BEFORE THE HONORABLE TRIBUNAL OF THE

INTERNATIONAL CENTRE FOR SETTLEMENT 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' CLOSING MEMORIAL

July 16, 1999

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Introduction

Claimants respectfully submit this Closing Memorial to address what appear to Claimants to be the remaining legal and factual issues before the Tribunal, without attempting to repeat all of the legal and factual arguments contained in Claimants' prior Memorial and Reply. Specifically, in this Closing Memorial, Claimants address the following: (1) the relevance of the Mexican administrative proceedings to Claimants' Chapter 11 claims; (2) Respondent's three purported justifications for repudiating the Concession Contract with DESONA; (3) that Respondent's repudiation of the Concession Contract constitutes an expropriation of DESONA's contractual rights and of Claimants' interests in DESONA and not simply a breach of contract; and (4) various issues related to the amount of the award.

I. Relevance of Mexican Administrative Proceedings

Claimants and Respondent agree that the proceedings in Mexican administrative court initiated by DESONA in an unsuccessful effort to suspend nullification of the Concession Contract are not binding on this Tribunal as res judicata. *See* Reply, § III, ¶¶ 51-63; Rejoinder ¶ 51; Spanish Transcript, June 24, 1999 [Tape 2], p. 30 (statement of Mr. Perezcano) (unofficial translation).[1] Respondent maintains however, that the decisions of the Mexican courts should have a persuasive effect. Claimants disagree.[2]

A. International Tribunals Are Not Bound by the Decisions of Domestic Tribunals

"[A]n international tribunal is not bound to follow the result of a national court. One of the reasons for instituting an international arbitration procedure is precisely that the parties -- rightly or wrongly -- feel often more confident with a legal institution which is not entirely related to one of the parties. If a national judgment was binding on an international tribunal such a procedure could be rendered meaningless." *Amco v. Indonesia* (Award, 20 Nov. 1984), 1 ICSID Rep. 413, 460 (1993), *sustained in relevant part*, *Amco v. Indonesia* (Decision on the

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[1]Generally, Claimants will cite to the official English Transcript of the hearings. However, portions of Mr. Goldenstein's testimony on June 22 and the translation of Mr. Perezcano's closing argument on June 24 were omitted from that transcript. When it is necessary to cite or to quote these missing portions of the transcript, Claimants will rely on their own unofficial translation of the Spanish Transcript, and the citation will so indicate.

[2]Claimants do not understand Respondent to be arguing that the submission to jurisdiction clause found in the thirty-second paragraph of the Concession Contract precludes this Tribunal from hearing these claims. Were Respondent to so argue, however, Claimants would respond (1) that the plain language of that provision does not require that all disputes arising out of the Concession Contract be resolved exclusively in Mexican courts, and (2) that Respondent should be estopped from making any such argument at this late date.

Application for Annulment, 16 May 1986), 1 ICSID Rep. 509, 526-27 (1993); *see also Buzau-Nehoiasi Railway Case* (Ger. v. Rom.), 3 U.N. Rep. Int'l Arb. Awards 1827, 1836 (1939); *In re S.S. Newchwang* (G.B. v. U.S.), 16 Am. J. Int'l L. 323, 324 (1922); Ian Brownlie, Principles of Public International Law 52 (5th ed. 1998); Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 337, n.6 (1953).[3]

Respondent agrees with this statement of the law. As Mr. Perezcano stated during closing arguments: "We recognize that the decisions of national tribunals are not binding on international tribunals. However, this does not mean that they should not have persuasive value." Spanish Transcript, June 24, 1999 [Tape 2], p. 30 (statement of Mr. Perezcano) (unofficial translation).

B. The Decisions of the Mexican Administrative Courts Are Not Persuasive

Respondent contends that the Mexican administrative court decisions should persuade this Tribunal that the Concession Contract is invalid. *See* Rejoinder ¶ 52; *see also In re Newchwang* (U.K. v. U.S.) 16 Am. J. Int'l L. 323, 324 (1922) ("although the findings of the Court as to the facts upon which liability depends are not binding upon this Tribunal, yet they are evidence of the conclusions reached by a competent municipal tribunal"). Claimants submit that, on the facts of this case, the Tribunal ought not to find the decisions of the Mexican courts persuasive for three reasons: (1) deferring to the decisions of the Mexican courts would discourage future investors from seeking declaratory or injunctive relief in domestic court as expressly allowed by Article 1121; (2) the Mexican courts' factual conclusions were based on incomplete evidence; (3) the Mexican courts' legal conclusions are based on a legal theory to which this Tribunal must give no weight.

