(2) Must a potential claimant exhaust its remedies under national law before proceeding to NAFTA arbitration? Sensible? As a strategic matter, how should a potential complainant proceed in deciding when to initiate NAFTA arbitration? How should arbitrators approach a case in which no authoritative judicial decision has been rendered in a national court?

(3) What behavior would constitute a "clear and malicious" misapplication of the law? How might a court "administer justice in a seriously inadequate way?" Do these principles mean that the arbitrators should apply a highly deferential standard of review, but may hold for the complainant in cases where the arbitrators find clear legal error? Or must the complainant show that national courts exhibited personal animosity, corruption, or some other impropriety?

(4) Why would the parties to a trade agreement such as NAFTA give investors a private right of action to enforce investor rights provisions, but not allow private parties a right of action to enforce the wide array of other commitments on trade? Is the function of an investment agreement fundamentally different from the function of a trade agreement from the perspective of the "importing" country? See Alan O. Sykes, Public Versus Private Enforcement of International Economic Law: Standing and Remedy, 34 J. Leg. Stud. 631 (2005).

METALCLAD CORP. v. UNITED MEXICAN STATES

40 I.L.M. 36 (2001).
Before the Arbitral Tribunal constituted under Chapter Eleven of the North American Free Trade Agreement.

1. This dispute arises out of the activities of the Claimant, Metalclad Corporation (hereinafter "Metalclad"), in the Mexican Municipality of Guadalcazar (hereinafter "Guadalcazar"), located in the Mexican State of San Luis Potosi (hereinafter "SLP"). Metalclad alleges that Respondent, the United Mexican States (hereinafter "Mexico"), through its local governments of SLP and Guadalcazar, interfered with its development and operation of a hazardous waste landfill. Metalclad claims that this interference is a violation of the Chapter Eleven investment provisions of the North American Free Trade Agreement (hereinafter "NAFTA"). * * *

2. Metalclad is an enterprise of the United States of America, incorporated under the laws of Delaware. EcoMetalclad Corporation (hereinafter "ECO") is an enterprise of the United States of America, incorporated under the laws of Utah. Eco is wholly-owned by Metalclad, and owns 100% of the shares in Ecosistemas Nacionales, S.A. de C.V. (hereinafter "ECONSA"), a Mexican corporation. In 1993, ECONSA purchased the Mexican company Confinamiento Tecnico de Residuos Industriales, S.A. de C.V. (hereinafter "COTERIN") with a view to the acquisition, development and operation of the latter's hazardous waste transfer station and landfill in the valley of La Pedrera, located in Guadalcazar. COTERIN is the owner of record of the landfill property as well as the permits and licenses which are at the base of this dispute.

* * *

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 Guadalcazar in SLP. * * *

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").

* * *

31. Shortly thereafter, on May 11, 1993, the government of SLP granted COTERIN a state land use permit to construct the landfill. * * *

32. One month later, on June 11 1993, Metalclad met with 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" [the predecessor organization to SEMARNAP]) 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 * * * purchased COTERIN, the landfill site and the associated permits.

* * *

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 that 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 the SLP's agreement or support had ever been obtained.

* * *

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 State and from Mexico's federal, state and local governments.

46. Demonstrators impeded the "inauguration," blocked the exit and entry 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.

* * *

50. On December 5, 1995, thirteen months after Metalclad's application for the municipal construction permit was filed, the application was denied. * * *

* * *

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 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.

* * *

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 proceeding 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 landfill.

* * *

72. Metalclad contends that Mexico, through its local governments of SLP and Guadalcazar, interfered with and precluded its operation of the landfill. Metalclad alleges that this interference is a violation of Articles 1105 and 1110 of Chapter Eleven of the investment provisions of NAFTA.

73. A threshold question is whether Mexico is internationally responsible for the acts of SLP and Guadalcazar. The issue was largely disposed of by Mexico in paragraph 233 of its post-hearing submission, which stated that "[Mexico] did not plead that the acts of the Municipality were not covered by NAFTA. [Mexico] was, and remains, prepared to proceed on the assumption that the normal rule of state responsibility applies; that is, that the Respondent can be internationally responsible for the acts of state organs at all three levels of government." Parties to that Agreement must ensure that all necessary measures are taken in order to give effect to the provisions of the Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments." (NAFTA Article 105) A reference to a state or province includes local governments of that state or province. (NAFTA Article 201(2)) The exemptions from the requirements of Articles 1105 and 1110 laid down in Article 1108(1) do not extend to states or local governments. This approach accords fully with the established position in customary international law. * * *

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 Guadalcazar, SLP.

