

“Custom in International Investment Law: *Glamis Gold* and other developments”  
Notes for a presentation to the NYU Investment Forum, February 8, 2010  
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AUTHOR

Professor Robert Howse, [howserob@gmail.com](mailto:howserob@gmail.com)

It is a commonplace that the contemporary international law of foreign investment, while largely treaty-based, finds its origins or genesis in the customary law of diplomatic protection of aliens. Many bilateral investment treaties and investor protection provisions in free trade agreements, such as the NAFTA, contain obligations of fair and equitable treatment of investors and/or investments, and these obligations are thought most obviously to have as their basis the kind of obligations with respect to treatment of aliens that have long existed in customary international law. Some treaty provisions of this kind spell out particular types of treatment that violate the FET obligation, while others leave wide scope to the arbitral tribunal in articulating the content of the obligation. In the case of the NAFTA the relevant text, Article 1105, provides: “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.” On its face, the text would seem to instruct the treaty interpreter to articulate the relevant content of fair and equitable treatment from the entire universe of relevant sources of international law, most obviously those indicated in Article 38 of the Statute of the International Court of Justice, including other (i.e. non-NAFTA) treaties and conventions, general principles of law of civilized nations, custom, and the views of publicists and rulings of domestic and international tribunals. In so doing, the treaty interpreter would be guided by Articles 31 and 32 of the Vienna

Convention on the Law of Treaties. In determining what international law material that is relevant to ascertaining the content of fair and equitable treatment, the treaty interpreter would consider the ordinary meaning of the words of the treaty, in light of object, purpose and context. This would include the specific object and purpose of the investment protection regime in NAFTA, but also the more general purposes and principles articulated in the opening sections of the NAFTA. Given the distant origins of investment law in the customary law of diplomatic protection, it would seem that an arbitral tribunal might logically give pride of place to that traditional customary law out of which modern treaty law of investor protection has emerged. However, this is less than obvious when we consider that the historical function served by the law of diplomatic protection of aliens only partially overlaps with that of contemporary investment law. The initial importance of diplomatic protection emerges in a world where mistreatment of the national of one state by another could often provoke a diplomatic incident or even hostilities; in effect by treating its national in a certain way, the host state insulted the honor or dignity of the state whose national had been mistreated. In such an earlier world, where, as Teitel and I have recently argued,<sup>1</sup> the *grundnorm* of international law could be understood as sovereign equality, state responsibility for mistreatment of aliens served the function of finding a way to vindicate the sovereign equality of the insulted state through legal satisfaction, arguably reducing the chances of such incidents leading to political and diplomatic tensions, and at the limit, to hostilities. It is not surprising, given the concern with the kind of conduct that could be considered so insulting as to risk political tensions and even hostilities, that the law of diplomatic protection, in its concept of state responsibility, would be concerned with

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<sup>1</sup> “Cross-Judging,” *Infra* n. 13.

giving satisfaction to the offended state for behavior that could rightly be regarded as “shocking” or “egregious.”<sup>2</sup>

But is this the normative or policy preoccupation that underpins the inclusion of fair and equitable treatment in modern investment treaties and free trade agreements? Much of the policy material and academic commentary surrounding the inclusion of FET in modern investment treaties and free trade agreements emphasizes quite different concerns: the purported importance of good governance, some level of administrative fairness, transparency, and regularity, including transparency, to the investor’s ability to operate effectively their business in the host state, and indeed to the effective conduct of international economic relations under conditions of globalization<sup>3</sup> and, secondly and I think it is fair to say more controversially, the notion that FET can provide investors with effective insurance against losses from unanticipated regulatory or political changes in such a way as to constitute an efficient incentive to new investment.. Elsewhere, I have questioned to what extent FET provisions or broad interpretations of expropriation

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<sup>2</sup> The so-called “*Neer* standard”, since it was declared in the 1926 case of *Neer v. United Mexican States*. The actual language in *Neer* is as follows: “the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.” (paragraph 4).

