1 of 1 DOCUMENT

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INTERNATIONAL DECISION: GLAMIS GOLD, LTD. V. UNITED STATES: NAFTA Chapter 11 panel ruling on international minimum standards for investment protection and regulatory takings: Investor rights--NAFTA Chapter 11--indirect expropriation/regulatory taking--fair and equitable treatment--mining rights--protection of Native American sacred sites--international minimum standard--burden of proof

NAME: STEPHAN W. SCHILL, Max Planck Institute for Comparative Public Law and International Law
EDITED BY DAVID J. BEDERMAN

LEXISNEXIS SUMMARY:
... With respect to Glamis's claim under NAFTA Article 1110, the tribunal held that neither the mandatory backfilling requirement nor the interim denial of the project in 2001 constituted measures "tantamount to expropriation"; claimant still formally possessed its mining rights and could exploit mineral resources at a profit, albeit under changed circumstances (see paras. 353-536). ... Even though the M-Opinion was found to have changed the settled approval standard for mining operations significantly (see para. 759), it did "not exhibit blatant unfairness or evident discrimination to this particular investor" (para. 765) and did not upset legitimate expectations, which would have require d , as a threshold circumstance, at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment" (para. 766). ... The arbitral tribunal took an especially sensitive approach in reviewing a state's decision to restrict property rights as a means of protecting noninvestment interests--here the protection of Native American sacred sites against harm caused by open-pit mining operations. ... It is perhaps this statement on the public nature of investment treaty arbitration, along with the implications of this conception for the function of investment tribunals, that will be Glamis Gold's most significant and lasting contribution.

TEXT:
[*253] GLAMIS GOLD, LTD. V. UNITED STATES. Award. *At* <ita.law.uvic.ca/documents/Glamis_Award_001.pdf>.
NAFTA Chapter 11 Arbitral Tribunal, June 8, 2009.

In June 2009, an arbitral tribunal in *Glamis Gold v. United States* n1 dismissed a claim by a Canadian mining company against the United States for breach of Articles 1105 (fair and equitable treatment) and 1110 (expropriation) of the North American Free Trade Agreement. n2 Glamis Gold claimed that the United States, through various acts, wrongfully delayed approval of its open-pit gold-mining project in southeastern California (the "Imperial Project") and that, when federal approval appeared likely, the State of California rendered the project economically unfeasible by introducing a mandatory backfilling requirement in order to protect Native American sacred sites located in the area. The tribunal found that no expropriation had occurred since mining at a profit had not been made impossible, and that the measures did not breach NAFTA Article 1105 since no violation of the customary international law minimum standard, as laid down in the 1926 *Neer* case of the Mexican-U.S. General Claims Commission, had occurred. n3

[*254] In December 1994, claimant, based on mining claims under the federal Mining Law of 1872, n4 had applied for approval of the Imperial Project, which is located on public lands Class L within the California Desert Conser-

vation Area (CDCA). n5 Claimant intended to mine gold and silver in three open pits and expected to remove 150 million tons of ore and 300 million tons of waste rock between 1998 and 2017, yielding at least 1.17 million ounces of gold. Claimant's plan provided only for partial backfilling, leaving one open pit 4700 feet long, 2700 feet wide, and 800 feet deep (see paras. 31-34). However, significant cultural and religious sites of the Native American Quechan Tribe were also located in the area--most notably, the "Trail of Dreams," which is part of a network of ceremonial paths and sacred sites likened in their importance for the tribe to Mekka or Jerusalem (see paras. 103-08, 111).

Under the CDCA Plan issued by the federal Bureau of Land Management (BLM), Class L lands are, in principle, open for mining, but restrictions of mining rights are possible in order "to protect the scenic, scientific, and environmental values . . . against undue impairment" (para. 48). n6 For this purpose, the CDCA Plan requires nondiscretionary approval of mining operations by BLM, subject to the BLM-promulgated "3809 Regulations" (see paras. 49, 53-59). These regulations required that mining operations "include adequate and responsible measures to prevent unnecessary or undue degradation of the federal lands and to provide for reasonable reclamation" (para. 54). "Reasonable reclamation" included measures such as reshaping disturbed land to an appropriate contour and, when necessary, revegetating (para. 58). The 3809 Regulations did not require mandatory backfilling, however, and did not allow the denial of mining operations entirely in order to give precedence to competing land uses, including the protection of cultural resources (see paras. 53-62). n7

