

1 DAVID J. ST. LOUIS #041122  
2 LAW OFFICES OF DAVID J. ST. LOUIS, INC.  
3 575 East Alluvial Avenue, Suite 102  
4 Fresno, California 93720  
5 (209) 431-5563

6 Attorneys for: Claimants, ROBERT AZINIAN, KENNETH DAVITIAN  
7 and ELLEN BACA

8 INTERNATIONAL CENTRE FOR SETTLEMENT  
9 OF INVESTMENT DISPUTES

10 ROBERT AZINIAN, KENNETH  
11 DAVITIAN, and ELLEN BACA,

12 Claimants,

13 v.

14 THE GOVERNMENT OF THE UNITED  
15 MEXICAN STATES,

16 Respondent.

\*\*\*\*\*  
17 NOTICE OF CLAIM

SERVICE ACCEPTED IN  
OFFICIAL CAPACITY ONLY  
Salvador Villalobos  
EXECUTIVE DIRECTOR  
OFFICE OF THE LEGAL ADVISER  
1-24-97

18 COME NOW the Claimants and submit the notice of claim to arbitrate an  
19 investment dispute between Claimants and the United Mexican States (hereafter  
20 "Respondent") under the North American Free Trade Agreement, (hereafter "NAFTA"),  
21 Investment Chapter, and respectfully submit the following:

22 1. The designation of each of the parties to the dispute and the parties'  
23 respective address;

24 a. Claimants:

25 Robert Azinian, a U.S. citizen  
26 2934 1/2 Beverly Glen Circle, Suite 405  
27 Los Angeles, CA 90077

1 Kenneth Davitian, a U.S. citizen  
2 164 E. Palm Avenue, #103  
3 Burbank, CA 91502

4 Ellen Baca, a U.S. citizen  
5 13222 Addison Street  
6 Sherman Oaks, CA 91423

7 b. The Enterprise:

8 Desechos Solidos de Naucalpan, S.A.  
9 de C.V. ("DESONA")  
10 Estacas No. 29, Colonia Centro  
11 Naucalpan de Juarez  
12 Estado de Mexico, 53000

13 c. Notification Address:

14 David J. St. Louis, Esq.  
15 LAW OFFICES OF DAVID J. ST. LOUIS, INC.  
16 575 E. Alluvial, Suite 102  
17 Fresno, CA 93720  
18 Telephone: (209) 4431-5563  
19 FAX No.: (209) 431-2267

20 d. Respondent:

21 Secretaría de Comercio y Fomento  
22 Industrial Dirrecction General  
23 de Inversion Extranjera  
24 Oficialia de Partes

25 Address:

26 Avenida Insurgentes Sur 1940  
27 Colonia La Florida  
28 Mexico, Distrito Federal, 01030

2. The relevant provisions embodying the agreement of the parties to refer the dispute to arbitration are found in the NAFTA, Chapter Eleven, Section B, Articles 1115 through 1122, inclusive; more specifically:

a. Article 1122 contains Respondent's consent to arbitral jurisdiction for Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules [1122(2)a)];

b. Article 1121 sets forth the conditions precedent for Claimants herein to refer a dispute to arbitration, requiring the Claimants' consent to arbitration in accordance with

1 the procedures of the NAFTA. See Claimants' "Consent to Arbitration and Waiver of Rights  
2 of Disputing Investor and the Enterprise" (hereafter "Consent and Waiver"), a copy of which  
3 is attached hereto as Exhibit "A", the original of which was delivered to Respondent.

4 c. Article 1119 requires that Claimants deliver to Respondent a written "Notice  
5 of Intent to Submit a Claim to Arbitration" (hereafter "Notice of Intent"), a copy of which  
6 is attached hereto as Exhibit "B", the original of which was delivered to Respondent.

7 3. Approval by the Secretary-General as required by Article 3(1)(c) of the  
8 Arbitration (Additional Facility) Rules and Article 4 of the Additional Facility Rules. The  
9 approval, required therein, will be granted following the submission of this Notice of Claim.

10 4. Information concerning the issues in dispute and in indication of the amount  
11 in controversy is as follows:

12 a. Claimants' allege that Respondent has violated Section A, Chapter Eleven of  
13 the NAFTA, and specifically:

- |    |       |                              |
|----|-------|------------------------------|
| 14 | (i)   | Article 1102(1),(2) and (3); |
| 15 | (ii)  | Article 1103;                |
| 16 | (iii) | Article 1104;                |
| 17 | (iv)  | Article 1105                 |
| 18 | (v)   | Article 1106(1)(f)           |
| 19 | (vi)  | Article 1110                 |
| 20 | (vii) | Article 1111                 |

21 b. The general provisions of the NAFTA, including, but not  
22 limited to, Chapter Two, Article 201, basically provides that a state enterprise means an  
23 enterprise that is owned, or controlled through ownership interests, by a Party; and a  
24 reference to a state or province includes local governments of that state or province. Further,  
25 under Article 102, the objectives of the agreement arise generally to create effective  
26 procedures for the implementation and application of the NAFTA Agreement, joint  
27 administration and for the resolution of disputes in accordance with the applicable rules of  
28 international law.