<sup>3</sup> Reflected in the many “transparency” and due process provisions in the WTO treaties for example. See as just one instance Article X of the GATT, which has become increasingly central in disputes before the WTO panels and Appellate Body .

provisions in treaties are really desirable means of providing in effect a form of political risk insurance.<sup>4</sup>

The early approach of NAFTA arbitral tribunals to interpreting FET is clearly visible in *Pope & Talbot v. Canada*. In *Pope*, the tribunal, rejecting Canada's insistent argumentation that the FET standard in NAFTA should be confined to the traditional customary international law of investor protection, held 1105 "to require that covered investors and investments receive the benefits of the fairness elements under ordinary standards applied in the NAFTA countries, without any threshold limitation that the conduct complained of be "egregious," "outrageous or "shocking," or otherwise extraordinary."(Final Award on the Merits, paragraph 118). Considering the object, context and purpose of NAFTA, and noting the requirement in Article 102(2) of NAFTA to interpret the Agreement in light of objectives such as to "increase substantially investment opportunities" the tribunal rejected the limitation of the obligation of FET to the standard in the traditional customary law of diplomatic protection, by suggesting that the obligation in NAFTA was "additive" to the international law standard. In other words, the *Pope* tribunal regarded the ordinary meaning the expression "fairness" in light of the object purpose and context of the NAFTA as controlling, and that ordinary meaning extended beyond the international law *acquis*. It is to be noted that the investor in this case made a different argument, namely that while international law was controlling of the content of the fair and equitable treatment standard in NAFTA 1105, international law was not confined the traditional customary law of diplomatic protection but extended to a variety of sources of law, including decisions of tribunals other bilateral

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<sup>4</sup> Howse, "Compensation for Regulatory Change and Investor Protection in Bilateral Investment Treaties and Regional Trade Agreements: A Policy Analysis", forthcoming in Mavroidis, et al. eds. Volume on law and economics of regional trade agreements.

and multilateral treaties, and evolving custom, which taken together pointed to a content to fairness not confined to situations of conduct shocking and egregious from the perspective of sovereign equality but extending to elements of administrative fairness, transparency, or minimum good governance found in a wide range of norms in various contemporary international law, including international economic law, regimes and in the decisions of other tribunals.<sup>5</sup> I believe the investor's position is more consonant with the text of the NAFTA, where the obligation of treatment is stated in terms of treatment in accordance with international law, *including* fair and equitable treatment. The *Pope* tribunal's concern that the ordinary meaning of fairness in light of object, purpose and context would be distorted if it limited FET to what was "shocking" and "egregious" under the traditional customary law of diplomatic protection is a valid one; but here what fidelity to the VCLT required was for the tribunal to read the expression "international law" in 1105 so as not to defeat or distort the ordinary meaning of the proximate words "fair and equitable treatment." Very simply, by *including* fair and equitable treatment, an expression crystallized in the modern treaty law of investor protection, in the *content* of international law, the drafters were clearly indicating that their concept of international law was not confined to the traditional customary international law of diplomatic protection.

Canada's response to the tribunal's additive view of FET was to persuade the other NAFTA parties, the United States and Mexico to join it in issuing an authoritative FTC interpretation of 1105, to the effect that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of

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<sup>5</sup> In the interests of disclosure, I was an expert witness for the investor in *Pope*, although not on the question of 1105.

treatment to be afforded to investments of investors of another Party.” The interpretation was issued between the award on the merits and the damages phase in the *Pope* proceeding, leading to the possibility that the interpretation should be applied retroactively by the *Pope* tribunal, i.e. that it must revisit its award on the merits.<sup>6</sup>

In its award on damages, the tribunal confronted the meaning of the FTC interpretation for its award on the merits. In addition to the question of retroactivity, the tribunal was confronted with the difficult question of first impression as to whether in its purported binding effect the statement was a valid exercise of the power of the Commission to interpret NAFTA or rather whether it was, in fact, an ultra vires amendment of the NAFTA. The tribunal noted that “nowhere in the over forty negotiating texts submitted does the word “customary” appear in qualification of “international law” in what eventually became Article 1105.”(paragraph 43, Award on Damages). Moreover, the tribunal noted that the negotiators of NAFTA would have expected Article 38 of the ICJ Statute to govern the meaning of international law (paragraph 46). Therefore, the tribunal was inclined to the view that the FTC statement would best be understood not as a mere interpretive clarification of the intent of the NAFTA but rather as an (ultra vires) amendment. However, in a rather dramatic move, the tribunal confined these observations to dicta, stating that it was not necessary to make such a finding of law, even if the tribunal would be inclined to it, if necessary.

