BEFORE THE HONORABLE TRIBUNAL OF THE

INTERNATIONAL CENTRE FOR SETTLLEMENT OF INVESTMENT DISPUTES

PURSUANT TO THE NORTH AMERICAN FREE TRADE AGREEMENT

ROBERT AZINIAN, KENNETH DAVITIAN, ELLEN BACA	)	Case No. ARB (AF)/97/2
	)	
Claimants,	)	
	)	
vs.	)	
	)	
UNITED MEXICAN STATES	)	
	)	
Respondent,	)	
	)	
______________________________	)	

CLAIMANTS REPLY TO COUNTER MEMORIAL

January 19, 1999

David J. St. Louis
Attorney for Claimants

ORGANIZATION OF THE CLAIMANTS' REPLY TO RESPONDENT'S COUNTER MEMORIAL

Claimants' Reply to the United Mexican States' Counter Memorial is organized as follows:

	Preliminary Observations
Section I:	Introduction
Section II:	Claimants' Admissions & Denials of Respondent's Statement of Facts and Reply Thereto
Section III:	Claimants' Reply to Respondent's Legal Arguments
Section IV:	Claimants' Reply to Respondent's Defense to the Claim for Damages
Section V:	Claimants' Reply to Witness Statements and Expert Reports submitted by Respondent
	Conclusion
	Affidavits
	Appendix "A" (Bank Statements and Income Statement)
	Annex "1" Parts I,II,III

(At the request of the panel summaries are furnished to its members with the detailed exhibit filed with the ICSID Center for reference, if necessary. A full set is furnished for use of Respondent)

Each section is followed by a set of Exhibits, if applicable.

PRELIMINARY OBSERVATIONS

Augmentation of Record:

Claimants consider both the Motions filed and the replies thereto to be a part of the records of this proceeding. Reference has been made to the contents of the Motions, including exhibits, by both Claimants and Respondent. The same therefore should be consider as evidence in this proceeding and the Tribunal is requested to take judicial notice of its own file.

Translation Problems:

Claimants have identified in Respondent's Counter Memorial a substantial number of incomplete or incorrect translations of Spanish documents into English and vice-versa.

Some of these errors are grave mistakes.

For example, Exhibit "8" of the Counter Memorial is a letter from Mr. Azinian to Mayor Jacob Rocha dated February 15th, 1994. The original Spanish, last page (4.) reads: "Support enforcing that trucks [circulating in the city] be covered with a tarp". However, the English reads: "Assistance with respect to the payment for the trucks". There is a fundamental difference in meaning between covering a truck and payment for trucks.

Another example is that there are 3 paragraphs within the Spanish text of the Counter Memorial that have been omitted in the English version. [See Spanish Version, Page 65, three top paragraphs] Claimants point this out to the Tribunal in that it is only fair that all members of the panel are presented with the same text.

Claimants wish not to speculate as to Respondents suggestion, during our initial meeting in Washington, that the translations not be authenticated. Claimants agreed. However, perhaps Respondent should review its Counter Memorial for accuracy in translation so that error is not perpetuated.

Factual inaccuracies in Respondent's Admission and Denials of Claimants' Memorial (Contained in Annex 1):

In Annex 1, Respondent asserts factual allegations that are either lacking or untrue.

¶19, refers to Claimants' Memorial S2-P2-¶2: that there was a request that the enterprise be incorporate by individuals is not supported by the affidavit of Goldenstein. It is. [See affidavit of Goldenstein dated October 28, 1997]

¶20, refers to Claimants' Memorial S2-P3-¶1: Respondent alleges that Desona was not a corporation until November 23, 1993. The mere formality of registering Desona in the Public Registry was responsibility of the Public Notary who incorporated it. Notwithstanding such registration, Desona had been operating for over a year prior to November 23, 1993. It had a RFC number (Tax ID number), it had paid taxes, it had bank accounts, it was registered with the Mexican Social Security Administration, had employees, tools and equipment, car leases, etc.

¶35, refers to Claimants' Memorial S2-P6-¶2: Respondent's claim that wastes accumulations problems occurred in areas where Desona had assumed responsibility is simply untrue.

¶60, refers to Claimants' Memorial S3-P5-¶1: Respondent admits that the Concession Contract grants an exclusive concession to Desona; yet, in their damages section, they assert that Desona would not be able to service 100% of the commercial/industrial market within 24 months because there were 200 other (unauthorized) operators competing in the that market.

¶77, refers to Claimants' Memorial S3-P54-¶1: Respondent alleges that Desona failed to pay wages, cost of equipment and rent at the landfill, as required under the Concession Contract. That is not what the contract requires and is therefore untrue.

¶85, refers to Claimants' Memorial S3-P60-¶1: Respondent suggest that Desona ordered the new trucks on March 22, 1994, after nullification. That misstates the evidence in that the trucks were ordered and the import permits issued before the nullification. The SECOFI permits were issued on March 8 and 23, 1994 respectively. However

the applications for those permits had been submitted well in advance of those dates.

[See Claimants' Memorial, Section 4, Exhibit "15"]

¶97, refers to Claimants' Memorial S3-P65-32: States that Respondent is not bound to observe any provision in the concession contract.

¶118, refers to Claimants' Memorial S4-P4-¶7: Respondent's position is that only the Ayuntamiento had the legal authority to award the concession or approve changes to its fundamental terms. Also, they had authority to nullify upon learning that its terms were materially different that the proposal approved by the prior Ayuntamiento. Since they had the Concession Contract draft at the November 4th, 1992, meeting, this argument is without merit.

Violations of Previous Ruling:

The witness statement of J. Cameron Mowatt, an attorney of record herein, is legally objectionable. Mr. Mowatt made a number of attempts to contact witnesses that submitted statements for Claimants including, BFI, Sunlaw Energy, Basil Carter, Bryan A. Stirrat and Bill Rothrock. In addition he attempted, by his own evidence, to obtain a statement from Mr. Maphis. These witnesses, in their own right, declined to discuss any issues with Mr. Mowatt or to issue any statement.

Yet, by own his statement, which includes those witnesses conduct, denials and declinations, he seeks to avoid and therefore violate the Tribunal's Ruling of June 19, 1998, paragraph 5, which provides as follows:

"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"

Draft Business Plan:

Respondent repeatedly refers to a "Draft Business Plan" attributing its source to Desona. That business plan was not drafted by Desona and Claimants are unaware of its source. Such draft is dated January 11, 1994, and its terms materially vary from the Concession Contract and Operations Program.

Presentations to the City Council and to the State Legislature:

Respondent repeatedly alleges that the presentations made by to the Council and to the State Legislature were made by Desona. This simply is untrue. Both of those presentations were made by the City's Economic Development Department.

The affidavit of Ron Proctor Affidavit, Affidavit Section, Exhibit "5"

This affidavit is specifically introduced pursuant to Article 38 (3), as rejoinder to the affidavits of Francesco Piazzesi, James Hodge and the expert report of David Schwickerath.

SECTION I: Introduction

Basic Arguments

Respondent's Counter Memorial raises the following issues:

a) That the economic feasibility of the project was dependent upon the completion of all four phases.

b) That upon Sunlaw's departure from the project Desona was left without financing.

c) That Desona did not have the necessary experience to carry out the project and misrepresented that experience to the City.

d) That Desona did not have the necessary financing to carry out the project and misrepresented its financial ability to the City.

e) That Desona did not have the necessary equipment to carry out the project.

f) That Desona did not adequately performed its obligations under the Contract.

g) That there were technical errors in the formation of Desona.

h) That the City was justified in nullifying the contract because of public necessity.

i) That Desona's case was heard and ruled on by the Mexican Courts.

j) That the Claimants have not proven their right to damages under the NAFTA.

k) That the Claimants were not damaged as a result of the City's nullification of Desona's concession.

l) That the assumptions used by Desona's appointed experts to calculate future revenues are false.

m) That the method of evaluation of Desona's fair market value used by Claimants is inappropriate.

Claimants have responded to these issues in this reply and have provided evidence to rebut these arguments.

Claimants pose the following questions:

a) Why the City failed to recognize the legal effects of the Concession Contract.

b) Why the City failed to abide by the terms of the Contract and ignored its adjustment provisions.

c) Why the City failed to make any payments due under the Contract for services rendered by Desona.

d) Why the City failed to timely notify Desona of any alleged irregularities.

e) Why and how the City would be affected by allowing Desona to cure any alleged irregularity according the terms of the contract.

f) Why the City expedited the nullification process of the Concession without adequate warning to Desona.

SECTION II: CLAIMANTS'S ADMISSIONS & DENIALS OF RESPONDENT'S STATEMENT OF FACTS AND REPLY THERETO

NOTE:

This document is intended to be user friendly. Claimants have herein combined the text of the Counter Memorial's Statement of Facts, the Admissions and Denials thereof as well as their Reply thereto.

It is therefore not necessary to refer back to the previous pleading unless the reader is so inclined.

The text of this document is color coded to characterize the material presented.

Each paragraph from the Counter Memorial is cited textually and italicized. Each paragraph is numbered to correspond to the paragraphs contained in the Counter Memorial. The color-coding is as follows:

- ■ Text of the Counter Memorial
- ■ Admission of fact
- ■ Denial of fact
- ■ Reference to prior pleadings and exhibits
- ■ Claimants response to the text of the Counter Memorial

If the textual material is in the nature of a legal argument or is a mere recital of facts, it is so noted.

Certain textual material identified within the statement of facts, such as legal arguments and witness opinions, is omitted as being not necessary to reply. Legal arguments are covered by the Claimants' legal argument in reply.

RESPONDENT'S COUNTER MEMORIAL

PART II: STATEMENT OF FACTS

A. *Omitted Facts: page 3*

¶ 7 *The Memorial omits to address certain fundamental facts, which are dispositive of the claim.*

****

As being dispositive of the Claim.

The Fate of the Consortium: page 3

¶ 8 ***The Memorial discusses the origins and theory of the Integral Solution Project, but the Tribunal is given no sense of what actually transpired.*** *The implication is that the project as originally conceived and presented to the Ayuntamiento (the Municipal Council) and approved by it on November 4, 1992, is what was actually implemented. As shall be seen below, this is far from the truth.*

****

Section "3" pages 1-6 of Claimants Memorial describes the project that came to be known as the "Integral Solution". This project, which was conceived and presented to the Ayuntamiento by the Economic Development Department, served as the bases for both the awarding of the concession to Desona in Nov. 1992 and subsequent execution of the Concession Contract on Nov. 15, 1993. The Concession Contract reflects what was actually to be implemented.

¶ 9 ***The Integral Solution Project,*** *as presented to the Ayuntamiento,* ***was to be performed by a consortium of companies: Global Waste Industries, Inc. (Global), Bryan A. Stirrat & Associates (BAS), Sunlaw Energy Corporation (Sunlaw) and Mexico Diesel Electro-Motive S.A. de C.V (Mexico Diesel) (the latter affiliated itself with Sunlaw to set up a Mexican corporation Sunlaw de Mexico, S.A. de C.V. -to participate in the project).***

****

Admitted in part. Respondent fails to specify that the project was presented to the Ayuntamiento by the "Department of Economic Development" of the Municipality and that each member of the City Council was provided a copy of the proposal in writing.

"THE MUNICIPAL SECRETARY, BY INSTRUCTION OF THE PRESIDENCY, SUBMITS, FOR THE CONSIDERATION OF THE CITY COUNCIL, THE PROPOSSAL OF ARQ. ABEL DUARTE ORTEGA, DIRECTOR OF DEVELOPMENT AND ECONOMIC GROWTH, TO AWARD THE CONCESSION FOR FIFTEEN YEARS TO DESONA S.A. DE C.V. WITH ALL THE CHARACTERISTICS EXPRESSED IN THE PROPOSAL WHICH HAS BEEN PROVIDED, TO EACH ONE OF THE MEMBERS OF THE CITY COUNCIL, IN WRITING, OBTAINING A UNANIMOUS APPROVAL"

[See Claimants' Memorial, Section 2, Exhibit 5]

¶ 10 *The Claimants, the Tribunal will see, represented themselves as shareholders and officers of Global. Evidence of Mr. Goldenstein's making shows, however, that although he was vice-president of Global, neither he nor Mr. Azinian had any shareholding interest in Global. Mr. Davitian did; however, he owned only 15% of the shares of the company. Moreover, although Mr. Azinian was held out as being the President of Global, in fact he did not occupy any position with the company.*

****

Claimant's represented themselves as owners and operators of Global. The term "shareholders" is being introduced by Respondent both in the body of the text as well as footnote "1".

"Both Robert Azinian and Kenneth Davitian were owners and operators of Global Waste Industries. Each own 33% of the Company. The remaining 33% was owned by Mr. Goldenstein, not a party to this Claim. The ownership distribution was decided among the partners".

[Claimants' Reply to Motion for Directions, Section 2, Page 2]

¶ 11 *For present purposes, it is sufficient to note that* ***Messrs. Azinian and Goldenstein both held***

themselves out as owners of Global, and the former as the company's President. *For that reason, they will be described as the "ostensible owners" of Global.* ***They,*** *apparently* ***together with Mr. Davitian, formed*** *one of the versions of* ***DESONA.*** *This will be addressed further below.*

****

¶ 12. ***The Memorial refers to, and includes as an exhibit, the Memorandum of Understanding (MOU) signed by Global, Sunlaw and BAS on November 3, 1992, the day before the concession was granted. The evidence of Mr. Raul Romo of Sunlaw de Mexico, S.A. de C.V. (Sunlaw de Mexico) is that Sunlaw did indeed sign the MOU setting out how the consortium would operate,*** *but by January 20, 1993 (only two months after signing it), Sunlaw informed Global that it would not participate with Global on the basis of that agreement.*

****

The Conclusion by Counsel is not supported by the evidence presented. In the letter dated January 20, 1992, Sunlaw informed Global and Bryan A. Stirrat by (cc) that Sunlaw would not participate in the project on the bases of the Memorandum because three material terms of that Memorandum could not be satisfied.

[See Counter Memorial, Witness Statement of Raul Romo, Annex 3, Exhibit 4]

¶ 13 ***Sunlaw's President, Mr. Robert Danziger, held a meeting with Mr. Azinian and Mr. Davitian on January 19, 1993. In his letter to Mr. Azinian written the next day,*** *Mr. Danziger reiterated Sunlaw's objections to forming a relationship with Global on the basis contemplated by the November 3rd MOU, informing Mr. Azinian that:*

"Reference is... made to the Memorandum of Understanding dated 3 November 1992, as it is now clear that at least three material terms of the Memorandum cannot be satisfied, the position stated below replaces and supercedes the Memorandum".

Please note that Sunlaw strongly objects to Global's failure to deliver documents, data and other information in a timely way despite repeated requests-, failure to disclose material financial and trade information; and, unauthorized disclosure to competitors of highly sensitive and confidential data considered proprietary by Sunlaw and marked as confidential in transmission to Global. In addition, very serious communication problems require that alternative approaches for moving forward be implemented."

****

Text does not support the conclusion that Sunlaw objected to forming a relationship with Global.

The three material terms that Mr. Danzinger refers to are: (1) Authorization by CFE to generate electricity; (2) Celebration of a Power Sale agreement with the Electric Company; and (3) A commitment from Pemex to supply natural gas for 15 years.

[See MOU, Claimant's Memorial, Section 2, Exhibit 4]

¶ 14 ***It is evident from these paragraphs that Sunlaw was disturbed by Global's behavior in the two months following the MOU's signing.*** *Mr. Danziger went on to set out Sunlaw's position:*

"It is Sunlaw's position that it is now Global/Desona's responsibility to complete it's [sic] deal with the Municipality of Naucalpan and to comply with all Federal, State and Local requirements. Selection of Global/Desona for the waste collection and recycling is solely the province of Naucalpan, and we will not interfere in that process. You have represented to us that your position with Naucalpan is secure, and we have no reason at this time believe otherwise, although we do understand that negotiations are continuing, contracts are not signed, Federal approvals have not yet been obtained, and that performance bonds need to be provided by Desona shortly. It is in everyone's best interest that you complete these things quickly."[Emphasis added]

****

The text does not support the conclusion that Sunlaw was disturbed by Global's behavior.

¶ 15 *In place of the MOU, Mr. Danziger stated that Sunlaw would not align itself closely with Global/DESONA:*

"Global/Desona and Naucalpan will be responsible for negotiating with CFE [the Federal Energy Authorities] or any other party for payment of the services to be rendered by Global/Desona. If Sunlaw is asked to receive funds from CFE or any other party on behalf of, or for the benefit of Global/Desona, Sunlaw will use its best efforts to do so, subject to all requirements of our financiers, lenders and equity investors as well as Mexican and United States laws."

****

The text does not support the conclusion drawn by Respondent.

¶ 16 *By its own terms, this letter was copied to Mr. Bryan Stirrat, and Mr. Danziger sent another copy to Mr. Romo.*

****

Unable to admit or deny.

¶ 17 *After January 20, 1993, therefore, according to the evidence of Mr. Romo, Mr. Danzinger's partner in the energy project, the energy generation part of the project proceeded on a separate track from the garbage collection track. Throughout the period leading up to the end of October of 1993, just before DESONA B signed the concession contract, Sunlaw de Mexico had some dealings with the municipal officials, but dealt mainly with federal energy officials. It had virtually no dealings with Global/DESONA itself for the reasons stated in Mr. Danziger's letter.*

****

Sunlaw remained involved in the project until end of October 1993. [See Counter Memorial, Romo Statement,

Annex 3, Page 5, Paragraph (26)]. Meetings were held often between Sunlaw and Municipal officials, many in which Desona participated. Joint presentations were made to the Governor of the State in which Desona, Sunlaw, BAS, Municipal Authorities and others participated. In August of 1993, Sunlaw was an integral participant of the presentation to the State Legislature's committee. [See Counter Memorial, Romo Statement, Annex 3, Page 5, Paragraph (24)]

Furthermore, as stated by Dr. Ted Guth, environmental affairs manager of Sunlaw, in his witness statement submitted as a part of Claimant's Memorial:

…"had the permits been granted and the contracts been executed, Sunlaw was capable and prepared to honor the commitments <u>outlined in our initial proposal</u>"

[See Declaration of Dr. Ted Guth, Claimants Memorial, Section 4, Exhibit 9]

¶ 18 *Mr. Romo testifies that in March of 1993, Sunlaw was informed by* ***Mr. Abel Duarte, the General Director of Economic Development,*** *that it had erred in estimating the electricity consumption figures. Instead of being able to consume 200 megawatts, the municipality could consume only 15 to 20 megawatts. This made the project simply not economically feasible. Over the next months,* ***Mr. Duarte sought to broaden the geographical scope of the project by approaching other neighboring municipalities*** *in the hope that they would be interested in consuming the energy that would be generated.*

****

Mr. Romo's statement reads that "…By March of 1993 Sunlaw was informed by SEMIP [not by Mr. Duarte] that the consumption figures were too high". Furthermore, the phrase "the project was not economically feasible" is taken out of context. Mr. Romo mentions nothing about the project not being feasible in March of 1993. [Counter Memorial, Annex 3, Page 5, Paragraph (23)].

¶ 19 *In addition, Sunlaw de Mexico found that* ***the biogas generated by the Rincon Verde landfill*** *would*

not provide a rich enough fuel supply for the electricity plant. It ***would have to be complemented by up to 90% natural gas.*** *This would involve the construction of a natural gas pipeline to the landfill where the plant would be located, with a corresponding increase in cost.*

****

Nowhere in Mr. Romo's Statement can the above be found. Furthermore, the need to complement the landfill gas with natural gas was known to all parties from the moment the project was conceived. That was the reason why Sunlaw needed to secure a contract with Pemex for the supply of natural gas.

[See MOU, Claimant's Memorial, Section 2, Exhibit 4]

¶ 20 *By the end of October of 1993, it was clear that the deficit in the anticipated electricity demand was not going to be made up and the electricity project - which Mr. Romo points out was intended to pay for the rest of the solid waste project, including the purchase of the state-of-the-art garbage trucks - was not economically feasible. Thus, he testifies that at that point, Sunlaw de Mexico lost interest in the project.*

****

Respondent has taken several pieces of Mr. Romo's statement, out of context, to build the above paragraph. The above is a fabrication. [See Counter Memorial, Romo Statement, Annex 3]

¶ 21 *Mr. Romo testifies that the inclusion of the electrical generating phase in the concession contract that Global/DESONA signed made no sense because the underlying financial projections would not work, and there was no possibility that it would actually be implemented. He believes that any other power company that examined the project would arrive at the same conclusion.*

*****

Unable to admit or deny as the above is the opinion of the witness.