First, Article 1121 of NAFTA expressly allows investors to bring "proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party" and to bring a NAFTA claim separately. DESONA's claim before the Mexican courts was a claim for declaratory and injunctive relief, seeking to suspend the City Council's decision to annul the Concession Contract. There was no claim for damages. By bringing such a claim in domestic court, an investor gives the host state an opportunity to correct a measure that might otherwise give rise to liability under NAFTA. If a subsequent NAFTA Tribunal were to accept the decision of the domestic court rather than making a *de novo* determination of the facts and legal issues, it would discourage investors from seeking declaratory and injunctive relief in domestic courts before bringing a NAFTA claim. Such a result would be undesirable because fewer suits for declaratory and injunctive relief in domestic courts as authorized by Article 1121 would mean

[3]In any event, the requirements for res judicata under customary international law are not met in this case. *See* Reply, § III, ¶¶ 59-63.

fewer opportunities for a host state to correct measures that might give rise to liability under NAFTA.

Second, the Mexican courts did not have all the relevant facts before them. DESONA's domestic suit to have the nullification suspended was based on procedural grounds. *See* Amended Complaint of April 11, 1994, Counter Memorial, Exhibit 18. Although DESONA did dispute several of the 27 alleged irregularities in its amended complaint, it ultimately decided not to present evidence concerning its performance of the Concession Contract, its ability to perform the Concession Contract, or the alleged misrepresentations made to City officials. Indeed, Respondent has repeatedly pointed to DESONA's failure to present such evidence to the Mexican courts. *See* Counter Memorial ¶ 230; Counter Memorial, Annex 3, Statement of Dr. Davalos ¶¶ 36-39; Rejoinder ¶¶ 50, 62, 82-87, 97-98. As a result, the only evidence the Mexican courts had before them was evidence provided by the City. Claimants submit that this Tribunal should not find the Mexican courts' conclusions with respect to the facts surrounding the nullification of the Concession Contract persuasive because the Mexican courts heard only half the story. Unlike the Mexican courts, this Tribunal has heard evidence from both of the parties and it is therefore in a better position to determine the facts that may be relevant to Respondent's defenses to the Concession Contract.

Third, the Mexican courts' legal conclusion that the Concession Contract was invalid is based on a legal theory to which this Tribunal must give no weight: that under Mexican law the City's mayor lacked authority to enter the Concession Contract on November 15, 1993. This theory was developed by Dr. Davalos, *see* Counter Memorial, Annex 3, Statement of Dr. Davalos ¶¶ 14-21, and subsequently adopted by the Mexican courts. Of the 27 alleged irregularities found by the Administrative Tribunal, nine were sustained by the Superior Chamber of the Administrative Tribunal. *See* Counter Memorial ¶ 129; Counter Memorial, Annex 3, Statement of Dr. Davalos ¶ 50. Of those nine (all of which are set forth in Counter Memorial ¶ 130), seven relate to alleged misrepresentations made to the City Council on November 4, 1992.[4] The other two relate to other irregularities under Mexican law which

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[4]Those six are the following:

Irregularity # 1: That the Cabildo was told on November 4, 1992 that the concession would be operated by a consortium consisting of Bryan A. Stirrat & Associates, Global Waste Industries, Sunlaw Energy Corporation, and Mexico Diesel.

Irregularity # 2: That the Cabildo was told that 45% of DESONA would be held by American companies, that 45% would be held by a Mexican company, and that 10% would be held by the City.

Irregularity # 3: That the Cabildo was told on November 4, 1992 that City would hold 10% of the concessionaire's company, which was repeated in the Concession Contract of