The reason it was not necessary was that, according to the tribunal, the customary international law standard of treatment had itself evolved from the traditional law of diplomatic protection; thus the fairness element that the tribunal had presented as “additive” in its award on the merits, was now presented as inclusive in customary

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<sup>6</sup> See correspondence of the tribunal to the parties on this issue.

international law as it had evolved. The tribunal held that “international agreements constitute practice of states and contribute to the grounds of customary international law.”(paragraph 59). In demonstrating the evolution of customary international law, the tribunal pointed to the *ELSI* case, where the ICJ discerned non-arbitrariness as a customary norm, understood as something opposed to the rule of law, “a willful disregard of due process of law”, as well as to the range of bilateral investment agreements articulating standards of fair and equitable treatment where “state conduct (is) to be evaluated under the fairness elements apart from the standards of [traditional] customary international law” (paragraph 61). The tribunal concluded: “the practice of states is now represented by those treaties.”(paragraph 62).

This brings us to *Glamis Gold*. In *Glamis*, the tribunal held, contrary to Pope , that the customary international law standard remains, *presumptively*, that of the traditional law of protection of aliens, prohibiting only “shocking” or “egregious” conduct. This is the standard to be applied under the FTC Interpretation of NAFTA, unless the investor can prove the existence of some new or evolved rule of customary international law. According to the tribunal, “it is difficult to establish a change in customary international law. As Respondent explains, establishment of a rule of customary international law requires: (1) “a concordant practice of a number of States acquiesced in by others,” and (2) “a conception that the practice is required by or consistent with the prevailing law (opinion juris.)” 603. The evidence of such “concordant practice” undertaken out of a sense of legal obligation is exhibited in very few authoritative sources: treaty ratification language, statements of governments, treaty practice (e.g. Model BITs), and sometimes pleadings. Although one can readily identify

the practice of states, it is usually very difficult to determine the intent behind those actions. Looking to a claimant to ascertain custom requires it to ascertain such intent, a complicated and particularly difficult task. In the context of arbitration, however, it is necessarily Claimant's place to establish a change in custom....the difficulty in proving a change in custom, effectively freezes the protections provided for in this provision at the 1926 conception of egregiousness. “

While noting that the Claimant had cited numerous arbitral awards for the proposition that the customary law standard had evolved since the 1920s, the tribunal held that such arbitral awards only had persuasive authority where they themselves were based on the onerous proof of custom in the manner understood by the *Glamis* tribunal itself. However, the tribunal went on to indicate that, although the customary standard was frozen in terms of “shocking” and “egregious” the range of conduct that might be held to be “shocking” or “egregious” today could be considerably different and indeed wider than the case when this standard was originally articulated. Therefore, the scope of FET is not frozen in terms of those kinds of conduct actually found to be “shocking” or “egregious” in the first part of the 20<sup>th</sup> century.

I wish to give a preliminary assessment of the *Glamis* tribunal's approach to custom starting from what I regard as two highly relevant reference points. The first is the method used more generally by international tribunals today to establish custom. This method, as various academic commentators have noted, some admiringly and others highly critically, is sharply different than what might call the old fashioned method set out in *Glamis*.<sup>7</sup> The difference is well captured by Roberts: “traditional custom results from general and consistent practice followed by states from a sense of legal

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<sup>7</sup> Anthea Roberts, Eyal Benvenisiti, Goldsmith and Posner.

