this perspective, the problem may be put quite simply. The Ayuntamiento believed it had grounds for holding the Concession Contract to be invalid under Mexican law governing public service concessions. At DESONA's initiative, these grounds were tested by three levels of Mexican courts, and in each case were found to be extant. How can it be said that Mexico breached NAFTA when the Ayuntamiento of Naucalpan purported to declare the invalidity of a Concession Contract which by its terms was subject to Mexican law, and to the jurisdiction of the Mexican courts, and the courts of Mexico then agreed with the Ayuntamiento's determination? Further, the Claimants have neither contended nor proved that the Mexican legal standards for the annulment of concessions violate Mexico's Chapter Eleven obligations; nor that the Mexican law governing such annulments is expropriatory.

With the question thus framed, it becomes evident that for the Claimants to prevail it is not enough that the Arbitral Tribunal disagree with the determination of the Ayuntamiento. A governmental authority surely cannot be faulted for acting in a manner validated by its courts *unless the courts themselves are disavowed at the international level*. As the Mexican courts found that the Ayuntamiento's decision to nullify the Concession Contract was consistent with the Mexican law governing the validity of public service concessions, the question is whether the Mexican court decisions themselves breached Mexico's obligations under Chapter Eleven.

True enough, an international tribunal called upon to rule on a Government's compliance with an international treaty is not paralysed by the fact that the national courts have approved the relevant conduct of public officials. As a former President of the International Court of Justice put it:

The principles of the separation and independence of the judiciary in municipal law and of respect for the finality of judicial decisions have exerted an important influence on the form in which the general principle of State responsibility has been applied to acts or omissions of judicial organs. These basic tenets of judicial organization explain the reluctance to be found in some arbitral awards of the last century to admit the extension to the judiciary of the rule that a State is responsible for the acts of all its organs. However, in the present century State responsibility for acts of judicial organs came to be recognized. Although independent of the Government, the judiciary is not independent of the State: *the judgment given by a judicial authority emanates from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive.* The responsibility of the State for acts of judicial authorities may result from three different types of judicial decision. The first is a decision of a municipal court *clearly incompatible with a rule of international law.* The second is what is known traditionally as a '*denial of justice.*' The third occurs when, in certain exceptional and well-defined circumstances, a State is responsible for a judicial decision contrary to municipal law.<sup>14</sup>

The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seized has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA. *What must be shown is that the court decision itself constitutes a violation of the treaty.* Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA.

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<sup>14</sup> Eduardo Jiménez de Aréchaga, "International Law in the Past Third of a Century," 159-1 Recueil des cours, General Course in Public International Law, The Hague, 1978 (emphasis added.)

More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end.

But the Claimants have raised no complaints against the Mexican courts; they do not allege a denial of justice. Without exception, they have directed their many complaints against the Ayuntamiento of Naucalpan. The Arbitral Tribunal finds that this circumstance is fatal to the claim, and makes it unnecessary to consider issues relating to performance of the Concession Contract. *For if there is no complaint against a determination by a competent court that a contract governed by Mexican law was invalid under Mexican law, there is by definition no contract to be expropriated.*

The Arbitral Tribunal does not, however, wish to create the impression that the Claimants fail on account of an improperly pleaded case. The Arbitral Tribunal thus deems it appropriate, *ex abundante cautela*, to demonstrate that the Claimants were well advised not to seek to have the Mexican court decisions characterised as violations of NAFTA.

A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way. There is no evidence, or even argument, that any such defects can be ascribed to the Mexican proceedings in this case.

There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of “pretence of form” to mask a violation of international law. In the present case, not only has no such wrongdoing been pleaded, but the Arbitral Tribunal wishes to record that it views the evidence as sufficient to dispel any shadow over the *bona fides* of the Mexican judgments. Their findings cannot possibly be said to have been arbitrary, let alone malicious.

To reach this conclusion it is sufficient to recall the significant evidence of misrepresentation brought before this Arbitral Tribunal. For this purpose, one need to do no more than to examine the twelfth of the 27 irregularities, upheld by the Mexican courts as a cause of nullity: that the Ayuntamiento was misled as to DESONA’s capacity to perform the concession.

If the Claimants cannot convince the Arbitral Tribunal that the evidence for this finding was so insubstantial, or so bereft of a basis in law, that the judgments were in effect arbitrary or malicious, they simply cannot prevail. The Claimants have not even attempted to rebut the Respondent’s evidence on the relevant standards for annulment of concessions under Mexican law. They did not challenge the Respondent’s evidence that under Mexican law a public service concession issued by municipal authorities based on error or misrepresentation is invalid. As for factual evidence, they have vigorously combated the inferences made

by the Ayuntamiento and the Mexican courts, but they have not denied that evidence exists that the Ayuntamiento was misled as to DESONA's capacity to perform the concession.