allegedly affected the validity of the Concession Contract under Mexican law.[5] However, Claimants had no reason to know that the mayor lacked authority to enter the Concession Contract or that the contract was otherwise invalid under Mexican law. Claimants relied on the mayor's apparent authority to enter the Concession Contract. Under Article 1131 of NAFTA this Tribunal is required to "decide the issues in dispute in accordance with this Agreement and applicable rules of international law," and it is well established in international law that a state may not plead lack of authority of its officials or other technical defects under its internal law to escape international responsibility for its contractual obligations. *Aminoil v. Kuwait*, 21 ILM 976, 1006 (1982); *Shufeldt Claim* (U.S. v. Guat.), 2 U.N. Rep. Int'l Arb. Awards 1079, 1095, 1098 (1929); *Wauquier et Cie v. Government of Turkey*, 5 Annual Digest of Public International Law Cases 434 (H. Lauterpacht ed. 1929-30); *In re Hemming* (G.B. v. U.S.), 15 Am. J. Int'l L. 292 (1921); *Trumbull v. Chile*, 6 John Bassett Moore, International Arbitrations to Which the United States Has Been a Party 3569 (1898). Thus, the Mexican courts' legal conclusion that the Concession Contract is null and void can carry no weight with this Tribunal, for it is based on a theory that the Tribunal cannot accept as a matter of international law.

November 15, 1993. (In fact, Mr. Azinian did deliver these stock certificates to Mr. Piazzesi. Memorial, Affidavit of Mr. Azinian, p. 4; Counter Memorial, Annex Three, Statement of Mr. Piazzesi ¶ 37.)

Irregularity # 5: That the Cabildo was told on November 4, 1992 that DESONA would be incorporated with a consortium of American and Mexican companies as its shareholders when in fact DESONA had already been incorporated with individuals as its shareholders.

Irregularity # 6: That the Cabildo was presented a deed of incorporation in November 1992 showing shareholders other than the actual shareholders of DESONA.

Irregularity # 12: That the Cabildo was misled as to DESONA's capacity to perform the concession.

Irregularity # 15: That the Cabildo was promised on November 4, 1992 that it would not have to invest any capital, whereas the Concession Contract provided for payments by the City and the transfer of trucks and sanitation equipment.

[5]Those two are the following:

Irregularity # 13: That DESONA's shareholders did not provide the Notary with evidence of their capacity to appear as shareholders in the deed of incorporation or with express authorization of the Secretariat of Governance.

Irregularity # 18: That the City lacked authority to transfer municipal goods to the concessionaire.

II. Respondent Lacked Any Valid Justification for Repudiating the Concession Agreement

In its Counter Memorial and Rejoinder, and during the hearing, Respondent has advanced three basic justifications for its repudiation of the Concession Contract in March 1994: (1) that DESONA did not perform its obligations under the Concession Contract; (2) that DESONA lacked the financial and technical capacity to perform its obligations under the Concession Contract; and (3) that the Concession Contract is null and void because of misrepresentations allegedly made by DESONA.

A. DESONA Performed Its Obligations Under the Concession Contract

As a preliminary matter, it is important to note that the thirty-first paragraph of the Concession Contract requires the City to notify DESONA in writing if it finds any irregularities in the implementation of the Concession Contract and to give DESONA "30 days to correct such irregularity and justify the reason why it existed." Memorial, Vol. I, § 3, p. 29. This procedure was not followed. DESONA was not given written notice of the 27 alleged irregularities until March 10, 1994. At that point, it was given four business days to explain why the Concession Contract should not be annulled. Counter Memorial, Annex 3, Statement of Dr. Davalos ¶ 26. Claimants submit that the City's failure to give DESONA 30 days to correct and explain any irregularities in performance should preclude Respondent from relying on such irregularities to justify repudiation of the Concession Contract. *See Shufeldt Claim* (U.S. v. Guat.), 2 U.N. Rep. Int'l Arb. Awards 1079, 1096 (1929).

Respondent has maintained throughout this proceeding that DESONA generated a waste crisis. *See* Counter Memorial ¶¶ 61-62. However, Respondent's principal witness Mr. Piazzesi denied any such crisis. English Transcript, vol. III, pp. 105-09 (testimony of Mr. Piazzesi). He also agreed that DESONA was responsible for residential waste collection only in the Satelite section from December 17, 1993 through March 1, 1994 when it assumed responsibility for residential waste collection in the Echegaray section as well. English Transcript, vol. III, pp. 56-59 (testimony of Mr. Piazzesi). Mr. Piazzesi also conceded that DESONA was not obligated under the Concession Contract to pay rent on the landfill. English Transcript, vol. III, p. 120 (testimony of Mr. Piazzesi). At the hearing, Mr. Piazzesi focused instead on an alleged shifting of trucks from the residential to the industrial sector, which allegedly left the City fleet short of trucks with which to service the other sectors. The evidence showed that not to be true, however, as the industrial sector only used containers that required front-loader trucks. English Transcript, vol. III, p. 13 (testimony of Mr. Davitian).[6]

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[6]Mr. Piazzesi also testified that the City had only 30 to 40 trucks running, English Transcript, vol. III, p. 101, but when the City described its fleet in the Concession Contract, it claimed to possess 111 trucks, of which 80 were described as being in regular or good shape. Counter Memorial, Annex 3, Statement of Dr. Davalos, Exhibit 15.