obligation....Traditional custom is evolutionary and identified through an inductive process in which a general custom is derived from specific instances of state practice....By contrast modern custom is derived by a deductive process that begins with general statements of rules rather than particular instances of practice....Modern custom can develop quickly because it is deduced from multilateral treaties and declarations by international for a such as the General Assembly, which can declare existing customs, crystallize merging customs, and generate new customs.”<sup>8</sup>. The modern method has been noted in the ICJ rulings in *Nicaragua* (Roberts), the *Continental Shelf* ( Brigitte Sttern), and *Gabcikovo-Nagymaros* (Benvenisti). It has been traced as far back as the *US-Canada Trail Smelter Arbitration*. The modern method has been linked by Benvenisti<sup>9</sup> to the role of international adjudicators in protecting through law global community goods, where the evolution of conventional, i.e. treaty law is transaction costs intensive and too slow to allow for timely protection of these goods. It has been linked by Tasioulas to an increasing concern with the moral substance of international legal norms as a legitimating consideration, relative to state consent as such. Along similar though not identical lines Teitel has framed the modern method as interpretative-responding to the task of the adjudicator in responding to the ascendance of the humanity norm as central to international legal order, while confronting a wide range of given legal material in contexts that remain in relevant ways highly “political.”<sup>10</sup> The modern

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<sup>8</sup> Anthea Roberts, “Traditional and Modern Approaches to Customary International Law: A Reconciliation, *AJIL* 95; 757 (2001), 758, footnotes omitted. Hereinafter, Roberts.

<sup>9</sup> Eyal Benvenisti, “Customary international law as a judicial tool for promoting efficiency,” in Benvenisti and Hirsch, eds., *The Impact of International Law on International Cooperation: Theoretical Perspectives* (Cambridge University Press, 2004).

<sup>10</sup> *Humanity’s Law*, ch. 7, forthcoming OUP.

method has also been noted as pervasive in the jurisprudence of the ICTY (Noora Arajarvi).<sup>11</sup>

The second reference point is the Glamis tribunal's understanding of its own role as an adjudicative institution, given the specific features of NAFTA and investor-state arbitration. Normally, one has to read between the lines to construct the tribunal's self-understanding but to the *Glamis* tribunal's credit, in an extraordinary act of self-reflection, the opening pages of the award state explicitly the tribunal's understanding of its own role and mandate. According to the tribunal, "its mandate under Chapter 11 of NAFTA [is] similar to the case-specific mandate ordinarily found in international commercial arbitration."(paragraph 3). Interpreting the NAFTA is analogous to resolving one dispute under one contract. The tribunal contrasts its own situation with that of "a standing adjudicative body which addresses multiple disputes."(paragraph 3).

At the same time, the *Glamis* tribunal suggests that there is a larger "context" of which it is aware, which is the NAFTA Chapter 11 "system of private investment protection." Insuring the integrity of this "system" requires that the tribunal not "ignore systemic considerations." This entails considering the rulings of other NAFTA tribunals and giving reasons for deviating from them. Indeed, in general "it is important that a NAFTA tribunal provide particularly detailed reasons for its decisions."(paragraph 8). Notably absent from the *Glamis* tribunal's understanding of "context" is the broader universe of international law. This is consonant with its self-image of a commercial arbitrator deciding a dispute under a contract.<sup>12</sup> But a treaty is not a contract. The very

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<sup>11</sup> "Le Rôle du Juge Pénal International dans la Formation du Droit International Coutumier," EJLS 1:2.

<sup>12</sup> Of course, this is a crude self-image even on its own terms in the sense that international commercial arbitration can engage a broader universe of international legal norms even where dealing with a

meaning of a treaty and the rights and obligations that flow from it depends on a set of metanorms and/or default rules (the VCLT , the ILC Articles on State Responsibility, the sources of law in the ICJ Statute). Through its role as a *treaty* interpreter, the NAFTA tribunal is already placed in an interpretive community constituted if underdetermined by such metanorms and/or default rules, an interpretative community including courts tribunals and other actors (such as the ILC for instance) who in their own specific *praxis*, apply, interpret and therefore evolve the norms in question in implicit or explicit dialogue with each other (Teitel and Howse<sup>13</sup>). On this alternative understanding, the individual arbitral tribunal does not stand isolated in fear and trembling before the NAFTA system, as a protestant believer before her G-d; the tribunal operates within and is fully part of a broader interpretative community, even if it is not a standing body hearing multiple cases and controlling its *own* jurisprudence. One could argue that in defining FET itself in terms of treatment in accordance with “international law” the NAFTA drafters were actually assuming that NAFTA tribunals would be indigenized in the interpretative community defined by the idea of public international legality and that deploying “international law” in its full sense, would be, as it were, second nature. The preamble to NAFTA refers to the resolve of the NAFTA parties “BUILD on their respective rights and obligations under the *General Agreement on Tariffs and Trade* and other multilateral and bilateral instruments of cooperation” and 102(2) of NAFTA states: “The Parties

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contractual dispute. But my point is that treaty interpretation places the tribunal directly and obviously within the international law interpretative community.