78. The Government of Mexico issued a 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. the 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:

> legal 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.

84. The same law also limits state environmental powers to those not expressly attributed to the federal government. Id., Article 7.

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 . . .

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.

* * *

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.

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 concerns. 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 the 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.

102. NAFTA Article 1110 provides that "no party shall directly or indirectly ... expropriate an investment ... or take a measure tanta-

mount to ... expropriation ... except: (a) for a public purpose; (b) on a non-discriminatory 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 ... 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. The 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.

* * *

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.

113. In this instance, the damages arising under NAFTA, Article 1105 and the compensation due under NAFTA, Article 1110 would be the same since both situations involve the complete frustration of the operation of the landfill and negate the possibility of any meaningful return on Metalclad's investment. In other words, Metalclad has completely lost its investment.

114. Metalclad has proposed two alternative methods for calculating damages: the first is to use a discounted cash flow analysis of future profits to establish the fair market value of the investment (approximately $90 million); the second is to value Metalclad's actual investment in the landfill (approximately $20–25 million).

115. Metalclad also seeks an additional $20–25 million for the negative impact the circumstances are alleged to have had on its other business operations. The Tribunal disallows this additional claim because a variety of factors, not necessarily related to the La Pedrera development, have affected Metalclad's share price. The causal relation-

ship between Mexico's actions and the reduction in value of Metalclad's other business operations are too remote and uncertain to support this claim. This element of damage is, therefore, left aside.

* * *

118. NAFTA, Article 1135(1)(a), provides for the award of monetary damages and applicable interest where a Party is found to have violated a Chapter Eleven provision. With respect to expropriation, NAFTA, Article 1110(2), specifically requires compensation to be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place. This paragraph further states that "the valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value."

119. Normally, the fair market value of a going concern which has a history of profitable operation may be based on an estimate of future profits subject to a discounted cash flow analysis. Benvenuti and Bonfant Srl v. The Government of the People's Republic of Congo, 1 ICSID Reports 330; *21 I.L.M. 758;* AGIP SPA v. The Government of the People's Republic of Congo, 1 ICSID Reports 306; *21 I.L.M. 737.*

120. However, where the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit, future profits cannot be used to determine going concern or fair market value. In Sola Tiles, Inc. v. Iran (1987) (14 Iran–U.S.C.T.R. 224, 240–42; *83 I.L.R. 460, 480–81),* the Iran–U.S. Claims Tribunal pointed to the importance in relation to a company's value of "its business reputation and the relationship it has established with its suppliers and customers." Similarly, in Asian Agricultural Products v. Sri Lanka (4 ICSID Reports 246 (1990) at 292), another ICSID Tribunal observed, in dealing with the comparable problem of the assessment of the value of goodwill, that its ascertainment "requires the prior presence on the market for at least two or three years, which is the minimum period needed in order to establish continuing business connections."

121. The Tribunal agrees with Mexico that a discounted cash flow analysis is inappropriate in the present case because the landfill was never operative and any award based on future profits would be wholly speculative.

122. Rather, the Tribunal agrees with the parties that fair market value is best arrived at in this case by reference to Metalclad's actual investment in the project. Thus, in Phelps Dodge Corp. v. Iran (10 Iran–U.S. C.T.R. 121 (1986)), the Iran–U.S. Claims Tribunal concluded that the value of the expropriated property was the value of claimant's investment in that property. In reaching this conclusion, the Tribunal considered that the property's future profits were so dependent on as yet unobtained preferential treatment from the government that any prediction of them would be entirely speculative. (Id. at 132–33.) Similarly, in the Biloune case (see above), the Tribunal concluded that the value of

the expropriated property was the value of the claimant's investment in that property. While the Tribunal recognized the validity of the principle that lost profits should be considered in the valuation of expropriated property, the Tribunal did not award lost profits because the claimants could not provide any realistic estimate of them. In that case, as in the present one, the expropriation occurred when the project was not in operation and had yet to generate revenue. (Biloune, *95 I.L.R. at 228–229).* The award to Metalclad of the cost of its investment in the landfill is consistent with the principles set forth in Chorzow Factory (Claim for Indemnity) (Merits), Germany v. Poland, P.C.I.J. Series A., No. 17 (1928) at p. 47, namely, that where the state has acted contrary to its obligations, any award to the claimant should, as far as is possible, wipe out all the consequences of the illegal act and reestablish the situation which would in all probability have existed if that act had not been committed (the status quo ante).