The only remaining performance issue was that of the additional trucks. Indeed, Mr. Piazzesi testified that he recommended against nullifying the Concession Contract on March 7, 1994 because he felt that if these trucks had been introduced the problem would have been resolved. English Transcript, vol. III, pp. 129-130, 132-33 (testimony of Mr. Piazzesi). The Concession Contract required DESONA to introduce two front-loader trucks by November 17, 1993, five rear-loader trucks by December 13, 1993, and five front-loader and two roll-off trucks by March 1, 1994. *See* Memorial, § 3, p. 47. The evidence shows that DESONA brought two front-loader trucks to Naucalpan by November 7, 1993. *See* English Transcript, vol. I, p. 318 (testimony of Mr. Goldenstein). The evidence further shows that DESONA attempted to bring to Naucalpan 17 reconditioned trucks beginning in September, 1993, which would have included all of the trucks required by March 1, 1994. *See* English Transcript, vol. I, p. 327 (testimony of Mr. Goldenstein). The entry of these trucks into Mexico was delayed, however, because SECOFI refused to issue permits for them, as Mr. Azinian explained to the City in his letter of February 15, 1994. *See* Counter Memorial, Exhibit 8.[7] Shortly thereafter, DESONA decided to purchase ten new rear-loader trucks through BFI for residential waste collection, a number that was soon increased to 16 rear-loader trucks (the same trucks, painted with DESONA's colors, that are depicted in the photograph on section 3, page 60 of Claimants' Memorial). *See* English Transcript, vol. I, p. 290 (testimony of Mr. Goldenstein). Import permits were applied for beginning on March 3, 1994 and were issued beginning on March 8, 1994. *See* Claimants' Reply to Respondent's Motion for Directions, Exhibit 6. It is inconceivable that City officials were unaware of these steps. The only explanation for their failure to give DESONA 30 days' notice as required by the thirty-first paragraph of the Concession Contract is their awareness that the necessary trucks were at the border coupled with a desire to end the Concession Contract.[8]

B. DESONA Had the Capacity to Perform Its Obligations

Respondent has also asserted that the repudiation of the Concession Contract was justified because DESONA lacked the capacity to perform its obligations under the Concession Contract. Yet both Mr. Stirrat and Mr. Proctor testified at the hearing that they were not concerned about DESONA's capacity to perform its obligations. English Transcript, vol. I, pp. 68-69 (testimony of Mr. Stirrat); *id.*, pp. 144, 169-71, 256-57, 262-63 (testimony of Mr. Proctor). Even in the absence of financing from Sunlaw or BFI, DESONA had arranged for two lines of

[7]As Claimants have previously pointed out, there are some flaws in Respondent's English translation of this document. *See* Reply, Preliminary Observations, p. 1.

[8]Mr. Piazzesi also testified that, to the best of his knowledge, the City never collected on the performance bond for DESONA's alleged failure to perform its obligations under the Concession Contract. English Transcript, vol. III, pp. 31-34 (testimony of Mr. Piazzesi).

credit totaling $15 million to supply them with working capital.[9] Moreover, Mr. Carter testified that waste collection trucks are very easy to finance because they make such good collateral. English Transcript, vol. II, p. 99 (testimony of Mr. Carter).

Indeed, even the Respondent's principal witness Mr. Piazzesi testified in response to questions from the Tribunal that he recommended against nullification of the Concession Contract on March 7, 1994 because he felt that if the additional trucks could have been introduced "the problem and the feelings of ill will on the part of the city government would have been resolved." *See* English Transcript, vol. III, pp. 129-130, 132-33 (testimony of Mr. Piazzesi).

C. City Officials Knew All the Relevant Facts Before November 15, 1993

Virtually all of the alleged misrepresentations on which Respondent relies as a basis for nullifying the Concession Contract occurred at the November 4, 1992 City Council meeting, more than a year before the Concession Contract was signed. The only subsequent alleged misrepresentations that could conceivably have influenced the State Legislature's decision, published on August 16, 1993, to authorize the City to conclude the Concession Contract with DESONA or the City's decision on November 15, 1993 to enter the Concession Contract with DESONA are: (1) various statements regarding 40 years experience in the waste business; (2) failure to disclose that Global Waste Industries was in bankruptcy; and (3) representations concerning Dr. Palacios' status as an investor in DESONA.

