



*INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, CASE BETWEEN METALCLAD CORPORATION AND THE UNITED MEXICAN STATES (EXCERPTS RELATING TO THE FACTS OF THE CASE AND THE DECISION OF THE ARBITRAL TRIBUNAL) SOURCE: ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL*

**Metalclad Corporation (Claimant) v The United Mexican States (Respondent)**

(...)

**V. FACTS AND ALLEGATIONS**

**A. The Facilities at Issue**

28. In 1990 the federal government of Mexico authorized COTERIN to construct and operate a transfer station for hazardous waste in La Pedrera, a valley located in Guadalucazar in SLP. The site has an area of 814 hectares and lies 100 kilometers northeast of the capital city of SLP, separated from it by the Sierra Guadalucazar mountain range, 70 kilometers from the city of Guadalucazar. Approximately 800 people live within ten kilometers of the site.
29. On January 23, 1993, the National Ecological Institute (hereinafter “INE”), an independent sub-agency of the federal Secretariat of the Mexican Environment, National Resources and Fishing (hereinafter “SEMARNAP”), granted COTERIN a federal permit to construct a hazardous waste landfill in La Pedrera (hereinafter “the landfill”).

**B. Metalclad’s Purchase of the Site and its Landfill Permits**

30. Three months after the issuance of the federal construction permit, on April 23, 1993, Metalclad entered into a 6-month option agreement to purchase COTERIN together with its permits, in order to build the hazardous waste landfill.
31. Shortly thereafter, on May 11, 1993, the government of SLP granted COTERIN a state land use permit to construct the landfill. The permit was issued subject to the condition that the project adapt to the specifications and technical requirements indicated by the corresponding authorities, and accompanied by the General Statement that the license did not prejudice the rights or ownership of the applicant and did not authorize works, constructions or the functioning of business or activities.
32. One month later, on June 11, 1993, Metalclad met with the Governor of SLP to discuss the project. Metalclad asserts that at this meeting it obtained the Governor’s support for the project. In fact, the Governor acknowledged at the hearing that a reasonable person might expect that the Governor would support the project if studies confirmed the site as suitable or feasible and if the environmental impact was consistent with Mexican standards.
33. Metalclad further asserts that it was told by the President of the INE and the General Director of the Mexican Secretariat of Urban Development and Ecology (hereinafter



“SEDUE”)<sup>1</sup> that all necessary permits for the landfill had been issued with the exception of the federal permit for operation of the landfill. A witness statement submitted by the President of the INE suggests that a hazardous waste landfill could be built if all permits required by the corresponding federal and state laws have been acquired.

34. Metalclad also asserts that the General Director of SEDUE told Metalclad that the responsibility for obtaining project support in the state and local community lay with the federal government.
35. On August 10, 1993, the INE granted COTERIN the federal permit for operation of the landfill. On September 10, 1993, Metalclad exercised its option and purchased COTERIN, the landfill site and the associated permits.
36. Metalclad asserts it would not have exercised its COTERIN purchase option but for the apparent approval and support of the project by federal and state officials.

### **C. Construction of the Hazardous Waste Landfill**

37. Metalclad asserts that shortly after its purchase of COTERIN, the Governor of SLP embarked on a public campaign to denounce and prevent the operation of the landfill.
38. Metalclad further asserts, however, that in April 1994, after months of negotiation, Metalclad believed it had secured SLP’s agreement to support the project. Consequently, in May 1994, after receiving an eighteen-month extension of the previously issued federal construction permit from the INE, Metalclad began construction of the landfill. Mexico denies that SLP’s agreement or support had ever been obtained.
39. Metalclad further maintains that construction continued openly and without interruption through October 1994. Federal officials and state representatives inspected the construction site during this period, and Metalclad provided federal and state officials with written status reports of its progress.
40. On October 26, 1994, when the Municipality ordered the cessation of all building activities due to the absence of a municipal construction permit, construction was abruptly terminated.
41. Metalclad asserts it was once again told by federal officials that it had all the authority necessary to construct and operate the landfill; that federal officials said it should apply for the municipal construction permit to facilitate an amicable relationship with the Municipality; that federal officials assured it that the Municipality would issue the permit as a matter of course; and that the Municipality lacked any basis for denying the construction permit. Mexico denies that any federal officials represented that a municipal permit was not required, and affirmatively states that a permit was required and that Metalclad knew, or should have known, that the permit was required.