¶ 22 *This explains why the Memorial devotes considerable space to describing the Integral Solution Project but omits to explain why the lead company, Sunlaw de Mexico, which had the technical expertise and the access to the capital necessary for the project, disappeared from the scene and did not appear as part of the concessionaire. Of course, since Sunlaw de Mexico was supposed to finance the whole project, its absence from the final contract highlights one of the fundamental problems that Global/DESONA faced in performing the concession contract: namely, finding the funds to pay for the state-of-the-art trucks and equipment that it promised to provide.*

****

A. Sunlaw de Mexico did not disappear from the scene but remained a part of the project until the end of October 1993. [See statement of Raul Romo, ¶ 26, page 5]

B. Sunlaw de Mexico was never intended to be a part of the concessionaire. [See MOU, Claimant's Memorial, Section 2, Exhibit 4]

C. Desona had, at the time of the signing of the Concession Contract and at the time of nullification of the Concession Contract, financing in place to fully perform its obligations. Desona had acquired the state-of-the art trucks and equipment that it was required to introduce under the contract. [See Claimant's Memorial, Section 3, Page 60 & Section 4, Exhibit 15]

As stated by BFI's Mr. David Page in his affidavit submitted to this panel as part of Claimant's Memorial,

..."under the proposed terms of BFI's mutual understanding with Desona, BFI would advance to the joint venture all the capital and equipment required to perform under the Naucalpan's concession".

[See affidavit of Mr. David Page, Claimant's Memorial, Section 2, Exhibit 8]

¶ 23 *To the extent that the Memorial adduces* ***evidence regarding the energy generation part of the concession as originally conceived, that evidence has been taken from documents prepared by Sunlaw de Mexico or one of its two parent companies*** *and passed off, implying falsely that it was material produced by Global/DESONA.*

¶ 24 *With respect to the other intended member of the consortium, Bryan A. Stirrat & Associates (BAS), the Respondent has been unable to precisely identify the nature of its participation in the project. It is clear that BAS continued to do business with Global even though Mr. Stirrat was apparently copied with Mr. Danziger's letter of January 20, 1993.* ***Mr. Stirrat*** *also* ***attended key meetings such as the June 1, 1994 meeting of the Cabildo at which DESONA defended its performance of the concession.***

¶ 25 ***It has been represented to the Tribunal both by the Claimants and by Mr. Stirrat himself that BAS was a mere subcontractor to Global/DESONA and that it is owed monies for services it rendered.***

¶ 26 *The Respondent's investigation of the claim yielded evidence that* ***the relationship between Mr. Stirrat and Global/DESONA was much closer than that*** *represented to the Tribunal. First, the evidence of Mr. Jim Hodge, formerly of the Washington State-based company, Regional Disposal Company (RDC), is that in late December of 1993, one month after the concession entered into force, he was contacted by an employee of BAS to inquire as to his company's interest in investing in Global/DESONA. In fact,* ***in early January of 1994, he and his superior visited Naucalpan*** *to inspect Global/DESONA's operations.* ***They were accompanied by Mr. Stirrat himself.***

¶ 27 *Secondly, in early 1994 after RDC declined to invest in DESONA, Mr. Stirrat arranged for a broker, Mr. Mike Carolan, to try to attract investors to Global/DESONA. One of the people contacted by Mr. Carolan was Mr. Sam Maphis of Boulder, Colorado. From the file provided to the Respondent by Mr. Maphis, it is clear that he understood that Mr. Stirrat was an owner of Global/DESONA, not a subcontractor.*

****

Respondent submitted no evidence as to the arrangement between Mr. Stirrat and Mr. Carolan. In addition, no witness statement was submitted from Mr. Maphis specifying his understanding of the relationship between Mr. Stirrat and Desona. On the other hand, Mr. Stirrat's witness statement clearly states that BAS was a subcontractor to Desona. [See affidavit of Bryan A. Stirrat, Claimants Memorial, Section 3, Exhibit 9, Page 2]

¶ 28 *Mr. Stirrat originally volunteered to answer written questions put to him by the Respondent. To obtain further information on this issue, therefore, the Respondent sent detailed questions to Mr. Stirrat on July 1, 1998, inquiring inter alia, as to the extent if any of his ownership interest in DESONA. After repeated inquiries as to whether he intended to respond, on September 24, 1998, Mr. Stirrat sent a letter to counsel declining to answer the questions posed to him.*

****

Unable to admit or deny

¶ 29 *The Respondent intends to address Mr. Stirrat's activities further in the Oral Procedure phase of this proceeding.*

****

Paragraph does not call for an admission or a denial.

¶ 30 For obvious reasons, the Memorial repeatedly attempts to distance Global/DESONA and Mr. Goldenstein from the statements that he made to induce the Ayuntamiento to grant the concession. It is argued that his representations (and others made at the November 4, 1992 meeting) are not relevant because some of them were not reflected in the contract that purported to memorialize the concession. However, the municipal administration that nullified the concession concluded that there were major misrepresentations made to the Ayuntamiento.

****

There is no attempt in the Memorial to distance Mr. Goldenstein from the statements he made at the City Council meeting on Nov. 4th 1992 nor there were any misrepresentations.

The representations made by Mr. Goldenstein at the City Council meeting dated Nov. 4th 1992, as evidenced by the City Council minutes were as follows:

A. that once the Rincon Verde landfill is closed, its terrain would be suitable for a sports park;
B. that the City's waste collection trucks would be replaced by new and modern equipment;
C. that the company would give employment to 200 people;
D. that the company would promote intensive radio and television campaigns to educate on the handling of domestic solid waste;
E. that the investment of his company would be of approximately $60,000,000 new pesos;
F. that the education on the domestic handling of solid waste would be done slowly;
G. that the collection process could be started with the existing equipment;
H. that the operation would begin, once the concession is approved, within the first trimester of 1993;
I. that by then, the new collection trucks would be circulating in Naucalpan and that at that time the recycling work will begin and the energy

generation will go into operation during the third trimester of 1993.

[See Counter Memorial, Witness Statement of Dr. Davalos, Exhibit 4]

Those representations were made by Mr. Goldenstein in connection to the project that was being presented to Council by the Economic Development Department of the Municipality for approval and were not, in any way, misrepresentations.

In fact, the investment was being made [See Appendix "A" under Summary of Investment], employment was being generated [See Appendix "A" under Income Statement, Expense, Payroll],], the trucks were being replaced [See Claimants' Memorial, Section 3, Page 60], the education program was designed [See Claimants response to Motions for Directions, Section III, page 2], Municipal existing equipment was used in the collection process [See Affidavit of Kenneth Davitian, Affidavit Section, Exhibit "2"], operations began 2 days after the Concession Contract was executed [See Claimants' Memorial, Section 3, Exhibit "8"] and the Landfill of Rincon Verde would have turned into a sports park [See Claimants' Memorial, Section 3, Exhibit "7", Page 3].

¶ 31 *Although Global/DESONA was summoned to a hearing in order to provide explanations and proof to the contrary in response to the Ayuntamiento's findings, it failed to do so. Global/DESONA was given an opportunity to reply in writing following the hearing. In its reply, Global/DESONA focused on the purported inability of the Ayuntamiento to nullify the concession, but did not address the Ayuntamiento's findings.*

****

Desona took the position that it was not required to comply with the Municipality's demand to provide explanations, as this was outside the contract provisions. Instead, Desona initiated legal action as

described in ¶ 95-96 of Respondent's Counter Memorial, supra.

¶ 32 *The Memorial omits to note the fact that in its initial solicitation of the solid waste disposal concession to the municipality and in its presentation to the Ayuntamiento in November 1992, Global misrepresented the true state of its experience and its complete lack of financial capacity. Some of the major misrepresentations include the following:*

a) Global prepared a company profile in Spanish stating that it had "more than 40 years of experience" and was "considered to be a leading company in the industry". *These statements were false. A search of the California State Public Registry shows that far from having the experience that it claimed,* ***the company had been incorporated*** *only* ***six months before the statements were made and*** *only* ***sixteen months before the Claimants appeared before the Ayuntamiento. Moreover, of its principals,*** *only* ***Mr. Davitian had*** *any experience and he did not have* ***more than 40 years of experience that could be imputed to the company.***

****

The "English" translation of GWI's company profile submitted by Respondent as "Exhibit 1" of the Counter Memorial does not reflect the content of the Spanish version that was submitted. The English translation of Exhibit "1" to the Counter memorial should be given no regard by the Tribunal. Respondent's conduct and intentions should be noted.

For example, unlike the English version, the "Introduction" of the Spanish Version reads:

"Global Waste Industries is a company that specializes in the collection and reduction of solid waste. The main officers of GWI [refers to Mr. Davitian] have more than 40 years of experience in waste collection…."

As stated in Claimant's Memorial, Mr. Davitian, an owner of Desona and Claimant herein, had experience of 3 generations in the waste collection business.

[See Claimant's Memorial, Affidavit of Davitian, Page 1] Mr. Davitian was a recognized operator in the industry. [See affidavit of Ron Proctor, Affidavit Section, Exhibit "5"] Mr. Davitian's experience was brought in and became a part of GWI's experience once it was formed.

GWI was incorporated in 1991. The City was provided with a copy of GWI's documents of incorporation. [See affidavit of Robert Azinian, Affidavit Section, Exhibit "1"]

b) ***Global petitioned itself into bankruptcy in the United States Court of Bankruptcy on May 28, 1992,*** *some six months before Mr. Goldenstein appeared before the Ayuntamiento and outlined his company's plans for delivering new trucks and other equipment, closing and sealing the Rincon Verde landfill and turning it into a recreational park, and making an investment of 60,000,000 new pesos (20 million U.S. dollars). Global's total annual income according to Mr. Goldenstein's sworm testimony in the bankruptcy proceedings was 30,000 dollars.*

****

In May, 1992, as a result of a failed real-estate investment, GWI filed a petition for "Chapter 11" re-organization before the United States Bankruptcy Court. [See Exhibit "1"]

Mr. Goldenstein's statements at the City Council meeting of November 4th, 1992, were made, as General Director, on behalf of the newly formed Desona.

Moreover, as of the date of the City Council meeting, Sunlaw Energy Corporation was to provide financing for 100% of the project, including 20 million US dollars for collection and recycling [which Mr. Goldenstein refers to] as well as 39.5 million for landfill development. [See Sunlaw's Executive Summary, submitted herein as Exhibit "2"]

c) *Throughout the period leading up to the presentation to the Ayuntamiento,* ***in written communications with the municipality and in the company profile,*** *as noted earlier,* ***Mr. Azinian held***

himself out as President of Global. *However, in the company's Statement of Financial Affairs filed in the company's U.S. bankruptcy proceeding, Mr. Goldenstein swore that Mr. Davitian, not Mr. Azinian, was President.*

****

Mr. Azinian is fluent in Spanish, Mr. Davitian is not. Mr. Azinian would be able to travel to Mexico more frequently that Mr. Davitian and so Mr. Azinian acted as President of GWI. He went on to become the president of Desona. [See Affidavit of Robert Azinian, Affidavit Section, Exhibit "1"]

d) In fact, neither Mr. Azinian nor Mr. Goldenstein had any experience in the garbage business. Mr. Azinian had operated diverse businesses such as Da Azini, Inc., Two Roberts Shoe Co., RA RA RA Shoe Inc. Corp., Black Night Production, Inc., and American Mall Management, and in the late 1980's, prior to declaring personal bankrupcy in late December of 1990, held a one-half interest in a gas station.

****

As stated above, the "English" translation of GWI's company profile submitted by Respondent as "Exhibit 1" of the Counter Memorial is very different from the Spanish version that was submitted.

Under "Experience", Respondent's English translation states that American Waste was formed by Mr. Azinian's grandfather. This statement which is incorrect, for it was Mr. Davitian's grandfather who was in the waste business, does not appear in the original Spanish document. The Spanish version of "Experience" starts at "Currently" and even that portion is an inaccurate translation.

More important is the fact that the Company Profile Respondent refers to contains a section of "Personal References" of Messrs. Azinian, Davitian and Goldenstein which clearly shows that, at no point, Messrs. Azinian or Goldenstein claimed to have waste collection experience.

e) *Mr. Azinian had a history of lawsuits against him at least 34 in the greater Los Angeles area at the time that the concession was granted. Most involved breach of contract or misrepresentation claims. For example, in 1989, Mitsui Manufacturers Bank sued him in Los Angeles Superior Court for breach of contract and obtained a judgment against him for 250,300 dollars.*

f) *Mr. Davitian also had a history of unsuccessful business dealings and lawsuits against him. Like the suits against Mr. Azinian, these lawsuits involved breach of contract and misrepresentation claims. The Respondent has been able to identify 9 default judgments against Mr. Davitian.*

g) *Mr. Goldenstein's business experience was limited to the owership of a restaurant in Los Angeles known as "Johnny Rockets".*

****

The information contained in (e) through (g) above is misleading, incomplete and inaccurate.

The Mexican Legal Proceedings: page 8

¶ 33 through ¶ 38: Respondent's text omitted

All issues related to the Mexican Legal Proceedings are addressed by Claimants in the Legal Argument Section of this reply. **All evidence submitted by the Municipality's Counsel during the Mexican Legal proceedings is denied.**

B. *Events Leading Up to and Following Nullification The Concession: Page 9*

¶ 39 *As pleaded by the Claimants,* ***a concession was granted by the municipal administration of Naucalpan led by Municipal President Mario Ruiz de Chavez.***

¶ 40 *The concession was granted by the Ayuntamiento on November 4, 1992. The concession involved the collection and recycling of municipal waste; the remediation and closure of the existing landfill, Rincon Verde, and the development of a sports park on the site upon closure; the development of a new landfill at Corral del Indio; and the construction of an electrical power plant and generation of electricity using bio-gas produced at the landfills.*

¶ 41 *In essence, the concession was approved under the following terms: the concession would be operated by a consortium of four companies: Global Waste Industries, Inc., Sunlaw Energy Corporation, Mexico Diesel Electro-Motive, S.A. de C.V. and Bryan A. Stirrat & Associates. The project would be fully funded by the consortium which would, nonetheless, hold only 90% of the capital stock, as the Municipality would hold title to the remaining 10%, with no investment on its part. The 90% participation held by the consortium was to be comprised of 45% U.S. capital and 45% Mexican capital.*

****

The City Council approved the awarding of a concession to "Desechos Sólidos de Naucalpan S.A. de C.V." (DESONA) based on a proposal submitted to it by the Economic Development Department. The implementation of the program was subject to an approval by the State Legislature of the term of the concession and the execution of a Concession Contract between the Municipality and the Concessionaire.

¶ 42 *Since it was intended that the concession would last for a period of 15 years, it was necessary to seek the approval of the State Legislature- Approval was granted on August 16, 1993.*

¶ 43 *Negotiations over the contract that was to memorialize the terms of the concession then took place. The results of the negotiations purported to memorialize the terms of the concession.*

****

The purpose of the negotiations between the City and Desona was to detail the responsibilities and obligations of the parties and to define a schedule of implementation of the program reflecting the evolution of the project from conception to the time of execution of the Contract.

¶ 44 ***The contract was signed by Mr. Azinian and Mr. Goldenstein for Global/DESONA and Municipal President Ruiz de Chavez and Municipal Secretary Chavez Tello for the municipality.***

****

Global was not a party to the Concession Contract.

¶ 45 ***The concession contract entered into force on November 15, 1993.***

The Concession Contract's Performance: page 10

¶ 46 ***On or about December 23, 1993, prior to officially taking office, the incoming General Director of Economic Development, Mr. Francesco Piazzesi di Villamosa, and the newly elected Municipal President, Enrique Jacob Rocha, met with Global/DESONA to review the initial implementation of the concession contract.*** *Mr. Piazzesi testifies that he was enthusiastic about the prospect of the improved service that Global/DESONA was to provide under the concession.*

¶ 47 *Mr. Piazzesi's evidence is that at the first meeting, held approximately one month after* ***Global/DESONA purportedly began performance under the concession, he informed the Global/DESONA representatives that the people of the municipality were not happy with the first month of Global/DESONA's public waste collection service.*** *According to Mr. Piazzesi, "it appeared to us that Global/DESONA was concentrating on developing fee paying commercial and industrial accounts and was ignoring its duty to provide the public waste collection service".*

¶ 48 *By the end of December of 1993, before the new administration even took office,* ***Global/DESONA had already failed to comply with the requirement to introduce seven state-of-the-art trucks for use in the public waste collection service. Global/DESONA had introduced*** *only* ***two trucks of its own into circulation which were devoted to servicing the industrial and commercial areas of the municipality for which it charged fees for collection.***

****

In addition to the trucks that were in circulation, 17 additional trucks, although acquired and lined at the US/Mexican border, were not introduced for lack of import permits. [See affidavit of Robert Azinian, Affidavit Section, Exhibit "1"]

¶ 49 *In order to try to meet its contractual obligations, therefore,* ***in December of 1993 and throughout the period leading up to the concession's nullification,*** *Global/DESONA* ***used the municipality's aging fleet of trucks, its fuel, and its workers*** *- all at the municipality's expense.*

****

Desona was meeting its contractual obligations from inception to nullification [See Claimants' Memorial, Section 3, Pages 52-61] The use of Municipal trucks and personnel were allocated by the contract [See Claimants' Memorial, Concession Contract, Thirteenth and Fifteenth Clauses, Section 3, Page 23].

¶ 50 *Mr. Piazzesi testifies that Mr. Goldenstein told him that the trucks necessary to perform the concession were on order from the United States and that they would put them to work as soon as possible.*

¶ 51 ***On December 31, 1993, Naucalpan's Municipal President Ruiz de Chavez's three year administration ended.***

¶ 52 ***On January 1, 1994, the NAFTA entered into force. On the same day, the new Municipal Government took office.***

¶ 53 *The evidence of Mr. Jim Hodge, the former Senior Vice President of the Seattle, Washington-based company, RDC, is that* ***in early January of 1994, he and RDC's owner, Mr. Warren Razore, visited Naucalpan*** *at Global/DESONA's request. The request was made to him through Mr. Dave Luneke, an employee of Bryan A. Stirrat & Associates.*

¶ 54 & ¶ 55 Respondent's text omitted

Witness opinion not necessary to reply.

¶ 56 *Thus, it was evident to an independent third party as early as the beginning of January of 1994, that Global/DESONA was incapable of performing the concession*

****

Conclusion of counsel based upon an opinion without sufficient foundation.

¶ 57 ***In January of 1994,*** *Global/**DESONA invoiced the municipality.** Mr. Piazzesi testifies that the municipality refused to pay the invoice because Global/DESONA was not providing the waste collection service as required by the concession contract, and the municipality was still paying the salaries of all the municipal workers as well as for its fleet of trucks (and the fueling thereof). In general, it was not satisfied with Global/DESONA's performance.*

¶ 58 *Mr. Piazzesi testifies that, in essence, Global/DESONA wanted the municipality to pay twice; it had to pay for its own trucks, workers, and fuel, yet Global/DESONA expected to be paid a service fee for the activity performed by the municipality's own trucks and worker.*

¶ 59 *The municipality's external legal counsel, Dr. Davalos, testifies that he later provided expert*

evidence of the municipality's continued expenditures to the State Administrative Tribunal when Global/DESONA appealed the concession's nullification by the Ayuntamiento. A financial expert reviewed the municipality's financial accounts and testified that there had been no diminishment in its expenditures. The Tribunal accepted this testimony".

****

The continued expenditure were made in accordance to Clauses Twenty Second and Twenty Third of the Concession Contract. [See Claimants' Memorial, Section 3, Page 26]

¶ 60 *Mr. Piazzesi testifies that in January of 1994, he was repeatedly instructed by Municipal President Jacob to contact Messrs. Goldenstein and Azinian to discuss the waste service issue. He says that he had at least seven meetings with them in January and February of 1994, and that they continually promised they would comply with the concession contract and the operation program. However, with the garbage situation worsening rather than improving, public pressure upon the administration was mounting, and officials did not see any sign of progress.*

****

Desona was in full compliance with the concession contract in January and February [See Claimants' Memorial, Section 3, Pages 52-61] and no complaints were voiced by the Municipality either oral or in writing. On February 15, 1994, Desona's President wrote a letter to the City's mayor in which he reviewed all of Desona's responsibilities under the contract. Such letter went unanswered. [See Respondent's Counter Memorial, Exhibit 8]

¶ 61 *Mr. Piazzesi notes that some 300 tons of garbage a day were piling up in the municipality's streets and public areas. He also testifies that although Global/DESONA claims that the garbage crisis that was unfolding in the residential areas could not be attributed to the company because it was not yet*

responsible for those sectors, this was not in fact the case. In fact, Global/DESONA was using the municipality's trucks and diverting them to its needs and as a result the rest of the municipality was suffering because there were few trucks left to collect garbage in those districts.

****

The 300 tons that Mr. Piazzesi refers to is the same tonnage that was present in the feasibility study conducted by the City in July 1992. [See Exhibit "3"]. The inability to collect all of the waste generated at the Municipality was one of the reasons a concession was awarded.

Furthermore, Desona was only using the trucks of the sector it was contractually required to service. [See affidavit of Kenneth Davitian, Affidavit Section, Exhibit "2"]

¶ 62 *Residents began to protest about the garbage accumulating in public areas. For example, in January some citizens groups went to the Municipal offices and dumped waste in the hallways in protest. Faced with the mounting public pressure, the municipality did not have the resources on hand to solve the problem. Mr. Piazzesi testifies that the municipal government was relying upon Global/DESONA to provide the service and the municipal resources were not enough to collect the growing waste build-up.*

****

Paragraph does not call for an admission or a denial.