At the presentation of the project to the Ayuntamiento in November 1992, where Mr. Goldenstein "of Global Waste" explained that his company would employ some 200 people and invest approximately US \$20 million, Mr. Ted Guth of Sunlaw Energy – identified as a company to be associated in the creation of DESONA – also appeared and articulated some "essential elements" of the project as follows:

to enter into a power agreement with the electric company for 15 years and to build a power plant that will use methane gas from the sanitary landfills of Rincon Verde and Corral del Indio in Naucalpan, with an estimated generation of 210 megawatts, using bio-gas and some natural gas.

As indicated above,<sup>15</sup> this prospect – apparently devoid of any feasibility study worth the name – strikes the Arbitral Tribunal as unrealistic. This was the grandiose plan presented to the Ayuntamiento, which was told at the same meeting that the city of Naucalpan would be given a carried interest of 10% in DESONA "without having to invest one single cent and that after 15 years it would be theirs." One can well understand how members of the Ayuntamiento would be impressed by ostensibly experienced professionals explaining how a costly headache could be transformed into a brilliant and profitable operation.

The Claimants obviously cannot legitimately defend themselves by saying that the Ayuntamiento should not have believed statements that were so unreasonably optimistic as to be fraudulent.

So when the moment came, one year later, for the Concession Contract to be signed, an absolutely fundamental fact had changed: the Claimants had fallen out with Sunlaw Energy, who had disappeared from the project, as best as the Arbitral Tribunal can determine, by October 1993.

For the Claimants to have gone ahead without alerting the Ayuntamiento to this factor was unconscionable. The Arbitral Tribunal cannot believe that the matter was adequately covered by alleged oral disclosures; Article 11 of the Concession Contract states flatly that "[t]he Concessionaire is obligated to install an electricity generating plant which will utilize biogas out of Rincon Verde, Corral del Indio, or other."<sup>16</sup>

It is more than a permissible inference that the original text of the Concession Contract had been prepared on the basis, from the

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<sup>15</sup> See paragraph 32.

<sup>16</sup> Claimants' Translation, Claimants' Memorial, Section 3, p. 22.

Claimants' perspective, that they would be able to form an operating consortium, that they had envisaged a programme dependent on the contributions of such third parties, and that once the text had been approved by the legislature they did not wish to endanger what they had achieved by disclosing that key partners had defected.

The testimony of Mr. Ronald Proctor, although he was proffered by the Claimants, was unfavourable to them. His written statement explains that during late October and early November 1993, he attended meetings with Naucalpan officials, including the Mayor, during which he explained that his company, BFI, was assisting DESONA and "would commit the necessary start-up effort, capital and operational expertise to DESONA in order to ensure the performance of the Concession Contract."

There is no doubt about *BFI's* capacity; it is a billion-dollar company with unquestioned credibility in the industry. The point is rather that this testimony flatly contradicts an ostensible foundation of the Concession Contract *with* DESONA. There is not a shred of written evidence that Mexican officials were content to rely on DESONA because BFI was there, in effect, to do everything: start-up, funding, and operations. Quite to the contrary, the contemporaneous written evidence relating to the period prior to signature shows reliance on the representations of the Claimants as to their own capabilities. The Concession Contract itself does not contemplate assignments, subcontracts, or surrogates – let alone any suggestion that DESONA could ensure performance of the Concession Contract only if it found an able joint venture partner.

In a phrase, Mr. Proctor's testimony, perhaps unintentionally, supports the conclusion that the Claimants' main effort was focussed on getting the Concession Contract signed, after which they intended to offer bits and pieces of valuable contract rights to more capable partners.

The Ayuntamiento was entitled to expect much more.

The Concession Contract says nothing about assignability. The Respondent has proffered evidence of Mexican law to the effect that public service concessions are granted *intuitu personae* to a physical person or legal entity on the basis of particular qualities. The Claimants have not contradicted this evidence.

The Claimants also sought to rely on an unsigned letter said to have been written by the previous Mayor of Naucalpan in March 1994. The substance of the letter is in support of the Claimants, who of course at that point in time were in imminent danger of losing DESONA's concession. The Respondent does not accept this document as genuine. But taking it as proffered by the Claimants, it is highly damaging to their case in connection with the alleged misrepresentations, because it refers to the fact that the DESONA "stockholders are owners of a North American company that has 40 years of experience in waste collection service. ... These businessmen provide services in the City of Los Angeles, Montebello, City of Industry and the City of Malibu."

If this is what the Mayor who signed the Concession Contract still thought in March 1994, the Claimants cannot seriously contend that, whatever they say might have been their earlier “puffery” in 1992 (to use Mr. St. Louis’ hopeful euphemism), they had revealed all relevant elements of their modest experience, and Global Waste’s short and woeful corporate history, by the time the Concession Contract was signed in November 1993.

The only evidence the Claimants have to support their contention that they made adequate disclosures before signature of the Concession Contract – as is clear from their post-hearing “Closing Memorial” – is the self-serving oral assertion of Mr. Goldenstein that he fully informed city officials in various unrecorded conversations. This evidence is not consistent with the record. It is rejected.