Initially, it appeared that Glamis's plan--as BLM itself indicated in November 1996--fulfilled the statutory requirements for approval (see paras. 99, 112). Because of opposition by the Quechan, however, BLM conducted additional ethnographic surveys and concluded, in November 1997, that the project would have "significant unavoidable" impact on the Trail of Dreams, even with complete backfilling (see paras. 103-10). BLM then requested a legal opinion from the Department of the Interior solicitor's office about the conflict of claimant's mining rights and the Quechan's right to practice their religion (see paras. 111-14). Furthermore, in August 1998, the Advisory Council on Historic Preservation (ACHP), a federal public body, recommended to reject Glamis's proposal because it would cause "serious and irreparable" degradation to the sacred sites (see paras. 119-27). n8

In December 1999, the requested legal opinion was issued (the M-Opinion) (see paras. 136-45). It suggested a new standard for approval of mining projects, arguing that independent of the "unnecessary and undue degradation" standard in 3809 Regulations, BLM could [*255] apply the more onerous "undue impairment" standard of the CDCA Plan. Under that standard, the M-Opinion argued, BLM could not only require reasonable mitigation measures, but refuse to approve a project in order to prevent substantial and irreparable harm to cultural values. Based on this novel interpretation of the applicable standard, approval of the Imperial Project was denied in January 2001 under the Clinton administration (see paras. 148-55). Toward the end of 2001, however, the Bush administration repealed the M-Opinion and any decision based on it, thus requiring reconsideration of Glamis's proposal (see paras. 157-65). A decision on Glamis's plan was still outstanding, however, at the time the award was handed down.

Parallel to the 2001 denial of the Imperial Project, the State of California became active in order to stop the Imperial Project and protect the Quechan's sacred sites (see paras. 166-84). For this purpose, the state enacted--in April 2003, when BLM approval of the Imperial Project again appeared likely--legislation, including emergency measures, that introduced a mandatory backfilling requirement for mining activities affecting Native American sacred sites. In parallel, emergency state regulations were enacted, imposing a mandatory backfilling requirement for metallic mining operations. In reaction, claimant filed for arbitration in July 2003 (see para. 185).

With respect to Glamis's claim under NAFTA Article 1110, the tribunal held that neither the mandatory backfilling requirement nor the interim denial of the project in 2001 constituted measures "tantamount to expropriation"; claimant still formally possessed its mining rights and could exploit mineral resources at a profit, albeit under changed circumstances (see paras. 353-536). The tribunal observed that the concept of expropriation in international law comprised "action that is confiscatory or that 'unreasonably interferes with, or unduly delays, effective enjoyment' of the property" (para. 354). n9 By contrast, a "State is not responsible . . . 'for loss of property or for other economic disadvantage resulting from bona fide . . . regulation . . . if it is not discriminatory'" (*id.*). n10 Moreover, an indirect expropriation requires that the state's interference with a property right is permanent and "render[s] almost without value the rights remaining with the investor" without the actual transfer of ownership (para. 355). Accordingly, permanent and substantial impairment of an investor's economic rights can constitute expropriation, whereas mere restrictions on the property rights do not (see para. 357). The measures at issue in *Glamis Gold* did not satisfy even the conditions for indirect expropriation: the denial of the project in 2001 was only of "short duration" (para. 360), and the mandatory backfilling requirement did not render the Imperial Project economically useless. Indeed, the project's post-backfilling-requirement value was determined to be in excess of $ 20 million (see paras. 361-536).

As for the claim under NAFTA Article 1105 (see paras. 537-830), the tribunal agreed with the parties to the arbitration (and with all parties to NAFTA) that the provisions should be interpreted in accordance with the Free Trade Commission's *Notes of Interpretation of Certain Chapter 11 Provisions* n11 as referring to the customary international law minimum standard, not [*256] an automonous treaty standard of fair and equitable treatment (see para. 599). How to determine the content of the customary minimum standard, however, was controversial: claimant argued that the tribunal should follow arbitral precedent interpreting fair and equitable treatment (see para. 542), whereas respondent insisted that a showing was needed of "general and consistent practice of states followed by them out of a sense of legal obligations or *opinio juris*," because "international tribunals do not create customary international law" (para. 543).

