Summary: Glamis brought its claim against the USA for: (i) wrongfully delaying consideration of its proposed project at the federal level; (ii) when there appeared to be possibly federal level approval, California adopted both legislation and regulations concerning the proposed project that rendered it economically infeasible; this expropriated the mining rights possessed by Glamis and denied Glamis fair and equitable treatment in breach of USA’s obligations under Chapter 11 of NAFTA.
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
Washington, D.C.

In accordance with the  
United Nations Commission on International Trade Law (UNCITRAL)  
Arbitration Rules

Glamis Gold, Ltd.  
(Claimant)

- AND -

United States of America  
(Respondent)

AWARD

Before the Arbitral Tribunal constituted under Chapter 11 of the North American Free Trade Agreement, and comprised of:

Michael K. Young  
Professor David D. Caron  
Kenneth D. Hubbard

Secretary of the Tribunal  
Ms. Eloïse Obadia

Legal Assistant to the Tribunal  
Ms. Leah D. Harhay

Date of dispatch to the parties: June 8, 2009
its adjustments are applied to Glamis’ valuation methodology, the post-backfilling valuation of the Imperial Project should be in excess of $20 million. In light of this significantly positive valuation, the Tribunal holds that the first factor in any expropriation analysis is not met: the complained of measures did not cause a sufficient economic impact to the Imperial Project to effect an expropriation of Glamis’ investment. The Tribunal thus holds that Glamis’ claim under Article 1110 fails.16

18. The Tribunal denies Glamis’ Article 1105 claim that it did not receive fair and equitable treatment from both the US federal government and the State of California during its efforts to utilize its federally granted mining right, on the ground that Glamis Gold has not established that any of the cited actions, whether viewed individually or together as a whole, violate the obligation of the United States to provide fair and equitable treatment for the reasons elaborated below.17

19. In some bilateral investment treaties, the phrase “fair and equitable treatment” is viewed as autonomous treaty language. It is not contested at this point in time that the reference in Article 1105 to “fair and equitable treatment” is to be understood not as autonomous treaty language but in terms of customary international law. The content of that rule, however, remains unsettled.18 The Tribunal therefore devotes substantial analysis to this question.19

20. Approaching the task of ascertaining the customary international law standard of “fair and equitable treatment,” the Tribunal employs a mode of reasoning that differs from some of the awards it has reviewed. The Tribunal emphasizes that the task of seeking the meaning of “fair and equitable treatment” by way of treaty interpretation is fundamentally different from the task of ascertaining the content of custom. A tribunal confronted with a question of treaty interpretation can, with little input from the parties, provide a legal answer. It has the two necessary elements to do so, namely the language at issue and rules of interpretation. A tribunal confronted with the task of ascertaining custom, on the other hand, has a quite different task because ascertainment of the content

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16 See infra ¶¶ 534-36.
17 See infra ¶¶ 756-830.
18 See infra ¶¶ 559-62, 600.
19 See infra ¶¶ 598-627.
of custom involves not only questions of law but also questions of fact, where custom is found in the practice of States regarded as legally required by them.\textsuperscript{20} The content of a particular custom may be clear; but where a custom is not clear, or is disputed, then it is for the party asserting the custom to establish the content of that custom.\textsuperscript{21}

21. In the case of the customary international law standard of “fair and equitable treatment,” the Parties in this case and the other two NAFTA State Parties agree that the customary international law standard is at least that set forth in the 1926 Neer arbitration.\textsuperscript{22} The Parties disagree, however, as to how that customary standard has in fact, if at all, evolved since that time. As an evidentiary matter, the evolution of a custom is a proposition to be established. The Tribunal acknowledges that the proof of change in a custom is not an easy matter to establish. In some cases, the evolution of custom may be so clear as to be found by the tribunal itself. In most cases, however, the burden of doing so falls clearly on the party asserting the change.\textsuperscript{23}

22. In the instant case, the Tribunal finds that Glamis fails to establish the evolution in custom it asserts to have occurred. It thus appears that, although situations presented to tribunals are more varied and complicated today than in the 1920s, the level of scrutiny required under Neer is the same. Given the absence of sufficient evidence to establish a change in the custom, the fundamentals of the Neer standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be 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(1). Such a breach may be exhibited by a “gross denial of justice or manifest arbitrariness falling below acceptable international standards;” or the creation by the State of objective expectations in order to induce investment and the subsequent repudiation of those expectations.

\textsuperscript{20} See infra ¶¶ 607-11.
\textsuperscript{21} See infra ¶¶ 601-05.
\textsuperscript{22} See infra ¶ 612.
\textsuperscript{23} See infra ¶¶ 601-05.
349. The basis of the claim is to be determined with reference to the submissions of Claimant. Claimant argues that the events listed by Respondent are not the basis of its claim but rather form “the factual predicate of the unlawful and now rescinded January 17, 2001 Secretarial Record of Decision denying the Imperial Project, and are thus the context for the substantial damage flowing from that decision and the failure of the federal and state government authorities to comply with the law and approve Glamis’s Plan of Operation on a timely basis.”

350. The Tribunal has reviewed the submissions of Claimant and finds that Claimant does not in its Notice of Arbitration, nor its subsequent filings, bring a claim on the basis of the earlier events listed by Respondent. The Tribunal denies Respondent’s objection.

D. **Final Disposition of the Tribunal with respect to Preliminary Objections**

351. The Tribunal holds that Claimant’s claims are not time barred. Claimant does not in its Notice of Arbitration, nor its subsequent filings, bring a claim on the basis of the earlier events listed by Respondent.