---

<sup>1</sup> SEDUE is the predecessor organization to SEMARNAP.



42. On November 15, 1994, Metalclad resumed construction and submitted an application for a municipal construction permit.
43. On January 31, 1995, the INE granted Metalclad an additional federal construction permit to construct the final disposition cell for hazardous waste and other complementary structures such as the landfill's administration building and laboratory.
44. In February 1995, the Autonomous University of SLP (hereinafter "UASLP") issued a study confirming earlier findings that, although the landfill site raised some concerns, with proper engineering it was geographically suitable for a hazardous waste landfill. In March 1995, the Mexican Federal Attorney's Office for the Protection of the Environment (hereinafter "PROFEPA"), an independent sub-agency of SEMARNAP, conducted an audit of the site and also concluded that, with proper engineering and operation, the landfill site was geographically suitable for a hazardous waste landfill.

#### **D. Metalclad is Prevented from Operating the Landfill**

45. Metalclad completed construction of the landfill in March 1995. On March 10, 1995, Metalclad held an "open house," or "inauguration," of the landfill which was attended by a number of dignitaries from the United States and from Mexico's federal, state and local governments.
46. Demonstrators impeded the "inauguration," blocked the entry and exit of buses carrying guests and workers, and employed tactics of intimidation against Metalclad. Metalclad asserts that the demonstration was organized at least in part by the Mexican state and local governments, and that state troopers assisted in blocking traffic into and out of the site. Metalclad was thenceforth effectively prevented from opening the landfill.
47. After months of negotiation, on November 25, 1995, Metalclad and Mexico, through two of SEMARNAP's independent sub-agencies (the INE and PROFEPA), entered into an agreement that provided for and allowed the operation of the landfill (hereinafter "the *Convenio*").
48. The *Convenio* stated that an environmental audit of the site was carried out from December, 1994 through March, 1995; that the purpose of the audit was to check the project's compliance with the laws and regulations; to check the project's plans for prevention of and attention to emergencies; and to study the project's existing conditions, control proceedings, maintenance, operation, personnel training and mechanisms to respond to environmental emergencies. The *Convenio* also stated that, as the audit detected certain deficiencies, Metalclad was required to submit an action plan to correct them; that Metalclad did indeed submit an action plan including a corresponding site remediation plan; and that Metalclad agreed to carry out the work and activities set forth in the action plan, including those in the corresponding plan of remediation. These plans required that remediation and commercial operation should take place simultaneously within the first three years of the landfill's operation. The *Convenio* provided for a five-year term of operation for the landfill, renewable by the INE and PROFEPA. In addition to requiring remediation, the *Convenio* stated that Metalclad would designate 34 hectares of its property as a buffer zone for the



conservation of endemic species. The *Convenio* also required PROFEPA to create a Technical-Scientific Committee to monitor the remediation and required that representatives of the INE, the National Autonomous University of Mexico and the UASLP be invited to participate in that Committee. A Citizen Supervision Committee was to be created. Metalclad was to contribute two new pesos per ton of waste toward social works in Guadalcazar and give a 10% discount for the treatment and final disposition of hazardous waste generated in SLP. Metalclad would also provide one day per week of free medical advice for the inhabitants of Guadalcazar through Metalclad's qualified medical personnel, employ manual labor from within Guadalcazar, and give preference to the inhabitants of Guadalcazar for technical training. Metalclad would also consult with government authorities on matters of remediation and hazardous waste, and provide two courses per year on the management of hazardous waste to personnel of the public, federal, state and municipal sectors, as well as social and private sectors.