As Mr. Goldenstein explained at the hearing, statements concerning 40 years experience referred to Mr. Davitian, whose family had been in the waste business for a long time, and who had himself run American Waste Removal for many years. *See* English Transcript, vol. II, p. 17 (testimony of Mr. Goldenstein). City officials knew that DESONA itself had not been incorporated until 1992. Mr. Goldenstein testified that City officials had fully investigated the DESONA principals and were satisfied that they had the experience and capacity to perform the concession. Spanish Transcript, June 22, 1999 [Tape 1], p. 46 (testimony of Mr. Goldenstein) (unofficial translation). Subsequent references to 40 years experience by City officials and representatives of DESONA were, at most, puffery, and there is no evidence that either the City or the State Legislature relied on a specific number of years experience as opposed to Mr. Davitian's extensive experience in the waste business, experience that is not disputed.

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[9]On June 30, 1993, EDM Corporation promised DESONA a $2 million line of credit once the Concession Contract had been concluded with the City and a further $8 million following a satisfactory analysis of DESONA's cash flow, for a total of $10 million. *See* Letter from Terry Patrick to Robert Azinian, June 30, 1993 (submitted to the Tribunal on June 24, 1999). On August 2, 1993, Pyramid Financial Group approved a $5 million line of credit for DESONA, conditioned on review of the Concession Contract with the City. *See* Letter from Steve Sirang to Robert Azinian, Aug. 2, 1993 (submitted to the Tribunal on June 24, 1999).

With respect to Global Waste Industries' bankruptcy, Mr. Goldenstein testified that City officials were fully aware of this even at the time of the original City Council meeting on November 4, 1992. *See* English Transcript, vol. I, pp. 300-01 (testimony of Mr. Goldenstein); Rejoinder, Annex 1, Full Spanish Text, Turno 13, Hoja 2 (remarks of Mr. Goldenstein). Moreover, by the time of the presentation to the State Legislature in August 1993, the City officials knew that the concession would be performed by DESONA and not by a consortium that included Global. Before the State Legislature, Mr. Goldenstein appeared on behalf of DESONA -- not Global. *See* English Transcript, vol. II, pp. 14-15 (testimony of Mr. Goldenstein). Given the City officials' awareness of Global's situation and the fact that the City was making the principal presentation to the State Legislature, Mr. Goldenstein testified that he did not think it was his role to discuss Global since the City had not thought it important to do so. *See* Spanish Transcript, June 22, 1999 [Tape 1], p. 47 (testimony of Mr. Goldenstein) (unofficial translation). And certainly, the City's decision to sign the Concession Contract with DESONA on November 15, 1993 could not have been influenced by a failure to disclose Global's bankruptcy because City officials had known of this bankruptcy for more than a year. *See* English Transcript, vol. I, pp. 300-01 (testimony of Mr. Goldenstein).

Regarding Dr. Palacios' investment in DESONA I, Mr. Goldenstein testified that including Mexican shareholders was the idea of a City official, Mr. Duarte, who thought it might head off political opposition to awarding a concession to foreigners. *See* English Transcript, vol. II, pp. 20-22 (testimony of Mr. Goldenstein). In the end, however, no such opposition surfaced, and the State Legislature authorized City to enter a Concession Contract with DESONA, a company with no Mexican investors. *See* English Transcript, vol. II, pp. 31-32 (testimony of Mr. Goldenstein); Spanish Transcript, June 22, 1999 [Tape 1], pp. 67-68 (testimony of Mr. Goldenstein) (unofficial translation). Thus, it is impossible to conclude that either the State Legislature or the City relied on representations concerning Dr. Palacios as an investor.