It is important to point out, however, that up until December 12, 1993, with technical limitations but without any major complaints from the citizens, the former Municipal Department of Public Works was performing collection services in all 9 sectors of the Municipality. From December 13th until December 31st in only 8 sectors, as Desona began to service "Satelite".

On January 1st, 1994, as the new Municipal Government took office and the new Department of Public Works took over, the garbage crisis began. In essence, one can conclude that the new Municipal Department of Public works was incapable of performing the same task its predecessor had performed for three years, with the same exact resources and without relying on Desona.

¶ 63 *According to Mr. Piazzesi, by mid-January it was becoming clear that Global/DESONA was having problems obtaining the state-of-the-art trucks it had promised to provide both in the November 4,1992 Cabildo session in which the concession was awarded to the DESONA's consortium, and in the concession contract formalizing the concession that was signed on November 15, 1993.* ***In mid-January of 1994, Global/DESONA informed Mr. Piazzesi that they were having problems importing 17 trucks and requested his help.*** *He suggested buying the trucks in Mexico and offered assistance in obtaining a loan from BANOBRAS, a Mexican government-owned development bank, to acquire them. However, the Global/DESONA principals rejected this idea, arguing that BANOBRAS would demand that they acquire Mexican trucks, and that new Mexican garbage trucks were not "state-of-the-art" technology. In fact, Mr. Piazzesi notes that Mercedes Benz, among other companies, manufactures garbage trucks in Mexico. (After the public service reverted back to the municipality upon nullification of the concession, the Ayuntamiento acquired Mercedes Benz trucks to continue providing the service on its own)*

****

- Desona acquired the trucks it was contractually responsible to introduce.
- No suggestion to buy Mexican trucks was ever made by Mr. Piazzesi nor there any need to obtain local financing.
- Desona visited several Mexican trucks manufacturers but determined that those vehicles were not suitable for the work that needed to be undertaken in that they

would not accommodate front loading equipment, had neither size nor weight capacity to properly service the City. [See affidavit of Kenneth Davitian, Affidavit Section, Exhibit "2"]

The Municipality Develops Serious Doubts about Global/DESONA: page 13

¶ 64 *According to Mr. Piazzesi,* ***on February 9, 1994, Global/DESONA again invoiced the municipality.*** *The* ***Ayuntamiento again objected to paying the invoice because the municipal government was still paying for the garbage trucks, fuel and the salaries for workers and technicians.*** *While it continued to make the same expenditures as it had prior to the concession contract's entry into force, the public waste problem was worsening and the officials had not seen an adequate response from Global/DESONA. Mr. Piazzesi testifies that* ***he told Global/DESONA that they should be paying the additional expenses being incurred by the municipality.***

****

The Municipality did not refuse to pay the invoice on the grounds stated which are pure fabrication. Rather, upon presentation of the invoice the Municipality requested that in order to give course to the payment the "original invoice" as opposed to a "copy" needed to be presented. [See Exhibit "4"]

¶ 65 *The worsening waste disposal problem and the administration's dealings with Global/DESONA led officials to have serious concerns about Global/DESONA's professionalism, financial capacity and its willingness to comply with its obligations under the concession. Mr. Piazzesi was instructed by the Municipal President to try to obtain relevant information about Global/DESONA, Global Waste Industries, and the Global/DESONA representatives themselves.*

****

Unable to admit or deny. However, pursuant to the Contract, the City was required to state any concerns in writing and to meet and confer, which they failed to do. [See Claimants Memorial, Section 3, Concession Contract, Clauses Twenty Ninth and Thirty Fist, page 29]

¶ 66 *Mr. Piazzesi's investigations revealed that the principals of Global/DESONA had made several misrepresentations about their U.S. company, Global, to municipal officials and at the session of the Cabildo which approved the grant of the concession on November 4, 1992. Moreover, Mr. Piazzesi formed the opinion that Messrs. Goldenstein and Azinian wholly lacked the technical, administrative and financial expertise required for the concession and that only Mr. Davitian had any experience in the garbage industry at all. He also discovered that both Global and Mr. Azinian had commenced corporate and personal bankruptcy proceedings respectively less than two years before the concession was awarded to Global/DESONA.*

****

- There were no misrepresentation made at the Cabildo meeting. [See above ¶32. See also legal argument IIB]
- Mr. Piazzesi's "opinion" has no foundation.
- The City was aware, prior to the submission of the project to City Council, that, in May, 1992, as a result of a failed real-estate investment, GWI filed a petition for "Chapter 11" Re-Organization before the United States Bankruptcy Court.

¶ 67 *Mr. Piazzesi also spoke to persons who had had unfortunate experiences in their dealings with the principals of Global/DESONA, including Eduardo and Emilio Sanchez ("the Sanchez brothers"), Mr. Romo of Sunlaw de Mexico, and Dr. Oscar Palacios, a*

shareholder in DESONA 1'. (Evidence of each of the Sanchez brothers and Dr. Palacios' dealings with Messrs. Goldenstein, Azinian and Davitian is provided below.)

****

Paragraph does not call for an admission or denial.

Outside Legal Counsel is Retained: page 14

¶ 68 *On or about February 9, 1994, Mr. Carlos Alfaro, the General Director of Municipal President Jacob's Technical Office, contacted Dr. Davalos of the Mexico City law firm Davalos y Associados, S.C. to arrange a meeting between Dr. Davalos and Messrs. Jacob and Piazzesi to discuss the Global/DESONA problem. Dr. Davalos was asked to prepare an analysis of the circumstances surrounding the awarding of the concession to Global/DESONA. He was also asked to advise the municipality of its legal rights and obligations.*

****

Unable to admit or deny

The Used Trucks Import Problem: page 14

¶ 69 ***Given that Global/DESONA was having problems importing the trucks from the United States, in early February of 1994, Mr. Piazzesi contacted the Secretariat of Commerce and Industrial Development (SECOFI) to request its help in facilitating the importation process.*** *At that time, Mr. Piazzesi testifies, he did not know that Global/DESONA intended to import used, rather than new trucks.*

****

Had he reviewed the file, Mr. Piazzesi would have been aware that the Former City's Economic Development Department, in September 1993, had applied for import permits of those used trucks. The applications

included a full description of the vehicles as well as pictures.

[See Exhibit "5"]

¶ 70 *By letter dated February 10, 1994, the Director General of Industrial Promotion for SECOFI, Mr. Manuel Fernandez Perez, replied to the municipality's request for assistance regarding the importation of the trucks.*

¶ 71 *Mr. Fernandez informed Municipal President Jacob that the trucks the company sought to import were as follows:*

"…new and used waste cleaning equipment the first importation petition consisting of 17 used waste collecting trucks (10 Volvo White Expeditor trucks; 5 Ford L8000 trucks, and 2 Volvo White Roll-Offs) models 1981 to 1988 with a total cost of $357,700 dollars..,"

¶ 72 *Mr. Piazzesi testifies that Mr. Jacob instructed him to contact the SECOFI officials to find out what the problem was. He spoke with Mr. Fenandez who explained that the trucks that Global/DESONA wanted to import were very old and that Mexican federal law restricted the importation of used trucks.*

****

Unable to admit or deny as there is no evidence of the instruction given by Mr. Jacob nor of the conversation between Mr. Piazzesi and Mr. Fernandez. However, Mr. Piazzesi's statement is not supported by the text of Mr. Fernandez's letter to the mayor. Such letter does not discuss any Federal law restrictions to import used trucks but simply asks for a letter of support from the Governor of the State. The letter provides in part:

"Upon having examined the request, I take this opportunity to inform you that it is necessary that Desechos Solidos de Naucalpan S.A. de C.V. present a letter of support from the State Governor…." [See Exhibit 5 of Respondent Counter Memorial]

The mayor failed to request such a letter of support from the State Governor as directed by Mr. Fernandez.

¶ 73 *Mr. Piazzesi then confronted Messrs. Goldenstein and Azinian and informed them of the problem. The Tribunal will recall that Global/DESONA had committed to acquiring state-of-the-art trucks and, purportedly for this reason, had declined to purchase Mexican-made trucks.*

¶ 74 *Mr. Piazzesi testifies that the* **Global/DESONA** *principals claimed that the used trucks were "state-of-the-art" for the purposes of the concession, and that they required those trucks and only those trucks. He testifies further that they "could never explain to me why those were the only trucks they needed or why thirteen year old trucks were more 'state-of-the-art' than new Mexican trucks".*

****

For practical purposes, trucks manufactured by either Volvo/White or Ford were required. The Mexican trucks, made by Mercedes-Benz, would require a separate large inventory of parts as well as trained mechanics. [See Affidavit of Ken Davitian, Affidavit Section, Exhibit "2"]

The Attempt to Transfer Shares Informally: page 15

¶ 75 *Around this time,* ***Global/DESONA forwarded*** *some* ***share certificates that*** *they said* ***represented the municipality's 10% interest in the company. Under the terms of the concession contract, this should have been done by December 15, 1993.*** *By letter dated February 14, 1994 Mr. Piazzesi forwarded the share certificates to the municipality's General Counsel, Sergio Maldonado". He also enclosed a copy of Global/DESONA letter dated February 9, 1994 presenting the shares to the municipality. Mr. Piazzesi informed Mr. Maldonado that* ***the shares were provided extemporaneously and he believed that the value of the shares did not correspond to the current capital stock of the company.*** *He added that his office had no authority to keep the shares.*

****

- The shares were transferred to the Municipality on Dec. 15th 1993 as evidenced by the Minutes to the Desona's Shareholders meeting. [See Claimants' Memorial, Section 3, Exhibit 11]
- The shares were delivered and accepted on February 9th by Mr. Piazzesi without objection.
- Mr. Piazzesi's belief as to the value of the shares has no basis in fact.

Global/DESONA's Failure to take Responsibility for the Landfill: page 15

¶ 76 *Shortly after the Municipal officials discovered that* Global/*DESONA was proposing to employ used trucks, that Mr. Piazzesi and other officials considered could not reasonably be described as "state-of-the-art", they were surprised to find that the municipality was also about to be assigned full responsibility for the Rincon Verde landfill. By letter dated February 15,1994, Pablo Perez Gavilan, Director General of the State Secretariat of Ecology, informed Mr. Jacob that effective February 28, 1994, the State Secretariat of Ecology would be transferring the operation of the landfill to the municipal government".*

****

The responsibility to manage the landfill was transferred to Desona by the Municipal Government on December 11th, 1993.[See Claimants' Memorial, Section 3, Exhibit 11]. The worked performed by Desona at the landfill is best explained by Bryan A. Stirrat. [See Declaration of Bryan A. Stirrat, Claimants' Memorial, Section 3, Exhibit 9]

However, by mid February, 1994 there were 2 issues related to landfill management that needed to be resolved: (1) the responsibility for the operation of the heavy equipment at the Rincon Verde Landfill which

was to remain in the hands of the State Secretariat of Ecology until February 28th, 1994 as per the agreement between the State and the Municipality. The Concession Contract in its Twenty Seventh Clause recognizes that agreement; and (2) the negotiation of a new land lease between Desona and the Common of San Mateo Nopala, owners of the land. The Concession Contract in its Seventh Clause provides for that.

From early February up until the nullification process by the Municipality began, Desona, the Ejido, the State Secretariat of Ecology and the Municipality were holding meetings to provide for the orderly assumption of the operation of heavy equipment at the landfill by Desona and the negotiation of a new land lease agreement with the Common. (It is to be noted that the Municipality's representative failed to attend those meetings) [See affidavit of Robert Azinian, Affidavit Section, Exhibit "1"]

¶ 77 *Mr. Piazzesi testifies that, like the used trucks issue, this announcement came as somewhat of a surprise to Municipal officials. They thought the landfill was already being administered by Global/DESONA because the concession contract required it to assume all responsibility for the landfill on December 1, 1993.*

****

Pragraph does not call for an admission or denial. In any case, Desona was in full operational and administrative control of the landfill.

[See also ¶ 76 above]

¶ 78 *In fact,* ***the State Secretariat of Ecology had been operating the Rincon Verde landfill*** *(and twelve other landfills within the State of Mexico), pursuant to the Metropolitan Solid Waste Program, that was jointly carried out with the Department of the Federal District (the government agency then in charge of administrating the Federal District). Operations involved final disposition of solid waste, and included operation of* ***heavy duty machinery and dump trucks (which the Secretariat leased at its own cost);***

extraction of tepetate (a special kind of soil) which it used to cover up waste; construction of drains and bio-gas wells; and dealing with the pepenadores (the workers who separate waste and recycle it) who work at landfills. The personnel involved in the operation of the landfill were hired and paid by the State Secretariat. Ecological control over the landfill was also exercised by the State Secretariat.

****

Desona Personnel were performing all duties in relation to the landfill, other than the operation of the heavy equipment.

[See Declaration of Bryan A. Stirrat, Claimants' Memorial, Section 3, Exhibit 9]

¶ 79 *Mr. Piazzesi contacted Mr. Goldenstein and found that Global/DESONA had been charging a fee to independent waste collection trucks for dumping at Rincon Verde, that the company was not declaring this income, and that it had not informed the municipality of these fees. The municipality was concerned about this because, although* ***the concession contract gave Global/DESONA the right to collect fees,*** *this had to be done in accordance with the relevant municipal regulations. In addition, Global/DESONA had not provided the necessary personnel or equipment to the landfill. There was one representative from BAS at the landfill but he was not there on a full time basis and Global/DESONA was controlling access to it, otherwise, the landfill was being operated by State employees.*

****

- The Municipality was fully aware that Desona was charging tipping fees to independent waste haulers. [See affidavit of Robert Azinian, Affidavit Section, Exhibit "1"]

- The fees that were being charged by Desona were the exact same fees charged by the City prior to December 11th, 1993, the day Desona assumed management of the landfill. [See affidavit of Robert Azinian, Affidavit Section, Exhibit "1"]

- The assertion that Desona was not declaring the income generated at the landfill is untrue. Desona issued a dated and numbered receipt to each paying customer at the landfill entrance. [See affidavit of Robert Azinian, Affidavit Section, Exhibit "1"]
- Desona was in compliance with its obligations to manage the landfill under the Concession Contract in terms of personnel and equipment. [See affidavit of Bryan A. Stirrat, Claimants' Memorial, Section 3, Exhibit 9]

¶ 80 *Mr. Piazzesi's evidence is corroborated by that of Mr. Hodge. His testimony is that when he visited Naucalpan, there was only one BAS technician at Rincón Verde and he did not appear to have the necessary support from Global/DESONA to undertake BAS's plans.*

****

Objectionable as unfounded opinion based on speculation.

¶ 81 *In summary, since December 1, 1993, Rincon Verde had been a source of income for Global/DESONA but it had not assumed any meaningful responsibility in regard to the landfill's operation.*

¶ 82 *Mr. Piazzesi testifies that he received a large volume of manuals, documents, forms and other materials from Ms. Tejeda of the State Secretariat of Ecology. He called Mr. Goldenstein who assured him that Global/DESONA would take care of everything and that it would pick up the large volume of materials. He testifies that Global/DESONA did not do so.*

¶ 83 ***In a letter dated February 15, 1994, Mr. Azinian sent Municipal President Jacob a financial pledge to guarantee the company's performance under the concession (as set out in clause eighteen of the concession contract this pledge was to be provided 90***

days after the November 15, 1993 signing of the concession contract).

The Ayuntamiento Considers Dr. Davalos' Legal Advice: Page 17

¶ 84 through ¶ 88 Respondent's text omitted

Unable to admit or deny.

Another Third Party Examines Global/DESONA's Situation: P. 18

¶ 89 through ¶ 92 Respondent's text omitted

This purported evidence in not admissible. Mr. Maphis refused to submit a witness statement when solicited by Mr. Mowatt who is counsel for Respondent. Counsel's declaration is an attempt to introduce incompetent evidence in direct violation of the Tribunal's ruling of June 19, 1998 (5), concerning unsigned witness statements.

Formal Notice of the Defects is Given to DESONA: Page 19

¶ 93 *Mr. Piazzesi, the responsible official, repeatedly informed the Claimants that Global/DESONA's performance of the concession was inadequate. In addition, **on March 8, 1994,** Global/**DESONA was formally notified by Mr. Ignacio Espinoza, Primer Sindico of the municipality, of the initiation of an administrative law procedure to** review **the concession. The notice established March 10, 1994 as the date for a meeting in the Primer Sindico's office to personally inform** Global/**DESONA of the** irregularities and violations found by the Ayuntamiento. **The notice was hand delivered to Mr. Davitian, who identified himself as a shareholder and Mr. Edgar Lozada. The latter read it, and informed Davitian of its content. Also present was Mr. Carolan,** the broker who had been retained to assist Global/DESONA in selling the company.*

****

- Mr. Piazzesi never informed Desona orally or in writing of any performance inadequacy under the Concession Contract.

- The notice issued by the Primer Sindico, to inform Desona that an administrative procedure to nullify the concession had been initiated, was in contravention of the terms set forth by the Concession Contract.

  [See Claimants' Memorial, Section 3, Concession Contract, Clauses Twenty Ninth and Thirty First]

- There is no evidence that Mr. Carolan was retained by Desona to sell the company.

¶ 94 *In the March 10, 1994 hearing, Global/DESONA was informed of the nullification process and provided with a document setting out the 27 irregularities as well as a copy of the Ayuntamiento's decision dated March 7,1994.*

¶ 95 *Global/DESONA provided its response to the Ayuntamiento on March 16, 1994. However, the company fail to address the irregularities found and instead had initiated a claim before the State Administrative Tribunal requesting the nullification of all acts of the Ayuntamiento arising out of, and including, the March 7, 1994 resolution.*

****

The above was done on the advice of Desona's Mexican counsel Lic. Ortega Arenas given at that time.

¶ 96 *In its response, Global/DESONA who alleged that, inter alia;*

the Ayuntamiento and the company had entered into a concession contract on November 15, 1993 setting out the rights and obligations for both parties;

the parties had agreed in clause 34 of the contract that in celebrating the contract, there had been no error or any other cause of nullity;

clause 32 established that the parties waived the jurisdiction of the courts of their legal domiciles, and agreed to subject themselves to the jurisdiction of the courts of the State of Mexico;

they agree to consult in order to solve their differences before taking the matter to the courts;

the Ayuntamiento had not quoted the provisions that had been violated by the concessionaire, the provisions establishing the initiation of the administrative procedure, or the provisions under which the concessionaire had been notified; and

the Ayuntamiento could not claim that it entered the contract on the basis of an error of fact or law because of the principle that 'no one can claim in his favor his own mistakes

The Concession Is Nullified: page 20

¶ 97 *On March 21, 1994, after reviewing Global/DESONA's response of March 16, 1994, the Ayuntamiento unanimously resolved to nullify the concession.*

¶ 98 *By letter dated March 22, 1994, the Primer Sindico, Mr. Ignacio Espinoza, requested that the Municipal General Director of Public Services participate in a procedure to enforce the March 21, 1994 decision regarding the municipality's repossession of the Rincón Verde landfill, so that he could identify the municipal government's property. Mr. Ignacio Espinoza sent similar letters to the Municipal Treasurer and to the Director General for Public Security and Firemen Corps Police Director General. He asked the Treasurer to appoint an official to take over the collection of fees at the Rincón Verde landfill beginning the next day, and requested that the Municipal Police Director implement a general protection operation for the repossession action.*

■ Text ■ Admission ■ Denial ■ Other Sources ■ Claimant's response

****

Claimants are unable to admit or deny.

¶ 99 *On March 23, 1994, the Ayuntamiento notified Global/DESONA that the concession had been nullified. Mr. Goldenstein received and signed the notice at 9:00 A.M. At 11:00 A.M. the municipality took possession of the Rincón Verde landfill. The report noted that Global/DESONA retrieved all of its equipment, including the money in the cash register in the amount of 1,835 new pesos.*

The State Administrative Tribunal Proceedings

¶ 100 through ¶ 107 Respondent's text omitted

Claimants admit that proceedings at Mexican Courts took place.

The Cabildo Session of June 1, 1994: page 25

¶ 108 through ¶ 116 Respondent's text omitted

All allegations made by witnesses at that Cabildo meeting are denied. [See also Claimants reply to Counter Memorial's witness statements]

The Tribunal Proceedings Continue: page 26

¶ 117 through ¶ 134 Respondent's text omitted

[See answer to above ¶ 100 through ¶ 107]

C. Additional Relevant Facts

The Four Versions of DESONA: page 40

¶ 135 *As the Tribunal has seen, the confusion between the Claimants' creation of two almost identical versions of the company, DESONA A and B, was one of the bases for the Mexican Courts' decision to uphold the nullification. In addition, the*

Ayuntamiento cited the **failure to incorporate the 'DESONA Consortium'** *as an irregularity. Finally, DESONA I's role in the events leading up to the conclusion of the concession contract is explained by Dr. Palacios in his witness statement.*

****

Claimants' incorporated only one version of Desona. [A more detailed explanation of this is set forth in Claimants' Memorial Section 1, pages 8 through 11].

