Court File No. T-153-13

FEDERAL COURT

BETWEEN:

HUPACASATH FIRST NATION

APPLICANT

- and -

THE MINISTER OF FOREIGN AFFAIRS CANADA and THE ATTORNEY GENERAL OF CANADA

RESPONDENTS

REPLY OF THE APPLICANT, HUPACASATH FIRST NATION

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Reply of the Applicant, Hupacasath First Nation

Introduction

1. In an effort to dismiss the Applicant's claims as being "without merit," Canada has tried to cast the Applicant's argument as being a general challenge to the wisdom of the Executive's decision to ratify the CCFIPPA. Canada suggests that it can identify the Applicant's "real concerns" and that these should be equated with those raised by non-First Nations parties in *Council of Canadians*.[1] Canada's argument demonstrates that it has failed to recognize and give regard to the unique interests of First Nations such as the Applicant with respect to the CCFIPPA, and to consider its specific constitutional obligation to engage in consultation with respect to those interests in a manner consistent with the honour of the Crown.

2. The duty to consult is aimed at ensuring that Crown decision-making takes into account the interests of aboriginal people who may have rights to land and resources protected by s. 35 of the *Constitution Act, 1982*. The existence of the duty does not depend on a demonstration that those rights have been breached, as is the case in a *Charter* claim like that raised in *Council of Canadians*. Rather, the duty arises when Crown action "may adversely affect" the ability of aboriginal people to exercise or realize those rights. The duty is aimed at promoting reconciliation by ensuring that aboriginal interests are recognized and respected when the Crown is contemplating actions which may render those rights more vulnerable. A finding that Canada has a duty to consult does not detract from its ability to make and implement policy decisions about international investment treaties. It just means that Canada must first engage in a process which ensures that it listens to and appropriately responds to the concerns of the Applicant prior to assuming obligations which cannot be terminated by any legislature or court for at least 30 years.

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[1] *Council of Canadians v. Canada (Attorney General)* (2006), 217 O.A.C. 316 (QL), aff'g *Council of Canadians v. Canada (Attorney General)*, [2005] O.J. No. 3422 (QL (ON SC), leave to appeal ref'd [2007] S.C.C.A. No. 48 [*Council of Canadians*], Respondents' Book of Authorities ("R BOA") Vol. II, Tabs 40, 39 and 41

Canada: The CCFIPPA Does Not Change any Laws or the Regulation of Land and Resources in Canada

3. Canada's first argument, clearly aimed at equating the case at bar with *Council of Canadians*, is that the ratification of the CCFIPPA cannot, "as a matter of law," give to a duty to consult, because the ratification and operation of the CCFIPPA "will not alter Canadian domestic law." Whether a proposed Crown action will "alter existing laws" has never been part of the analysis regarding whether the duty to consult arises. The question is whether the action, which can include the full panoply of non-legislative Crown conduct, might adversely affect the exercise of or protection for aboriginal rights or title, not whether the law has been changed. While such an argument may well have been successful in *Council of Canadians* where an alleged breach of the *Charter* was raised, it is no answer to the Applicant's claim that a duty to consult is triggered.

4. Similarly, Canada repeatedly states that the CCFIPPA will not "determine" the Applicant's s. 35 rights under Canadian law.[2] Again, that is not the question. Nothing, short of constitutional amendment, can have the effect of changing the constitutional protection given to Aboriginal Rights and Title. But in *Haida*[3] the Supreme Court of Canada held that where the Crown makes a decision that might adversely affect the exercise of Aboriginal Rights, or the protection of the land and resources which are the subject of Aboriginal Rights, consultation must take place.