123. Metalclad asserts that it invested $20,474,528.00 in the landfill project, basing its value on its United States Federal Income Tax Returns and Auditors' Workpapers of Capitalized Costs for the Landfill reflected in a table marked Schedule A and produced by Metalclad as response 7(a) in the course of document discovery. The calculations include landfill costs Metalclad claims to have incurred from 1991 through 1996 for expenses categorized as the COTERIN acquisition, personnel, insurance, travel and living, telephone, accounting and legal, consulting, interest, office, property, plant and equipment, including $328,167.00 for "other."

* * *

125. The Tribunal agrees, however, with Mexico's position that costs incurred prior to the year in which Metalclad purchased COTERIN are too far removed from the investment for which damages are claimed. The Tribunal will reduce the Award by the amount of the costs claimed for 1991 and 1992.

* * *

127. The question remains of the future status of the landfill site, legal title to which at present rests with COTERIN. Clearly, COTERIN's substantive interest in the property will come to an end when it receives payment under this award. COTERIN must, therefore, relinquish as from that moment all claim, title and interest in the site. The fact that the site may require remediation has been borne in mind by the Tribunal and allowance has been made for this in the calculation of the sum payable by the Government of Mexico.

128. The question arises whether any interest is payable on the amount of the compensation. In providing in Article 1135(1) that a Tribunal may award "monetary damages and any applicable interest," NAFTA clearly contemplates the inclusion of interest in an award. On the basis of a review of the authorities, the tribunal in Asian Agricultural Products v. Sri Lanka (4 ICSID Reports 245) held that "interest

becomes an integral part of the compensation itself, and should run consequently from the date when the State's international responsibility became engaged (ibid., p. 294, para. 114). The Tribunal sees no reason to depart from this view. As has been shown above, Mexico's international responsibility is founded upon an accumulation of a number of factors. In the circumstances, the Tribunal considers that of the various possible dates at which it might be possible to fix the engagement of Mexico's responsibility, it is reasonable to select the date on which the Municipality of Guadalcazar wrongly denied Metalclad's application for a construction permit. The Tribunal therefore concludes that interest should be awarded from that date until the date 45 days from that on which this Award is made. So as to restore the Claimant to a reasonable approximation of the position in which it would have been if the wrongful act had not taken place, interest has been calculated at 6% p.a., compounded annually.

* * *

130. Both parties seek an award of costs and fees. However, the Tribunal finds that it is equitable in this matter for each party to bear its own costs and fees, as well as half the advance payments made to ICSID.

131. For the reasons stated above, the Tribunal hereby decides that, reflecting the amount of Metalclad's investment in the project, less the disallowance of expenses claimed for 1991 and 1992 ... and less the estimated amount allowed for remediation, plus interest at the rate of 6% compounded annually, the Respondent shall, within 45 days from the date on which this Award is rendered, pay to Metalclad the amount of $16,685,000.00. Following such period, interest shall accrue on the unpaid award or any unpaid part thereof at the rate of 6% compounded monthly.

Notes and Questions

(1) With reference to NAFTA Article 1105, precisely how did Mexico fail to afford to Metalclad "treatment in accordance with international law, including fair and equitable treatment ... ?" Is the arbitral tribunal saying that the lack of transparency in its system constitutes a violation of Article 1105? Are there any transparency obligations in Chapter 11? Does the reference to transparency in Article 102 create those obligations? Are they simply an inherent part of "international law?" If Mexico has violated its own law, is that a basis for finding a violation of Article 1105?

(2) To what extent does the decision rest on the conclusion that, as a matter of Mexican law, the municipality lacked authority to deny a construction permit, at least on the grounds apparently relied on by the municipality? Mexico disputed this proposition in the arbitration—what standard do the arbitrators apply to resolve the conflict? What standard should they apply? If indeed "the exclusive authority for siting and permitting a hazardous waste landfill resides with the Mexican federal government," (para. 105), why not require Metalclad to pursue its remedy in the Mexican legal system?