To resume: the Claimants have not even attempted to demonstrate that the Mexican court decisions constituted a fundamental departure from established principles of Mexican law. The Respondent’s evidence as to the relevant legal standards for annulment of public service contracts stands un rebutted. Nor do the Claimants contend that these legal standards breach NAFTA Article 1110. The Arbitral Tribunal finds nothing in the application of these standards with respect to the issue of invalidity that appears arbitrary or unsustainable in light of the evidentiary record. To the contrary, the evidence positively supports the conclusions of the Mexican courts.

By way of a final observation, it must be said that the Claimants’ credibility suffered as a result of a number of incidents that were revealed in the course of these arbitral proceedings, and which, although neither the Ayuntamiento nor the Mexican courts would have been aware of them before this arbitration commenced, reinforce the conclusion that the Ayuntamiento was led to sign the Concession Contract on false pretences. It is hard to ignore the consistency with which the Claimants’ various partners or would-be partners became disaffected with them. A Mexican businessman, Dr Palacios, appears to have contributed US \$225,000, as well as equipment, in the mistaken belief that he was making a capital contribution which would lead to his becoming a DESONA shareholder. On 5 June 1994 he brought a criminal action for fraud against Mr. Goldenstein, requesting that the police be requested to arrest him on sight. Mr. Proctor of BFI, although called as a witness by the Claimants, apparently recommended legal action against the Claimants when he found out that the two vehicles purchased with the proceeds of a loan from BFI were sold by DESONA without repaying the loan. Mr. Bryan Stirrat, whose company worked as an independent contractor on the Naucalpan landfill and to this day has an unsecured claim against DESONA in the amount of US \$765,000, excluding interest, stated on cross-examination that he had not been aware when he went with Mr. Goldenstein on 1 June 1994 to a meeting of the Ayuntamiento to seek reinstatement of the Concession Contract that

DESONA had sold all of its assets 10 days earlier; he affirmed that his company had received nothing from the proceeds of that sale.

The list of demonstrably unreliable representations made before the Arbitral Tribunal is unfortunately long. The arbitrators are reluctant to dwell on it in this Award, because they believe that the Claimants' counsel are competent and honourable professionals to whom a number of these revelations came as a surprise. Nor is there any reason to embarrass Mr. Davitian, who struck the Arbitral Tribunal as a hard-working individual who may have been well out of his depth in an unfamiliar environment, not even understanding what was being said on his behalf. The same is *a fortiori* true of Ms. Baca, his divorced spouse, who apparently had no role in the project at all.

The credibility gap lies squarely at the feet of Mr. Goldenstein, who without the slightest inhibition appeared to embrace the view that what one is allowed to say is only limited by what one can get away with. Whether the issue was how non-U.S. nationals could de facto operate a Subchapter S corporation, how the importer of vehicles might identify the ostensible seller and the ostensible price to the customs authorities, or how a cheque made out to an official – as reimbursement of a luncheon – but endorsed back to the payer might still be presented as evidence of payment under a lease, Mr. Goldenstein seemed to believe that such conduct is not only acceptable in business, but a sign of worldly competence.

The Arbitral Tribunal obviously disapproves of this attitude, and observes that it comforts the conclusion that the annulment of the Concession Contract did not violate the Government of Mexico's obligations under NAFTA.

## VII. COSTS

**T**HE CLAIM HAS FAILED IN ITS ENTIRETY. The Respondent has been put to considerable inconvenience. In ordinary circumstances it is common in international arbitral proceedings that a losing claimant is ordered to bear the costs of the arbitration, as well as to contribute to the prevailing respondent's reasonable costs of representation. This practice serves the dual function of reparation and dissuasion.

In this case, however, four factors militate against an award of costs. First, this is a new and novel mechanism for the resolution of international investment disputes. Although the Claimants have failed to make their case under NAFTA, the Arbitral Tribunal accepts, by way of limitation, that the legal constraints on such causes of action were unfamiliar. Secondly, the Claimants presented their case in an efficient and professional manner. Thirdly, the Arbitral Tribunal considers that by raising issues of defective performance (as opposed to voidness ab initio) without regard to the notice provisions of the Concession Contract,

the Naucalpan Ayuntamiento may be said to some extent to have invited litigation. Fourthly, it appears that the persons most accountable for the Claimants' wrongful behaviour would be the least likely to be affected by an award of costs; Mr. Goldenstein is beyond this Arbitral Tribunal's jurisdiction, while Ms. Baca – who might as a practical matter be the most solvent of the Claimants – had no active role at any stage.

Accordingly the Arbitral Tribunal makes no award of costs, with the result that each side bears its own expenditures, and the amounts paid to ICSID are allocated equally.

### **VIII. DECISION**

**F**OR THE REASONS STATED ABOVE, and rejecting all contentions to the contrary, the Arbitral Tribunal hereby decides in favour of the Respondent. Made as at Toronto, Canada, in English and Spanish, both versions being equally authentic.

signed

Mr. Benjamin R. Civiletti

Date: [October 11, 1999]

signed

Mr. Claus von Wobeser

Date: [October 18, 1999]

signed

Mr. Jan Paulsson,  
President

Date: [6 October 1999]