Further, the incorporation of Desona is set forth in the MOU celebrated between the members of the Consortium, which provides as follows:

"Subsequent to the awarding of this Concession by the Municipal Authorities agreements between the three above mentioned companies are to be drawn and executed"

[Claimants' Memorial, Section 1, Exhibit 4]

¶ 136 *From the beginning of this proceeding, the Respondent has raised questions about the nature of the alleged investment and the Claimants' purported interests therein. The Tribunal will recall* ***that there have been four versions of DESONA;***

- ***the first, which the Respondent designated as DESONA A for ease of reference (and whose deed of incorporation listed two Mexican nationals as shareholders, Mr. Jose Humberto Pulido Garcia and Mr. Epifanio Lopez Martinez, together with Mr. Azinian and Mr. Goldenstein);***
- *the second, which the Respondent designated as* ***DESONA*** *B (and* ***whose deed of incorporation listed*** *only* ***Mr. Azinian, Mr. Davitian and Mr. Goldenstein as shareholders);***
- *the third,* ***DESONA I (a company incorporated on March 3, 1993 whose shareholders were Mr. Goldenstein and Dr. Oscar Palacios);*** *and*

- *a fourth version, which in fact was never created, was described in the November 4, 1992 Cabildo minutes as a consortium of four companies.*

¶ 137 *Since corporate documents for the fourth version were apparently never produced, the Respondent will not address it further other than to note that at the Cabildo session of November 4, 1992, it was represented that "four companies have associated... to incorporate a Mexican enterprise called DESONA, S.A. de C.V., which means Desechos Solidos de Naucalpan." Thus, the concession would be operated by four companies. DESONA was described as being a company whose capital stock would be distributed as follows: 45% U.S. interest; 45% Mexican interest; and 10% interest of the Municipality. It is evident that neither DESONA A, DESONA B, nor DESONA I corresponded to the shareholding that was described to the Ayuntamiento.*

¶ 138 *It should be noted that the Claimants did not add the letters 'A' and 'B' to DESONA's deeds of incorporation. The Respondent did so in its original motion in order to distinguish between the two different versions of the company's shareholders. The corporate name, the deed number and the notarial seal were otherwise identical.*

¶ 139 *After the First Session of the Tribunal, the Respondent filed a Motion seeking directions from the Tribunal that the Claimants establish their standing and clarify the basis for their claim. The Tribunal received the motion, and a reply from the Claimants, and decided to defer the consideration of the motion's merits until later in the proceeding.*

****

[See Tribunal Ruling, Paragraph 39, received by Claimants on January 23, 1998]

¶ 140 *The Tribunal will recall that the Respondent requested further information regarding the three versions of DESONA and transactions relating to their share capital. The Respondent has attempted to make*

sense of the evidence that it has received. However, the Tribunal will see that the ***Claimants' account of the various transactions simply does not make sense.***

¶ 141 *It is established that* **two versions of the deeds of DESONA were drafted by Notary Public #7 of Cuautitlitn lzcalli** *on November 4, 1992, just prior to the Cabildo meeting at which the concession was granted to "DESONA".* **Neither one was perfected according to Mexican law.** *The deed of incorporation would have to be* **registered at the local Public Registry** *and then finally authorized by the Notary Public. This was not done until* ***November 26, 1993****, one year later.*

DESONA A: page 41

¶ 142 *DESONA A originally issued shares to two Mexican businessmen, Jose Humberto Pulido G. (initially holding 500 shares) and Epifanio Lopez Martinez (initially holding 500 shares), in addition to Mr. Azinian (with 2700 shares) and Mr. Goldenstein (with 1300 shares). The Claimants assert that DESONA A was simply abandoned because the two Mexicans did not subscribe to their shares.*

****

No shares were ever issued by the company Respondent refers to as Desona A. Further, Respondents misquotes prior pleadings. See footnote 109. That text actually provides:

"The purported stockholders Jose Humberto Pullido Garcia and Epifanio Lopez Martinez were nominees of the City of Naucalpan but never registered with the notary and never received an interest in the corporation"

[See Claimants' reply to Motion for Directions dated November 5th, 1997, Page 8]

¶ 143 *However, the Respondent has obtained a document prepared by Mr. Goldenstein on August 12, 1993, in which he set out the January through July financial situation for DESONA A. It contains balance sheets prepared by the accounting firm Dinamica*

Contable, S.C. The Tribunal will see that both Mr. Pulido and Mr. Lopez are listed as shareholders, while Mr. Davitian is not listed as a shareholder. It further indicates that the original capital contributions were subscribed (including by the two Mexican shareholders), and that Mr. Pulido made substantial additional capital contributions -at least in relation to the other shareholders. This document of Mr. Goldenstein's own making therefore contradicts the Claimants' account of DESONA A.

****

The names of Mr. Pulido Garcia and of Mr. Lopez Martinez in Desona's balance sheets were entered in error by Dinamica Contable S.C.. This error was later corrected. [See Respondent's Counter Memorial, Exhibit "38"]

¶ 144 *Oddly, the balance sheets in Mr. Goldenstein's August 12th financial report for DESONA A list DESONA I as a creditor, even though DESONA I at that time held the concession.*

****

Desona was the only operating company at all times.

DESONA I: page 41

¶ 145 *It is established that **DESONA I was incorporated by Mr. Goldenstein** (holding 3500 shares) **and Dr. Oscar Palacios** (holding 1500 shares) **on March 3, 1993. On April 22, Mr. Goldenstein formally requested the Ayuntamiento to assign the concession to DESONA I and on May 3, 1993, it obliged.***

****

The City instructed Claimants, on the advise of the State Legislature, to incorporate Desona I. [See Exhibit "6"]. However, shares of Desona I were never issued.

¶ 146 *Dr. Palacios testifies that Mr. Goldenstein promised him that DESONA I would be the concession*

holder. They agreed that ***Dr. Palacios (on behalf of EPYCSA S.A. de C.V., a Mexican group that he directed) would contribute cash and manufacture metal garbage containers for use in the concession.*** *Once the concession was approved by the State Legislature, Mr. Goldenstein and his colleagues would contribute their share of money.*

****

The statement: "Dr. Palacios testifies that …" is nowhere to be found in his witness statement. Furthermore, the agreement between Desona and Dr. Palacios was that he or his companies would buy 5% of Desona's shares in exchange for US$300,000 in cash and US$200,000 in equipment. [See letter sent by Mr. Goldenstein to Dr. Palacios dated 2/2/93 and submitted by respondent as Annex III, Volume III, H, Exhibit "1"].

Note about the English translation:

In the first paragraph, it could be understood that Mr. Navarrete was the manager of Desona. This was not the case.

In page 2, paragraph 2: the sentence. "I also propose that if you believe it to be necessary…" should read "…if you believe it appropriate…"

¶ 147 *Mr. Goldenstein told Dr. Palacios to deposit the funds in a BANAMEX S.A. account number 520786-5. Dr. Palacios testifies that he deposited funds into the account on several occasions and set about manufacturing the metal garbage containers.*

****

The statement: "Mr. Goldenstein told Dr. Palacios to deposit funds……" is nowhere to be found in the witness statement.

The State of Affairs as of April 1993: page 42

¶ 148 *As of April 1993, according to the evidence generated by the Claimants, there were three versions of DESONA: DESONA A, which according to Mr.*

Goldenstein's own financial records was the operative version of DESONA (although the necessary steps to complete the company's registration had not been effected), DESONA I, which had just been incorporated and was about to take the assignment of the concession, and DESONA B, the deed for which had apparently been drafted but which was evidently not operative at all.

*****

The above is not supported by the evidence.

The April 19th Shareholders Meeting: page 42

¶ 149 *Although DESONA A and DESONA I were the two of the three versions that were being "operated" at this time, the* ***Claimants have produced minutes of a shareholders meeting*** *purportedly* ***held on April 19, 1993 at which*** *they claim that* ***they scrutinized the share capital of DESONA. According to the minutes, Mr. Davitian certified that the total shares issued were represented and that owners of such shares were, Mr. Azinian (2700), Mr. Goldenstein (1300), and 1000 for himself.***

¶ 150 *This, of course, is* ***contradicted by Mr. Goldenstein's subsequent August 12th financial statement for DESONA,*** *which included a balance sheet for the month in which this meeting is claimed to have occurred. Further, DESONA I was already in existence and was to hold the concession, so it is unclear why DESONA (either A or B) would have a meeting to discuss performance of the concession - particularly when Mr. Goldenstein, only three days later, requested that the concession be transferred to DESONA I. Finally, Dr. Palacios, who on Mr. Goldenstein's own evidence was an incorporating shareholder of DESONA I, was described in the minutes as a "special guest" - a peculiar term in the context of a shareholders meeting.*

****

[See answer to ¶ 143, above]

The Awarding of the Concession: page 43

¶ 151 ***The State Legislature committee considered the awarding of the concession for a period of fifteen years during its sessions held on July 22 and 24 of 1993. The Legislature eventually authorized the awarding of the concession for fifteen years to "DESONA".*** *Oddly, the documents submitted by the Global/Desona principals refer to both DESONA B and DESONA I. In fact, the deed of incorporation and the draft Title of Concession (which informed the Legislature how the concession contract would operate) are two documents which specifically refer to DESONA I.* ***Nevertheless, in the end, it was "DESONA" that was authorized the concession apparently due to a typographical error which omitted to include the number "I" in an <u>otherwise</u> identical corporate name.***

****

The package that was submitted to the State Legislature was prepared and presented to the committee by the City and not by Desona as Respondent claims.

Events After the State's Approval: page 43

¶ 152 ***The draft title of concession before the State Congress required that the concessionaire associate with Sunlaw de Mexico and BAS immediately upon the concession being approved, and to initiate operations 90 days thereafter.***

****

However, the draft title that was presented to the City Council on Nov. 4th, 1992, does not call for such association.

¶ 153 *Dr. Palacios' testimony is that after the State Legislature approved the concession he pressed Mr. Goldenstein to make his promised contribution. Although Mr. Goldenstein promised to do so, he never did it.*

¶ 154 *Instead, Mr. Goldenstein proceeded to negotiate the concession contract with Mr. Chavez Tello, the Municipal Secretary.* ***The concession contract was signed,*** *not on behalf of DESONA I, but rather on* ***behalf of DESONA B whose deed of incorporation was*** *subsequently* ***registered in the State Public Registry of Property and Commerce on November 23, 1993.***

¶ 155 *On the date of the contract's signing, it was DESONA I, not DESONA B, that held the concession.*

****

The City had determined that Desona was the holder of the concession. This determination was ratified by the City Council in its minutes of November 16, 1993. [See Claimants' response to Motions for Directions dated November 5th, 1997, Exhibit "k"]

¶ 156 ***On November 26, 1993, Mr. Goldenstein****-acting on behalf of DESONA B rather than the then-concession-holder, DESONA 1-* ***requested that the concession be transferred from DESONA I to DESONA B.*** *The Tribunal should note that this occurred eleven days after the ostensible "signing" of the concession contract.*

****

The unanimous approval by the City Council to transfer the concession back to Desona was done on November 16, 1993, the day after the concession contract was signed. [See Claimants' response to Motions for Directions dated November 5th, 1997, Exhibit "k"]. It is to be noted that Naucalpan's City Council did not meet on November 15th. Furthermore, Mr. Goldenstein's written request was made acting on instructions by the City Authorities. [See affidavit of Goldenstein]

¶ 157 *The Claimants' response to the Respondent's request for clarification as to the status of DESONA I was terse and uninstructive. Nonetheless, it is apparent that Dr. Palacios was left without the*

benefit of his investment and DESONA B converted both the money and the metal containers that he contributed to DESONA I to its own use. Hence Dr. Palacios subsequently filed a criminal complaint for fraud against Mr. Goldenstein.

****

[See Claimants' reply to Dr. Palacios' witness statement]

DESONA B: page 44

¶ 158 ***The Claimants have provided the share certificates that** they claim **represent their interests in Desona B.***

¶ 159 *The Tribunal will see that **the certificates are dated November 15, 1993,** the date of the ostensible signing of the concession contract. This date has further significance for reasons that will be explained below.*

****

The "November 15th" date in the certificates was entered in error. The certificates were issued after Desona's shareholders meeting of December 15, 1993, and reflect the resolutions taken during that meeting.

[See affidavit of Robert Azinian, Affidavit Section, Exhibit "1"]

¶ 160 ***The certificates are numbered in the upper left hand corner, commencing with #52.** Certificates #1-51 have not been produced, so it is not known what names were inscribed on them. **Each certificate that has been produced represents 100 shares. The certificates were issued as follows:***

- Certificates #52-73: Robert Azinian, totaling 2200 shares.
- Certificates #87-96: Ellen Baca, totaling 1000 shares.
- Certificates #97-101: H. Ayuntamiento de Naucalpan de Juizez, totaling 500 shares.

¶ 161 *This adds up to 3700 shares. The 5100 shares represented by certificatcs#1-51, and the 1300 shares represented by certificates #74-86, are unaccounted for. Even assuming that Mr. Goldenstein was issued 1300 shares, as the Claimants assert, the 5100 shares that were represented by certificates #1-51 are unaccounted for. It could be inferred that those shares were issued to Mexican investors, such as Mr. Pulido, Mr. Lopez, and perhaps Dr. Palacios.*

****

Certificates #1-27 were issued to Mr. Robert Azinian
Certificates #28-40 were issued to Mr. A. Goldenstein
Certificates #41-51 were issued to Mr. Kenneth Davitian
Certificates #74-96 were issued to Mr. A. Goldenstein

Following the stockholders' meeting of December 15, 1993, certificates #1-51 were cancelled and replaced with certificates #52-101.

The information regarding the inscription of Desona in the Public Registry was entered in the cancelled certificates after the Public Notary provided such information.

[See certificates #1-51 and #74-96, Exhibit "7"]

¶ 162 *It is important to note that, as of the date of the shares' issuance, November 15, 1993, Ms. Baca is now listed as a shareholder in place of Mr. Davitian.*

****

[See answer to ¶ 159 above]

¶ 163 *The reasons why November 15th is a critical date is that only three days later, Messrs. Azinian, Davitian, and Goldenstein signed a Security and Guaranty Agreement with BFI to secure a loan for 100,000 dollars.*

****

Unable to admit or deny as argument of counsel.

¶ 164 ***The Agreement's recitals in Clause I note that "The Guarantors Robert Azinian, Ariel Dario Goldenstein and Kenneth Davitian are currently the legal and beneficial owners respectively of fifty-four percent (54%), twenty-six percent (26%) and twenty percent (20%) of the issued and outstanding shares of Desechos Solidos de Naucalpan (DESONA)".***

¶ 165 *This recital is inconsistent with several other facts. First, according to the share certificates provided to the Respondent, only three days earlier, Mr. Davitian's shares were issued to Ms. Baca.*

****

[See answer to ¶ 159 above]

¶ 166 *Second, Mr. Azinian's pledge of 750 shares to BFI as a Guarantor demonstrates another inconsistency: the Tribunal will note that he has tendered as evidence of his shareholding 100% of the shares that he initially hold. Yet he claims that BFI has demanded payment of its loan. It seems inconceivable that BFI would have returned its security to Mr. Azinian prior to repayment.*

****

BFI's loan is personally guaranteed by Claimants and Mr. Goldenstein. As inconceivable as may seem to Respondent, BFI never demanded to physically hold the share certificates that were pledged as guarantee.

¶ 167 *The Respondent has obtained another balance sheet for "DESONA" as of October 31, 1993. The balance is very similar to those contained in the August 12 financial report, and was prepared by the same accounting firm. In particular, like the balance sheet for DESONA as of July 31, 1993, it shows DESONA I as a creditor.*

****

It should be noted that the names of Messrs. Pullido Garcia and Lopez Martinez that appeared in the July

31st balance sheet of Desona no longer appear in the balance sheet of October 31st, as the error was corrected.

Likewise, Epysca appears as a creditor of Desona. [See Respondent's Counter Memorial, Exhibit 38]

¶ 168 *The balance sheet shows that an additional subscription of Capital was made by EPYCSA (the Mexican group directed by Dr. Palacios), thereby indicating that EPYCSA was a shareholder.*

¶ 169 *It therefore, appears that, unbeknownst to Dr. Palacios, his financial contribution to DESONA I was recorded on the books of DESONA A as a capital contribution by EPYCSA.*

¶ 170 *It should be noted that it was not until this time that the Claimants actually took steps to formalize one of the versions of DESONA A or B, which was apparently done because of a requirement in the BFI agreement that DESONA be incorporated. The Tribunal will see that the deed of incorporation for DESONA B is actually registered on November 23d, and then finally certified by the Notary Public on November 26th.*

****

Argument of counsel unsupported by evidence.

The December 15th Shareholders Meeting: page 45

¶ 171 ***The Claimants have tendered minutes of their December 15th shareholders meeting in which the assignment of Mr. Davitian's shares is reported as being authorized.***

¶ 172 ***As in the April 19th minutes, there is a section in which the existing shareholders are scrutinized and Mr. Davitian is said to still hold his allotment of 1000 shares.***

¶ 173 *The problem for the Claimants is that according to the certificates provided by them in this*

proceeding, Ms. Baca had already received her shares one month before. Yet it is at this meeting that Mr. Davitian allegedly requests the transfer of his shares to Ms. Baca.

****

[See answer to ¶159, above]

¶174 *It is not possible for the Claimants to argue that this meeting merely ratified that which was done one month earlier because, as the December 15th meeting's minutes state, Mr. Azinian was authorized "to issue new stock certificates under the name of Ellen Marie Baca and cancel the ones under Mr. Kenneth Davitian (sic) name".*

****

Argument of counsel. [See answer to ¶159, above]

Summary: page 46

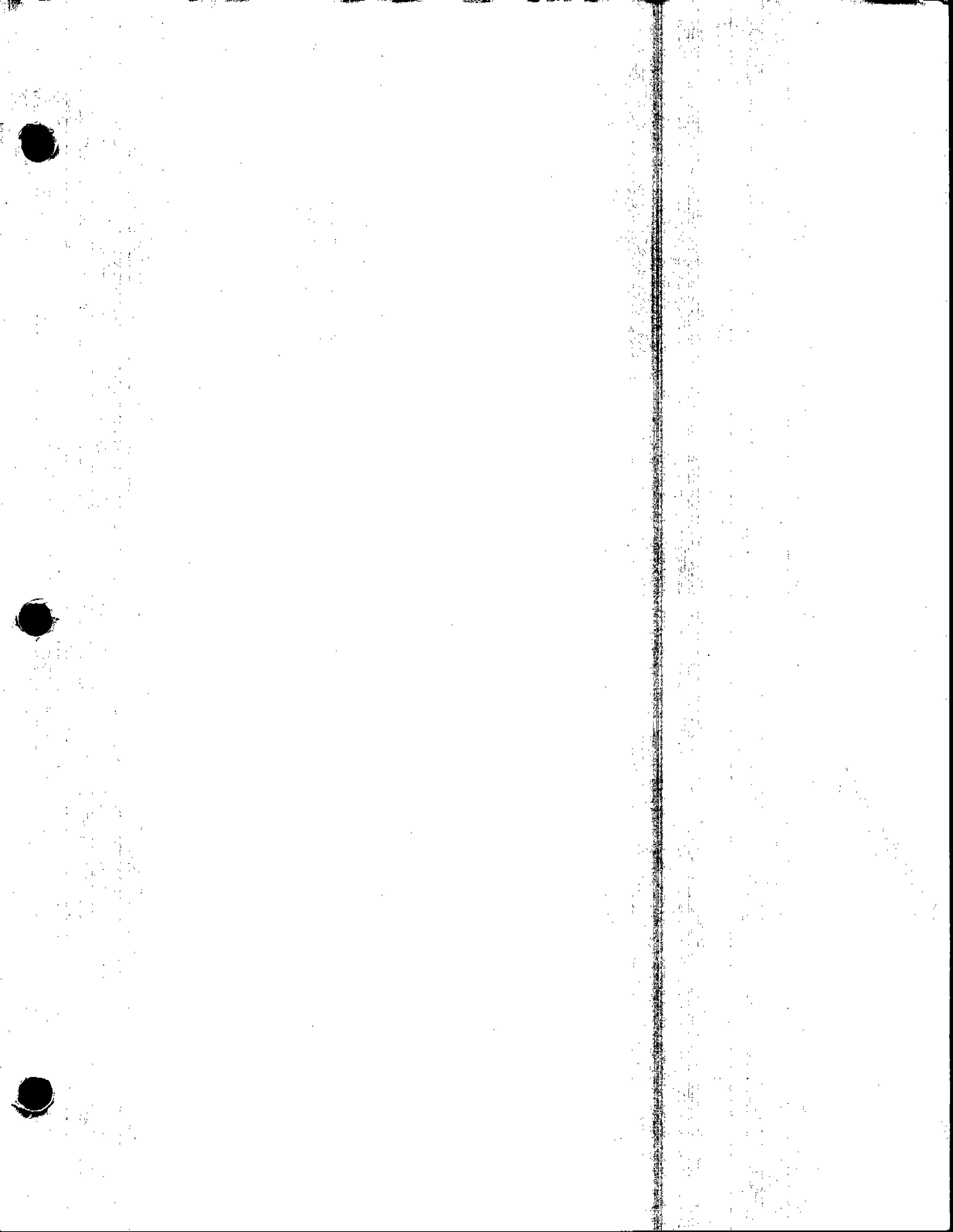
¶ 175 through ¶ 177, Respondent's text omitted