<sup>13</sup> “Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order,” NYU JILP 41:4 (2009).

shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.”<sup>14</sup>

Let us now consider the *Glamis* tribunal’s treatment of custom in light of the two reference points just articulated. The tribunal’s statement of the method of establishing custom reads as if a naïve schoolchild had picked up a well-worn treatise on international law and copied the definition of “custom.” The tribunal simply does not acknowledge any significant range of views or approaches either in the academic literature or in the practice of international courts and tribunals. While addressing the question of whether the customary law of diplomatic protection had evolved, the tribunal never addressed the question of whether the method of proving custom itself might have evolved. The tribunal’s approach is even more astonishing given that, even though decided in 1926 the *Neer* case itself, which is the tribunal’s authority for the customary law *acquis deviation* from which is essentially impossibly onerous for the investor to prove, is an example of the modern method of establishing custom! In *Neer*, the arbitral tribunal made no effort to directly survey state practice or *opinion juris* from the few authoritative primary sources countenanced by the *Glamis* tribunal: instead, the tribunal began with a statement of the law from the treatises of publicists (and not even a large number) and

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<sup>14</sup> And see Kingsbury and Schill: “Within the severe constraints imposed by the existing architecture of the investor-State arbitration system, several doctrinal approaches for improvement have considerable currency. These include the comprehensive application of general international law methods or treaty interpretation as instantiated in the Vienna Convention on the Law of Treaties (VCLT), deeper analysis and use of the customary international law which underpins or complements central investment treaty provisions, greater reference to ‘general principles of law’ distilled through robust methodologies, and the use of principles of systemic integration and techniques of defragmentation identified by the United Nations International Law Commission and others concerned with the ‘fragmentation’ of international law” “Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law”, p. 4.

said that it would “go a little further than the authors quoted.” The *Glamis* tribunal’s own rule that it cannot rely on statements by tribunals before which custom has not been proven by the traditional method would exclude *Neer* itself. It is certainly mysterious why *Neer* would be more authoritative for the Glamis tribunal than, say, the ICJ ruling in *ELSI*.

If we take the reference point of the tribunal’s self-understanding, which defines its “context” as the NAFTA system, one would have had at least to ask: when the NAFTA drafters referred to interpreting the NAFTA in light of the *applicable* rules of international law, were they not thinking of international law as it would exist at the time at which the interpretation occurred? Or: when the FTC interpretative statement referred to “custom” did it do so in complete unawareness of the modern method of establishing custom, and its arguable predominance in contemporary jurisprudence of international courts and tribunals? In any case the modern method of establishing custom was already rather widespread by the time of the drafting of NAFTA.

Of course, this does not mean that the modern method has been determined, beyond controversy, to be the correct law. It means even less that correctly applying the modern method would have yielded an understanding of FET favorable to the investor’s claim in *Glamis*. I will lay my cards on the table. I am partial to the modern method. I cannot in the context of this Forum fully elaborate a position on the underlying controversy concerning custom but I do think that the modern method is particularly apposite to the underlying character of the international legal system as I understand it. This system remains fragmented, institutionally decentralized, quite uneven and varied in the normative material that it generates and the processes used to generate (bilateral,