49. Metalclad asserts that SLP was invited to participate in the process of negotiating the *Convenio*, but that SLP declined. The Governor of SLP denounced the *Convenio* shortly after it was publicly announced.
50. On December 5, 1995, thirteen months after Metalclad's application for the municipal construction permit was filed, the application was denied. In doing this, the Municipality recalled its decision to deny a construction permit to COTERIN in October 1991 and January 1992 and noted the "impropriety" of Metalclad's construction of the landfill prior to receiving a municipal construction permit.
51. There is no indication that the Municipality gave any consideration to the construction of the landfill and the efforts at operation during the thirteen months during which the application was pending.
52. Metalclad has pointed out that there was no evidence of inadequacy of performance by Metalclad of any legal obligation, nor any showing that Metalclad violated the terms of any federal or state permit; that there was no evidence that the Municipality gave any consideration to the recently completed environmental reports indicating that the site was in fact suitable for a hazardous waste landfill; that there was no evidence that the site, as constructed, failed to meet any specific construction requirements; that there was no evidence that the Municipality ever required or issued a municipal construction permit for any other construction project in Guadalcazar; and that there was no evidence that there was an established administrative process with respect to municipal construction permits in the Municipality of Guadalcazar.
53. Mexico asserts that Metalclad was aware through due diligence that a municipal permit might be necessary on the basis of the case of COTERIN (1991, 1992), and other past precedents for various projects in SLP.
54. Metalclad was not notified of the Town Council meeting where the permit application was discussed and rejected, nor was Metalclad given any opportunity to participate in that process. Metalclad's request for reconsideration of the denial of the permit was rejected.



55. In December 1995, shortly following the Municipality's rejection of Metalclad's permit application, the Municipality filed an administrative complaint with SEMARNAP challenging the *Convenio*. SEMARNAP denied the Municipality's complaint.
56. On January 31, 1996, the Municipality filed an *amparo* proceeding in the Mexican courts challenging SEMARNAP's dismissal of its *Convenio* complaint. An injunction was issued and Metalclad was barred from conducting any hazardous waste landfill operations. The *amparo* was finally dismissed, and the injunction lifted, in May 1999.
57. On February 8, 1996, the INE granted Metalclad an additional permit authorizing the expansion of the landfill capacity from 36,000 tons per year to 360,000 tons per year.
58. From May 1996 through December 1996, Metalclad and the State of SLP attempted to resolve their issues with respect to the operation of the landfill. These efforts failed and, on January 2, 1997, Metalclad initiated the present arbitral proceedings against the Government of Mexico under Chapter Eleven of the NAFTA.
59. On September 23, 1997, three days before the expiry of his term, the Governor issued an Ecological Decree declaring a Natural Area for the protection of rare cactus. The Natural Area encompasses the area of the landfill. Metalclad relies in part on this Ecological Decree as an additional element in its claim of expropriation, maintaining that the Decree effectively and permanently precluded the operation of the landfill.
60. Metalclad also alleges, on the basis of reports by the Mexican media, that the Governor of SLP stated, that the Ecological Decree "definitely cancelled any possibility that exists of opening the industrial waste landfill of La Pedrera".
61. Metalclad also asserts that a high level SLP official, with respect to the Ecological Decree and as reported by Mexican media, "expressed confidence in closing in this way, all possibility for the United States firm Metalclad to operate its landfill in this zone, independently of the future outcome of its claim before the Arbitral Tribunals of the NAFTA treaty".
62. The landfill remains dormant. Metalclad has not sold or transferred any portion of it.
63. Mexico denies each of these media accounts as they relate to the Ecological Decree.
64. Mexico also maintains that consideration of the Ecological Decree is outside the jurisdiction of the Tribunal because the Decree was enacted after the filing of the Notice of Intent of Arbitration. More particularly, Mexico argues that NAFTA, Article 1119, entitled "Notice of Intent to Submit a Claim", precludes claims for breaches that have not yet occurred, relying on the language in that Article which states that: "The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before a claim is submitted, which notice shall specify:  
...



(b) The provisions of [the NAFTA] alleged to have been breached and any other relevant provisions.