5. Canada also argues that there can be no adverse effect on Aboriginal Rights because FIPPA "has no application to how resources are managed." The Applicant's argument is not that the CCFIPPA applies to directly regulate the resources which are the subject of its rights and title claims. Rather, we argue that Canada's agreement to be bound by the CCFIPPA "may set the stage for further decisions that will have a direct adverse impact on land and resources" by granting Chinese investors enforceable rights which must be taken into account when any level of

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[2] See, for example, Respondent's Memorandum of Fact and Law, para. 101

[3] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*], Applicant's Motion Record ("AR") Vol. IV, pp. 1115-36

government makes any kind of resource management decision.[4] While the existing domestic law has not been modified, Canada has taken on an obligation to only develop the domestic law, or exercise its own authority under that law, in a manner consistent with an entirely separate body of rules. That other body of rules, applied by a new decision making body consisting of *ad hoc* arbitrators appointed by the parties, will determine whether measures taken by all levels of government in Canada amount to a breach of the obligations under the CCFIPPA, for which compensation is payable. Governments at all levels will have to take that into account when they are deciding what measures to enact or steps to take, including steps to protect or accommodate asserted Aboriginal Rights and Title claims.

6. To support its argument, Canada relies on the fact that the arbitral tribunals will have no means of actually preventing Canada from acting a manner inconsistent with its obligations under the CCFIPPA. This is of no consequence. The Court cannot proceed on the basis that Canada will disregard its international commitments. Canada's ratification of the CCFIPPA must be seen as a promise to act in accordance with the obligations it has assumed. In any event, Canada's evidence is that it does take its international obligations into account when making decisions about how to exercise its powers.[5] This is to be expected. Canada cannot on the one hand promise the international community that it will exercise its governance powers in a certain way, and on the other hand say that there was no obligation to consult on those commitments because international tribunals have no means of actually preventing Canada from enacting inconsistent laws.

7. At para. 136 of its Memorandum, Canada refers to the Applicant's argument that claims under the CCFIPPA may "operate as a disincentive to the Crown to provide reasonable accommodation of rights and title." Canada suggests that this is entirely answered because "the duty to consult and, where appropriate, accommodate will continue to operate between the Crown and First Nations, untouched." This

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[4] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, 2 S.C.R. 650 [*Rio Tinto*], para. 45, AR Vol. IV, p. 1388

[5] Cross-Examination on Affidavit of Vernon John MacKay, conducted on April 3, 2013 ("MacKay Cross"), Ex. 1, AR Vol. II, pp. 482-483, 537

ignores the fact that the assessment of what constitutes reasonable consultation and accommodation entails a balancing of the various interests involved, with attention to the particular factual context. Granting one group of resource investors new enforceable rights with respect to their investments, backed up by a right to compensation funded by Canadian tax payers, changes the equation. To suggest that this will have no impact on what happens on the ground is simply not sustainable.

Canada: The Applicant's Claims are Entirely Speculative

8. Relying on the Supreme Court of Canada's dicta in *Rio Tinto*, the vast majority of Canada's argument is aimed at seeking to persuade this Court that the potential adverse effects on aboriginal rights and title are "too speculative" to give rise to the duty to consult in this case. However, in seeking to do so, Canada has significantly mischaracterized the Applicant's arguments, the law on the duty to consult, and the evidence before the Court concerning the effects of the CCFIPPA.

9. The jurisprudence on what is or not "too speculative" is not particularly well developed to date. In our submission, there are a few key factors which must be considered in determining whether the potential for interference with aboriginal rights is sufficient in this case to trigger the duty to consult.

10. First, contrary to the repeated suggestions by Canada, this case does not bring into question the government's authority to determine that it is in Canada's best interests to enter into the CCFIPPA. We do not ask this Court to second-guess the investment trade policy which Canada intends to implement through the CCFIPPA, or find that the treaty itself conflicts with any fundamental constitutional principle. Rather, the only question before the Court is whether the federal government is required to engage in a process of consultation prior to ratifying the treaty. The question of what effects are "too speculative" must be assessed based on the understanding that what is at stake is not the ability of Canada to assume the obligations set out in the CCFIPPA, but only whether it will engage in some form of consultation prior to doing so.