The tribunal, essentially siding with the United States, found that its task was not one of treaty interpretation, but one of determining the content of customary international law. Since the parties disagreed as to whether the customary international law minimum standard had evolved since the 1926 *Neer* case, the tribunal determined that it fell on claimant to establish such an evolution through the showing of state practice and *opinio juris* (see paras. 600-03). Arbitral precedent, by contrast, could not create or prove custom, but only illustrate its content, provided that it actually involved an examination of custom rather than an autonomous interpretation of fair and equitable treatment (see paras. 605-11). n12 In examining arbitral precedent--in particular, *Mondev*, n13 *S.D. Myers*, n14 and *International Thunderbird Gaming* n15 --the tribunal found that claimant had not met its burden of proof concerning an evolution of the minimum standard (see paras. 612-27). Conceding that "it is entirely possible . . . that, as an international community, we may be shocked by State actions now that did not offend us previously" (para. 616), the tribunal concluded that

> a violation of the customary international law minimum standard of treatment, as codified in Article 1105 of the NAFTA, requires an act that is sufficiently egregious and shocking--a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons--so as to fall below accepted international standards and constitute a breach of Article 1105. (Para. 627)

In applying that standard, the tribunal determined that none of the measures violated customary international law. Even though the M-Opinion was found to have changed the settled approval standard for mining operations significantly (see para. 759), it did "not exhibit blatant unfairness or evident discrimination to this particular investor" (para. 765) and did not upset legitimate expectations, which would have require[d], as a threshold circumstance, at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment" (para. 766). Furthermore, the delay in the administrative proceedings was not manifestly arbitrary since complicated issues were at stake (see paras. 773-77). The tribunal also found that ACHP's cultural review did not breach customary international law since as it was not the tribunal's mandate "to supplant its own judgment . . . for that of a qualified domestic agency" (para. 779); instead, the tribunal reviewed only whether the agency's review was arbitrary or lacking reasons, ultimately finding against claimant in this respect (see paras. 778-87).

[*257] As regards California's measures, the tribunal found no evidence that claimant's investment was specifically targeted. Instead, the measures were found to be of general application, both in form and effect (see paras. 791-97, 819-21). Likewise, the tribunal saw no reason to take issue with the process by which the new rules were adopted, as claimant, absent specific assurances, could not have had legitimate expectations that the regulatory framework would remain unchanged (see paras. 800-02, 809-15). Likewise, California's legislation was found not to be arbitrary; the measures were rationally related to a legitimate government purpose (see paras. 803-06, 816-18).

* * * *

The award in *Glamis Gold* is the first to deal with the impact of international investment law on domestic regulatory autonomy in a sophisticated land-use management system, which is based on balancing competing land uses. The arbitral tribunal took an especially sensitive approach in reviewing a state's decision to restrict property rights as a means of protecting noninvestment interests--here the protection of Native American sacred sites against harm caused by open-pit mining operations. The tribunal thereby continues a trend in investment jurisprudence to grant significant leeway to domestic institutions to regulate in the public interest in the absence of an investor-state contract or specific assurances by the state that aim at inducing investment. n16 Without a contractual or quasi-contractual bond between investor and state, neither the prohibition of indirect expropriation without compensation nor the fair and equitable treatment standard offer protection against state measures that, in pursuing a legitimate government interest, merely make use, enjoyment, and exploitation of property more costly, but not impossible.

The decision also illustrates a trend to apply NAFTA Article 1105's fair and equitable treatment standard primarily in a proceduralized fashion. Thus, the panel examined the procedural propriety of domestic administrative proceedings and legislation without measuring the outcome of the domestic processes against substantive standards and without testing, other than for unreasonable excesses, the balance struck between competing rights and interests at the domestic level. n17 If one understands the restrictive link that the tribunal draws between the international minimum standard and the *Neer* test primarily as one concerning the standard of review (see paras. 616-17), one can even agree with the otherwise atavistic ruling that the customary international minimum standard is "effectively [frozen] . . . at the 1926 conception of egregiousness" (para. 604). An international arbitral tribunal under NAFTA Chapter 11 should not replace its own value judgments for those of the domestic legislator or administration, but is limited to determine breaches of international law--in particular, where an investor has not made use of available domestic remedies. n18 In this respect, differences between the tribunal's understanding of the customary international minimum standard and an autonomous [*258] interpretation of fair and equitable treatment are, except for issues concerning transparency, perhaps less a question of substance than of the institutional relationship between arbitral tribunals and states and of the applicable level of scrutiny. After all, under the tribunal's ruling, breaches of NAFTA Article 1105 remain possible when state measures, without amounting to bad faith, contravene objective expectations created by the state itself in order to induce investment, and result in "a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons" (para. 627).