352. The Tribunal additionally holds that Claimant’s claim as articulated, that the California measures caused such significant harm to its investment as to effect an expropriation on the date of their passage, is ripe for adjudication.

V. **Claimant’s Claim for Expropriation Under Article 1110**

353. NAFTA Article 1110(1), titled “Expropriation and Compensation,” provides:

No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“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 in accordance with paragraphs 2 through 6.

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698 Claimant’s Reply Memorial, ¶ 287.
354. The inclusion in Article 1110 of the term “expropriation” incorporates by reference the customary international law regarding that subject. Under custom, a State is responsible, and therefore must provide compensation, for an expropriation of property when it subjects the property of another State Party’s investor to an action that is confiscatory or that “unreasonably interferes with, or unduly delays, effective enjoyment” of the property.699 A State is not responsible, however, “for loss of property or for other economic disadvantage resulting from bona fide … regulation … if it is not discriminatory.”700

355. A direct expropriation is readily apparent: there is an “open, deliberate and acknowledged taking[] of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State….”701 In an indirect expropriation, the property is still “taken” by the host government in that the economic value of the property interest is radically diminished, but such an expropriation does not occur through a formal action such as nationalization. Instead, in an indirect expropriation, some entitlements inherent in the property right are taken by the government or the public so as to render almost without value the rights remaining with the investor. An action “tantamount to expropriation”, like an indirect taking, does not involve the direct transfer of title from the investor to the host State. “Tantamount” means equivalent and thus the concept should not encompass more than direct expropriation; it merely differs from direct expropriation which effects a physical taking of property in that no actual transfer of ownership rights occurs.702

356. This proceeding involves the particularly thorny issue of what is commonly known as a regulatory taking. More specifically, the question presented in this

699 RUDOLF DOLZER, EXPROPRIATION AND NATIONALIZATION, 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 319 (Rudolf Bernhardt, ed. 1995).
700 RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712, Comment (g) (1986).
701 Metalclad, Award, ¶ 103 (Aug. 30, 2000).
702 See S.D. Myers, Partial Award, ¶ 285 (Nov. 13, 2000). Actions that result in an indirect taking or are “tantamount to expropriation” include those acts that sometimes constitute what is known as “creeping expropriation”. See S.D. Myers, supra, ¶ 286. Creeping expropriation occurs when the expropriating measures are implemented over a period of time. See Feldman, Award, ¶ 101 (Dec. 16, 2002). Most often, creeping expropriation is said to occur when a State seeks “to achieve the same result [as an outright taking] by taxation and regulatory measures designed to make continued operation of a project uneconomical so that it is abandoned.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712, Reporter’s Note 7 (1986) [Ex. 44].
proceeding is whether the administrative and legislative actions taken individually, or in concert, by the federal government and the State of California constitute an expropriation under Article 1110. The Parties, citing to the 2004 Model Bilateral Investment Treaty, indicate that tribunals in such instances often assess whether measures of a State constitute a non-compensable regulation or a compensable expropriation by examining, inter alia, (1) the extent to which the measures interfered with reasonable and investment-backed expectations of a stable regulatory framework, and (2) the purpose and character of the governmental actions taken. There is for all expropriations, however, the foundational threshold inquiry of whether the property or property right was in fact taken. This threshold question is relatively straightforward in the case of a direct taking, for example, by nationalization. In the case of an indirect taking or an act tantamount to expropriation such as by a regulatory taking, however, the threshold examination is an inquiry as to the degree of the interference with the property right. This often dispositive inquiry involves two questions: the severity of the economic impact and the duration of that impact.

357. Several NAFTA tribunals agree on the extent of interference that must occur for the finding of an expropriation, phrasing the test in one instance as, “the affected property must be impaired to such an extent that it must be seen as ‘taken’”; and in another instance as, “the test is whether that interference is sufficiently restrictive to support a

703 Claimant’s Memorial, ¶ 423; Respondent’s Counter-Memorial, at 160. The Tribunal notes that both Parties, to support this assertion, refer to the 2004 U.S. Model Bilateral Investment Treaty, ann. B ¶ 4, and Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978). The Parties both cite to and rely on U.S. law of takings, not because it is applicable, but because it is argued by both as a well-developed body of law.

704 Cane Tenn., Inc. v. United States, 63 Fed. Cl. 715 (2005), quoting Cienega Gardens v. United States, 331 F.3d 1319, 1345-46 (2003) (internal citations omitted) (“The purpose of consideration of plaintiffs’ investment-backed expectations is to limit recoveries to property owners who can demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.”).

705 OECD, “INDIRECT EXPROPRIATION” AND THE “RIGHT TO REGULATE” IN INTERNATIONAL INVESTMENT LAW, (OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT) 10 (2004/4) [Ex. 53]. See also Saluka, Award, ¶ 264 (Mar. 17, 2006) (emphasis in original) (“It thus inevitably falls to the adjudicator to determine whether particular conduct by a state ‘crosses the line’ that separates valid regulatory activity from expropriation. Faced with the question of when, how and at what point otherwise valid regulation becomes, in fact and effect, an unlawful expropriation, international tribunals must consider the circumstances in which the question arises. The context within which an impugned measure is adopted and applied is critical to the determination of its validity.”).

