E. The Merits of the Dispute

I. Expropriation

113. "The Agreement does not define the term "expropriation", nor does it establish the measures, actions or behaviors that would be equivalent to an expropriation or that would have similar characteristics. Although formally an expropriation means a forcible taking by the Government of tangible or intangible property owned by private persons by means of administrative or legislative action to that effect, the term also covers a number of situations defined as de facto expropriation, where such actions or laws transfer assets to third parties different from the expropriating State or where such laws or actions deprive persons of their ownership over such assets, without allocating such assets to third parties or to the Government."

114. "Generally, it is understood that the term "...equivalent to expropriation..." or tantamount to expropriation" included in the Agreement and in other international treaties related to the protection of foreign investors refers to the so-called "indirect expropriation" or "creeping expropriation", as well as to the above-mentioned de facto expropriation. Although these forms of expropriation do not have a clear or unequivocal definition, it is generally understood that they materialize through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have that effect. This type of expropriation does not necessarily take place gradually or stealthily -the term "creeping" refers only to a type of indirect expropriation-and may be carried out through a single action, through a series of actions in a short period of time or through simultaneous actions. Therefore, a difference should be made between creeping expropriation and de facto expropriation, although they are usually included within the broader concept of "indirect expropriation" and although both expropriation methods may take place by means of a broad number of actions that have to be examined on a case-by-case basis to conclude if one of such expropriation methods has taken place."

115. "To establish whether the Resolution is a measure equivalent to an expropriation under the terms of section 5(1) of the Agreement, it must be first determined if the Claimant, due to the Resolution, was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto -such as the income or benefits related to the Landfill or to its exploitation- had ceased to exist. In other words, if due to the actions of the Respondent, the assets involved have lost their value or economic use for their holder and the extent of the loss. This determination is important because it is one of the main elements to distinguish, from the point of view of an international tribunal, between a regulatory measure, which is an ordinary expression of the exercise of the state's police power that entails a decrease in assets or rights, and a de facto expropriation that deprives
those assets and rights of any real substance. Upon determining the degree to which the investor is deprived of its goods or rights, whether such deprivation should be compensated and whether it amounts or not to a de facto expropriation is also determined. Thus, the effects of the actions or behavior under analysis are not irrelevant to determine whether the action or behavior is an expropriation. Section 5(1) of the Agreement confirms the above, as it covers expropriations, nationalizations or ...any other measure with similar characteristics or effects...  

The following has been stated in that respect: In determining whether a taking constitutes an "indirect expropriation", it is particularly important to examine the effect that such taking may have had on the investor's rights. Where the effect is similar to what might have occurred under an outright expropriation, the investor could in all likelihood be covered under most BIT provisions. 

130 The following has been stated in that respect: In determining whether a taking constitutes an "indirect expropriation", it is particularly important to examine the effect that such taking may have had on the investor's rights. Where the effect is similar to what might have occurred under an outright expropriation, the investor could in all likelihood be covered under most BIT provisions. 

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196."The Claimant requests that any compensation awarded to it accrue compound interest at a rate of 6%. The Arbitral Tribunal has not found any specific allegation by the Respondent regarding this point. The application of compound interest has been accepted in a number of awards, and it has been stated that:

...compound (as opposed to simple) interest is at present deemed appropriate as the standard of international law in [...] expropriation cases.

241 In connection with this case, in the opinion of the Arbitral Tribunal, application of compound interest is justified as part of the integral compensation owed to the Claimant as a result of the loss of its investment.

(The Full award is available on the ICSID-homepage)


125 Award dated August 30, 2000, in ICSID case No. ARB(AF)/97/1 Metalclad v. United Mexican States, 16 Mealey's International Arbitration Report (2000), pp. A-1 et seq.; p. A-13 (p. 33 of the award, 103): "Thus, expropriation [...] includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State." 


127 Ibid. p. 383.


130 Emphasis added by the Arbitral Tribunal.


240 Memorial, p. 146.


Referring Principles:

- VII.7 - Right to charge compound interest
- XI.1 - Compensation for expropriation