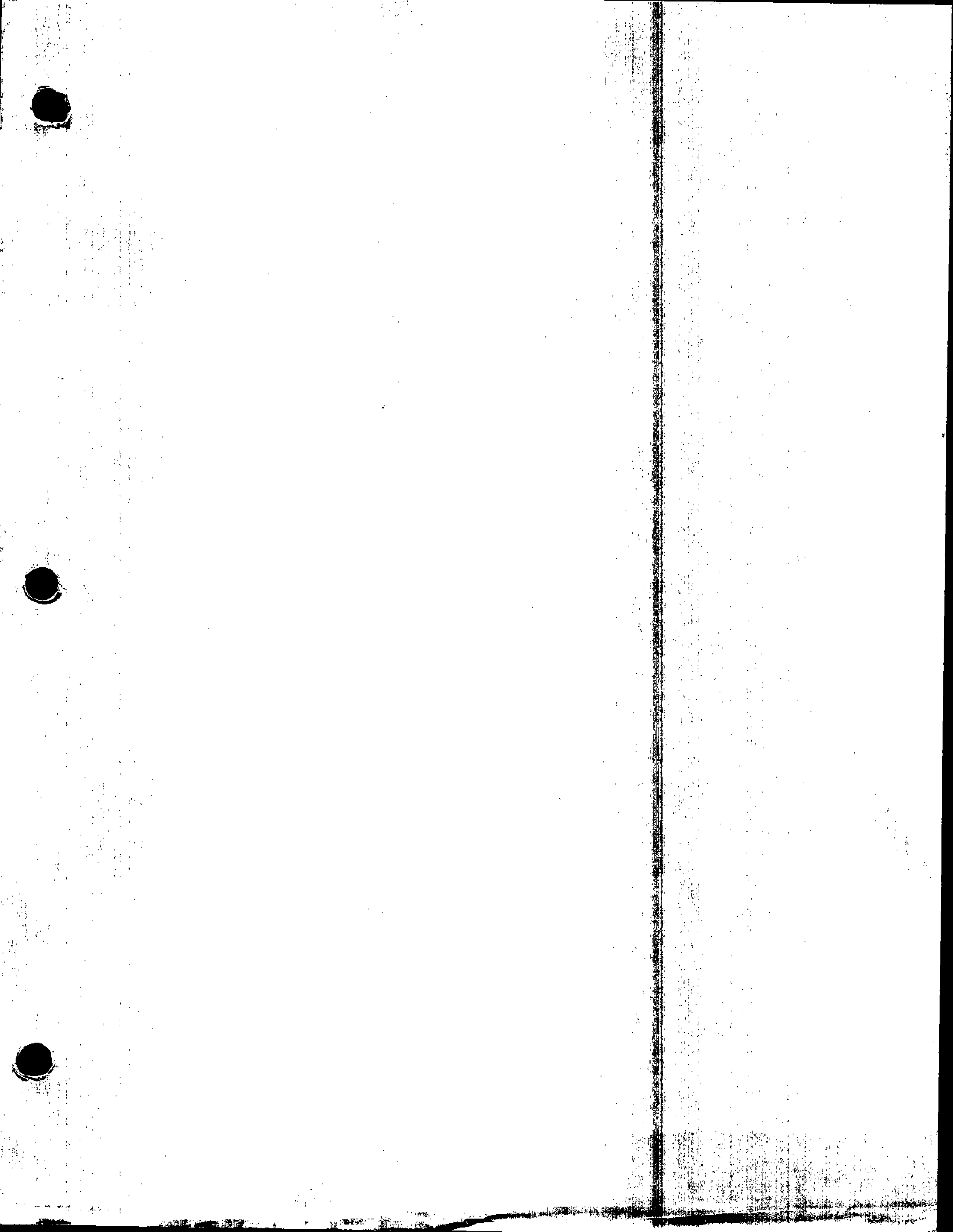
Argument of Counsel

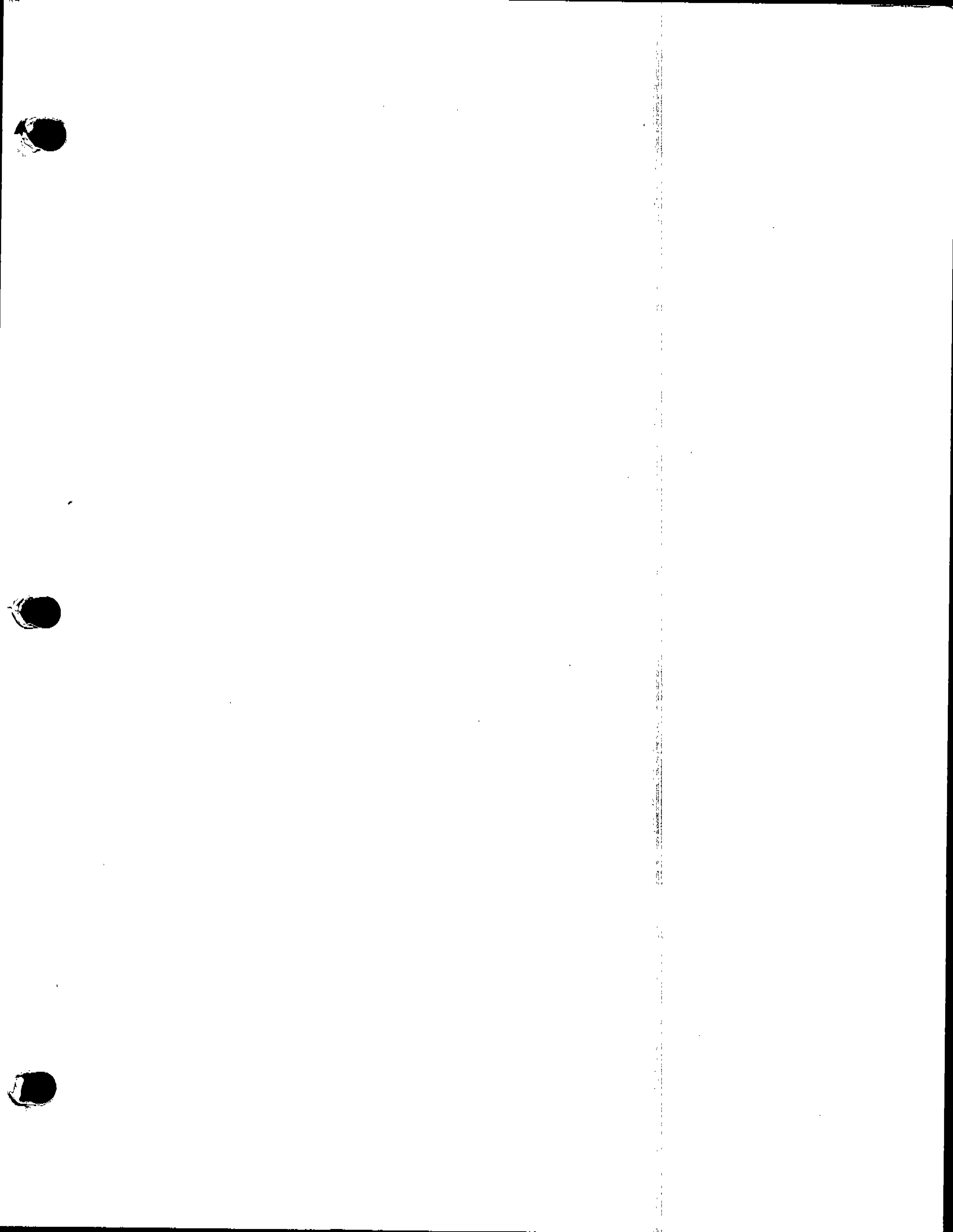
Chart on page 47 omitted.

Section II

(Spanish)







SECTION III: Legal Argument

Summary

1. Much of Respondent's argument depends on the proposition that the contract between the parties was formed on November 4, 1992, the date of the City Council meeting that authorized the concession, rather than on November 15, 1993, the date that the Concession Contract was signed. That proposition in turn depends on Respondent's argument that under Mexico's internal law only the City Council has authority to grant a concession. By focusing on the November 4, 1992 date, Respondent is able to make three related arguments: (1) that DESONA did not comply with the terms of concession because it did not do all of the things it said it would in the November 4, 1992 meeting; (2) that there were misrepresentations to the City Council because some of the facts changed after the November 4, 1992 meeting; and (3) that the Mexican administrative and judicial proceedings annulling the Concession Contract on the basis of DESONA's alleged non-performance and misrepresentations should be given *res judicata* effect.

2. Claimants basic response is that the contract between the parties was formed on November 15, 1993, when the Concession Contract was signed. Whether the mayor and clerk of the City had authority under Mexico's internal law to enter a contract that allegedly differed from the draft that was submitted which the City Council had authorized, is irrelevant. Claimants were entitled to rely on the authority of the City's mayor and clerk to enter the Concession Contract on behalf of the City. Thus, Claimants will argue: (1) that the Concession Contract sets forth DESONA's obligations and DESONA substantially complied with those obligations; (2) that there were no misrepresentations that would invalidate the Concession Contract because all of the material facts allegedly misrepresented were known to the when the Concession Contract was signed on November 15, 1993; and (3) that the Mexican administrative and judicial decisions should not be given *res judicata* effect.

I. Claimants Have Standing

3. As set forth in Claimants' Memorial, Claimants have standing to bring claims on behalf of themselves under Article 1116 and on behalf of the enterprise DESONA under Article 1117. In ¶ 193 of its Counter Memorial, Respondent suggests that the Tribunal has disallowed Claimants' claims on behalf of DESONA under Article 1117, but Respondent is misreading the Tribunal's Interim Decision of January 22, 1998. In ¶ 39 of that Interim Decision, the Tribunal noted that DESONA is not *itself* a claimant. The Tribunal made no ruling, however, on Claimants' standing under either Article 1116 or Article 1117, preferring to defer consideration of those issues until consideration of the merits.

A. Claimants Have Committed Capital and Other Resources under Article 1139(h)

4. Respondent argues that Claimants have not made an investment under Article 1139(h) because they have not committed any capital or other resources under the Concession Contract. [Counter Memorial ¶¶ 196-204]. Respondent is mistaken. Claimants have committed capital as evidenced by the money advanced to the project prior to the incorporation of Desona [See Claimants' Memorial Section 6, Page 2, top]; money advanced from the time of incorporation to the execution of the Concession Contract; and money advanced in connection with the implementation of the contract. [See Appendix "A", herein] Claimants have also committed "other resources" under the Concession Contract including, personal time and effort from late 1991 [See Claimants' affidavits] as well as equipment and rolling stock [See affidavit of Davitian].

5. Having committed capital and other resources under the Concession Contract, Claimants have established that they have made an "investment" under Article 1139(h) of NAFTA. It is worth emphasizing that Article 1139(h) defines "investment" not simply as "the commitment of capital or other resources ... under ... concessions" but as "*interests arising* from the commitment of capital or other resources ... under ... concessions." The "interests arising" from the commitment of capital or other resources may be more valuable than the capital and other resources committed. In this case, those interests would include the full value of the Concession Contract that Respondent's wrongful repudiation prevented Claimants from realizing, even though the full value of the Concession Contract exceeds the value of the capital and other resources that Claimants committed prior to Respondent's repudiation.

B. <u>Claimants Have Made Investments Under Article 1139(a), (b) and (e)</u>

6. Respondent argues that Claimants have not made an investment in an enterprise, that they do not own equity securities of an enterprise, and that they do not have interests in an enterprise that entitle them to share in its income or profits, each of which would constitute an investment under Article 1139(a), (b) and (e) respectively. [Counter Memorial ¶¶ 205-12]. Respondent does not dispute that DESONA is an "enterprise" or that Claimants hold equity securities and other interests in DESONA. Rather, Respondent argues that under Mexico's internal law DESONA never technically held the Concession Contract and that Claimants were incapable of performing the Concession Contract.

7. With respect to Respondent's first argument, it is clear that DESONA did hold the Concession Contract, as evidenced by the contract itself which was signed, executed and performed by the parties. Moreover the Ayuntamiento on November 16, 1993,ratified the contract and approved to "leave without effect the authorization given to Desona I regarding the Concession for the collection, transportation of recycling by the City Council on May 3, 1993 in light of the fact, as per the gazette of the government on the resolution, the State Legislature has given to Desona S.A. de C.V. like it was originally given on Nov. 4, 1991[sic]2, by the City Council. This proposal is approved unanimously…". [See Claimants' reply to motion for direction dated Nov. 5th, 1997, Exhibit "K"]

8. Even if were true that DESONA did not technically hold the Concession Contract, Mexico should not be allowed to plead technical non-compliance with its internal law as a defense when the City authorities clearly knew that it was the Claimants, operating through DESONA, who were performing the Concession Contract. As discussed further below, a foreign investor should be allowed to rely on the representations of government officials and the government may not plead technical non-compliance with its internal law as a way of escaping its obligations under a concession agreement. [*See infra* IIA1]

9. With respect to Respondent's second argument, it is simply not true that Claimants were unable to perform the Concession Contract. At the time the City repudiated the Concession Contract, DESONA was substantially in compliance with its obligations under that contract. [*See infra* IIA1]. Moreover, the City did not give DESONA 30 days to remedy the alleged irregularities in its performance or negotiate with DESONA to resolve the parties differences as required under

Clauses Twenty Ninth and Thirty First of the Concession Contract.

C. Claimants Have Made Loans to an Enterprise Under Article 1139(c)

10. This Claim is withdrawn. Claimants, after having borrowed substantial sums from Browning Ferris Industries and Western Waste Industries, and having made personal guarantees to this creditor, invested the borrowed funds in Desona. Said funds, which are capital contributions under 1139 (h), appear in Desona's bank accounts and Appendix "A" hereto. Said information has been requested by respondent in its Motion for Direction dated June 8, 1998 and provided herewith.

D. Additional Issues

11. Respondent raises a number of additional issues concerning Claimants' standing to bring these claims: (1) That Mr. Davitian is not an investor; (2) that Ms. Baca is not an investor; and (3) that Mr. Goldenstein should not be permitted to assign his shares in DESONA to Mr. Azinian. Counter Memorial ¶¶ 215-23. As explained in Claimants' Memorial, even after the assignment of his shares to Ms. Baca, Mr. Davitian continued to have an interest that entitled him to share in the income or profits of DESONA, making him an investor under Article 1139(e). As explained in Claimants' Memorial, Ms. Baca received shares in DESONA from Mr. Davitian on December 15, 1993. It is clear that Mr. Davitian was a shareholder in DESONA, and worked as the operations officer, on a daily basis, in Naucalpan, tending to route assignments, driver assignment and equipment repair and maintenance. This was done, without pay, in expectation to share in the profits of the company . [See Davitian's Affidavit, Affidavit Section, Exhibit "2"]

12. As explained in Claimants' Memorial, the assignment of Mr. Goldenstein's shares in DESONA to Mr. Azinian was not an attempt to evade NAFTA's nationality limitations. Rather, it was necessary to protect the other investors against creditor claims. Messrs. Azinian and Davitian are jointly liable with Mr. Goldenstein for debts incurred in connection with DESONA. If Mr. Goldenstein were not allowed to assign his stock interest to Mr. Azinian, both Mr. Azinian's and Mr. Davitian's interests as investors in Mexico would be impaired, since they would be liable to creditors not only for their own share of these debts but for Mr. Goldenstein's as well.

13. However, Respondent's objections concerning Mr. Davitian, Ms. Baca, and Mr. Goldenstein miss a larger point. It is undisputed that Mr. Azinian is an investor and has standing to bring these claims not only on behalf of himself

under Article 1116 but also on behalf of the enterprise DESONA under Article 1117. Under Article 1117, Mr. Davitian is entitled to recover on behalf of DESONA *all* of the damages suffered by DESONA as a result of the City's wrongful repudiation, which the claimants may divide as they see fit. In other words, even if the Tribunal were to conclude that Mr. Davitian or Ms. Baca lack standing under Article 1116 or that Mr. Azinian's claims under Article 1116 should not reflect the shares received from Mr. Goldenstein, Mexico remains fully liable for all of the damages sustained by DESONA under Article 1117.

II. The Concession Contract Between the Parties Was Formed on November 15, 1993

14. Much of Respondent's argument depends on the proposition that the contract between the parties was formed on November 4, 1992, the date of the City Council meeting that authorized the concession, rather than on November 15, 1993, the date that the Concession Contract was signed. That proposition in turn depends on Respondent's argument that under Mexico's internal law only the City Council has authority to grant a concession. It is only by focusing on the November 4, 1992 date that Respondent is able to argue that DESONA did not comply with the terms of the concession and that the Concession Contract is invalid because of misrepresentations.

15. Claimants contend that the contract between the parties was formed on November 15, 1993, when the Concession Contract was signed. Whether the mayor and clerk of the City had authority under Mexico's internal law to enter a contract that allegedly differed from the draft presented to the City Council is irrelevant; DESONA was entitled to rely on the authority of the City's mayor and clerk to enter the Concession Contract on behalf of the City. DESONA was substantially in compliance with its obligations under the Concession Contract. Furthermore, there were no misrepresentations that would invalidate the contract because all of the material facts allegedly misrepresented were known to the City when the Concession Contract was signed on November 15, 1993.

16. Claimants do not seek to have this Tribunal sit as a court of appeals to review the determinations of Mexican courts on Mexican law. The questions of internal Mexican law on which the Mexican court decisions rest are not relevant to Claimants' international law claims. Rather, Claimants ask this Tribunal to decide whether their rights and DESONA's under Articles 1110 and 1105 were violated, claims that were never presented in the Mexican administrative and judicial proceedings.

A. DESONA Has Not Breached the Concession Contract

17. Mexico's basic argument is that DESONA was required to comply not with the terms of the Concession Contract that was signed on November 15, 1993 but with the terms approved by the City Council at its November 4, 1992 meeting. Counter Memorial ¶¶ 40-41. The apparent basis for this startling proposition is that under the internal law of Mexico only the City Council has authority to award a concession. Davalos Statement ¶ 14. Thus, Respondent asserts that the concession was actually awarded on November 4, 1992, Counter Memorial ¶ 40, and that the Concession Contract signed by the mayor and the clerk of the City could not alter the terms of that concession, which, standing alone, is incomplete.

1. The Parties Are Bound Exclusively by the Terms of the Concession Contract

18. Respondent concedes that the Concession Contract was signed on behalf of the City by Municipal President Ruiz de Chavez and Municipal Secretary Chavez Tello and entered into force on November 15, 1993. Counter Memorial ¶¶ 43-44. Claimants submit that they are entitled to rely on the Concession Contract as setting forth the terms of their agreement with the City and should not have been required to question the authority of the Municipal President and Municipal Secretary to enter a contract that differed in certain respects from the terms approved by the City Council. Of the various terms approved by the City Council, only one was expressly incorporated in the Concession Contract: that DESONA would assign 10% of its stock to the City. Concession Contract Clause Twelfth. Claimants reasonably believed DESONA was not bound by other terms approved by the City Council that were not expressly incorporated in the Concession Contract.

19. International arbitral tribunals have consistently rejected arguments like Respondent's and have held that a government official's authority to bind the government to a contract with a foreign party should be presumed. As the arbitral tribunal in the 1982 *Aminoil* arbitration observed, "it is entirely normal and useful that, in transnational economic relations, the capacity of the Minister in charge of economic matters should be presumed, as is that of a Minister for Foreign Affairs in inter-State relationships." Aminoil v. Kuwait, 21 ILM 976, 1006 (1982).

20. Earlier arbitral decisions are in accord. In *Wauquier et Cie v. Government of Turkey*, 5 Annual Digest of Public International Law Cases 434 (H. Lauterpacht ed. 1929-30), the

tribunal held that the Government of Turkey was bound to a contract to buy cast-iron pipe even if the Governor-General who signed the contract lacked authority to do so, where performance of the contract had begun.[1] In two separate decisions, international arbitral tribunals rejected arguments by the United States that it was not bound to pay for legal services performed for its representatives abroad because those representatives lacked authority under U.S. law to enter the contracts. *See* In re Hemming (G.B. v. U.S.), 15 AM. J. INT'L L. 292 (1921);[2] Trumbull v. Chile, 6 JOHN BASSETT MOORE, INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3569 (1898).[3]

2. DESONA's Performance Was Consistent with the Concession Contract

21. Respondent contends that DESONA breached its obligations under the concession because its performance differed from what was described at the City Council's November 4, 1992 meeting. DESONA's performance was fully consistent, however, with the terms of the November 15, 1993 Concession Contract.