plurilateral, multilateral negotiations, hard and soft law, legislative and declaratory material from many overlapping specialist regimes) and yet at least in aspiration unified by interpretative dialogue following certain explicit and implicit canons and some sense of community interests or values (manifested most strongly in *ius cogens* and less strongly in thickening regimes concerning human rights, the environment, etc. manifesting a community interest dimension.) The modern method of creating custom is one means of more adequately positivizing this aspirational unity, without however moving to (in my view an undesirable) constitutionalization or institutional centralization of international law (as suggested recently for instance by Habermas). As Benvenisti suggests, in the decentralized, messy system the transaction costs of organizing variegated and incomplete normative material into legal rules through negotiated consent of all states is extremely high but the communitarian interest in an effective rule may be also very high and pressing (preserving the global commons for interest). In such circumstances, the modern method of establishing custom offers an alternative means of more effective positivization of variegated and in certain ways incomplete or undetermined normative material in light of a relevant conception of communitarian interest. At the same time, the major defect or drawback of the modern method would seem to be its countenancing of judicial activism and its indifference to state consent. Of course, it should be noted, and this goes to the *Glamis* tribunal's rather naïve confidence in the traditional method of proving custom as sufficient to vindicate the value of state consent, that even the traditional method rarely involved canvassing the practice of more than a subset of states (often selectively the most powerful or influential ones: Brigitte Stern), and never required universal or unanimous practice *or opinio juris*. But the

modern method, when understood properly in terms of how normative effects actually operate in the international legal system, hardly renders state practice, and even state consent irrelevant. Generally speaking, a rule of customary international law only gains normative effectiveness through being interpreted, applied, debated, formulated and reformulated by diverse actors-including the organs and agencies of states, other domestic and international tribunals, corporations and individuals, whose behavior is shaped in many ways by states and by politics at multiple sites and levels of governance.<sup>15</sup> In Benvenisti's image, the modern method entails the judges' "leapfrogging" the formation of law through state consent, but not ultimately dispensing with state consent. Where state practice does not *ex post* significantly align itself with custom established by the modern method, then the custom in question is likely to fall into desuetude. As discussed, the Neer standard itself may be an example of "leapfrogging," the tribunal deciding to go 'a little further" than the best statements of the *lex lata* it could find in the work of publicists; if the Neer standard represents state practice therefore it is not that the *Neer* tribunal based its ruling on its own survey of such practice; rather state practice post-*Neer* is confirmatory of *Neer*. And then one needs to ask what about state practice post-*ELSI*?

Now let us return to the particulars of *Glamis*. Is there a community interest in the application of a concept of fairness to the relationship between foreign economic actors and states, beyond the traditional community interest in vindicating sovereign equality through state responsibility for "egregious" and "shocking" conduct towards nationals of another state? Drawing on the approach of Global Administrative law developed by

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<sup>15</sup> See for an elaboration of this point of view, Howse and Teitel, "Beyond Compliance: Rethinking Why International law Really Matters."

Benedict Kingsbury and Richard Stewart and their various collaborators, Kingsbury and Schill suggest that the FET obligation should be seen in light of the of accountability of public authorities and as an increasingly recognized global value or interest, salient across many specialized regimes of international and transnational law and regulation.. But they explicitly stop short of saying that their conception of publicness (which includes elements of transparency and due process) “is part of the recognized *lex lata* or indeed *lex ferenda*.”(p.6)

While one can view the norms of investor protection with respect to FET through the lenses of global administrative law, and make a case for “leapfrogging” through the modern method of custom (and here there are important developments in human rights law and other areas<sup>16</sup> that are relevant, not just the jurisprudence of international economic law), it is also true that FET has become embroiled in the broader social and political controversy concerning investor protection that is part of the debate concerning the basic terms and consequences of “globalization.” In decisions of tribunals such as most dramatically *Tecmed*, notions FET as implying regularity and stability in the framework of governance and regulation have spilled over into a conception of a requirement to compensate investors for unanticipated or unexpected regulatory changes to their disadvantage, a matter of significant and sharp controversy. If one were to craft a modern customary standard for FET, it would be difficult to do so in abstraction from these broader struggles or controversies over the terms of globalization. In its statement of its self-understanding, the tribunal (anxiously, if one reads psychologically between the lines) recognizes these controversies are out there and that what it does will be judged

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<sup>16</sup> Notice for example in the ICJ *LeGrand* decision, the shifting conception of diplomatic protection of aliens: what is protected is not simply the dignity of the state but may also be the “individual rights” of the alien as established under a treaty.

by the private and public actors embroiled in them. And *Glamis* itself raised specifically issues of aboriginal rights and environmental protection. The tribunal's approach, as explicitly articulated in paragraph 8 of its award, is to avoid to the extent possible deciding any "controversial issues." and to refrain from any "statements not required by the case before it." Essentially closing the door to any consideration of the evolution of custom beyond the standard in the traditional law of diplomatic protection of aliens was arguably a way of vindicating this approach of steering clear of controversy to the greatest extent possible—even at the cost of confining FET to a notion that is uncontroversial because it is anachronistic and largely irrelevant to the context of investor protection.