11. In this regard, we note that Canada has entered into numerous agreements with First Nations, protected by s. 35 of the *Constitution Act, 1982*, which specifically provide that Canada will engage in consultation prior to assuming new international obligations. Canada cannot now assert that there is something in the nature of international treaty making which insulates it from the requirements of the duty to consult with First Nations.

12. Canada attempts to make much of the fact that there has never been any request for consultation with respect to any other investment treaty. This may be true, but it is entirely irrelevant. The concerns that the Applicant has with this FIPPA arise because of the significant amount of Chinese investment in Canada. None of the other FIPPAs involve a country with which Canada is in a capital importing position. Most of the countries with whom Canada has concluded a FIPPA have virtually no investment in Canada. The only agreement, other than this particular FIPPA, that Canada has entered into involving an investor state arbitration mechanism where there is significant foreign investment in Canada is NAFTA, which was entered into in 1994. The duty to consult was not even recognized until ten years later. Even if the novel nature of the claim was somehow relevant to the analysis, the novelty would not be unexplained. This is the first time the issue could have arisen.

13. A critical factor which must inform the assessment of whether the duty to consult arises in this case is that once the CCFIPPA is ratified, it will be beyond the power of any Canadian legislature or court for a period of at least 15 years, and its protection for existing investments will extend for another 15 years after that. This is different than most, if not all other kinds of government decisions which may give rise to a duty to consult. While we agree that most of the provisions at issue here are similar to those in NAFTA, there is one very significant difference between the CCFIPPA and NAFTA, which Canada entirely fails to address. NAFTA has no minimum term – it can be terminated at any time by either party with one year's notice. No other FIPPA has as long a term as this one. In a very real sense, then, this

is the last opportunity for Canada to engage in meaningful consultation with First Nations on the CCFIPPA. It cannot be said that the claim is premature.

14. With those factors in mind, we now turn to Canada's specific arguments that the potential impact on aboriginal rights and title is "too speculative."

15. Canada suggests that the Applicant's concerns are too speculative because they have not identified a Chinese investor in their territory, or a specific government measure which would give rise to a claim. We submit that when the government decision is one which is irrevocable for a period of 30 years, the fact that the Applicant cannot identify a current Chinese investor or an existing government measure that is at risk of being challenged right at this time cannot be determinative of whether the Applicant's concerns are "too speculative." As the Court stated in *Rio Tinto*, it is appropriate to take a "generous, purposive approach" to the question of whether the Crown activity has an adverse effect on the aboriginal right. This is because the doctrine's purpose is to "recognize that actions affecting Aboriginal title or rights can have irreversible effects that are not in keeping with the honour of the Crown."[6]

16. In any case, Canada cannot now claim that the reason it takes the position that there is no duty to consult with the Applicant is because there is no identifiable Chinese investment in their traditional territory. The Dene Tha' First Nation has identified a Chinese investor in their traditional territory, engaged in fracking, which the Dene Tha' are very concerned may impact on the exercise of their rights.[7] A moratorium on fracking is the subject of a recent NAFTA complaint against Canada.[8] However, Canada did not engage in any consultation with the Dene Tha', despite their request for it. In these circumstances, the Court should completely disregard Canada's suggestion that the duty to consult is not triggered because of the specific circumstances of the HFN.

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[6] *Rio Tinto*, para. 46, AR Vol. IV, p. 1388
[7] Affidavit of Chief James Ahnassay, sworn March 13, 2013, paras. 9-13, Ex. C, AR Vol. II, pp. 318, 324
[8] MacKay Cross, Ex. 5, AR Vol. III, pp. 623-39