Article 105, provides that the parties shall ensure that all necessary measures are

1 taken in order to give effect to the provisions of this agreement, including their observance,  
2 except as otherwise provided in this agreement, by state and provincial governments. By  
3 virtue thereof the acts hereinafter complained of and attributable to the state and local  
4 municipalities in Mexico are given full force and effect and are binding upon the Respondent  
5 herein.

6 c. Respondent has discriminated against Claimants by denying "national  
7 treatment," "most favored nation" treatment, and the better of national treatment or most  
8 favored nation treatment; and, has denied Claimants' treatment in accordance with  
9 international law, including fair and equitable treatment and full protection and security.

10 5. The Municipality of Naucalpan de Juarez, State of Mexico was undergoing  
11 severe waste management problems. As a result, the city invited a number of companies  
12 having expertise to seek solutions for the problem with the intention of granting a concession  
13 for a solid waste management project.

14 6. In January and February of 1992, officials of the Municipality made trips to  
15 several cities in the US where they visited the facilities of the companies that were  
16 participating in the process -- in order to observe directly the experience and competence that  
17 these companies brought to their waste management services.

18 7. Claimants assembled a well experienced waste management consortium,  
19 including Bryan A. Stirrat & Associates, Global Waste Industries, and Sunlaw Energy  
20 Corporation (hereafter the "Consortium"). All members of the Consortium are United States  
21 based companies, which jointly undertook a comprehensive study of the solid waste  
22 management program in Naucalpan and made extensive topographical and geographical  
23 studies of both the existing landfill located at "Rincon Verde" and of the site for a future  
24 landfill at "Corral del Indio," with the aim of designing an integrated solid waste disposal  
25 system for the City of Naucalpan.

26 8. Following ten months of deliberations and several trips to California, the  
27  
28

1 Municipal authorities concluded that the most qualified group to undertake the project was  
2 the Consortium, as the solution it presented was the most appropriate for Naucalpan. At that  
3 time the members of the Consortium were strongly encouraged by Municipal officials to  
4 form a Mexican corporation and to be prepared to present the project to the City Council.  
5 However, the Mayor, Mario Ruiz de Chavez, requested that said enterprise be incorporated  
6 by individuals as opposed to companies in order to guarantee transparency of the company's  
7 operations. Therefore, the Claimants, U.S. nationals and Ariel Goldenstein, a Brazilian  
8 national, formed the corporation and were its principal investors. Seventy-four (74%)  
9 percent of the stock was owned by the U.S. citizen investors.

10 9. After such instruction, Desechos Solidos de Naucalpan S.A. de C.V. (hereafter  
11 "DESONA") was incorporated under the laws of Mexico, as evidence in public deed number  
12 6,477 dated November 4, 1992, granted before Notary Public number 7 for the District of  
13 Cuautitlan Izcalli, State of Mexico, Mr. Benjamin de la Peña Mora. The owners and  
14 operators of DESONA were the Claimants herein as well as its General Director,  
15 Ariel Goldenstein.

16 The Consortium clearly provided that DESONA would work in Naucalpan with  
17 the technical and economic support of the Consortium through a Memorandum of  
18 Understanding.

19 The project was presented to the Naucalpan's City Council and approved  
20 unanimously.

21 10. As required by the Mexican Municipal Organic Law, since the term for  
22 which the concession was granted exceeded the term of the administration that granted it,  
23 a ratification of the awarding of the concession by the Legislature of the State of Mexico  
24 was needed. For that purpose a full week of hearings in front of the Ecology Commission  
25 of the State Congress, a 28 member panel, was scheduled for early August 1993.

26 11. On August 16, 1993, through the enactment of Legislative Decree number  
27  
28

1 213, the Legislature of the State of Mexico authorized the Municipality of Naucalpan to  
2 award the concession to DESONA for a period of 15 years, granting the Municipality the  
3 authority to establish all necessary terms of that contract. By virtue of said decree and the  
4 applicable sections of the NAFTA, the acts of the Municipality become binding upon the  
5 State of Mexico and therefor the Respondent herein.