By contrast, the tribunal's analysis of the normative content of the international minimum standard is problematic in light of the procedural framework that the tribunal applies. The tribunal appears to go much beyond what the international minimum standard requires of parties to arbitrations. Thus, it is difficult to justify that claimant--a private investor who, under NAFTA Chapter 11, can arbitrate investment-related disputes directly against a foreign state--should bear the burden of proof for establishing what customary international law requires in terms of state practice and *opinio juris*. The private law rationale behind distributing the burden of proof is unconvincing in view of the information asymmetry between the host state and an investor who, without the assistance of its home state, will typically have no access to diplomatic practice. Such an approach also contravenes the understanding of NAFTA Chapter 11 as establishing a "public system of private investment protection" that the tribunal prominently notes at the very beginning of its opinion in *Glamis Gold* (para. 5).

Instead, the tribunal should have applied the principle *iura novit curia* n19 and accepted that the content of the international minimum standard today, rather than emerging through the aggregation of state practice, is forged primarily by the rulings of arbitral tribunals, n20 which are called to determine what international standards of justice require of states in times of a rapidly evolving, global economy. One central feature of a system of investor-state dispute settlement is that arbitral decisions themselves create expectations of investors and states in how principles of investment law will be applied, including fair and equitable treatment. n21 Arguably, the distinction between a treaty-based and a customary standard has little impact on those expectations--in particular, when considering that the customary standard itself lacks precise content and requires interpretation by arbitral tribunals, just like a treaty-based standard of fair and equitable treatment. Accordingly, numerous tribunals within the NAFTA context, as well as beyond, treat both standards indiscriminately in their application to the facts of each specific case. n22 Finally, although the most-favored-nation clause in NAFTA Article 1103 was not [*259] invoked in the present arbitration, it militates against an interpretation of NAFTA Article 1105 as freezing the international minimum standard to what it was in the 1920s. Indeed, even under the *Neer* standard, a delay of fifteen years in an administrative proceeding would likely be considered a denial of justice.

Criticisms notwithstanding, the award in *Glamis Gold* contains an important statement on the function and nature of investment treaty arbitration. Noting that it was only partly "a creature of contract, tasked with resolving a particular dispute arising under a particular contract" (para. 3), the tribunal emphasized that it was operating in "a significant public system of private investment protection" (para. 5). Although each tribunal resolves only an individual dispute, it must "rende[r] its case-specific decision with sensitivity to the position of future tribunals and an awareness of other systemic implications" (para. 6). In the tribunal's view, tribunals must therefore (1) confine their decisions to the issues presented by the specific disputes, (2) accept and address relevant amicus briefs, (3) provide detailed reasons, including for the general public, for their decisions in order to induce compliance and enhance the legitimacy of the arbitral process, (4) prepare brief summaries of their decisions, and (5) give reasons for departing from earlier jurisprudence (see para. 8). It is perhaps this statement on the public nature of investment treaty arbitration, along with the implications of this conception for the function of investment tribunals, that will be ***Glamis*** *Gold's* most significant and lasting contribution. n23

STEPHAN W. **SCHILL**

Max Planck Institute for Comparative Public Law and International Law

Legal Topics:

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Energy & Utilities LawTransportation & PipelinesEminent Domain ProceedingsInternational LawDispute Resolution-TribunalsInternational LawSources of International Law

FOOTNOTES:

n1 Glamis Gold, Ltd. v. United States, Award (NAFTA Ch. 11 Arb. Trib. June 8, 2009).