(c) The issues and factual basis for the claim.” Mexico further invokes NAFTA, Article 1120 which requires that six months elapse between the events giving rise to a claim and the submission of the claim. On the basis of these two Articles, Mexico argues that a claimant must ensure its claim is ripe at the time it is filed. At the same time, Mexico does not exclude the possibility that amendments to a claim may be made. Rather, Mexico initially asserted that in order to ensure fairness and clarity, amendment of a claim or the presentation of an ancillary claim within Article 48 of the Additional Facility Rules should be the subject of a formal application and the required amendment should be stated clearly. Later, Mexico adjusted its position in its posthearing brief in which it argues that Section B of Chapter Eleven does not contemplate the amendment of ripened claims to include post-claim events. Mexico contends that Section B of Chapter Eleven modifies the Additional Facility Rules as regards the amendment of claims and the filing of ancillary claims, making Article 48 of the Additional Facility Rules inapplicable.

65. Metalclad’s position is that Mexico’s analysis of Articles 1119 and 1120 is artificial, and that the six month rule merely sets forth an initial rule for claim eligibility designed to foster exhaustion of pre-arbitral methods of dispute resolution. In support of its position, Metalclad invokes NAFTA, Article 1118, which provides that disputing parties should first attempt to settle a claim through consultation or negotiation. Metalclad further adduces policy reasons in support of its right to base its claim on acts occurring after submission of its Notice of Claim. First, Metalclad argues that policies related to the administration of justice support its position. In particular, it argues that an inability to rely on post- Notice of Claim acts would deprive parties of redress concerning a period during which a State might be most inclined to disregard its treaty obligations. Second, Metalclad argues that requiring a claimant to forego or defer the airing of subsequent, related, breaches would be inconsistent with NAFTA’s stated aim of creating effective procedures for the resolution of its disputes. Such an interpretation, Metalclad suggests, would create serious inefficiencies by requiring the claimant to bring related actions *seriatim* and that those actions would be subject to *res judicata* principles to a Claimant’s detriment. Metalclad also argues that injustice would result because claimants will choose, for financial and other reasons, not to start a fresh NAFTA action and tribunals would be unable to consider acts of bad faith occurring during the arbitration. Third, Metalclad maintains that its view is consistent with the ICSID Arbitral Tribunal’s broad jurisdiction. Metalclad points out that the texts mentioned in NAFTA, Article 1120, allow for amendment of claims and cites Article 48 of the Rules as allowing for incidental or additional claims provided that such claims are within the scope of the arbitration agreement of the parties. Metalclad concludes that the policies underlying NAFTA, Articles 1119 and 1120, are fulfilled once the appropriate periods have passed prior to submission of the claim and that the Respondent is not prejudiced by the amendments, provided that they are made no later than the Claimant’s Reply and that the Respondent is permitted a Rejoinder.
66. The Tribunal accepts Mexico’s contention that a case may not be initiated on the basis of an anticipated breach. However, the Tribunal cannot accept Mexico’s interpretation and application of the time limits set out in the NAFTA. Metalclad properly submitted



its claim under the Additional Facility Rules as provided under NAFTA, Article 1120. Article 1120(2) provides that the arbitration rules under which the claim is submitted shall govern the arbitration except to the extent modified by Section B of Chapter Eleven. Article 48(1) of the Rules clearly states that a party may present an incidental or additional claim provided that the ancillary claim is within the scope of the arbitration agreement of the parties.

67. The Tribunal does not agree with Mexico's post-hearing position that Section B of Chapter Eleven modifies Article 48 of the Rules. The Tribunal believes it was not the intent of the drafters of NAFTA, Articles 1119 and 1120, to limit the jurisdiction of a Tribunal under Chapter Eleven in this way. Rather, the Tribunal prefers Mexico's position, as stated in its Rejoinder, that construes NAFTA Chapter Eleven, Section B, and Article 48 of the Rules as permitting amendments to previously submitted claims and consideration of facts and events occurring subsequent to the submission of a Notice of Claim, particularly where the facts and events arise out of and/or are directly related to the original claim. A contrary holding would require a claimant to file multiple subsequent and related actions and would lead to inefficiency and inequity.
68. The Tribunal agrees with Mexico that the process regarding amendments to claims must be one that ensures fairness and clarity. Article 48(2) of the Rules ensures such fairness by requiring that any ancillary claim be presented not later than the Claimant's Reply. In this matter, Metalclad presented information relating to the Ecological Decree and its intent to rely on the Ecological Decree as early as its Memorial. Mexico subsequently filed its Counter-Memorial and Rejoinder. The Ecological Decree directly relates to the property and investment at issue, and Mexico has had ample notice and opportunity to address issues relating to that Decree.
69. The Tribunal thus finds that, although the Ecological Decree was issued subsequent to Metalclad's submission of its claim, issues relating to it were presented by Metalclad in a timely manner and consistently with the principles of fairness and clarity. Mexico has had ample opportunity to respond and has suffered no prejudice. The Tribunal therefore holds that consideration of the Ecological Decree is within its jurisdiction but, as will be seen, does not attach to it controlling importance.