17. Similarly, Canada cannot now take the position that the fact that the Applicant has not been actively engaged in the treaty process since 2009 means that the claim that the ratification of the CCFIPPA will limit the law making powers which they can negotiate in a treaty is too speculative. The very purpose of the duty to consult is to ensure that when a First Nation is able to conclude a treaty, the ability to negotiate meaningful rights has not been rendered ineffective as a result of previous actions of the Crown. However, when a First Nations raises the duty to consult, there is no need to prove that they have reached a specific point in the treaty process. Some First Nations are not participating in the treaty process at all, but are still able to rely on the duty to consult. In this case, Ms. Sayers, on cross examination, made it clear that the HFN remains committed to the treaty process, but has not progressed in the past three years due to capacity issues. As a result they remain at stage 4 of the process.[9]

18. In any event, Canada cannot now say that the claim about the limitation on treaty rights of governance is too speculative because of the HFN's circumstances when it has refused to consult even with a First Nation who already has treaty rights to self government.[10]

19. Indeed, it is clear from para. 145 of Canada's argument that they have missed the fundamental point of the Applicant's argument about the limitation on treaty rights to self government. They state that a FIPPA "arbitral tribunal would have no power to invalidate" a First Nations measure that is held to be inconsistent with the CCFIPPA obligations. But the terms of the Final Agreements themselves make it clear that such a finding would require the First Nation to "remedy" the measure.

20. In *Council of Canadians*, the Court cited the following quote with approval:

> Treaties are a restriction on sovereignty. All treaties, all international agreements, are a compromise of sovereignty. They are first an exercise of sovereignty. But they represent agreements by the state parties to do or not to

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[9] Transcript of Brenda Sayers Cross-Examination, April 9, 2013, Respondents' Record ("RR") Vol. III, pp. 915-16

[10] Affidavit of Chief Bryce Williams, sworn January 21, 2013, Exs. A, B, AR Vol. I, pp. 45-47

> do certain things. A promise not to conduct oneself in a particular way is a restriction on one's future action. So to that extent, NAFTA and every other international agreement does represent a restriction on the exercise of sovereignty.[11]

21. If Canada ratifies the CCFIPPA, it will commit both itself, and any other government in Canada "not to conduct itself in a particular way." This is "a restriction on one's future action." That restriction will apply to the federal, provincial and First Nations governments. According to Canada, it engaged in discussions with provincial governments to keep them informed throughout the negotiation of the CCFIPPA. No discussions, however, have ever been held with First Nations at any time during those negotiations.

22. Canada misstates the applicable legal test when it says, at para. 7 of its Memorandum, that the duty to consult cannot arise "in the absence of an adverse impact on the Applicant's asserted Aboriginal rights." The Supreme Court of Canada has made it clear that the duty arises when the Crown contemplates conduct that "might adversely affect" rights or title. The Applicant is not required to prove that the adverse impact will occur (as Canada suggests at para. 93), but that it might occur. Some level of "possibility" is sufficient.[12]

23. This is one of the fundamental distinctions between this case and the *Council of Canadians* case relied on so heavily by Canada. In that case, the applicants argued that the provisions of NAFTA's Chapter 11, which had been in force for almost a decade, violated, *inter alia*, rights under the *Charter*. A *Charter* claim requires a demonstration that the *Charter* right has been, or will be breached. The Court in *Council of Canadians* held that the *Charter* claim was premature. The Court did not hold that there could be no *Charter* implications arising from actions taken by Canada as a result of its obligations under NAFTA. Rather it held that such claims would not be ripe for adjudication until Canada took those actions. For a *Charter* claim, the mere possibility of interference is not sufficient.

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[11] *Council of Canadians*, para. 33, R BOA Vol. II, Tab 39, p. 13
[12] *Rio Tinto*, para. 45, AR Vol. IV, p. 1388

24. Canada also relies on the *Adams Lake* case.[13] In that case, the BC Court of Appeal considered whether the Crown had fulfilled its duty to consult and accommodate with respect to a decision to replace the Sun Peaks Mountain Resort Improvement District with a new Sun Peaks Mountain Resort Municipality. The assets of the improvement district were to be transferred to the municipality, and the bylaws of the improvement district would remain in place as bylaws of the municipality until amended or replaced. That case is very different than the one before the Court, since it did not involve the application of a separate body of law, and the decision maker was still bound by provincial legislation. Importantly, however, the Court of Appeal did not find that consultation and accommodation were not required, rather, it held that the consultation and accommodation which took place were adequate.