706 GAMI Investments, Final Award, ¶ 126 (Nov. 15, 2004).
conclusion that the property has been ‘taken’ from the owner.” 707 Therefore, a panel’s analysis should begin with determining whether the economic impact of the complained of measures is sufficient to potentially constitute a taking at all: “[I]t must first be determined if the Claimant was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto . . . had ceased to exist.” 708 The Tribunal agrees with these statements and thus begins its analysis of whether a violation of Article 1110 of the NAFTA has occurred by determining whether the federal and California measures “substantially impair[ed] the investor’s economic rights, i.e. ownership, use, enjoyment or management of the business, by rendering them useless. Mere restrictions on the property rights do not constitute takings.” 709

358. To determine whether Claimant’s investment in the Imperial Project has been so radically deprived of its economic value to Claimant as to potentially constitute an expropriation and violation of Article 1110 of the NAFTA, the Tribunal must assess the impact of the complained of measures on the value of the Project. Claimant has alleged that the federal and California measures acted both individually and together to effect a taking. 710 As to their collective effect, Claimant argues that Respondent, at the federal and state levels, committed a “continuum of acts” with the delay and denial of decisions and approvals by the federal government’s having allowed the State of California the time to impose legislative and regulatory measures on the Imperial Project. 711 Although the federal measures were “partially lift[ed],” there was not, according to Claimant, ever a “correction” of that act; thus Claimant’s investment was left exposed to the subsequent California measures. 712

707 Pope & Talbot, Interim Award, ¶ 102 (June 26, 2000).
708 Tecmed, Award, ¶ 115 (May 29, 2003).
710 Counsel for Claimant, Tr. 1591:10-1592:4.
711 Counsel for Claimant, Tr. 1591:14-1592:1.
712 Counsel for Claimant, Tr. 1591:14-1592:1. See also Claimant’s Memorial, ¶¶ 512-514. Claimant argues that the denial of its Plan of Operations by Secretary Babbitt also severely affected the value of the Imperial Project, occasioning “unreasonable and improper delays” that are “the very reason that Glamis became subject to the California measures in December 2002.” Claimant argues, however that, should the denial not appear sufficiently severe on its own, it breaches international obligations when viewed in totality with the California measures.
359. As this is an indirect expropriation claim and Claimant argues that there are several acts working together to effect the expropriation, several dates of expropriation are discussed. Claimant argues that the date of the California regulations—December 12, 2002—would be the last date upon which expropriation occurred (though it may have occurred previously), and it argues for this date as it is “so much more clear of [a] precise date of expropriation.”713 With respect to the federal measures, Claimant places the date of expropriation as January 17, 2001, the date of the ROD denying the Plan of Operations.714 The Parties in fact discuss many possible dates because, as Claimant explains, “in cases such as these involving measures tantamount to expropriation, the Tribunal could look to other dates as well ….”715 Respondent argues, however, that this, or presumably any date, is an “artificial” date for valuation, as the California reclamation requirements have not yet been applied to Claimant.716

360. To the extent that Claimant argues that the delay and temporary denial occasioned by the federal government themselves effected an expropriation, the Tribunal finds Claimant’s argument without merit. The Tribunal finds that the federal Record of Decision denying approval of the Imperial Project, even if it presented difficulties to Claimant, was quickly reversed and therefore of short duration. This does not constitute an expropriation under NAFTA Article 1110. The Tribunal therefore denies Claimant’s claim that the delay and temporary denial occasioned by the federal government either individually or in combination with subsequent complained of measures of the State of California were violations of Article 1110.

361. To the extent that Claimant is arguing that the federal measures facilitated the expropriation by the California measures, the issue becomes the effect of the California measures. The Tribunal thus focuses upon the effect of the California measures, which

713 Counsel for Claimant, Tr. 1593:3-4; see also 1592:5-11. See also supra ¶¶ 181-84. These regulations took effect on December 18, 2002, and were set to expire as of April 17, 2003, but were re-filed on April 15, 2003, and were finally made final and permanent on April 18, 2003 and, on May 30, 2003, were approved by the Office of Administrative Law.


715 Claimant’s Reply Memorial, ¶ 302; See Counsel for Claimant, Tr. 2002:4-13 (arguing that Respondent, is “responsible for all of the measures,” and therefore, in a claim for an act tantamount to expropriation, there is no need to divide up each of the individual actions. There is a choice as to when, in the pattern of practice that begins with the federal measures on July 17, 2002, expropriation actually occurs.).

716 Counsel for Respondent, Tr. 1903:2-6.
Claimant itself has done. The Tribunal necessarily turns its attention to the impact of the California measures—Senate Bill 22 (“SB 22”) and the State Mining and Geology Board Regulations (“SMGB Regulations”) (collectively referred to as “the backfilling measures” or the “California measures”). Therefore, the Tribunal turns to the determination of whether there has been a radical diminution in value of the Imperial Project, which is ascertained by the analysis of the entitlements and value that remain with Claimant after the enactment of these measures.

The first of the five contested elements concerns the cost of backfilling and involves weighing the two Parties’ contentions as to the appropriate cost of backfilling, which in turn is based on four sub-factors: (a) the calculated cost per ton of backfilling, which includes an analysis of the regulatory requirements for and estimated expenses of pit engineering, (b) the cost of equipment refurbishment, (c) the appropriate swell factors for the two identified mineral groups—ore-containing materials and waste rock—a critical issue for determining how many tons of material would need to be backfilled and thus the ultimate cost of backfilling; and (d) the estimated total tonnage that would need to be backfilled to satisfy the California requirements, which includes evaluating the Parties’ disparate views regarding the timing of such movement and the associated costs of performing the various stages of backfilling at different times. The second element examined is the appropriate weight to be given the third pit, the Singer Pit, and