Respondent has introduced no evidence to contradict Mr. Goldenstein's testimony that City officials knew all of the relevant facts. Respondent has not introduced any witness statements from the former mayor or members of the City Council asserting that any of them were misled at any time. Respondent's principal witness, Mr. Piazzesi, did not assume office until January 1, 1994, *see* English Transcript, vol. III, p. 24, and could not speak to what City officials knew or relied upon when the Concession Contract was signed. *See* English Transcript, vol. III, pp. 88-89, 126. Dr. Davalos states that his investigations uncovered misrepresentations that induced the City Council to award the Concession Contract to DESONA, *see* Counter Memorial, Annex 3, Statement of Dr. Davalos ¶¶ 16-17, 21, but these misrepresentations are alleged to have occurred on November 4, 1992. Even Dr. Davalos does not assert that on November 15, 1993, when the Concession Contract was signed, any material facts about DESONA, its principals, or its obligations were unknown to City officials. It was established that the City officials who negotiated and signed the Concession Contract were available and perhaps even interviewed by the Respondent. *See* English Transcript, vol. IV, p. 124 (statement of Mr. Thomas). In light of Respondent's failure to call such witnesses, the Tribunal may infer that Respondent's allegations of fraud would not have been supported by their testimony.

The overall thrust of Respondent's argument seems to be this -- that it is simply implausible to think that the City would enter this Concession Contract with a newly formed, and thinly capitalized entity run by Messrs. Azinian, Davitian, and Goldenstein in the absence of some misrepresentations. And, indeed, the President of this Tribunal asked Mr. Proctor what it was that DESONA brought to the table. English Transcript, vol. I, pp. 267-68. First, DESONA invested approximately $2.79 million in capital. *See* Memorial, § 6, p. 2. Second, as Mr. Proctor testified, the combination of Mr. Davitian's experience in the waste business, Mr. Azinian's political and communications skills, and Mr. Goldenstein's financial abilities provided the necessary mix of skills and experience to develop and implement a waste concession for Naucalpan. English Transcript, vol. I, pp. 256-57, 270-71 (testimony of Mr. Proctor). Third, DESONA was extremely flexible and responsive to the changing desires of the City administration, in a way that a larger company probably would not have been. *See* Spanish Transcript, June 22, 1999 [Tape 1], pp. 55-56 (testimony of Mr. Goldenstein). Finally, DESONA and its principals brought with them a willingness to invest not just their capital but a large amount of their time and energy in working with the City to develop the Naucalpan concession project without any guarantee that they would ultimately be awarded the Concession Contract, *see* English Transcript, vol. II, pp. 22-24 (testimony of Mr. Goldenstein); Spanish Transcript, June 22, 1999 [Tape 1], pp. 55-56 (testimony of Mr. Goldenstein), a risk that a more established company might not have been willing to take. In short, DESONA brought to the table the capital, expertise, responsiveness, and energy that clearly impressed not just the City administration but companies like BFI, BAS, and Northside Steel Fabricators. *See* English Transcript, vol. I, pp. 256-57 (testimony of Mr. Proctor); *id.*, pp. 68-69, 84, 111-12 (testimony of Mr. Mr. Stirrat); *id.*, vol. II, p. 113 (testimony of Mr. Carter). Moreover, as outlined above, the evidence shows that DESONA would have been able to perform its obligations to the City had the Concession Contract not been repudiated.

III. Respondent Has Thus Expropriated DESONA's Contractual Rights and DESONA Itself

By repudiating the Concession Contract without a valid justification for doing so, Respondent has directly expropriated DESONA's contractual rights under the Concession Contract and has indirectly expropriated DESONA itself and the Claimants' interests in DESONA. There is a wealth of authority for the proposition that the deprivation of contract rights may constitute an expropriation. *See Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, 21 Iran-U.S. Cl. Trib. Rep. 79, 106 (1989); *Starrett Housing Corp. v. Islamic Republic of Iran*, 16 Iran-U.S. Cl. Trib. Rep. 112, 230 (1987); *Libyan American Oil Co. v. Libyan Arab Republic* (1977), 20 ILM 1, 53 (1981); *Shufeldt Claim* (U.S. v. Guat.), 2 U.N. Rep. Int'l Arb. Awards 1079, 1097 (1929); *Certain German Interests in Polish Upper Silesia* (Ger. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 44 (May 25); *Norwegian Shipowners' Claims* (Nor. v. U.S.), 1 U.N. Rep. Int'l Arb. Awards 307, 334 (1922); *Rudloff Case* (U.S. v. Ven.), 9 U.N. Rep. Int'l Arb. Awards 244, 250 (1903-05). Even Professor Brownlie, upon whom Respondent relies for the proposition that a mere breach of contract cannot be advanced as a basis for an international claim, *see* Rejoinder ¶ 36, states that "the situation in which the state exercises its executive or

legislative authority to destroy the contractual rights as an asset comes within the ambit of expropriation." Ian Brownlie, Principles of Public International Law 550 (5th ed. 1998).