25. Justice Low found that the consultation which took place was sufficient because it met the requirements of the lower end of the consultation spectrum, which is what the Court in *Haida* held was applicable when the "potential for infringement was minor."[14] The Province had met with the First Nation, provided them with information, and given them an opportunity to respond. Justice Low also found that the accommodation reached was sufficient, given that there was a requirement that the municipality form a First Nations Advisory Council until at least the end of 2014, a First Nations role that did not exist under the previous form of local governance.

26. In contrast, in this case, Canada asks the Court to find that there is no obligation for even this minimal form of consultation and accommodation. Canada takes the position that in this case, the answer to the controlling question regarding what is necessary to preserve the honour of the Crown, is, in short, "nothing." There has been no consultation or discussion at all with the Applicant or any other First Nation on Canada's FIPPA program generally, on the 2004 model FIPPA, or on this FIPPA specifically. There have been no discussions with any First Nations

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[13] *Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council)*, 2012 BCCA 333, leave to appeal ref'd [2013] S.C.C.A. No. 425, R BOA Vol. II, Tab 23
[14] *Haida*, para. 43, AR Vol. IV, p. 1127

represented by the B.C. Union of Indian Chiefs, the Ontario Chiefs, or the Assembly of First Nations. There have been no discussions with First Nations who have modern day or historical treaties, or those who do not. There have been no discussions with First Nations who currently host Chinese investment in their traditional territories, or those who do not. Canada's position is that it is not required to consult, because the executive is entitled to commit all government entities in Canada, including First Nations governments, not to act in a certain way towards Chinese investors, including those with investment in First Nations' territories, without even listening to any concerns from aboriginal people about the content of those commitments. We respectfully submit that such an approach is antithetical to the goal of reconciliation, and cannot be in keeping with the honour of the Crown.

27. Canada also rests its claim that the adverse effects of FIPPA are "too speculative" on its assertion that Canadian law is already entirely consistent with the obligations under FIPPA, so that nothing will change once the agreement is entered into. This is connected to Canada's suggestion that the obligations assumed under FIPPA are nothing more than "basic international obligations" that Canada would comply with in any event.

28. With respect, Canada's position appears disingenuous. It is unlikely that China would negotiate for years and finally sign a FIPPA with Canada if it did not believe that some substantive protections were being obtained. There is certainly no evidence before the Court to suggest that China is entering into the CCFIPPA in order to encourage Canadian investment in China. The evidence discloses that Chinese investment in Canada is growing much more rapidly that Canadian investment in China, and that China refused to grant Canadian investments increased market access through the CCFIPPA.[15]

29. Canada's suggestion that the CCFIPPA obligations essentially mirror the provisions of Canadian law is belied by Canada's experience with investment treaty

[15] MacKay Affidavit, Exs. H, I, AR Vol. II, pp. 420-35; MacKay Cross, pp. 38, 40-41, 76, AR Vol. II, pp. 503, 505-06, 541

claims. A recent UNCTAD report notes that out of 50 countries, Canada ranks 6th in having the most investment claims filed against it.[16]

30. At para. 64, Canada purports to summarize the outcomes of claims brought against it under NAFTA, and states that there have been only two tribunal decisions which ruled against Canada. This is not accurate. Canada completely fails to refer to the decision in *Mobil Investments*,[17] decided against Canada on the merits in May 2012. Although the damages award has not yet been released, the tribunal did hold that Canada was liable for a breach of NAFTA provisions regarding performance requirements.[18]

31. At para. 65, Canada states that it as paid "only" $143 million out in response to claims. Leaving aside the future damages payable in *Mobil Investments*, Canada's calculations are contradicted by the evidence of Professor van Harten, who puts that number at $160 million, a point on which he was not cross examined.[19]

32. As Mr. Justice Tysoe stated in the *Metalclad*[20] judicial review, it is clearly open to a tribunal under NAFTA to adopt a definition of indirect expropriation which is inconsistent with any definition of expropriation under Canadian law. The same is true under the CCFIPPA. As discussed below, the content of the fair and equitable treatment standard is a matter of continuing controversy, and may evolve over time. It is, with respect, simply not credible to assert that the CCFIPPA disciplines impose no restrictions on government action than already exist under Canadian law.