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717 Counsel for Claimant, Tr. 1593:1-6.
Claimant’s assertion that its value is too speculative to include in the post-backfilling valuation and Respondent’s argument that this assumption is incorrect. The third element that the Tribunal analyzes is the appropriate price of gold: although the Parties agree on the correct price of gold at the alleged date of expropriation, they dispute the relevance of the current price to the value of the Imperial Project. The fourth element the Tribunal analyzes is the Parties’ dispute regarding the amount and type of financial assurances that the federal, state and county governments would require to be posted to ensure proper reclamation of the Imperial Project. The Tribunal assesses both the types of financial assurances available to Claimant, as well as the timing for posting these assurances as required by the various responsible governmental entities. In the fifth and final element, the Tribunal determines the appropriate discount rate to be employed in valuing the Imperial Project as of the asserted date of expropriation—December 12, 2002—which includes an assessment of the disparate discount rates offered by the Parties to use in calculating the present value of the Imperial Project. This rate is based on the risk-free rate plus a component that accounts for the specific risks of the particular project and is a critical component of valuing an asset with an uncertain or risky income stream.

364. The Tribunal in the following sections examines each of these elements and the contentions of the Parties regarding each. With respect to each element, the Tribunal decides upon the appropriate reduction in value, if any, for each of these five elements and modifies the Claimant’s asserted post-backfilling measures valuation. This approach—namely, the Tribunal’s acceptance of Claimant’s assumptions as a starting point—is a best case scenario for Claimant. In essence, this approach asks: “Even if the Tribunal accepts Claimant’s pre-backfilling measures valuation as correct and further accepts Claimant’s characterization of the factors resulting in a reduced value, does a review of the claimed reduction and the resulting adjustments by the Tribunal result in a radical diminution in the value of the Imperial Project?”

365. Thus, to be specific, the Tribunal’s goal in this inquiry into Claimant’s valuation model is not to determine if there was an expropriation, but to determine if there was not

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719 The Tribunal notes that this methodology would not apply at a damages phase, where the Tribunal would be required to reach a final definitive number; whereas in this situation, the Tribunal need only reach the conclusion that substantial value remained.
significant economic impact. These are very different inquiries: the first requires definitive cost calculations and a full revision of the discounted cash flow methodologies to determine exactly the value of the Imperial Project post-backfilling; while the second requires only sufficient calculation to determine if the Project’s value is positive. In this latter endeavor, issues presenting specific complexity, in which the Tribunal is satisfied with neither of the calculations offered by either Party, can be resolved in Claimant’s favor, as the question above is not what is the exact value of the Imperial Project following the complained of measures, but is the value of the post-backfilling Imperial Project positive even if such an issue is decided in Claimant’s favor.

366. The Tribunal, after completing its analysis, concludes that the California backfilling measures did not result in a radical diminution in the value of the Imperial Project. Therefore, it denies Claimant’s claim that the actions of the state and federal government resulted in an expropriation under Article 1110. The Tribunal observes that, although Arbitrator Hubbard dissents to the Tribunal’s conclusion with respect to the fourth element, financial assurances, he agrees that the remaining value of the Imperial Project would be sufficiently positive to warrant dismissal of Claimant’s claim for expropriation.720

A. THE FIRST DISPUTED ELEMENT OF CLAIMANT’S VALUATION: THE COST OF BACKFILLING

1. ISSUE PRESENTED

367. The California measures require complete backfilling of all pits to the extent possible, and spreading and recontouring of any remaining piles to a maximum height of 25 feet. The cost of this required backfilling is central to the determination of whether the value of the Glamis Imperial Project has been so dramatically decreased as to warrant a finding of expropriation under Article 1110. Claimant estimates total reclamation costs at the end of the Project being as much as $98.5 million; Respondent places the total cost of backfilling, spreading and recontouring at approximately $55.4 million, a difference of $43 million.

720 See infra footnote 1044.
derived discount rate of 9.283% in its determination of whether the Imperial Project has in fact suffered significant enough diminution in value as to meet the first requirement of an expropriation.

F. **Final Determination of the Tribunal with Respect to Claimant’s Claim for Expropriation Under Article 1110**

534. The Tribunal therefore makes the following adjustments to Claimant’s post-backfilling valuation to determine whether value remains in the Imperial Project following the imposition of the backfilling measures:

- Substitutes Claimant’s cost per ton figure with that of 28.44 cents;
- Adds $7.7 million to the cash flows in Year 12 (2014) based on the Tribunal’s determination that an equipment refurbishment would not be necessary at that point;
- Determines the appropriate swell factor for both the ore-containing and waste rock at Imperial Project site to be 30.2%; based upon this calculation, the Tribunal reduces the estimate of the total tonnage of waste material that Claimant would need to backfill by 6 million tons;
- Adds $6.43 million to the value of the Imperial Project post-backfilling scenario for additional profits associated with the Singer Pit, but also adds 18.7 million tons that will be produced by mining this pit to the total tons to be backfilled;
- Adopts the price of gold per ounce of $326, as used by both Parties;
- Derives from these adjustments a total cost of backfilling and spreading of $60.86 million (starting in Year 8 and continuing for six years), based on 214 million tons to be backfilled and spread at a cost of $0.2844 per ton;
- Adjusts the cost of financial assurances based on this revised calculation of the total cost of backfilling and spreading and the use of a Letter of Credit at a fee of 1% per annum posted at the Project’s inception; and
- Brings all figures to net present value as of December 12, 2002, using a discount rate of 9.283%.

535. When these adjustments are applied to Claimant’s valuation methodology, the post-backfilling valuation of the Imperial Project exceeds $20 million.