22. First, Respondent complains that the concession was to be performed by a consortium of companies, not by DESONA alone. Counter Memorial ¶¶ 9, 41. However, the preamble of the Concession Contract clearly identifies DESONA alone as the concessionaire, and paragraph II.1 describes the concessionaire as "a company incorporated pursuant to the laws of Mexico as established with public deed No. 6,477, Volume 167 ...." Nowhere in the Concession Contract does DESONA undertake to perform the Concession Contract as a consortium. Rather, Clause Twenty Eight of the Concession Contract allows but does not require DESONA to assign its

---

[1]"It is not necessary to examine the question whether the Governor-General had the power to sign the disputed contract, seeing that the parties are agreed that subsequent to its conclusion the contract was executed in part and that the pipes and accessories were delivered and two-thirds of the price was paid by the Municipality. . . . It follows from these facts that, even if it be granted that the Governor-General, Emin Bey, was not authorised to sign in the name of the Municipality of Sivas, the latter must be regarded as having ratified the contract." *Id.* at 435. [.]

[2]"Whatever at the outset was the authority of the United States Consul to employ an attorney at the expense of the United States Government, it is plain . . . that that Government was perfectly well aware . . . of Hemming's employment in a prosecution initiated solely for its benefit, that it did not object in any way whatever during the progress of the case to the steps taken by its Consul, but appeared implicitly at all events to approve of those steps and of Hemming's employment.

"This Tribunal is, therefore, of opinion that the United States is bound by the contract entered into, rightly or wrongly, by its Consul for its benefit and ratified by itself." *Id.* at 293-94. [

[3] Footnote omitted

rights and obligations and to contract with third parties, with the approval and consent of the Municipality.

23. Second, Respondent complains that DESONA's capital structure was not the same as the proposal at the City Council meeting, under which 45% of DESONA was to be held by U.S. investors, 45% by Mexican investors, and 10% by the City itself. Counter Memorial ¶ 41. The requirement that DESONA transfer 10% of its shares to the City was incorporated in Clause Twelfth of the Concession Contract, but there is no requirement in the Concession Contract that 45% of DESONA be held by Mexican investors. Moreover, the City was aware of DESONA's capital structure at the time the Concession Contract was signed. It is to be noted that the City's 10% stock was issued on December 15th, 1993, and delivered without protest to Francisco Piazzesi, Director of Economic Development, who accepted it on behalf of the City. It is only later that the City raised their questions and attempted to return the stock.

24. Third, Respondent complains that DESONA was concentrating on developing fee paying commercial and industrial accounts and was ignoring its duty to provide public waste collection service. Counter Memorial ¶ 47. However, under the Concession Contract, the first phase of the Operations Program was to consist entirely of the disposal of commercial and industrial waste. Concession Contract ¶ 4; Operations Program pp. 2-10. Residential and public waste collection constituted Phase 3 of the Operations Program and was to be implemented sector by sector. Concession Contract ¶ 10; Operations Program pp. 14-20. As of March 1994, when the City repudiated the Concession Contract, DESONA was required to have started residential and public waste collection in only two of the nine sectors. [See Claimants' Memorial, Section 3, Pages 44, as well as Affidavit of Ron Proctor, Affidavits, Exhibit "5"]

25. Fourth, Respondent complains that DESONA failed to introduce seven state-of-the-art trucks for use in the residential and public waste collection service. Counter Memorial ¶ 48; 69-74, 124. Clause Fourteenth of the Concession Contract speaks of DESONA replacing the vehicle fleet with "state-of-the-art technology units." The Concession Contract does not, however, define "state-of-the-art." Moreover, DESONA is only required to introduce such units "gradually as it serves the nine sectors of the residential garbage pick up service schedule" and then only "if the service so requires." Concession Contract ¶ 14.

26. Fifth, Respondent complains that DESONA used the municipality's trucks and workers to perform the Concession Contract. Counter Memorial ¶ 49, 58, 64. This was expressly authorized, however, by the Concession Contract. Clause

Thirteen of the Concession Contract provides: "The Municipal Government will provide the Concessionaire with all their trucks and equipment that is in good condition as well as the yards, so that the Concessionaire complies with the residential service schedule stipulated in the operation program". Clause Fifteenth provides: "The Municipal Government is obligated to transfer all union labor that works in the waste collection division of public works and that wishes to be transferred"

27. Finally, Respondent complains that DESONA was charging fees at the Rincon Verde landfill but had not assumed responsibility for the landfill. Counter Memorial ¶¶ 76-81, 122(f)(vii). Clause sixth of the Concession Agreement expressly gave DESONA the right to "set the sanitary landfill rates based on costs." [See Claimants' Memorial, Section 3, Clause Sixth, Page 20]

3. The City Failed to Give DESONA an Opportunity to Remedy the Alleged Breaches as Required by the Concession Contract

28. On February 15th, 1994, at the request of the City, Desona's president submitted a summary of Desona's responsibilities and performance under the concession contract. Such letter was submitted by respondent as their exhibit "8" to the counter memorial and is attached hereto as exhibit "1". Azinian further solicited the mayor's support in obtaining truck permits and requested that they worked together to produce the fruits of the project for the benefit of Naucalpan.

29. It would appear that if the Mayor was unhappy with Desona's performance he would have so stated in a reply, which he failed to do. It is now clear that, as of February the 9th, plans were underway to nullify Desona's Concession.[See Witness Statement of Carlos Davalos, Annex III, Volume II, Page 3, ¶4]

30. Even if DESONA had breached the Concession Contract, the City was required to notify DESONA and give it an opportunity to cure the breaches. Clause Thirty First of the Concession Contract provides:

> "The Municipal Government must notify in writing to the Concessionaire if it finds any irregularities in the implementation of the four phases that comprises this Concession Contract and the Concessionaire will have 30 days to correct such irregularity and justify the reason why it existed.

> Clause Twenty Ninth further provides:

"The Parties agree that before the Municipal Government proceeds to the cancellation, revocation or municipalization of this Contract, the Parties will attempt to conciliate their differences."

31. DESONA was not given 30 days in which to remedy its alleged breaches. Nor did the City attempt to settle its differences with DESONA through negotiation prior to terminating the Concession Contract. Further, there is no written evidence of any complaint registered by the City and delivered to Desona or its representatives of any material breach of the written contract.

32. Claimants submit that by failing to do so, the City has waived its right to rely on any alleged breach by DESONA as a reason for repudiating the Concession Contract. *See* Shufeldt Claim (U.S. v. Guat.), 2 U.N. REP. INT'L ARB. AWARDS 1079, 1096-97 (1929).

B. The Facts Allegedly Misrepresented Were Known to the City When the Concession Contract Was Signed

33. Respondent's argument that the Concession Contract is invalid because of misrepresentations made to the City also depends on Respondent's assertion that the contract between the parties was formed on November 4, 1992 rather than on November 15, 1993, because by November 15, 1993 all of the material facts allegedly misrepresented were known to the City. For the reasons discussed above, *see supra* IIA1, the Tribunal should conclude that the contract was formed on November 15, 1993, the date the Concession Contract was signed. It follows that any facts known to the City as of that date cannot be used as grounds to invalidate the Concession Contract for error or misrepresentation.

34. First, Respondent argues that Claimants misrepresented that the concession would be held by a consortium. Counter Memorial ¶ 122(f)(iii).

35. As previously stated by Claimants', the actual shareholders of Desona were individuals, at the specific request of the former Municipal Government, which preferred Desona to be incorporated by natural persons rather than legal persons. [See Claimants' Memorial, Section 4, reply to allegation # 1]

36. The evidence shows that Mr. Goldenstein requested Public Notary, Lic. Benjamin de la Peña Mora, to incorporate Desona by Azinian, Davitian and Goldenstein on April 15, 1992, some eight months before the proposal to award the Concession was presented to City Council. [See Claimants' Reply to Motions for Direction, Exhibit 7]

37. The evidence further shows that the Notary where Desona was incorporated belonged to the Former Mayor, Mario Ruiz de Chavez, thus the Mayor himself was aware of the shareholders of Desona from its inception. [See Claimants' Reply to Motions for Direction, Exhibit 1]

38. Furthermore, Arq. Abel Duarte Ortega made the logistic arrangements with the Notary Lic. Benjamin de la Peña Mora to incorporate Desona and was he who eventually made the presentation and subsequent request to the City Council that the concession be awarded to Desona. [See Claimants' Memorial, Section 2, Exhibit 5]

39. Second, Respondent asserts that Claimants misrepresented their status as shareholders and officers of Global Waste Industries. Counter Memorial ¶¶ 10-11, 186-87. Claimants have always represented that they were owners and operators of Global not shareholders. [See Statement of Admission and Denial to the Counter Memorial, ¶ 10]

40. Third, Respondent asserts that Claimants misrepresented their experience in the waste management business. Counter Memorial¶¶ 32, 122 (f)(i), 188, 191. There was no misrepresentation as to experience. The representation that was made is contained in Respondent Exhibit 1 of it Counter Memorial. [See also Claimants' reply to ¶32 of Respondent's Admission and Denials]

41. Fourth, Respondent asserts that Claimants misrepresented their financial capacity. Counter Memorial ¶¶ 32, 122(f)(ii), 185, 189-90. The City was aware that Desona had financing in place from inception to nullification.

42. Fifth, Respondent asserts that Claimants failed to disclose that some of them had a history of lawsuits against them. Counter Memorial ¶ 32. [See Claimants' reply to ¶32 (e) & (f) of Respondent's Admission and Denials]

43. Sixth, Respondent asserts that Claimants promised to use modern trucks for waste collection. Counter Memorial ¶¶ 122(f)(iv), 124. As discussed above, Clause Fourteenth of the Concession Contract requires DESONA to introduce "state-of-the-art" trucks "gradually as it serves the nine sectors of the residential garbage pick up service schedule" and then only "if the service so requires." Given this explicit provision in the Concession Contract, Respondent cannot plausibly claim that the City was misled into thinking that state-of-the-art trucks would be introduced more quickly.

44. Finally, Respondent asserts that Claimants represented that the municipality would save money. Counter Memorial ¶¶ 122(f)(v), 124. The feasibility study that was prepared by the City's Economic Development Department and presented at the November 4, 1992 City Council meeting

indicated that, when all 4 phases of the project were completed, the residential and public waste collection service would be performed at no cost to the Municipality.

45. At bottom, Respondent's claims of misrepresentation are no more than a repackaging of its argument that DESONA should be held to the terms of the concession approved at the November 4, 1992 City Council meeting.

46. Of interest is the fact that there was a further year of negotiations between the parties and the fact that the Concession Contract that the parties actually signed contained many of the terms approved by the City Council.

47. The truth of the matter is, that the City Council was furnished a draft of the concession contract along with the feasibility study, as evidenced in the minutes of that November 4th, 1992 meeting.

The minutes provide in part:

> "…with all the characteristics expressed in the proposal which have been provided, to each one of the members of the City Council, in writing,…"

[The draft was submitted by Respondent as Exhibit "36" to the Counter Memorial and is attached hereto as exhibit "2".]

48. That draft does not include any reference to a consortium nor to a 45% American and 45% Mexican interest.

49. It is of great concern to Claimants that Respondent builds a case of misrepresentation on the false premise that the City Council of November 4th, 1992 was not aware of terms of the Concession Contract, when in fact Respondent has or should have the draft as a part of the City's official record.

C. Relevance of Domestic Mexican Legal Proceedings

50. Respondent's Counter Memorial places heavy reliance on Mexican administrative and judicial proceedings concerning the nullification of the Concession Contract. Respondent asserts that "all legal rights of the Claimants with respect to their failed attempt to operate the waste disposal concession in the Municipality of Naucalpan de Juarez, State of Mexico, were fully and fairly determined under the Mexican legal system" and that "the Claimants have brought this action in an attempt to use this Arbitration Tribunal as a court of appeal to review those determinations." Counter Memorial ¶ 1; *see also* Counter Memorial ¶¶ 225-45. This is simply incorrect. Claimants' claims for expropriation under Article 1110 of NAFTA and for breach of contract in violation

of international law under Article 1105 of NAFTA were never presented to the Mexican courts and were never determined by those courts. Claimants are not asking this Tribunal to review the decisions of Mexican courts concerning Mexican law; they are asking this Tribunal to decide questions of international law that no tribunal has previously addressed.

51. Respondent concedes that these prior proceedings do not preclude Claimants from bringing their claims under Chapter 11 of NAFTA. Counter Memorial ¶ 228. Nevertheless, Respondent argues that these decisions are *res judicata* and effectively preclude Claimants' claims under Chapter 11 of NAFTA. The Tribunal should reject Respondent's contention for three reasons: (1) international tribunals are not bound to give the decisions of municipal tribunals *res judicata* effect as a matter of customary international law; (2) even if customary international law would afford the decisions of municipal tribunals *res judicata* effect, Article 1121 of NAFTA precludes a Chapter 11 tribunal from giving similar deference to the decisions of municipal tribunals; and (3) even if customary international law and NAFTA allow the decisions of municipal tribunals to be given *res judicata* effect, the requirements for *res judicata* are not satisfied in this case.

1. International Tribunals Are Not Bound to Give the Decisions of Municipal Tribunals Res Judicata Effect

52. It is well established in customary international law that the decisions of international arbitral tribunals are to be given *res judicata* effect. *See* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 336 (1953) ("There seems little, if indeed any question as to *res judicata* being a general principle of law or as to its applicability in international judicial proceedings."); D.W. Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence*, 33 BRIT. Y.B. INT'L L. 176, 176 (1957) ("*res judicata*['s] ... reception into international jurisprudence is now beyond question"); Trail Smelter Case (U.S. v. Can.), 3 U.N. REP. INT'L ARB. AWARDS 1905, 1950 (1941) ("That the sanctity of *res judicata* attaches to a final decision of an international tribunal is an essential and settled rule of international law.").

53. "Generally, however, a decision of municipal law does not constitute *res judicata* in international law, because of the dualism of international law and municipal law." BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 337, n.6 (1953). Thus, in the *Buzau-Nehoiasi Railway Case* (Ger. v. Rom.), 3 U.N. REP. INT'L ARB. AWARDS 1827 (1939), the arbitral tribunal concluded that it was not

required to give *res judicata* effect to the judgment of a Romanian court on the same matter. The tribunal observed:

> "En général, les décisions nationales et internationales se meuvant dans les sphères différentes. Au regard des États étrangers, les décisions des tribunaux nationaux sont moins des jugements que de simples manifestations de l'activité étatique, pareilles dans leurs principe à celles de touts autre organe de l'État. C'est dans l'ordre interne seulement que l'autorité de la chose jugée par un tribunal national trouve son application."
>
> Id. at 1836.[4]

54. Respondent cites no case in which an international tribunal has given *res judicata* effect to the decision of a domestic tribunal, and Claimants' research has not uncovered any. Respondent relies instead on Judge Tanaka's separate opinion in *Barcelona Traction, Light and Power Co.*, 1970 I.C.J. 1. *See* Counter Memorial ¶ 233. In *Barcelona Traction*, Belgium brought a claim against Spain for injuries to Belgian shareholders of a Canadian company which had been declared bankrupt by the Spanish courts. The essence of the Belgian claim was that the Spanish courts had exceeded their jurisdiction and ignored applicable Spanish law in declaring Barcelona Traction bankrupt. *See* 1970 I.C.J. at 17-23. The court did not reach the merits, holding that because Barcelona Traction was incorporated in Canada, Canada and not Belgium would be the proper party to bring such a claim.

55. In his separate opinion, Judge Tanaka concluded that Belgium did have standing but that, on the merits, there had been no denial of justice rising to the level of an international law violation. It was in the context of Belgium's denial of justice claim that Judge Tanaka made the remarks quoted in Counter Memorial ¶ 233, including that "the acts and omissions complained of by the Belgian Government, so far as they are concerned with incorrectness of interpretation and application of municipal law, cannot constitute a denial of justice." 1970 I.C.J. at 158. Sohn and Baxter state the principle more broadly in the context of concession agreements: "In order to avoid putting an international tribunal in the position of a court of appeal from the courts of the State which is a party to the agreement, a 'clear' departure from the proper law of the

---

[4] My translation: "In general, national and international decisions operate in different spheres. With regard to foreign states, the decisions of national tribunals are less judgments than simple manifestations of state action, identical in their essence to those of all other state organs. It is only in the internal order that the decisions of a national tribunal are *res judicata*."

contract is requisite to the establishment of responsibility." Louis B. Sohn & R.R. Baxter, *Responsibilities of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, 571 (1961).

56. In essence, Respondent is attempting to recharacterize Claimants' claims as a denial of justice claim. *See* Counter Memorial ¶¶ 236-44. Claimants, however, do not assert that the Mexican administrative and judicial proceedings constituted a denial of justice for which the Mexican government is liable or ask the Tribunal to sit as a court of appeal from the Mexican courts. Claimants are not asking the Tribunal to evaluate the correctness of the Mexican courts' decisions on issues of Mexican law. As has been pointed out above, whether the Concession Contract was valid under Mexican law is irrelevant to the international claims before the Tribunal. *See supra* IIA1. Instead, Claimants are asking the Tribunal to determine that the wrongful repudiation of the Concession Contract was a violation of international law, specifically Articles 1110 and 1105 of NAFTA.

2. <u>Article 1121 Precludes a Chapter 11 Tribunal from Giving the Decisions of Municipal Tribunals Res Judicata Effect</u>

57. As a condition of submitting a claim to arbitration under Chapter 11, foreign investors must "waive their right to initiate or continue before any administrative tribunal or court under the law of any Party . . . any proceedings with respect to the measure" alleged to violate Chapter 11. Article 1121. However, nothing in Article 1121 or any other provision of NAFTA suggests that an investor who has previously challenged a measure in domestic court should be precluded from challenging the same measure as a violation of Chapter 11 before an arbitral tribunal. To do so would be inconsistent with the express purposes of Section B, one of which is to ensure that foreign investors have access to "an impartial tribunal" for the determination of their claims. Article 1115. Even Respondent agrees that prior proceedings before Mexican courts and administrative tribunals do not preclude Claimants from bringing their claims under Chapter 11 of NAFTA. Counter Memorial ¶ 228.

58. Thus, even if customary international law did require international arbitral tribunals to afford the decisions of domestic tribunals *res judicata* effect, NAFTA precludes a Chapter 11 Tribunal from giving such effect to the decision of a domestic tribunal.

3. The Requirements for Res Judicata Are Not Satisfied in this Case

59. In this case, however, the Tribunal need not determine whether customary international law accords *res judicata* effect to the decision of a domestic tribunal or whether Chapter 11 of NAFTA precludes the Tribunal from giving a domestic decision such effect. Even assuming arguendo that the doctrine of *res judicata* applies to the prior Mexican proceedings, those proceedings should not be given preclusive effect in this case because the requirements for *res judicata* are not satisfied.

60. Under customary international law, *res judicata* requires the identity of the parties and of the question at issue. BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 339-40 (1953). The question at issue is sometimes subdivided into the object (*petitum*) and the grounds (*causa pentendi*) of the case. *Id.* at 340; *see also* Trail Smelter Case (U.S. v. Can. 1941), 3 U.N. REP. INT'L ARB. AWARDS 1905, 1952 ("The three traditional elements for identification [are]: parties, object, and cause . . . ."); Polish Postal Service in Danzig Case, 1925 P.C.I.J. (Ser. B) No. 11, at 30 (May 16) ("the doctrine of *res judicata* [applies when] not only the Parties but also the matter in dispute [are] the same"); Chorzow Factory Case (Interpretation), 1927 P.C.I.J. (Ser. A), No. 13, at 23 (Oct. 17) (M. Anzilotti, dissenting) ("we have here the three traditional elements for identification, *persona, petitum, causa petendi*"). In this case neither the parties, the object of the claims, nor the grounds of the claims are identical.

61. The parties to this arbitration are different from the parties to the Mexican administrative and judicial proceedings concerning the nullification of the concession. DESONA's claims before the State Administrative Tribunal and its appeal to the Superior Chamber of the State Administrative Tribunal were brought against the City. DESONA's *amparo* challenge in Federal Circuit Court was brought against the Superior Chamber of the State Administrative Tribunal. Claimants' Chapter 11 claims, by contrast, are brought against the Federal Government of Mexico. Because the parties to the present arbitration are not identical to those in the prior domestic proceedings, those domestic decisions are not *res judicata*.

62. Furthermore, the object of the claims before this Tribunal is different from the object of the claims before the Mexican domestic tribunals. The object of the administrative and judicial proceedings in Mexico was to set aside the annulment of the Concession Contract by the City. Claimants did not seek damages for expropriation of their contractual rights or for wrongful breach of the Concession

Contract. Because the object of the claims at issue in this arbitration is different from the object of the prior domestic proceedings, those domestic decisions are not *res judicata*.

63. Finally, the grounds of the present claims are different from the grounds of the claims before the Mexican domestic tribunals. No claim that the Municipality had violated Articles 1110 and 1105 of NAFTA was before the State Administrative Tribunal or the Federal Circuit Court. As Professor Cheng has observed, "where new rights are asserted, there is a new case which ought not to be barred by a previous decision even if the parties and the object be identical." BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 345 (1953).

III. The City's Wrongful Repudiation of the Concession Contract Violates Articles 1110 and 1105 of NAFTA

64. As is more fully explained in Claimants' Memorial, the City's wrongful repudiation of the Concession Contract constitutes an expropriation of contract rights in violation of Article 1110 and a breach of contract in violation of Article 1105. International tribunals have allowed concession holders to pursue these two theories in the alternative. *See, e.g.,* Phillips Petroleum Co. v. Islamic Republic of Iran, 21 IRAN-U.S. CL. TRIB. REP. 79 (1989).