6 12. After three months of extensive and detailed contractual negotiations, on  
7 November 15, 1993, the Municipality and DESONA executed the concession agreement for  
8 the public services of collection and transport of all residential, commercial and industrial  
9 non-toxic solid waste generated in the Municipality (Phase 1); the recycling and processing  
10 of all non toxic solid waste (Phase 2); the operation of the existing landfill at "Rincon  
11 Verde" including the design, construction and operation of future landfills (Phase 3); and the  
12 construction and operation of a bio-gas based electrical power plant (Phase 4)<sup>1</sup> (hereafter  
13 the "Concession Agreement").

14 13. DESONA began immediate performance under the Concession Agreement.  
15 Only two days after the execution date, it began distributing steel containers to the industries  
16 of the area and collecting their waste with new front loader trucks that had been imported  
17 from the U.S. specifically for this agreement. It assumed rights and responsibilities of the  
18 Municipality's lease contract for the Rincon Verde landfill and began topographical and  
19 geographical studies with U.S. landfill engineers for expanding the life of the landfill.  
20 DESONA promptly began sanitation of the landfill and exercised control over access to it,  
21 controlling, among other factors, the safe handling of toxic waste.

22 14. Moreover, DESONA engaged in many activities beneficial to the operation  
23 of the landfill, relocating scavengers to a safer work location, extending and rehabilitating  
24 all bio-gas pipes, purchasing vehicles for landfill use, renting special equipment to fix access  
25 roads and for dust control, implementing weekly cleanup programs, hiring security guards  
26

27 <sup>1</sup> Implementation of this phase subject to permits to be issued by CFE.

1 to patrol the landfill and providing uniforms to personnel and training workers and  
2 mechanics.

3           15. In addition to the waste collection project, DESONA was in the process of  
4 negotiating a joint venture agreement with Northside Steel Fabricators of British Columbia,  
5 Canada; under which the two companies would co-own and operate a front load truck and  
6 container manufacturing facility in the State of Mexico.

7           16. On December 1, 1993, DESONA began residential waste collection services.  
8 According to the service schedule set out in the Operations Program of the Concession  
9 Agreement, DESONA was to gradually assume waste collection responsibilities for each of  
10 the Municipality's nine sectors. Service for the first sector, Satellite, was scheduled to begin  
11 on December 1, 1993, and service for the second sector, Echegaray, was scheduled to begin  
12 on March 1, 1994. All of the efforts made by DESONA were for the purpose of improving  
13 the health and safety of the citizens of Naucalpan and fulfilling its contractual commitment.

14           17. On January 1, 1994, a new administration went into control of the city  
15 government. For reasons not attributable to DESONA, when the new administration took  
16 office, the Municipality started to face new waste accumulation problems in those sectors  
17 in which DESONA had not yet assumed responsibility. In order to cooperate and support  
18 such additional collection efforts, DESONA needed permission from the competent Mexican  
19 authorities to allow entrance of 17 used trucks purchased by the company sitting on the U.S.  
20 Mexican Border.

21           18. The Ministry of Commerce and Industrial Development ("SECOFI")  
22 inexplicably denied the importation of the 17 trucks. Thus, DESONA was not able to  
23 accelerate its services. Nonetheless, DESONA did respond to an immediate waste crisis in  
24 another sector called "El Molinito," although DESONA was not obligated to begin service  
25 in "El Molinito" until October, 1994. The Municipality never paid DESONA for these  
26 services or any other service it provided while operating the concession.

1 19. On February 25, 1994, a majority of DESONA's shareholders, the new  
2 Municipality officials and the authorities of the Ecology Commission of the State of Mexico  
3 attended a meeting in order to review and clarify the obligations of DESONA, of the  
4 Municipality and of the Ecology Commission. In this meeting, at no time did the  
5 Municipality officials voice any complaints about DESONA's performance, under the  
6 Concession Agreement.

7 20. In early March 1994, DESONA learned through a newspaper reporter that  
8 the Municipality's Council was beginning an administrative proceeding to invalidate the  
9 Concession Agreement and nullify the concession. This council drew up a list of 27  
10 groundless "irregularities" and gave DESONA only four days to respond to these arguments.  
11 This demand specifically infringed the Concession Agreement's provision that established  
12 a 30-day period to restore or conciliate any misunderstanding between the parties.

13 21. On March 21, 1994, Naucalpan's Council unilaterally repudiated and  
14 nullified the concession granted to DESONA. Immediately following the repudiation  
15 DESONA's personnel were ejected from their operating facilities and from the landfill via  
16 armed guards.

17 22. Following this nullification, the Municipality engaged in various acts of  
18 intimidation and harassment in an attempt to force DESONA to leave Naucalpan. These acts  
19 included, among other things, unlawful search of DESONA's offices by Municipality  
20 officials and judicial police, campaigns of public denunciation and libel and intimidating  
21 harassment through tax audits of DESONA's records.