536. In light of this significantly positive valuation, the Tribunal holds that the first factor in any expropriation analysis is not met: the complained of measures did not cause a sufficient economic impact to the Imperial Project to effect an expropriation of
Claimant’s investment. The Tribunal thus holds that Claimant’s claim under Article 1110 fails.

VI. CLAIMANT’S CLAIM UNDER ARTICLE 1105

537. Claimant argues that the complained of measures of the United States federal and California state governments, viewed both individually and collectively, violated its rights to receive fair and equitable treatment as promised by Article 1105 of the NAFTA. In order to evaluate these claims, the Tribunal must first determine the scope and bounds of the customary international law minimum standard of treatment of aliens which, as discussed below, comprises the fair and equitable treatment standard of Article 1105. The Tribunal begins this task by identifying the sources which bear on determining this standard; it then assesses the record to determine what state obligations are required by the customary international law minimum standard of treatment. Finally, the Tribunal will hold the federal and California measures, both individually and as a collective whole, up against this standard and assess whether Claimant has proven a breach of Article 1105.

A. ARTICLE 1105(1) LEGAL STANDARD: WHAT IS REQUIRED OF A STATE PARTY BY THE OBLIGATION TO PROVIDE “FAIR AND EQUITABLE TREATMENT”

1. ISSUE PRESENTED

538. Article 1105(1) of the NAFTA provides that “[e]ach 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.” The scope and reach of what is required of a Party by this standard has been addressed in numerous arbitrations and debated by scholars; this case is no different.

539. The Parties to this Arbitration agree that fair and equitable treatment is a “recognized standard under customary international law,” and that it is “firmly within the minimum standard of treatment to be accorded under customary international


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3. DECISION OF THE TRIBUNAL WITH RESPECT TO THE ARTICLE 1105(1)

LEGAL STANDARD

598. As noted above, Article 1105(1) of the NAFTA provides that “[e]ach 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.”

599. There is no disagreement among the State Parties to the NAFTA, nor the Parties to this arbitration, that the requirement of fair and equitable treatment in Article 1105 is to be understood by reference to the customary international law minimum standard of treatment of aliens.1243 Indeed, the Free Trade Commission (“FTC”) clearly states, in its binding Notes of Interpretation on July 31, 2001, that “Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.”1244

600. The question thus becomes: what does this customary international law minimum standard of treatment require of a State Party vis-à-vis investors of another State Party? Is it the same as that established in 1926 in Neer v. Mexico?1245 Or has Claimant proven that the standard has “evolved”? If it has evolved, what evidence of custom has Claimant provided to the Tribunal to determine its current scope?

601. As a threshold issue, the Tribunal notes that it is Claimant’s burden to sufficiently answer each of these questions. The State Parties to the NAFTA (at least Canada and Mexico) agree that “the test in Neer does continue to apply,” though Mexico “also agrees that the standard is relative and that conduct which may not have violated international law [in] the 1920’s might very well be seen to offend internationally accepted principles today.”1246 If, as Claimant argues, the customary international law

1243 Counsel for Claimant, Tr. 36:15-18; Counsel for Respondent, Tr. 1390:11-14; Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, § B(2) (July 31, 2001) (“FTC Notes”).
1244 FTC Notes, § B(1). For further discussion of the binding nature of the FTC Notes, see NAFTA Article 1131(2): “An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.”
1246 ADF Group, Second Article 1128 Submission of the United Mexican States, p. 15 (July 22, 2002), quoting Pope & Talbot, Post-Hearing Article 1128 Submission of the United Mexican States (Damages Phase), ¶ 8 (Dec. 3, 2001), quoting Pope & Talbot, Respondent Canada’s Counter-Memorial (Phase 2), ¶ 309 (Aug. 18, 2001) (Mexico’s Post-Hearing Article 1128 Submission in Pope & Talbot quotes with approval Canada’s submission as respondent in Pope & Talbot, which states in paragraph 8:

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minimum standard of treatment has indeed moved to require something less than the “egregious,” “outrageous,” or “shocking” standard as elucidated in Neer, then the burden of establishing what the standard now requires is upon Claimant.

602. The Tribunal acknowledges that 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 (opinio 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.

604. The Tribunal notes that, although an examination of custom is indeed necessary to determine the scope and bounds of current customary international law, this requirement—repeatedly argued by various State Parties—because of the difficulty in proving a change in custom, effectively freezes the protections provided for in this provision at the 1926 conception of egregiousness.

605. Claimant did provide numerous arbitral decisions in support of its conclusion that fair and equitable treatment encompasses a universe of “fundamental” principles common throughout the world that include “the duty to act in good faith, due process, transparency and candor, and fairness and protection from arbitrariness.” Arbitral awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove

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“The conduct of government toward the investment must amount to gross misconduct, manifest injustice or, in the classic words of the Neer claim, an outrage, bad faith or the willful neglect of duty.”

1247 Respondent’s Counter-Memorial, at 219 (citations omitted).

1248 In the NAFTA context, there is the addition of Article 1128 submissions through which the State Parties can express directly their views on and interpretations of the provisions of the NAFTA.

1249 Counsel for Claimant, Tr. 40:1-8.
customary international law. They can, however, serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation.