n2 *North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 107 Star. 2006, 32 ILM 289 & 605 (1993).*

n3 Neer (United States) v. Mexico, Opinion, Oct. 15, 1926, 4 U.N.R.I.A.A. 61-62.

n4 Mining claims under that law constitute property rights protected by the U.S. Constitution. *See* paras. 36-39.

n5 The CDCA was established under the Federal Land Policy and Management Act (FLPMA) of 1976, *43 U.S.C.A. §§ 1701*-1784. The act establishes a land-use management system for public lands that is based on balancing competing land uses. It recognizes the national interest in developing economically sound and stable mining industries, while also aiming to protect the lands' scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values. The FLPMA's land-use management system for the CDCA is implemented through the CDCA Plan. *See Glamis Gold,* Award, paras. 41-50.

n6 Quoting *43 U.S.C.A. § 1781*(f).

n7 A permit for surface-mining operations, as well as reclamation according to government-issued guidelines, was also required at state level. *See* paras. 72-75.

n8 The ACHP's recommendation triggered the withdrawal of Imperial County from new mining activities, although valid existing rights to mine were not affected. *See* paras. 128-35.

n9 Quoting Rudolf Dolzer, *Expropriation and Nationalization, in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 319 (Rudolf Bernhardt ed., 1995).

n10 Quoting *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712*, cmt. (g) (1986).

n11 *See* NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001), *at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en.

n12 For the purpose of determining custom, the tribunal therefore discarded arbitral awards that interpreted a treaty-based standard of fair and equitable treatment standard-in particular, the decision in *Tecnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, para. 154 (May 29, 2003), which is widely seen as presenting a fair definition of that standard.

n13 Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award, paras. 116, 127 (Oct. 11, 2002), 6 ICSID REP. 192 (2004), *42 ILM 85 (2003).*

n14 S.D. Myers, Inc. v. Canada, Partial Award, para. 263 (NAFTA Ch. 11 Arb. Trib. Nov. 13, 2000).

n15 Int'l Thunderbird Gaming Corp. v. Mexico, Award, para. 194 (NAFTA Ch. 11 Arb. Trib. Jan. 26, 2006).

n16 *See* Charles N. Brower & Stephan Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law*? *9 CHI. J. INT'L L. 471, 483-89 (2009)* (with further references).

n17 *See also* Stephan Schill, *"Fair and Equitable Treatment "As an Embodiment of the Rule of Law* (Institute for International Law and Justice Working Paper 2006/6 (Global Administrative Law Series)), *at* http://www.iilj.org/ publications/2006-6Schill.asp (arguing that the jurisprudence of investment tribunals on fair and equitable treatment can be summarized under a primarily institutional and procedural concept of the rule of law).

n18 *See, e.g.*, paras. 762 ("[I]t is not for an international tribunal to delve into the details of and justifications for domestic law. If Claimant, or any other party, believed that Solicitor Leshy's interpretation of the undue impairment standard was indeed incorrect, the proper venue for its challenge was domestic court."), 779 ("It is not the role of this Tribunal, or any international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency.").

n19 *See* MOJTABA KAZAZI, BURDEN OF PROOF AND RELATED ISSUES 44-50 (1995); ANNA RIDDELL & BRENDAN PLANT, EVIDENCE BEFORE THE INTERNATIONAL COURT OF JUSTICE 145-47 (2009).

n20 *See* Hollin Dickerson, *Minimum Standards, in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rudiger Wolfrum ed.), *at* http://www.mpepil.com.

n21 *See* STEPHAN SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 331 n. 156 (2009).

n22 In the NAFTA context see *Mondev, supra* note 13, paras. 117, 125, *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award, paras. 179-86 (Jan. 9, 2003), 18 ICSID REV. 195 (2003), 6 ICSID REP. 470 (2004), and *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, paras. 91-99 (Apr. 30, 2004). Outside the NAFTA context see *Saluka Investments BV v. Czech Republic*, Partial Award, para. 291 (UNCITRAL Mar. 17, 2006), *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, para. 361 (July 14, 2006), *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*,

ICSID Case No. ARB/05/22, Award, para. 592 (July 24, 2008), and *Rumeli Telekom A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, para. 611 (July 29, 2008).

n23 *See also* Stephan Schill, *Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator*, 23 LEIDEN J. INT'L L. 401 (2010).

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