## VII. THE TRIBUNAL'S DECISION

(...)

### **B. NAFTA Article 1105: Fair and equitable Treatment**

74. NAFTA Article 1105(1) provides that "each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security". For the reasons set out below, the Tribunal finds that Metalclad's investment was not accorded fair and equitable treatment in accordance with international law, and that Mexico has violated NAFTA Article 1105(1).



75. An underlying objective of NAFTA is to promote and increase cross-border investment opportunities and ensure the successful implementation of investment initiatives. (NAFTA Article 102(1)).
76. Prominent in the statement of principles and rules that introduces the Agreement is the reference to “transparency” (NAFTA Article 102(1)). The Tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party (whose international responsibility in such matters has been identified in the preceding section) become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.
77. Metalclad acquired COTERIN for the sole purpose of developing and operating a hazardous waste landfill in the valley of La Pedrera, in Guadalucazar, SLP.
78. The Government of Mexico issued federal construction and operating permits for the landfill prior to Metalclad’s purchase of COTERIN, and the Government of SLP likewise issued a state operating permit which implied its political support for the landfill project.
79. A central point in this case has been whether, in addition to the above-mentioned permits, a municipal permit for the construction of a hazardous waste landfill was required.
80. When Metalclad inquired, prior to its purchase of COTERIN, as to the necessity for municipal permits, federal officials assured it that it had all that was needed to undertake the landfill project. Indeed, following Metalclad’s acquisition of COTERIN, the federal government extended the federal construction permit for eighteen months.
81. As presented and confirmed by Metalclad’s expert on Mexican law, the authority of the municipality extends only to the administration of the construction permit, “. . .to grant licenses and permits for constructions and to participate in the creation and administration of ecological reserve zones . . .”. (Mexican Const. Art. 115, Fraction V). However, Mexico’s experts on constitutional law expressed a different view.
82. Mexico’s General Ecology Law of 1988 (hereinafter “LGEEPA”) expressly grants to the Federation the power to authorize construction and operation of hazardous waste landfills. Article 5 of the LGEEPA provides that the powers of the Federation extend to: V. [t]he regulation and control of activities considered to be highly hazardous, and of the generation, handling and final disposal of hazardous materials and wastes for the environments of ecosystems, as well as for the preservation of natural resources, in accordance with [the] Law, other applicable ordinances and their regulatory provisions.





83. LGEEPA also limits the environmental powers of the municipality to issues relating to non-hazardous waste. Specifically, Article 8 of the LGEEPA grants municipalities the power in accordance with the provisions of the law and local laws to apply: [l]egal provisions in matters of prevention and control of the effects on the environment caused by generation, transportation, storage, handling treatment and final disposal of solid industrial wastes which are not considered to be hazardous in accordance with the provisions of Article 137 of [the 1988] law. (Emphasis supplied).
84. The same law also limits state environmental powers to those not expressly attributed to the federal government. *Id.*, Article 7. CASES 25
85. Metalclad was led to believe, and did believe, that the federal and state permits allowed for the construction and operation of the landfill. Metalclad argues that in all hazardous waste matters, the Municipality has no authority. However, Mexico argues that constitutionally and lawfully the Municipality has the authority to issue construction permits.
86. Even if Mexico is correct that a municipal construction permit was required, the evidence also shows that, as to hazardous waste evaluations and assessments, the federal authority's jurisdiction was controlling and the authority of the municipality only extended to appropriate construction considerations. Consequently, the denial of the permit by the Municipality by reference to environmental impact considerations in the case of what was basically a hazardous waste disposal landfill, was improper, as was the municipality's denial of the permit for any reason other than those related to the physical construction or defects in the site.
87. Relying on the representations of the federal government, Metalclad started constructing the landfill, and did this openly and continuously, and with the full knowledge of the federal, state, and municipal governments, until the municipal "Stop Work Order" on October 26, 1994. The basis of this order was said to have been Metalclad's failure to obtain a municipal construction permit.
88. In addition, Metalclad asserted that federal officials told it that if it submitted an application for a municipal construction permit, the Municipality would have no legal basis for denying the permit and that it would be issued as a matter of course. The absence of a clear rule as to the requirement or not of a municipal construction permit, as well as the absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit, amounts to a failure on the part of Mexico to ensure the transparency required by NAFTA.
89. Metalclad was entitled to rely on the representations of federal officials and to believe that it was entitled to continue its construction of the landfill. In following the advice of these officials, and filing the municipal permit application on November 15, 1994, Metalclad was merely acting prudently and in the full expectation that the permit would be granted.