606. This brings the Tribunal to its first task: ascertaining which of the sources argued by Claimant are properly available to instruct the Tribunal on the bounds of “fair and equitable treatment.” As briefly mentioned above, the Tribunal notes that it finds two categories of arbitral awards that examine a fair and equitable treatment standard: those that look to define customary international law and those that examine the autonomous language and nuances of the underlying treaty language. Fundamental to this divide is the treaty underlying the dispute: those treaties and free trade agreements, like the NAFTA, that are to be understood by reference to the customary international law minimum standard of treatment necessarily lead their tribunals to analyze custom; while those treaties with fair and equitable treatment clauses that expand upon, or move beyond, customary international law, lead their reviewing tribunals into an analysis of the treaty language and its meaning, as guided by Article 31(1) of the Vienna Convention.

607. Ascertaining custom is necessarily a factual inquiry, looking to the actions of States and the motives for and consistency of these actions. By applying an autonomous standard, on the other hand, a tribunal may focus solely on the language and nuances of the treaty language itself and, applying the rules of treaty interpretation, require no party proof of State action or \textit{opinio juris}. This latter practice fails to assist in the ascertainment of custom.

608. As Article 1105’s fair and equitable treatment standard is, as Respondent phrases it, simply “a shorthand reference to customary international law,” the Tribunal finds that arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom. The various BITs cited by Claimant may or may not illuminate customary international law; they will prove helpful to this Tribunal’s analysis when they seek to provide the same base floor of

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\item[1251] Counsel for Respondent, Tr. 1934:9-20.
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conduct as the minimum standard of treatment under customary international law; but they will not be of assistance if they include different protections than those provided for in customary international law.

609. Claimant has agreed with this distinction between customary international law and autonomous treaty standards but argues that, with respect to this particular standard, BIT jurisprudence has “converged with customary international law in this area.”1252 The Tribunal finds this to be an over-statement. Certainly, it is possible that some BITs converge with the requirements established by customary international law; there are, however, numerous BITs that have been interpreted as going beyond customary international law, and thereby requiring more than that to which the NAFTA State Parties have agreed. It is thus necessary to look to the underlying fair and equitable treatment clause of each treaty, and the reviewing tribunal’s analysis of that treaty, to determine whether or not they are drafted with an intent to refer to customary international law.

610. Looking, for instance, to Claimant’s reliance on Tecmed v. Mexico for various of its arguments, the Tribunal finds that Claimant has not proven that this award, based on a BIT between Spain and Mexico,1253 defines anything other than an autonomous standard and thus an award from which this Tribunal will not find guidance. Article 4(1) of the Spain-Mexico BIT involved in the Tecmed proceeding provides that each contracting party guarantees just and equitable treatment conforming with “International Law” to the investments of investors of the other contracting party in its territory.1254 Article 4(2) proceeds to explain that this treatment will not be less favorable than that granted in similar circumstances by each contracting party to the investments in its territory by an investor of a third State.1255 Several interpretations of the requirement espoused in Article 4(2) are indeed possible, but the Tecmed tribunal itself states that it “understands that the scope of the undertaking of fair and equitable treatment under Article 4(1) of the Agreement described ... is that resulting from an autonomous interpretation ....”1256

1252 Counsel for Claimant, Tr. 1710:20-22.
1253 See Tecmed, Award, ¶ 4 (May 29, 2003), citing Agreement on the Reciprocal Promotion and Protection of Investments signed by the Kingdom of Spain and the United Mexican States, (Dec. 18, 1996).
1254 Claimant’s Memorial, ¶ 533, footnote 1033, quoting Tecmed, Award, ¶ 154 (May 29, 2003).
1255 Agreement on the Reciprocal Promotion and Protection of Investments signed by the Kingdom of Spain and the United Mexican States, Article 4(2) (Dec. 18, 1996).
1256 Tecmed, Award, ¶ 155 (May 29, 2003) (emphasis added).
Thus, this Tribunal finds that the language or analysis of the Tecmed award is not relevant to the Tribunal’s consideration.

611. The Tribunal therefore holds that it may look solely to arbitral awards—including BIT awards—that seek to be understood by reference to the customary international law minimum standard of treatment, as opposed to any autonomous standard. The Tribunal thus turns to its second task: determining the scope of the current customary international law minimum standard of treatment, as proven by Claimant.

612. It appears to this Tribunal that the NAFTA State Parties agree that, at a minimum, the fair and equitable treatment standard is that as articulated in Neer:1257 “the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful 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.”1258 Whether this standard has evolved since 1926, however, has not been definitively agreed upon. The Tribunal considers two possible types of evolution: (1) that what the international community views as “outrageous” may change over time; and (2) that the minimum standard of treatment has moved beyond what it was in 1926.

613. The Tribunal finds apparent agreement that the fair and equitable treatment standard is subject to the first type of evolution: a change in the international view of what is shocking and outrageous. As the Mondev tribunal held:

Neer and like arbitral awards were decided in the 1920s, when the status of the individual in international law, and the international protection of foreign investments, were far less developed than they have since come to be. In particular, both the substantive and procedural rights of the individual in international law have undergone considerable development. In light of these developments it is unconvincing to confine the meaning of ‘fair and equitable treatment’ and ‘full protection and security’ of foreign investments to what those

1258 Neer v. Mexico, 4 R. Int’l Arb. Awards, ¶ 4 (Oct. 15, 1926). The Neer tribunal continued to explain that its inquiry was limited to “whether there [was] convincing evidence either (1) that the authorities administering the Mexican law acted in an outrageous way, in bad faith, in wilful neglect of their duties, or in a pronounced degree of improper action, or (2) that Mexican law rendered it impossible for them properly to fulfil their task.” Id. ¶ 5.
terms—had they been current at the time—might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.  

Similarly, this Tribunal holds that the Neer standard, when applied with current sentiments and to modern situations, may find shocking and egregious events not considered to reach this level in the past.