Respondent's suggestion that it cannot be held accountable unless Claimants have suffered a "denial of justice," *see* Rejoinder ¶¶ 38-40, is misplaced. It assumes that Claimants were required to exhaust local remedies. Article 1121 of NAFTA, however, clearly permits investors to bring claims before a NAFTA tribunal without having exhausted local remedies.

IV. Claimants Are Entitled to Damages

Having suffered an expropriation under Article 1110 of NAFTA, Claimants are entitled to compensation "equivalent to the fair market value of the expropriated investment immediately before the expropriation took place . . . ," Art. 1110.2, plus interest, Art. 1110.4, and costs

A. Relevance of Proposed Agreement with BFI

At the hearing, the Tribunal heard testimony from Ron Proctor concerning a proposed joint venture with BFI, which would assume responsibility for the Naucalpan concession and would develop new projects with financing from BFI. Under the terms of this proposal, DESONA would receive $2 million and a 40% interest in the joint venture. English Transcript, vol I, p. 208 (testimony of Mr. Proctor). It is important for the Tribunal to understand that the $2 million figure is not probative of the value of 60% of the Naucalpan concession, for under the terms of the proposed joint venture, DESONA would receive not just $2 million but also a 40% interest in a new company that would operate not just the Naucalpan concession but other concessions as well -- concessions that were to be financed by BFI. English Transcript, vol I, pp. 209-10, 246 (testimony of Mr. Proctor); Spanish Transcript, June 22, 1999 [Tape 1], pp. 53, 55 (testimony of Mr. Goldenstein). Indeed, Mr. Goldenstein testified that this 40% interest would be "more valuable than 20 million, much more." Spanish Transcript, June 22, 1999 [Tape 1], p. 53 (testimony of Mr. Goldenstein) (unofficial translation).

What is probative of the value of DESONA is the offer to purchase DESONA for $18 million made by Sanifill on May 17, 1994, conditional on DESONA resurrecting its relationship with the City.[10] To assist the Tribunal, Claimants have also offered three alternative methods of valuation, which yield valuations ranging from $11,600,000 (based on the Discounted Cash Flow Method) to $19,203,000 (based on the Similar Transactions Method). *See* Memorial, § 6, Exhibits 4-6.

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[10]When it became apparent that the Concession Contract would not be reinstated, Sanifill agreed to purchase DESONA's remaining assets for $500,000. Unnumbered Hearing Exhibit; *see* English Transcript, vol. I, p. 174 (question by Mr. Mowatt); English Transcript, vol. II, pp. 49-50 (testimony of Mr. Goldenstein).

B. Amount of Recovery Under Article 1117

Respondent has suggested that Claimants' recovery under Article 1117 should be limited to Claimants' pro rata share of DESONA's losses. *See* Rejoinder ¶ 166 & n.75. Respondent relies on the decision in *Housing & Urban Services Int'l, Inc. v. Government of the Islamic Republic of Iran*, 9 Iran-U.S. Cl. Trib. Rep. 313 (1985). However, *Housing & Urban Services* and the decisions on which it relied involved partnership interests, not shareholder interests. Moreover, the Iran-U.S. Claims Tribunal expressly distinguished the question of shareholders: "The rationale for allowing such partners to bring individual claims is in part that unlike shareholders of corporations -- who generally may not pursue the claims of the corporation -- a 'partner is not entirely detached from the Societe in the form in which a shareholder is detached from a corporation.'" *Id.* (quoting E. Jimenez de Arechaga, *Diplomatic Protection of Shareholders in International Law*, 4 Philippine Int'l L.J. 71, 87 (1965)). Claimants submit that they are entitled under Article 1117 to recover the full amount of the loss sustained by DESONA as a result of Respondent's expropriation for three reasons.

First, the text of Article 1117 allows an investor who owns or controls an enterprise of another Party to submit a claim "that *the enterprise* has incurred loss or damage by reason of, or arising out of" a breach of Chapter 11, Section A "*on behalf of* [that] enterprise." Art. 1117.1 (emphasis added). The text of Article 1117 says nothing about limiting such an investor to a pro rata share of the loss to the enterprise. Moreover, since the claim is made on behalf of the enterprise and not on behalf of the individual investors, the recovery should be for the full amount of the loss to the enterprise.