90. On December 5, 1995, thirteen months after the submission of Metalclad's application – during which time Metalclad continued its open and obvious investment activity – the Municipality denied Metalclad's application for a construction permit. The denial was issued well after construction was virtually complete and immediately following the announcement of the Convenio providing for the operation of the landfill.
91. Moreover, the permit was denied at a meeting of the Municipal Town Council of which Metalclad received no notice, to which it received no invitation, and at which it was given no opportunity to appear.
92. The Town Council denied the permit for reasons which included, but may not have been limited to, the opposition of the local population, the fact that construction had already begun when the application was submitted, the denial of the permit to COTERIN in December 1991 and January 1992, and the ecological concerns regarding the environmental effect and impact on the site and surrounding communities. None of the reasons included a reference to any problems associated with the physical construction of the landfill or to any physical defects therein.
93. The Tribunal therefore finds that the construction permit was denied without any consideration of, or specific reference to, construction aspects or flaws of the physical facility.
94. Moreover, the Tribunal cannot disregard the fact that immediately after the Municipality's denial of the permit it filed an administrative complaint with SEMARNAP challenging the Convenio. The Tribunal infers from this that the Municipality lacked confidence in its right to deny permission for the landfill solely on the basis of the absence of a municipal construction permit.
95. SEMARNAP dismissed the challenge for lack of standing, which the Municipality promptly challenged by filing an amparo action. An injunction was issued, and the landfill was barred from operation through 1999.
96. In 1997 SLP re-entered the scene and issued an Ecological Decree in 1997 which effectively and permanently prevented the use by Metalclad of its investment.
97. The actions of the Municipality following its denial of the municipal construction permit, coupled with the procedural and substantive deficiencies of the denial, support the Tribunal's finding, for the reasons stated above, that the Municipality's insistence upon and denial of the construction permit in this instance was improper.<sup>2</sup>
98. This conclusion is not affected by NAFTA Article 1114, which permits a Party to ensure that investment activity is undertaken in a manner sensitive to environmental

---

<sup>2</sup> The question of turning to NAFTA before exhausting local remedies was examined by the parties. However, Mexico does not insist that local remedies must be exhausted. Mexico's position is correct in light of NAFTA Article 1121(2)(b) which provides that a disputing investor may submit a claim under NAFTA Article 1117 if both the investor and the enterprise waive their rights to initiate or continue before any administrative tribunal or court under the law of any Party any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in NAFTA Article 1117.



concerns. The conclusion of the Convenio and the issuance of the federal permits show clearly that Mexico was satisfied that this project was consistent with, and sensitive to, its environmental concerns.

99. Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.
100. Moreover, the acts of the State and the Municipality – and therefore the acts of Mexico – fail to comply with or adhere to the requirements of NAFTA, Article 1105(1) that each Party accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment. This is so particularly in light of the governing principle that internal law (such as the Municipality's stated permit requirements) does not justify failure to perform a treaty. (Vienna Convention on the Law of Treaties, Arts. 26, 27).
101. The Tribunal therefore holds that Metalclad was not treated fairly or equitably under the NAFTA and succeeds on its claim under Article 1105.