22 23. The Government of the United Mexican States, under the obligations  
23 imposed upon it by the NAFTA, DESONA and its investors attempted a settlement of the  
24 dispute of the breach of the Concession Agreement and expropriation of the property and a  
25 tentative settlement was reached in March, 1995. However, the Party Government has  
26 repudiated said settlement.

1           24. As a result of said repudiation and expropriation, the enterprise DESONA,  
2 whose single asset was the concession, has been rendered useless. The United States  
3 investors who owned and controlled DESONA, have suffered damage as individual investors  
4 within the meaning of Chapter 11 of the NAFTA, Article 1116, or in the alternative, suffered  
5 damages as investors of a party making a claim on behalf of the enterprise, as contemplated  
6 by Article 1117. In either event, DESONA is a defunct legal entity. As such, the consent  
7 on behalf of the enterprise as contemplated by Article 1121 is rendered useless as the  
8 Claimants have been deprived by the Respondent of the control of the enterprise.

9           In order to comply with the intent of this Article, said investors, as owners and  
10 directors of said enterprise have filed the additional consents appended hereto as Exhibit "C"  
11 and hereby submit this dispute to the International Centre for Settlement of Investment  
12 Disputes (ICSID) for arbitration under the Additional Facility Rules of ICSID, whose address  
13 is 1818 H Street, N.W., Washington, D.C. 20433.

14           25. The U.S. investors demand from the Federal Government of Mexico the  
15 immediate compensation for the fair market value of the property taken by the Municipality,  
16 the amount of which exceeds \$14 million (U.S. currency) together with interest from  
17 March 18, 1994 at a rate of 10%, plus attorney legal fees incurred from the beginning of this  
18 dispute until its conclusion, plus all corresponding damages which are estimated in the  
19 amount of \$3,000,000.00.

20           **C. NAFTA Provisions That Have Been Breached**

21           1. **Article 102** The main principles and rules governing the NAFTA for the  
22 protection of investors are, among others, National Treatment, Most-Favored-Nation  
23 Treatment and Transparency. The proper application of these principles substantially  
24 increases the investment opportunities in the territories of the Parties. As indicated above,  
25 both the U.S. Investors and DESONA have been deprived of these rights several times.

26           2. **Article 1102 (3) (4)** (National Treatment) As will be set forth through  
27  
28

1 evidence presented in the requested arbitral proceedings, the U.S. Investors and DESONA  
2 have been treated by the State of Mexico less favorably than Mexican enterprises or  
3 individuals in like circumstances, regarding the establishment, management and operation of  
4 investments.

5           3. **Article 1105 (Minimum Standard of Treatment)** According to this provision  
6 "each Party shall accord to investments of investors of another Party treatment in accordance  
7 with international law, including fair and equitable treatment and full protection and  
8 security."

9           4. **Article 1110 (Expropriation and Compensation)** Because the State of  
10 Mexico nullified DESONA's Concession Agreement on a discriminatory basis to the damage  
11 of Desona's U.S. Investors, it is required to compensate the U.S. Investors, including  
12 compensation of all expenses incurred by DESONA in performance of its obligations under  
13 the Concession Agreement. Moreover, under Article 1110 of the NAFTA a nullification of  
14 a concession is tantamount to an expropriation and, therefore, compensation shall be paid  
15 without delay and be fully realizable. Compensation must be equivalent to the fair market  
16 value of the expropriated investment immediately before the date of expropriation, and shall  
17 not reflect any change in value occurring because the intended expropriation had become  
18 known earlier.

19           As a result of all of the above, the U.S. Investors have suffered the losses as  
20 herein set forth.

21           Pursuant to Article 1123 of the NAFTA the parties agreed to the appointment of  
22 three arbitrators (in the absence of agreement otherwise, and none presently exists), one by  
23 each party, and the third, who shall be the presiding arbitrator, by agreement of the parties.

24           A check payable to International Centre for Settlement of Investment Disputes  
25 in the amount of one hundred fifty dollars (U.S.) in compliance with Article 4 of the  
26 Additional Facility Rules (Administrative and Financial) was submitted on December 12,  
27  
28

1 1996.

2 Enclosed and submitted with this submission is the authorization for the  
3 undersigned as a Claimant's legal representative attached hereto as Exhibit "D" and an  
4 additional check for one hundred fifty dollars (U.S.) also payable to International Centre for  
5 Settlement of Investments Disputes.

6 With this submission, Claimants respectfully request approval and registration  
7 by the Secretary-General in accordance with the ICSID Additional Facility Rules,  
8 specifically, Article 4 thereof; and Article 4 of the Arbitration (Additional Facility) Rules.

9 DATED: March 10, 1997.

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

11  
12  
13 By: 

14 DAVID J. ST. LOUIS, Attorney for  
15 Claimants  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28