I believe that international law and adjudication are playing and ought to play important roles to play in channeling, shaping and defining broader political controversies over the terms of globalization.<sup>17</sup> Thus, it is not surprising that I am left unsatisfied by the *Glamis*' tribunal's hiding behind anachronism as a controversy-avoidance strategy. There are other methods of preserving and enhancing judicial legitimacy in the context of political and moral controversy, perhaps the central challenge of public law adjudication in general (see for example Sunstein, *Legal Reasoning and Political Conflict*.) But of course the *Glamis* tribunal did not envisage itself as a public law adjudicator. Still, there is the legitimate question of whether these other techniques are available to an ad hoc tribunal that does not have behind it the gravitas of a given political and constitutional culture, or even a jurisprudential *acquis* of its own (and here of course the *Glamis* tribunal expressed explicitly its own feeling of nakedness as it were in not being "a standing adjudicative body.").

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<sup>17</sup> See the concluding section in my review essay "The End of the Globalization Debate", HLR, 2008.

But this returns me to an earlier theme in these remarks. Supposing that the Glamis tribunal had considered itself, while in some sense a stand-alone body, to be an integral participant in the broader international law interpretive community. Is this community thick enough in its interpretative practices and canons, and communitarian enough in its ability to envisage common goods and develop norms through interactive interpretative practice and dialogue, to allow for legitimate adjudication in the presence of competing public values and value claims, despite the absence of a specific background constitutional or political culture? I believe the answer is yes, but only given that international law is not simply *autonomous* in its normative effect and meaning from norms and institutions that are products of those even thicker particular constitutional and political cultures (and in this sense, contra-courant, I view *Kadi* as a *positive* development for international law). An FET standard informed by evolving custom would be inspired not only by the universe of BITs but also the universe of human rights law in the broadest sense; while doubtless encompassing some notion of “Global Administrative Law” (arguably that was there even before the contemporary law of investor protection and the globalization debates, already implicit in *ELSI*), it would arguably also be responsive to the obligations of the state with respect to the human rights of its own citizens; it would thus strike a balance between the values and interests that are up for grabs in the broader globalization debates inasmuch as they concern the terms of investor protection: the legitimate *expectations*<sup>18</sup> of the investor would be defined in terms of the overall demand of international law that the state discharge responsibility for the protection of persons and peoples (Teitel, “Humanity’s Law”). The normative sources of the investors’ legitimate expectations of administrative fairness and due process might turn out to be

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<sup>18</sup> And see Kingsbury and Schill, p. ??.

same or largely overlapping with the normative sources of the state's duty where necessary to change its regulatory framework-in a manner consistent however with administrative fairness and due process-to protect the persons and peoples within its territory.

Ultimately, the *Glamis* tribunal gave itself license to bring in surreptitiously and by the back door-and highly subjectively-all manner of normative material, without being accountable explicitly to the international law interpretative community in the use of this material, or disciplined in its use by the need to engage with that community in a manner structured by its explicit and implicit canons.<sup>19</sup> It did so by stating that while the standard is what is 'shocking' or 'egregious', what appears "shocking" or "egregious" varies historically. Instead of interpreting international law, a disciplined hermeneutic practice, the tribunal, sets itself up as the autonomous and subjective *arbitre* of "current sentiments and ....modern situations"(paragraph 613). It rejects a principled and transparent judicial activism only to embrace a much more dubious form of judicial activism.

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<sup>19</sup> Thus, Kahn characterizes the *Glamis* tribunal as disingenuous or engaged in a "charade" (p. 154)in including in the customary standard a notion of investor expectations which seems remote from traditional customary international law standard for diplomatic protection of aliens. Kahn, "Striking NAFTA Gold: Glamis Advances Investor-State Arbitration", *Fordham International Law Journal* 33:101 (2010),