A. Article 1110

65. The City's wrongful repudiation of the Concession Contract constitutes an expropriation of contractual rights. It also constitutes a measure tantamount to expropriation of DESONA itself and of Claimant's equity securities and other interests in DESONA because without the Concession Contract DESONA is of little or no value.

66. The City had no valid reason for repudiating the Concession Contract with DESONA. As has already been discussed, DESONA was substantially in compliance with its obligations under the Concession Contract. *See supra* IIA2. Respondent's argument that DESONA was required to comply not with the terms of the Concession Contract but by the terms approved by the City Council more than a year earlier must be rejected. *See supra* IIA1. Even if DESONA had breached the Concession Contract, the City's failure to afford DESONA an opportunity to remedy those breaches as required by the Concession Contract should preclude Respondent from relying on those breaches now. *See* Shufeldt Claim (U.S. v. Guat.), 2 U.N. REP. INT'L ARB. AWARDS 1079, 1096-97 (1929).

67. Nor are Claimants' alleged misrepresentations a valid reason for the City to repudiate the Concession Contract with DESONA. As discussed above, by the time the Concession Contract was signed, all of the material facts regarding DESONA and its principals were known to the City. *See supra* IIB. The City could have decided not to sign the Concession Contract because of what it had learned between November 4, 1992 and November 15, 1993. Because the City signed that contract, however, Respondent cannot now claim that the contract was invalid based on alleged misrepresentations that occurred earlier.

B. Article 1105

68. As more fully explained in Claimants' Memorial, the City's wrongful repudiation of the Concession Contract also constitutes a breach of contract in violation of Article 1105. Respondent argues that repudiation of the Concession Contract is not a violation of international law because it was not discriminatory and because domestic legal remedies were available. Counter Memorial ¶¶ 266-69. Claimants argument, however, is that the breach of contract violated international law because it was "motivated by noncommercial considerations, and compensatory damages were not paid." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712(2)(a)(ii). It is undisputed that Claimants have not been paid compensatory damages. It is also implausible to think that the City's repudiation of the Concession Contract was motivated by commercial considerations when DESONA was substantially in compliance with its obligations under that contract and when the City afforded DESONA no opportunity to cure its alleged breaches as required by that contract.

IV. Compensation

69. Respondent's basic argument is that Claimant's evidence of the profits that DESONA would have made over the life of the Concession Contract is too speculative. It was the City's wrongful repudiation of the Concession Contract, however, that has made it impossible to determine precisely what DESONA's profits would have been. American law generally requires that contract damages be proved with reasonable certainty, but relaxes that requirement where the defendant's breach is willful. *See* RESTATEMENT (SECOND) OF CONTRACTS § 352 & Counter Memorial. *a*. As comment *a* explains, "[d]oubts are generally resolved against the party in breach. A party who has, by his breach, forced the injured party to seek compensation in damages should not be allowed to profit from his breach where it is established that a significant loss has occurred." Similarly, the Unidroit Principles of International Commercial Contracts do not preclude

compensation even where damages cannot be proved with reasonable certainty. *See* Unidroit Principles of International Commercial Contracts, Article 7.4.3(3), 34 ILM 1067, 1078 (1995) ("Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court."). Claimants submit that they have proved their damages with sufficient certainty and that the requirement of that damages be proved with reasonable certainty should not be invoked to allow Respondent to profit from its own wrong.

70. It is also worth reemphasizing that Claimants are entitled to recover the full damages to DESONA regardless of how the Tribunal resolves questions of Mr. Davitian and Ms. Baca's standing and of the transfer of shares from Mr. Goldenstein to Mr. Azinian. It is undisputed that Mr. Azinian has standing to bring these claims not only on behalf of himself under Article 1116 but on behalf of DESONA under Article 1117. The damages awarded on behalf of DESONA should be the full damages to DESONA, which Claimants may divide as they see fit.

SECTION IV: Claimants' Reply to Respondent's Defense to the Claim for Damages

Summary

1. Respondent argues that Claimants have failed to meet the burden proof in asserting their claim for damages, for they have failed to produce any evidentiary records to support their investment.

2. Respondent's main argument depends on the proposition that there is no cogent evidence of the fair market value of Desona. That proposition in turn depends on Respondent's argument that the assumptions used in calculating future revenues are false. By focusing on that proposition, Respondent is able to make the argument that the E&Y's report, the Richard R. Carvell report and the Sanifill offer cannot be regarded as the proper way of determining fair market value.

3. Respondent's further argues that that Sanifill's conditional offer does not reflect fair market value as of the date of expropriation.

4. Finally, Respondent argues that the "DCF" method used to evaluate Desona's fair market value is inappropriate. Respondent makes no mention of the "Similar Transaction Method", also used by E&Y.

5. Claimants position is that all evidentiary records attached herein under Appendix "A" and Annex "1" parts 1, 2 and 3[1], are submitted for the purpose of supporting Claimants investment under Article 1139 (h) and not to assess damages. Damage calculation should be made on the basis of Fair Market Value at the time of expropriation as set forth by Article 1110.

[1] Annex "1" parts 1,2 and 3 is submitted only in 2 copies, one for Respondent and one for ICSID in keeping with the pannel's desire to review evidence in summary form.

6. Furthermore, Claimants rightfully assert that the assumptions used by E&Y, Richard Carvell, BFI and Sanifill were supplied to them by the City. Claimants were entitled to believe that the information provided to them by the City was true and accurate and to rely on that information to project costs and revenue.

7. Moreover, Claimants argue that the Sanifill's offer does reflect fair market value as of the date of expropriation.

8. Finally, Claimants argue that the Method of Valuation used to calculate Fair Market Value is not only appropriate given the circumstances but also widely accepted by Arbitral Tribunals in international proceedings.

I. Claimants Have Met the Burden of Proof: page 65

9. Respondent relies on its Motion for Directions dated June 8, 1998, to produce records (which the Tribunal decline to rule upon) to assert that Claimants have made no investment in the project and, therefore, their claim for damages fails.[Counter Memorial ¶291]

10. Claimants are submitting herewith as Appendix "A" and Annex "1" a full report of the expenses related to the project, including bank statements, deposits and copies of checks. Those support Claimants capital contribution to the project and support the claim of investment, in addition to the evidence already submitted. Of course, Claimants' position remains that damages should be calculated on a fair market value basis of the expropriated concession.

11. Respondent places great emphasis on questioning the nature and extent of the debts owing to BFI, WWI and BAS.[Counter Memorial ¶'s 253-300] Each Claimant, except for Baca, has admitted personal liability for those debts. These debts were legally incurred and the funds used in connection with the project.

12. Any defense of the Statute of Frauds under California Civil Code Section 1629 is not available to Respondent. That statute provides a defense to the party to be charged; i.e. the Claimants.

13. The funds advanced by BFI and WWI, which were capitalized by Claimants as a contribution to the project, represent only a portion of the capital investment made by Claimants. The additional contributions, including debts incurred in connection to services rendered by BAS to the project, are summarized herein [See "Appendix A"] and are detailed in Claimants' affidavits to the Memorial. [See affidavits of Azinian, Davitian and Baca]. These contributions clearly bring Claimants within the purview of Article 1139 of the NAFTA.

II. There is Cogent Evidence of Desona's Fair Market Value: page 70

A. Misstatement of Law by Respondent

14. Respondent misstates the law as it relates to evidence adduced from expert witnesses.(Counter Memorial ¶301).

15. A proper statement of the law is:

> For evidence to be admissible, it must be relevant. To be relevant, evidence must have probative value, i.e., it must tend to prove or disprove a material issue in controversy. Therefore, if evidence is admissible, it has necessarily already passed the threshold test of having probative value. Once evidence is deemed admissible, it is up to the trier of fact to give that piece of evidence the weight it may, or may not deserve.

B. The Assumptions Used by the Experts are Accurate: page 71

16. From early 1992 until the concession was awarded to Desona, the Economic Development Department of the City conducted a number of feasibility studies. Those studies included data gathering on population, industrial and commercial customers, recycling content of the municipal solid waste, tons collected per day, tons uncollected per day, tons disposed of at the landfill per day as well as other data.

17. Those studies were based on a set of assumptions that were provided to the companies that were interested in participating in the project, such as Desona, and were the

assumptions that Desona relied on to prepare its bid, financial projections and equipment needs. Those assumptions were relied on and verified by BFI [See affidavit of Ron Proctor] and were provided by Mr. Goldenstein to E&Y to conduct its valuation analysis.

18. Those assumptions were prepared by the City staff and furnished to the City Council in a feasibility study which was also provided to the State Legislature in August, 1993. They are also reflected in the Operations Program of the Concession Contract. Those assumptions are now being challenged by Respondent who not only furnished them to Claimants but also solicited and entered into a contract with Claimants based on those assumptions. Those assumptions are herein submitted as Exhibit "1".

(i) <u>General-Market Size and Growth</u>

19. The City provided Desona with the information on market size, which is contained in the feasibility study conducted by the City.[See Exhibit "1"]. It should be noted that under Exhibit "27" of the Counter Memorial, Respondent submited an expert report written by Angel Torralva Millares. In its second page, Mr. Torralva makes reference to the Feasibility Study conducted by the City which contains the assumptions given to Desona and used by Desona, BFI, E&Y, Richard Carvell and Sanifill in their respective projections. [See Respondent's Counter Memorial Exhibit 27, submitted herein as Exhibit "2"]

(ii) <u>Industrial and Commercial – Phase 1: page 71</u>

20. The City provided Desona with the information on the number of industries and commercial customers. [See Exhibit "1"] This information was included in the Concession Contract's Operations Program [See Claimants' Memorial, Section 3, Page 38]

21. Desona was the only entity allowed to provide service to this sector and by reason thereof would have captured 100% of the market.

The First Clause of the Concession Contract states in part that:

> "... concession that consists of the public services of collection, transportation, recycling, use and final disposition of residential, commercial and industrial solid waste ..."

The Twenty Eight Clause of the Concession Contract states in part that:

> "The Municipal Government is obligated not to award any similar Concession to any other company during the term of this Concession Contract..."

The "Regulation for the Handling of Solid Waste in The Municipality of Naucalpan," in its Fifth Chapter, Article 32, states that:

> "The collection of solid waste generated in the Municipality of Naucalpan would be performed by:
>
> I. The Municipal Department of Waste
> II. The Concessionaire of such service."

22. Thus, Desona was the only authorized entity to provide waste collection and disposal service to the entire Municipality including 100% of the Industrial/Commercial Sector, thereby negating Respondent's argument.

(iii) Residential Service – Phase 3: page 72

23. The City provided Desona with the information on the number of residential and popular households. [See Exhibit "1"]

(iv) Landfill Operation – Phase 2: page 72

24. The City provided Desona with an assumption 1,500 collected tons and 300 uncollected tons of solid waste per day. [See Exhibit "1"] The additional 1000 tons per day were generated by industrial/commercial customers and by other surrounding Municipalities that disposed of their waste in Rincon Verde.

25. Respondent claims that landfill tipping fees would be established on a cost recovery basis (Counter Memorial ¶309, (a)). That is neither true nor supported by the operations program footnote 159 [See Concession Contract, Sixth Clause, Page 21]

(v)Recycling Plant – Phase 2: page 73

26. The percentage of recyclable waste and the average resale price per ton is consistent with industry standards. This information is also contained in the City's conducted Feasibility Study [See Exhibit "1"]

(vi)Electricity Generating Plant – Phase 4: page 73

27. It is clear that authorization from the Federal Commission of Electricity (CFE) and a power sale agreement with the Electric Company were required in order to implement Phase 4 of the project. However, it is Claimants understanding that, since the nullification of Desona's contract, CFE has authorized private companies to generate electricity in Mexico.

28. Phase 4 of the project was then feasible and would have increased the fair market value of Desona as indicated by E&Y if those conditions were met.

III. The Sanifill's Offer Reflects Fair Market Value As Of The Date Of Expropriation: page 74

29. Respondent argues that Claimants have willfully concealed the forced sale of assets. However, willful concealment is a serious charge unsupported by the evidence.

30. Claimants contend that the Sanifill offer is representative of fair market value because it reflects the price to which a knowledgeable willing seller and a knowledgeable willing buyer agreed upon without duress to either party.

IV. Method of Valuation: page 74

31. Claimants have calculated their damages using two different methods of valuation, the Similar Transaction method and the DCF method. In addition, Claimants supported the result of those valuations with the opinion of an

expert, Richard Carvell, with a material offer by Sanifill Inc. and with the affidavit of Ron Proctor, submitted herein. [See affidavit Section, Exhibit "5"]

32. Claimants have provided sufficient evidence, both in their Memorial and in this reply, to prove that Desona was in fact an ongoing concern. [See affidavit of Robert Azinian] As such, the DCF method of valuation, which is based on the calculation of all anticipated profits that the expropriated enterprise could have earned over its lifetime, is the appropriate method to use.

33. By discounting all future cash flows, this single calculation captures all future benefits that DESONA would receive, less all future costs that DESONA would incur, if the contract ran full term.

34. Respondent should not be allowed to argue otherwise, based on the length during which Desona operated in that the City alone caused the operations to terminate prematurely. Respondent should be prevented from asserting the inapplicability of the DCF method by reason of the City's own wrongdoing.

35. Unlike the case cited by Respondent in its response (¶326 through ¶330), Desona's ability to earn revenues is set forth by the Concession Contract it celebrated with the City.

36. Other methods of compensation, such as net asset value or replacement value, do not account for the critical link between the economic value of an enterprise and its ability to produce cash. Moreover, those methods do not take into consideration the value of a contract such as Desona's. Furthermore, they do not account for the high level of risk that DESONA accepted in entering into an agreement with the City of Naucalpan.

37. The Treaty itself clearly establishes criteria to offer the Panel direction. Article 1110, Paragraph 2, provides in part:

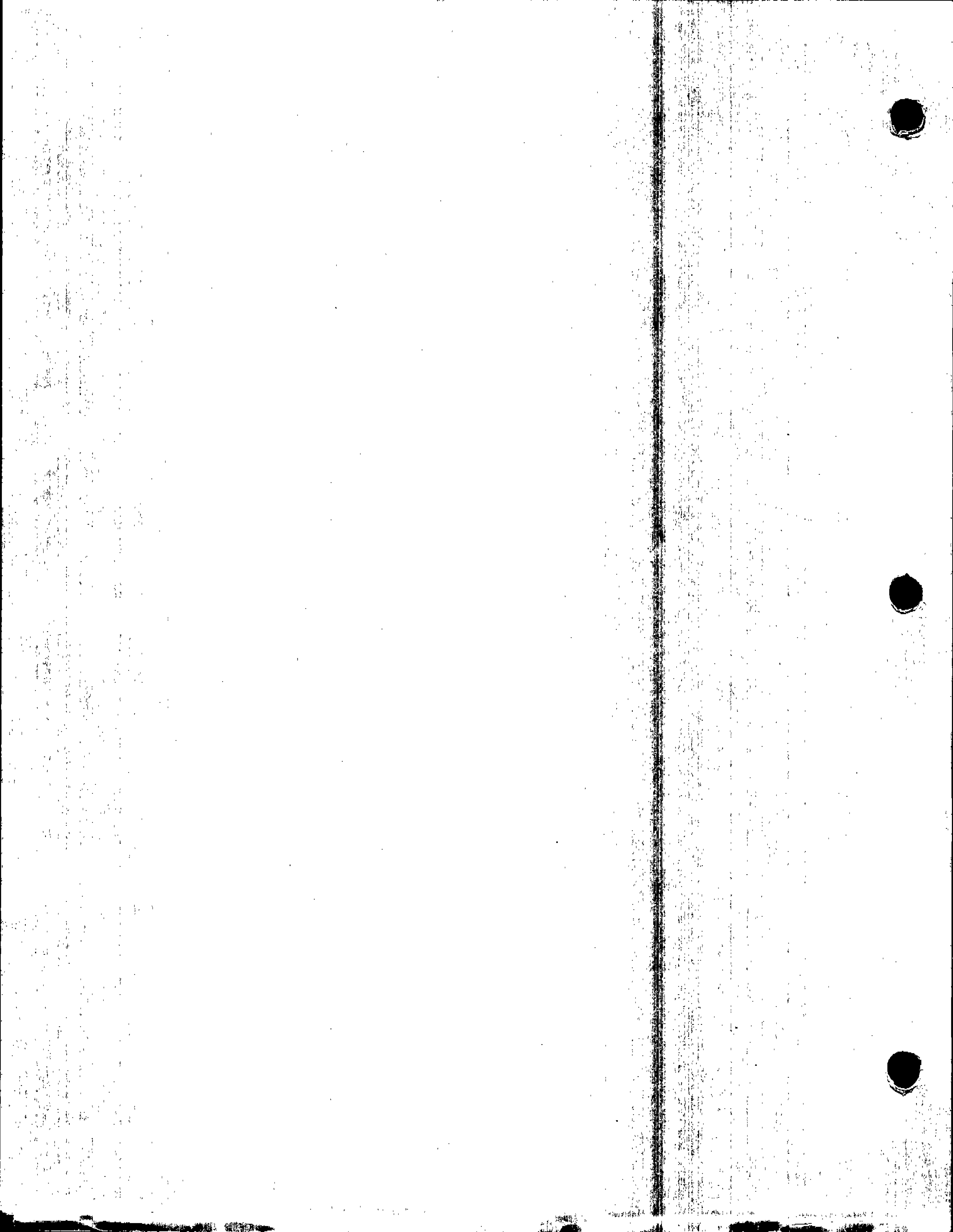
> "…Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value."

38. The argument on DFC is best summarized by Brice M. Clagett in the expropriation issue before the Iran-United States Claims Tribunal: Is "Just Compensation" Required by International Law or Not?

> "..., the DCF valuation method has gained near total acceptance in the business, financial, academic, and legal worlds as the proper measure of valuation. The goal of compensation in an expropriation claim is to restore to the investor the value of the property that was expropriated. That value is determined by projecting the future net cash flow that the asset was expected to generate -- that is, the future earnings that were lost by virtue of the expropriation -- and discounting that cash flow to its present value using a discount rate that fully accounts for any uncertainty associated with that projected cash flow.[2]"

---

[2] Brice M. Clagett, Law & Policy In International Business, [Vol. 16:813].



SECTION V: Claimants' Reply to Witness Statements and Expert Reports submitted by Respondent

1. Respondent submitted eight witness statements and two expert reports along with its Counter-Memorial. Claimants will address each witness statement individually[1], except for that of Dr. Davalos, for it contains primarily legal arguments and that of Mr. J. Cameron Mowatt, an attorney for the Respondent. Claimants will not address the expert report of the Instituto Juridico, for it also contains legal argument.

2. Before addressing the witness statement and expert report, Claimants wish to make the following observations:

3. The witness statement of J. Cameron Mowatt, an attorney of record herein, is legally objectionable. Mr. Mowatt made a number of attempts to contact witnesses that submitted statements for Claimants including, BFI, Sunlaw Energy, Basil Carter, Bryan A. Stirrat and Bill Rothrock. In addition he attempted, by his own evidence, to obtain a statement from Mr. Maphis. These witnesses, in their own right, declined to discuss any issues with Mr. Mowatt or to issue any statement.

4. Yet, by own his statement, which includes those witnesses conduct or comment, he seeks to avoid and therefore violate the Tribunal's Ruling of June 19, 1998, paragraph 5, which provides as follows:

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. As such, his affidavit is clearly inadmissible.

7. From the time of nullification and all through these proceedings Respondent has been claiming that Messrs. Pullido Garcia and Lopez Martinez, two Mexican nationals, were shareholders of Desona. Respondent argues that there was a distinction between a Desona "A" in which the Mexican nationals

---

[1] In the reply to individual witness statements, references are made to paragraph numbers in the witness statement as opposed to in the Counter Memorial.

were shareholders and a Desona "B" in which Messrs. Azinian, Davitian and Goldenstein are shareholders.

8. Yet Respondent failed to submit an affidavit from either Mr. Pullido Garcia or Mr. Lopez Martinez claiming to be shareholders.

9. In other words, expect for the draft of Desona's papers of incorporation and Desona's balance sheet, in which those names were entered in error and later deleted, Respondent has submitted no evidence to support the argument.

10. A review of the expert report of David A. Schwickerath discloses that Respondent failed to supply him with the basic proper assumptions used by Claimants, which were furnished to Desona by the City. Therefore, his conclusions are invalid as pointed out in the reply report of E&Y.