614. As regards the second form of evolution—the proposition that customary international law has moved beyond the minimum standard of treatment of aliens as defined in Neer—the Tribunal finds that the evidence provided by Claimant does not establish such evolution. This is evident in the abundant and continued use of adjective modifiers throughout arbitral awards, evidencing a strict standard. International Thunderbird used the terms “gross denial of justice” and “manifest arbitrariness” to describe the acts that it viewed would breach the minimum standard of treatment. S.D. Myers would find a breach of Article 1105 when an investor was treated “in such an unjust or arbitrary manner.” The Mondev tribunal held: “The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome ....”

615. The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community. Although the circumstances of the case are of course relevant, the standard is not meant to vary from state to state or investor to investor. The protection afforded by Article 1105 must be distinguished from that provided for in Article 1102 on National Treatment. Article 1102(1) states: “Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors ....” The treatment of investors under Article 1102 is compared to the treatment the State’s own investors receive and thus can

1259 Mondev, Award, ¶ 116 (Oct. 11, 2002).
1261 S.D. Myers, Partial Award, ¶ 263 (Nov. 13, 2000) (emphasis added).
1262 Mondev, Award, ¶ 127 (Oct. 11, 2002) (emphasis added).
vary greatly depending on each State and its practices. The fair and equitable treatment promised by Article 1105 is not dynamic; it cannot vary between nations as thus the protection afforded would have no minimum.

616. It therefore appears that, although situations may be more varied and complicated today than in the 1920s, the level of scrutiny is the same. The fundamentals of the Neer standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be 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(1). The Tribunal notes that one aspect of evolution from Neer that is generally agreed upon is that bad faith is not required to find a violation of the fair and equitable treatment standard, but its presence is conclusive evidence of such. Thus, an act that is egregious or shocking may also evidence bad faith, but such bad faith is not necessary for the finding of a violation. The standard for finding a breach of the customary international law minimum standard of treatment therefore remains as stringent as it was under Neer; it is entirely possible, however that, as an international community, we may be shocked by State actions now that did not offend us previously.

617. Respondent argues below that, in reviewing State agency or departmental decisions and actions, international tribunals as well as domestic judiciaries favor deference to the agency so as not to second guess the primary decision-makers or become “science courts.” The Tribunal disagrees that domestic deference in national court systems is necessarily applicable to international tribunals. In the present case, the Tribunal finds the standard of deference to already be present in the standard as stated, rather than being additive to that standard. The idea of deference is found in the modifiers “manifest” and “gross” that make this standard a stringent one; it is found in the idea that a breach requires something greater than mere arbitrariness, something that is surprising, shocking, or exhibits a manifest lack of reasoning.

618. With this thought in mind, the Tribunal turns to the duties that Claimant argues are part of the requirements of a host State per Article 1105: (1) an obligation to protect
legitimate expectations through establishment of a transparent and predictable business and legal framework, and (2) an obligation to provide protection from arbitrary measures. As the United States explained in its 1128 submission in Pope & Talbot, and as Mexico adopted in its 1128 submission to the ADF tribunal: "‘fair and equitable treatment’ and ‘full protection and security’ are provided as examples of the customary international law standards incorporated into Article 1105(1). … The international law minimum standard [of treatment] is an umbrella concept incorporating a set of rules that has crystallized over the centuries into customary international law in specific contexts.”

The Tribunal therefore finds it appropriate to address, in turn, each of the State obligations Claimant asserts are potential parts of the protection afforded by fair and equitable treatment.

a. Asserted Obligation to Protect Legitimate Expectations Through Establishment of a Transparent and Predictable Legal and Business Framework

619. As explained above, the minimum standard of treatment of aliens established by customary international law, and by reference to which the fair and equitable treatment standard of Article 1105(1) is to be understood, is an absolute minimum, a floor below which the international community will not condone conduct. To maintain fair and equitable treatment as an absolute floor, a breach must be based upon objective criteria that apply equally among States and between investors.

620. The Tribunal notes Respondent’s argument that even those expectations that manifest in a contract are insufficient to provide a basis for a breach of the minimum standard of treatment. The Tribunal agrees that mere contract breach, without something further such as denial of justice or discrimination, normally will not suffice to establish a breach of Article 1105. Merely not living up to expectations cannot be sufficient to find a breach of Article 1105 of the NAFTA. Instead, Article 1105(1)

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1263 ADF Group, Second Article 1128 Submission of the United Mexican States, p. 8 (July 22, 2002), quoting Pope & Talbot, Fourth Article 1128 Submission of the United States, ¶3, 8 (Nov. 1, 2000).
1264 Counsel for Respondent, Tr. 1397:15-18; Respondent’s Rejoinder, at 180.
1265 See Azinian v. United Mexican States (“Azinian”), NAFTA/ICSID Case No. ARB/(AF)/97/2, Award, ¶87 (Nov. 1, 1999) (holding, “NAFTA does not, however, allow investors to seek international arbitration for mere contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes.”).
requires the evaluation of whether the State made any specific assurance or commitment to the investor so as to induce its expectations.\textsuperscript{1266}

621. The Tribunal therefore agrees with \textit{International Thunderbird} that legitimate expectations relate to an examination under Article 1105(1) in such situations “where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct ….”\textsuperscript{1267} In this way, a State may be tied to the objective expectations that it creates \textit{in order to induce} investment.