Second, what little precedent exists supports the plain language of Article 1117. As Borchard explains, the issue arose in several cases argued before the Spanish Treaty Claims Commission. Although the Commission reserved the right to determine whether any part of an award should inure to the benefit of a shareholder who could not have brought an individual claim, Borchard reports that ultimately "no reduction was made because of the alien ownership of some of the shares of stock." Edwin Borchard, Diplomatic Protection of Citizens Abroad, § 282, p. 625 (1915).

Third, limiting Claimants' recovery on behalf of DESONA under Article 1117 would result in the unjust enrichment of Respondent. In order for Claimants to bring these claims, DESONA was required under Article 1121 to waive its right to seek damages in domestic court. As a shareholder, Mr. Goldenstein would not be permitted in most legal systems to pursue a claim for compensation on his own behalf. Thus, if recovery is limited under Article 1117, Respondent will effectively escape liability for a substantial portion of the loss that it has caused. In short, text, precedent, and policy all support Claimants' position that they should be allowed to recover on behalf of DESONA the full loss to DESONA and not simply their pro rata share of that loss.

C. Claimants' Costs to Date

Because only general guidelines for costs are set out in the international arbitral cases and such costs are not defined in either NAFTA or in the ICSID rules, Claimants will set forth all their actual costs so that the Tribunal may determine what award of costs would be reasonable. Claimants' costs were incurred in pursuing this matter in Mexican court, in pursuing the good faith negotiation mechanisms under NAFTA, and finally in connection with the proceedings before this Tribunal.[11]

Attorneys' Fees

1.	Lic. Ortega Arenas, Mexican Counsel for Mexican administrative proceedings	$75,000.00
2.	Daniel Price, Esq. Powell, Goldstein, Frazier & Murphy for prefiling NAFTA negotiations, including Berdeja & Associates, retained Mexican counsel	$358,000.00
3.	David J. St. Louis, Esq.	$510,000.00[12]
	SUBTOTAL	$943,000.00

[11]Upon the request of the Tribunal or Respondent, Claimants will furnish invoices, except for those costs that have been estimated.

[12]Because Claimants were required, of necessity, to retain counsel on a contingent-fee basis, time records were not kept. In seeking a reasonable recovery for attorneys' fees, however, the undersigned notes that over the course of four years he spent over 100 days out of the office in case preparation and travel, with average work days of 12 hours. That travel included three trips to Washington, D.C., one five-day trip to Mexico City, one three-day trip to Texas to meet with witnesses, and several trips to San Francisco, with the balance of the time out of the office spent in Los Angeles, where Claimants and Mr. Goldenstein assisted in the preparation of case evidence documents both in English and in Spanish. In addition to these 1,200 hours, the undersigned estimates that he has spent 500 hours in his office in connection with this case. Counsel's reasonable hourly rate, given the complexity of the case, would be $300.00 per hour.

Costs Incurred by Counsel in These Proceedings

1.	Investigation	$5715.00
2.	Expert Witnesses	$42,182.21
3.	Travel	$17,527.63
4.	Office Expenses	$5,718.84
	SUBTOTAL	$71,143.68

Costs Incurred by Claimants in These Proceedings

1.	Expert Fees:		
	a)	Ernest & Young	$25,000.00
2.	Witness Fees:		
	a)	Ron Proctor	$3452.80
	b)	Basil Carter	$2,000.00
3.	Tribunal Fees		$75,000.00
4.	Courier Services:		
	a)	Federal Express	$1,200.00
	b)	Airborne Express	$700.00
5.	Production Costs for Briefs		$3,000.00
6.	Additional Accounting Costs		$3,500.00
7.	Office Overhead Expenses		$5,000.00
8.	Hearing Costs for Witnesses for Hotel, Travel and Meals (estimated)		$15,000.00
	SUBTOTAL		$133,852.80

Administrative Assistance in These Proceedings

Claimants further request administrative assistance time in this matter. Mr. Goldenstein spent approximately 2,500 hours assisting in the preparation of the memorials, translating, and compiling exhibits for these proceedings. Counsel believes an administrative rate of $100.00 per hour is reasonable, which is comparable to a paralegal's rate in California.

SUBTOTAL	$250,000.00
TOTAL FEES, EXPENSES, AND ADMINISTRATIVE COSTS	$1,397,996.48

LAW OFFICES OF DAVID J. ST. LOUIS, INC.

By: _____
DAVID J. ST. LOUIS, Attorney for Claimants