Reply to the Witness Statement of Mr. Raul Romo Velazquez:

11. Mr. Romo's testifies that he was unaware of the existence of Desona until the 3rd of November, 1992, the day of execution of the MOU between Sunlaw, GWI and BAS, or the 4th of November, 1992, when the name Desona was used by the Municipal Authorities during the City Council session.(¶7&8)

12. The evidence shows, however, that everyone else in the project, including Sunlaw Energy, GWI, BAS and primarily the City, were aware that a Mexican company "Desona" will be formed to which the concession would be awarded. In fact correspondence from the City was already being directed to Desona as early as June 23, 1992 [See letter from Arq. Duarte to Desona, Claimants' Memorial, Section 2, Exhibit "3"]

13. By his own testimony, Mr. Romo believed that Sunlaw de Mexico, which was incorporated in almost equal parts between American and Mexican capital, was to be the concession holder (¶11&12). In fact that was his testimony in front of City Council. He Stated in part:

> "......he [Mr. Romo] also says that the project will have 45% of American capital 45% of Mexican capital and 10% to the municipality of Naucalpan."
>
> [See Claimants' Memorial, Section 2, Exhibit "5"]

14. Mr. Romo had to be referring to Sunlaw de Mexico when he made the statement that was recorded in the City Council's meeting of November 4th, 1992. This is clear because he again

refers to an equal split of capital between Mexican and American investment reserving 10% for the City.

15. This proves that Claimants did not misrepresent the true facts at the City Council meeting on November 4th, 1992, regarding equal participation by Mexican and American capital, as alleged by Respondent. [See counter Memorial ¶ 41- See also, alleged irregularity # 2, Claimants' Memorial, Section 4, Page 19]

16. Mr. Romo's statement further clarifies that even he understood the project would be implemented by a consortium in which four companies would participate (¶13) as opposed to those companies being shareholders in his Sunlaw de Mexico.

17. The above, in addition to the fact that Arq. Duarte had a copy of Desona's papers of Incorporation in hand, proves that Claimants did not misrepresent the true facts at the City Council meeting on November 4th, 1992, regarding the shareholding structure of Desona, as alleged by Respondent. [See alleged irregularity #1, Claimants' Memorial, Section 4, Page 19]

18. ¶16 of Mr. Romo's statement presents once again an error in translation. The Spanish statement reads "Thus, from the end of 1993, it was clear that…." Yet the English translation reads: "Thus, from the end of JANUARY 1993, it was clear that…." The word January was inserted.

19. ¶17 of Mr. Romo's statement presents yet another error in translation, which changes the meaning of what was said. The Spanish statement reads "From February 1993 and onward, the project was planned so that Sunlaw would be the only company to receive payment for the sale of electric energy…." Yet in the English version the words "…would develop the Integral Solution Project" were added.

20. In ¶ 27 through 33, Mr. Romo questions the City's authority to draft and include certain aspects in the concession contract it celebrated with the concessionaire. It is clear that Mr. Romo misread the concession contract in that the City was not granting Desona the permits to build a power plant but rather the authorization, should the permits be granted by the Federal Authorities, to do so. Such authorization was one of the original conditions set forth by Sunlaw Energy in the MOU dated November 3rd, 1992, granted by the City Council on November 4th, 1992, and included as a part of the concession contract dated November 15, 1993.

21. As to his comments on Desona's financial ability to undertake such a project or to comply with its obligations under the contract, it is clear that Mr. Romo's was not aware of Desona's relationship with Browning Ferris Industries

22. Mr. Romo's witness statement clearly does not add much substance of these proceeding.

Reply to the Witness Statement of Mr. James Hodge:

23. There is clearly very little to comment on Mr. Hodge's witness statement.

24. Respondent is introducing Mr. Hodge's statement as "the opinion of an independent third party" [Counter Memorial ¶56]

25. By his own statement, Mr. Hodge spend a handful of hours in Naucalpan with Desona. As put by Mr. Ron Proctor, who spent countless hours with Desona management on this project, "I noted Mr. Hodge's witness statement and find it superficial and inaccurate. His opinions and conclusions seem to be mere speculation since he was only able, by his own affidavit, to review the operations of the project for a couple of hours. It appears he did not gather any significant field data or complete the necessary research for a project of this size. Therefore his report and conclusions cannot be regarded seriously as that of an expert".[See affidavit of Ron Proctor, Affidavit Section, Exhibit "5"]

Reply to the Witness Statement of Mr. Francesco Piazzessi[2]:

26. Mr. Piazzesi's first misleading statement is found in ¶11 of his declaration. The service to parks and other public areas was to be implemented sector by sector just like the residential schedule, as opposed to the entire City starting on November 17, 1993, as implied.

27. Mr. Piazzesi second false statement is found in ¶16 of his declaration. He claims to have received letters from certain sectors complaining about the service provided. By his own account, he reveals this information to Desona's representatives on December 23, 1993. Yet, at that time, he was not in office. As stated by Claimants in Section II of this reply (¶62), the collection service in the residential sector, except for Sector Satelite, was being provided, without any complains from the population, by the former Department of Public Works.

28. In ¶19 Mr. Piazzesi claims that to the best of his knowledge, by March of 1994, Desona had only 2 trucks as opposed to the 14 it was required to have under the operations program. Mr. Piazzesi, however, was aware that, in early March, Desona had acquired 16 brand new rear loaders, that import permits had been obtained from SECOFI and that the trucks were in the process of crossing the border.[See Secofi Permits, Claimants' Memorial, Section 4, Exhibit "15"]. This observation is particularly important because, as Claimants will point out in the Conclusion Section of this reply, the nullification process the City had already initiated would have been thwarted had those brand new trucks been imported.

29. In ¶20, Mr. Piazzesi makes reference to the fact that Desona was using its two trucks to provide service to the fee collecting industrial area of Naucalpan instead of servicing the residential sectors. The concession contract and operations program is specific as to what sectors Desona was required to service and Desona was certainly complying with its obligation under the contract.

---

[2] Inaccurate Translation: ¶10, last sentence, "Desona was to provide state of the art side or back load type of trucks and roll-off type trucks for this service" in nowhere to be found in the Spanish version.

¶19 "....The Tribunal will recall.." is not where to be found in the Spanish version.

30. Another false statement by Mr. Piazzesi is found in ¶21. Service in Sector Satelite, the only sector Desona was required to service under the concession contract, was provided efficiently, regularly and no complains from the population were ever received.

31. Another false and misleading statement can be found in ¶23. When Desona initiated the process of obtaining import permits for trucks in September of 1993, Desona was told by City officials that, if the trucks were to be imported under the name of the City and because the equipment was to be used for a public purpose, the trucks would not be subject to import duties. This is why the application for the first 2 trucks was made under the City's name.[See Claimants' Response to Motions for Direction, Exhibit 12]. However, the day before the permits were granted, the City notified Desona that fees and duties in the amount of approximately U$86,000 needed to be paid immediately. At that point, and because Desona needed to issue a wire transfer from the United States to pay for those fees, it requested that the City advance the payment which would be reimbursed upon receipt of the wire transfer. Desona then issued a check in favor of the city for $265,395 Mexican pesos and requested that the City treasurer hold the check until funds arrived. The treasurer misunderstood Desona's instruction and deposited the check ahead of time. The check was returned by the bank as a result of insufficient funds but paid upon the arrival of the funds. In short, the fees were reimbursed to the City as evidenced by Exhibit "1" herein.

32. The reasons Mr. Piazzesi testifies the Cabildo used to refuse to pay Desona's invoice (¶25 to ¶28) are false and have extensively been addresses throughout these pleadings.

33. Mr. Piazzesi's comments on ¶31 are inconsistent with the evidence. [See Claimants Admissions and Denials of Respondent's Statement of Facts under ¶72].

34. ¶37 & ¶38, of Mr. Piazzesi's witness statement are addressed by Claimants, respectively, in ¶75 & ¶64 of Claimants Admissions and Denials of Respondent's Statement of Facts. All claims in relation to the landfill (¶39 to ¶59) are either addressed in Claimants Admissions and Denials of Respondent's Statement of Facts under ¶76-79 or by Mr. Stirrat in his witness statement submitted along with Claimants' Memorial[See Claimants' Memorial, Affidavit Section] or herein [See affidavit of Bryan A. Stirrat, affidavit section of this reply]

35. ¶59 is addressed in the Claimants Admissions and Denials of Respondent's Statement of Facts under ¶61,

36. Mr. Piazzesi's allegation that Desona was using the City trucks to service the industrial and commercial sectors is false.[See affidavit of Kenneth Davitian, hereto]

37. In ¶62 Mr. Piazzesi testifies that on February 11, 1994, at 20:30, he was instructed by Mayor Jacob Rocha to begin looking for ways to resolve the problem. In ¶63 he testifies that he asked Mr. Alfaro, presumably in response to the Mayor's request, to find a good lawyer to advise them. He further testifies that on February 15, 1994 at 6:00 he first met Dr. Davalos to discuss the matter. Yet Dr. Davalos testifies that he was first contacted by Mr. Alfaro on February 9th, 1994 and was provided with lots of documentation to support the opinion he submitted to the Mayor on February 23rd, 1994.

38. The above conflict of dates is important because it further supports Claimants theory that by February 9th, 1994, only 70 days after the program began and only 40 days after the new administration assumed control of the City, the "Instruction" to nullify the Concession had been issued. At that moment in time, the City, ignoring its contractual obligations, began to build its case against Desona. The rest is history.

39. To the best of Claimants knowledge Mr. Piazzesi never held a public position before becoming Director of Economic Development in Naucalpan. His background was in the private sector.

40. Mr. Piazzesi is the only Public official from the administration to provide a witness statement on behalf of Respondent. His statement is filled with accusations for which he could provide no evidence in support. He is no lawyer, but makes legal remarks in his statement; he is no engineer, but challenges the technical aspects of Mr. Bryan A. Stirrat's statement. He is no CPA, but discusses "the value part of the concession".

Reply to the Witness Statement of Ing. Patricia Tejeda:

41. Ing. Patricia Tejeda states that she has no knowledge about Desona's rule that all trucks entering the landfill were required to be covered (¶10) and she further states that she is unaware that Desona donated tarps to cover Municipal trucks transporting municipal residential waste (¶11).

42. She states that she has never met Mr. David Harrich, a full time BAS engineer assigned to Rincon Verde yet admits that Mr. Harrich may have been advising her personnel as to what needed to be done. (¶12).

43. She is unaware but does not deny the training given to her personnel by BAS engineering or of the Toxic-Waste spotting program that was implemented by Desona (¶ 13 & 14)

44. She mistakenly asserts that the water trucks were paid for by the Municipality (¶20), contrary to the evidence that shows that the water service was paid for by Desona [See Receipts, Exhibit "2"]

45. She has no knowledge that Desona rented equipment to fix access roads to the landfill (¶21); nor was she aware that Desona was the only authorize entity to collect waste in Naucalpan (¶22). [See Section IV, ¶21] She was unaware of the operation plan in place, which detailed the schedule and number of trucks that would be imported by Desona (¶22). [See Claimants' Memorial, Section 3, Page 47, Operations Program]

46. There are observations made in the English version that do not appear in the Spanish version. In ¶24 of the English version the term "Desona" appears but in the Spanish version the word "Mr. Stirrat" appears.

47. In conclusion, the reading of Ing. Patricia Tejeda's statement indicates that she simply had no first hand observation of the operation of the landfill of Rincon Verde from December 11, 1993 until March 21, 1994.

<u>Reply to Witness Statement of Mr. Emilio Sanchez Serrano:</u>

48. There is little to comment on Mr. Sanchez's witness statement.

49. It is clear that Mr. Sanchez's testimony does not add anything to these proceedings.

50. Mr. Sanchez states that he and his brother withdrew from of the project by April of 1992 (¶24) and had nothing more to do with the concession until the City contacted him on May 27, 1994 (¶25).

51. In fact, the City of Naucalpan knew nothing about the Sanchez brothers or of their personal opinions on Claimants at the material time of nullification. The City simply cannot argue that Mr. Sanchez's opinion, influenced its decision to nullify the concession.

Reply to the Witness Statement of Dr. Oscar Palacios Gomez[3]

52. Dr. Palacios factual description of events is for the most part accurate. He admits his interest to participate in the project with a 5% share (¶7), that he visited the GWI's facilities in Los Angeles where his personnel learned how to make waste containers (¶8) and that Desona I was incorporated by instruction of City officials (¶9). It is important to point out that even though Dr. Palacios was to hold a 5% interest in the project his shares in Desona I amounted to 30%. This was done at the request of Arq. Duarte who wished to show a larger percentage of Mexican owned interest in the project.

53. It should be clarified that the decision to request the transfer of the concession from Desona to Desona I was not made between Dr. Palacios and Mr. Goldenstein but rather at the instruction of the City (¶10)[See "3"]

54. The evidence shows that the incorporation of Desona I was a formality that was necessary to abide by in order to avoid possible political opposition. The project was one and the same, the principals were always the same and Dr. Palacios would have participated with 5% of the project in exchange for his contribution, regardless of the project being under either Desona or Desona I.

55. It is to be noted that in ¶13, Dr. Palacios makes reference to the Desona trucks that he painted. He refers to them as "old, 1984 models that they repaired and painted in Epycsa's garages so as to make them appear to be new." He goes on to say "They though they were impressing me with these trucks, but, despite the paint job, it was obvious to me that they were not modern trucks."

56. The above statement is particularly interesting because, if Dr. Palacios' witness statement is in fact true and is provided with the intention to assist the Tribunal in resolving this matter (¶27), it is inexplicable why he would fabricate such claim.

---

[3] A note was made in Section II of this Reply that the translation of exhibit "1" of Dr. Palacios' statement is inaccurate.

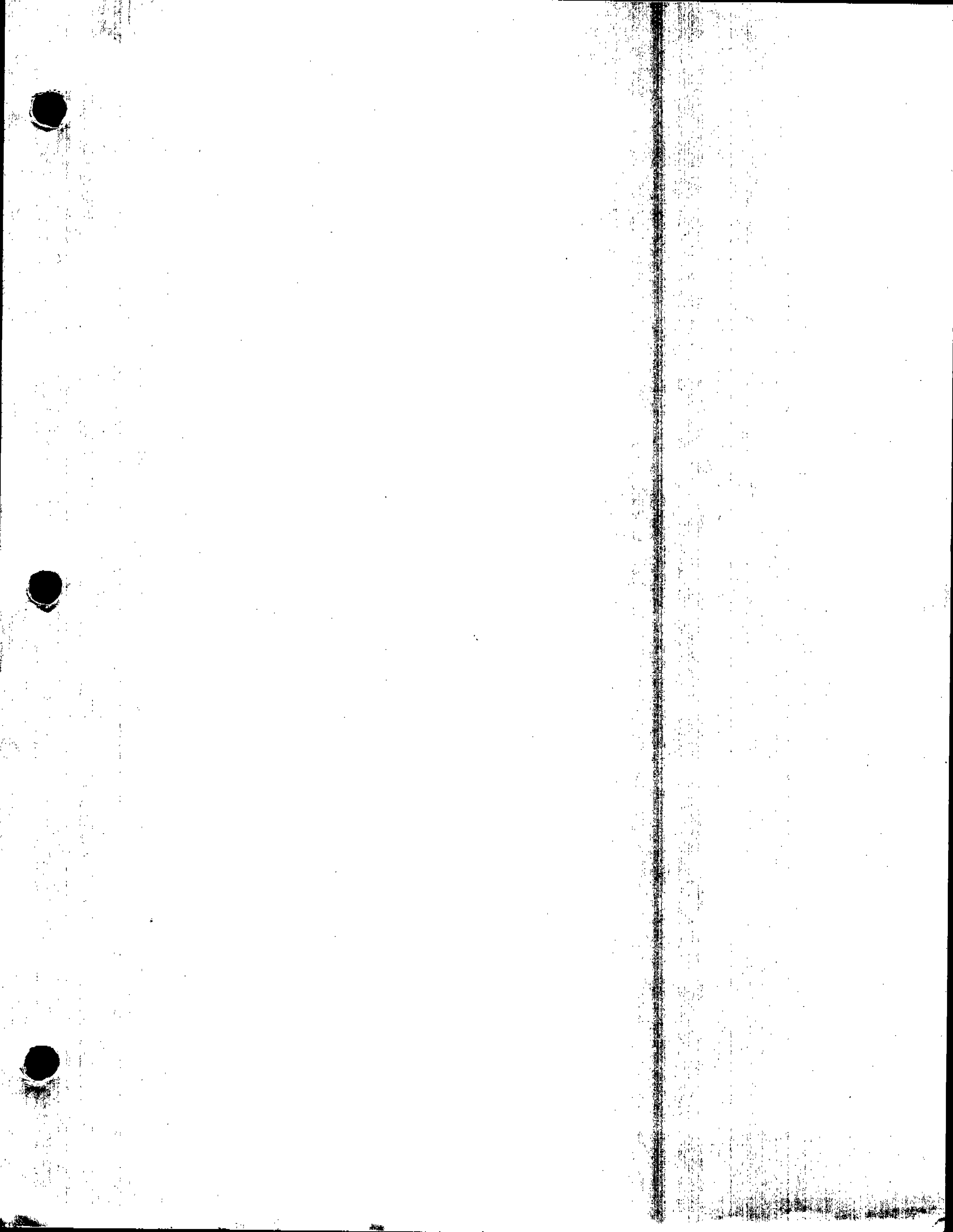
57. If the Tribunal recalls, no permits were issued by SECOFI for 1984 model trucks to enter Mexico. The trucks that were painted at Dr. Palacios' facilities were "brand-new" "state of the art" 1993 trucks [See Claimants' response to Motions for Directions, Exhibit "12"].

58. In ¶14, Dr. Palacios makes an observation, which clearly contradicts Respondent's argument that the terms of the concession were unknown to the City. He notes that Arq. Duarte had elaborated the Draft Concession Title that was submitted to the State Legislature as part of the package. He further notes that the Presentation included documents that referred to Desona and others to Desona I.

59. Dr. Palacios made monetary contributions to acquire 5% of the project both in cash and equipment.(¶11)(¶12) However, the breakdown of those expenses that he submitted is highly overstated. Dr. Palacios contribution included 225,000 new pesos in cash, 60 waste containers for 95,816.40 new pesos and the painting of 2 trucks for 12,797.74. The total contribution was 333,614.14 new pesos or roughly $100,000 US dollars. This is the sum that Mr. Azinian offered to refund him but that he declined to accept (¶18). The evidence further shows that Desona offered Dr. Palacios to complete his investment in Desona or to be refunded the funds he had advanced. [See Exhibit "3"] It should be noted that Dr. Palacios' advances to Desona were recorded, in his own books, as "loans". [See Respondent's Counter Memorial, Dr. Palacios' Witness Statement, Exhibit "4"]

60. All the other expenditures that appear in his statement of accounts (annex 6), such as the broker's fee he paid in order to become a part of the project, the cost of travel so that his personnel would learn how to build waste containers and the equipment he had to buy in order to manufacture those containers in Mexico cannot be considered investment in Desona.

61. Claimants' position remains that Dr. Palacios' is entitled to recover, should there be a recovery out of this proceeding, what Claimants believe was the amount he advanced to the project, that is 333,614.14 Mexican pesos. However, due to the gross misrepresentation as to the trucks and the overstatement of his contribution to the project, his witness statement should be regarded with caution.



CONCLUSION:

The major question presented is: Should a private party be able to rely upon a government to honor its contracts?

This case in not about 2 major corporations or 2 powerful governments locked in an economic or political struggle across a border. This case is about three entrepreneurs who went to Mexico with the determination to improve the health and safety of the 1.8 million citizens of a community.

These entrepreneurs took financial risks, perhaps beyond their personal means, but secured major financing not because of their net worth but because of the nature and rewards inherent in the contract they procured. They were presented with a seminal opportunity to open up a nationwide industry in a market that was ripe for development and attracted major world players.

There were unanticipated hurdles, that neither they nor the City was aware of, such as government import restrictions or permit issuance. The parties overcame those hurdles by way of mutual cooperation and understanding. There were anticipated events, such as a change in administration, that were contemplated by the ratification of the Concession by the State Legislature.

However, there was one development that Claimants could not foresee or guard against. That was becoming a political scapegoat for an administration incapable of solving its own internal problems. Rather than appreciating the long term benefits that the project would have brought, they elected instead to blame the outsiders for those problems.

The evidence submitted in this case shows that Claimants were in compliance with the obligations under the contract. The evidence further shows that City's case was designed to summarily rid itself of Claimants.

Claimants were then subjected to legal proceedings that ignored provisions of a contract that was 2 years in the making. They were charged with legal requirements that were neither bargain for not detailed in their contract. Finally, after suffering personal attacks they were told the contract that was entered into, in good faith, had no legal effect and their investment was lost.

The NAFTA arbitration provisions are designed to provide a economic, speedy and simple method of resolution of disputes between qualified parties. That has not happened here.

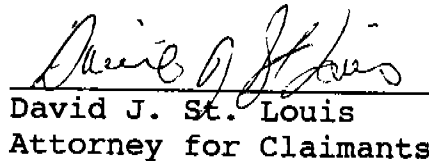
The Respondent has defended this asset expropriation by personally attacking Claimants. Respondent has defended this case by altering facts and ignoring evidence in its possession.

The keystone of Respondent's defense is as follows: "The Ayuntamiento.....was not bound to observe Clause Thirty Two or any other provision of the concession contract". In other words, Claimants could not rely on the City to honor its contract.

Claimants therefore have been denied their legal rights and their investment. This is what this case is about. The Treaty provides for a mechanism to resolve this claim.

January 19, 1999

Respectfully Submitted



David J. St. Louis
Attorney for Claimants