622. As the Tribunal determines below that no specific assurances were made to induce Claimant’s “reasonable and justifiable expectations,” the Tribunal need not determine the level, or characteristics, of state action in contradiction of those expectations that would be necessary to constitute a violation of Article 1105.

\textbf{b. Asserted Obligation to Provide Protection from Arbitrary Measures}

623. With respect to the asserted duty to protect investors from arbitrariness, the Tribunal notes Claimant’s citations to several NAFTA arbitrations that have found a violation of Article 1105 in arbitrary state action. Claimant cites to \textit{S.D. Myers} for its holding that “a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust and arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.”\textsuperscript{1268} Similarly, it quotes \textit{International Thunderbird}’s holding that “manifest arbitrariness falling below acceptable international standards” is prohibited under Article 1105.\textsuperscript{1269}

624. The Tribunal also notes, however, Respondent’s argument that no Chapter 11 tribunal has found that decision-making that appears arbitrary to some parties is sufficient to constitute an Article 1105 violation.\textsuperscript{1270} In \textit{Mondev}, for instance, the tribunal held: “The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the

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\item[1266] \textit{Mondev}, Final Award, Part IV, Ch. D, ¶ 7 (Aug. 3, 2005).
\item[1267] \textit{International Thunderbird}, Award, ¶ 147 (Jan. 26, 2006) (internal citation omitted).
\item[1268] Claimant’s Reply Memorial, ¶ 239, quoting \textit{S.D. Myers}, Partial Award, ¶ 263 (Nov. 13, 2000).
\item[1269] \textit{Id.}, citing \textit{International Thunderbird}, Award, ¶ 194 (Jan. 26, 2006).
\item[1270] Respondent’s Counter-Memorial, at 227.
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judicial propriety of the outcome …. “ 1271 Respondent understands this to be the case because tribunals consistently afford administrative decision-making a high level of deference. 1272 Respondent quotes S.D. Myers to illustrate this deference: “determination [that Article 1105 has been breached] must be made in light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.” 1273 This, Respondent argues, leads to the result that merely imperfect legislation or regulation does not give rise to State responsibility under customary international law. 1274

625. The Tribunal finds that, in this situation, both Parties are correct. Previous tribunals have indeed found a certain level of arbitrariness to violate the obligations of a State under the fair and equitable treatment standard. Indeed, arbitrariness that contravenes the rule of law, rather than a rule of law, would occasion surprise not only from investors, but also from tribunals. 1275 This is not a mere appearance of arbitrariness, however—a tribunal’s determination that an agency acted in a way with which the tribunal disagrees or that a state passed legislation that the tribunal does not find curative of all of the ills presented; rather, this is a level of arbitrariness that, as International Thunderbird put it, amounts to a “gross denial of justice or manifest arbitrariness falling below acceptable international standards.” 1276

626. The Tribunal therefore holds that there is an obligation of each of the NAFTA State Parties inherent in the fair and equitable treatment standard of Article 1105 that they do not treat investors of another State in a manifestly arbitrary manner. The Tribunal thus determines that Claimant has sufficiently substantiated its arguments that a duty to protect investors from arbitrary measures exists in the customary international law minimum standard of treatment of aliens; though Claimant has not sufficiently rebutted Respondent’s assertions that a finding of arbitrariness requires a determination of some act far beyond the measure’s mere illegality, an act so manifestly arbitrary, so unjust and surprising as to be unacceptable from the international perspective.

1271 Mondev, Award, ¶ 127 (Oct. 11, 2002).
1272 Respondent’s Counter-Memorial, at 227.
1273 Id. at 230, quoting S.D. Myers, Partial Award, ¶ 263 (Nov. 13, 2000).
1274 Respondent’s Rejoinder, at 188.
1275 ELSI, Judgment, ¶ 128 (July 28, 1989).
1276 International Thunderbird, Award, ¶ 194 (Jan. 26, 2006).
4. **Final Disposition of the Tribunal with Respect to the Scope of the Fair and Equitable Legal Standard**

627. The Tribunal holds that Claimant has not met its burden of proving that something other than the fundamentals of the *Neer* standard apply today. The Tribunal therefore holds 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. Such a breach may be exhibited by a “gross denial of justice or manifest arbitrariness falling below acceptable international standards;”1277 or the creation by the State of objective expectations in order to induce investment and the subsequent repudiation of those expectations.1278

The Tribunal emphasizes that, although bad faith may often be present in such a determination and its presence certainly will be determinative of a violation, a finding of bad faith is not a requirement for a breach of Article 1105(1).

B. **Determination of Whether the Facts Alleged Violate the Articulated Legal Standard of Article 1105(1)**

628. Claimant argues, as part of its claim under Article 1105 of the NAFTA, that in “determining whether the Respondent’s conduct rises to the level of a breach of Article 1105, the Tribunal should consider the entirety of its conduct rather than focusing on individual aspects of that conduct.”1279 Quoting *GAMI*, Claimant asserts that “[t]he record as a whole—not isolated events—determines whether there has been a breach of international law.”1280 To support its claim that the entirety of the United States federal and California State actions worked together to violate Claimant’s rights under Article 1105, however, Claimant discusses the individual federal and State actions—and their

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1277 *Id.*
1278 The Tribunal takes no position on the type or nature of repudiation measures that would be necessary to violate international obligations. As the Tribunal held above, Claimant has not proved governmental actions that would have legitimately created such expectations; the Tribunal therefore need not and does not reach the latter half of the inquiry.
1279 Claimant’s Memorial, ¶ 556.
1280 *Id.*, quoting *GAMI Investments*, Final Award, ¶ 97 (Nov. 15, 2004).