### **C. NAFTA, Article 1110: Expropriation**

102. NAFTA Article 1110 provides that “[n]o party shall directly or indirectly . . . expropriate an investment . . . or take a measure tantamount to . . . expropriation . . . except: (a) for a public purpose; (b) on a nondiscriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation . . . ” “A measure” is defined in Article 201(1) as including “any law, regulation, procedure, requirement or practice”.
103. Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour 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.
104. By permitting or tolerating the conduct of Guadalcazar in relation to Metalclad which the Tribunal has already held amounts to unfair and inequitable treatment breaching Article 1105 and by thus participating or acquiescing in the denial to Metalclad of the right to operate the landfill, notwithstanding the fact that the project was fully approved and endorsed by the federal government, Mexico must be held to have taken a measure tantamount to expropriation in violation of NAFTA Article 1110(1).
105. The Tribunal holds that the exclusive authority for siting and permitting a hazardous waste landfill resides with the Mexican federal government. This finding is consistent with the testimony of the Secretary of SEMARNAP and, as stated above, is consistent with the express language of the LGEEPA.



106. As determined earlier (see above, para 92), the Municipality denied the local construction permit in part because of the Municipality's perception of the adverse environmental effects of the hazardous waste landfill and the geological unsuitability of the landfill site. In so doing, the Municipality acted outside its authority. As stated above, the Municipality's denial of the construction permit without any basis in the proposed physical construction or any defect in the site, and extended by its subsequent administrative and judicial actions regarding the Convenio, effectively and unlawfully prevented the Claimant's operation of the landfill.
107. These measures, taken together with the representations of the Mexican federal government, on which Metalclad relied, and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount to an indirect expropriation.
108. The present case resembles in a number of pertinent respects that of *Biloune, et al. v. Ghana Investment Centre, et al.*, 95 I.L.R.183, 207-10 (1993) (Judge Schwebel, President; Wallace and Leigh, Arbitrators). In that case, a private investor was renovating and expanding a resort restaurant in Ghana. As with Metalclad, the investor, basing itself on the representations of a government affiliated entity, began construction before applying for a building permit. As with Metalclad, a stop work order was issued after a substantial amount of work had been completed. The order was based on the absence of a building permit. An application was submitted, but although it was not expressly denied, a permit was never issued. The Tribunal found that an indirect expropriation had taken place because the totality of the circumstances had the effect of causing the irreparable cessation of work on the project. The Tribunal paid particular regard to the investor's justified reliance on the government's representations regarding the permit, the fact that government authorities knew of the construction for more than one year before issuing the stop work order, the fact that permits had not been required for other projects and the fact that no procedure was in place for dealing with building permit applications. Although the decision in *Biloune* does not bind this Tribunal, it is a persuasive authority and the Tribunal is in agreement with its analysis and its conclusion.
109. Although not strictly necessary for its conclusion, the Tribunal also identifies as a further ground for a finding of expropriation the Ecological Decree issued by the Governor of SLP on September 20, 1997. This Decree covers an area of 188,758 hectares within the "Real de Guadalcazar" that includes the landfill site, and created therein an ecological preserve. This Decree had the effect of barring forever the operation of the landfill.
110. The Tribunal is not persuaded by Mexico's representation to the contrary. The Ninth Article, for instance, forbids any work inconsistent with the Ecological Decree's management program. The management program is defined by the Fifth Article as one of diagnosing the ecological problems of the cacti reserve and of ensuring its ecological preservation. In addition, the Fourteenth Article of the Decree forbids any conduct that might involve the discharge of polluting agents on the reserve soil, subsoil, running water or water deposits and prohibits the undertaking of any



potentially polluting activities. The Fifteenth Article of the Ecological Decree also forbids any activity requiring permits or licenses unless such activity is related to the exploration, extraction or utilization of natural resources.

111. The Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree. Indeed, a finding of expropriation on the basis of the Ecological Decree is not essential to the Tribunal's finding of a violation of NAFTA Article 1110. However, the Tribunal considers that the implementation of the Ecological Decree would, in and of itself, constitute an act tantamount to expropriation.
112. In conclusion, the Tribunal holds that Mexico has indirectly expropriated Metalclad's investment without providing compensation to Metalclad for the expropriation. Mexico has violated Article 1110 of the NAFTA.