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[16] MacKay Cross, Ex. 7, AR Vol. III, p. 712

[17] *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, NAFTA Ch. 11 Panel, Decision on Liability and on Principles of Quantum, 22 May 2012, R BOA, Vol. III, Tab 75

[18] There have also been various preliminary awards against Canada, such as the award on jurisdiction in *S.D. Meyers*. Canada also states in para. 64 that it has settled one case claim prior to a tribunal award, but in its footnote it refers to both the Abitibi Bowater claim and the claim by Ethyl Corporation. Canada settled the Ethyl Corporation claim after the initial award against it on jurisdiction. There may in fact be additional cases that Canada has settled, and awards made against Canada of which we are not aware. In any case, we submit that the summary in para. 64 cannot be regarded as helpful to the Court, given its omission of significant cases.

[19] Affidavit of Gus Van Harten, sworn February 13, 2013 ("Van Harten Affidavit"), Ex C, AR Vol. I, p. 90

[20] *Mexico v. Metalclad Corp.*, 2001 BCSC 664, 89 B.C.L.R. (3d) 359 [*Metalclad*], AR Vol. IV, pp. 1291-1322

33. Another basis on which Canada suggests that the Applicant's claims are "too speculative" is that those claims are based on a misunderstanding of how the CCFIPPA provisions will be applied. As Canada has noted, most of the obligations in the CCFIPPA are the same as those set out in NAFTA (and contrary to what Canada says, we do not dispute this). The two most significant for this case are the provisions relating to expropriation and the minimum standard of treatment, which includes fair and equitable treatment.

34. Canada asserts, at para. 128, that our arguments about the potential interpretation of the expropriation provisions of the CCFIPPA are "misleading". Canada misrepresents our argument in this regard, and it is in fact Canada that has not provided a full and accurate description of the expropriation provisions, and the law and evidence (including their own evidence) regarding their interpretation and effects.

35. Canada relies on Annex B.10 of the CCFIPPA and states at para. 48 that good faith measures adopted to protect legitimate public objectives "do not constitute expropriation, as long as these measures are applied in a non-discriminatory manner." But this is not the case. In fact, Canada's expert, Mr. Thomas, agreed on cross examination that *bona fide* regulation with a public purpose may constitute expropriation under FIPPA, and that the form of a measure and the intent of a state are not determinative. Further, he agreed that the question of when regulation crosses the line and constitutes a measure "tantamount to expropriation" is a contentious issue, and that there is no bright line which sets out when compensation will be required, as each case will be very fact dependent.[21]

36. It is significant that Annex B.10 does not provide any protection for measures whose purpose is to protect aboriginal rights and title, or to otherwise fulfill government's obligations under s. 35 of the *Constitution Act, 1982*. On cross examination, Mr. MacKay stated that there was no attempt to negotiate such

[21] Cross-Examination on Affidavit of John Christopher Thomas, conducted on April 5, 2013, Thomas Cross, pp. 37, 41-42, AR Vol. III, pp. 755, 759-60

protection. He confirmed that the exceptions listed in Annex B.10 were intended to "restate the police powers principle when it comes to compensation in the event of an expropriation." When asked what harm it would have done to include "aboriginal rights and title" after "environment," he stated "The moment you start adding elements to this list, then it invites other elements. So from a negotiating point of view, you don't like to enter that trading game."[22] There can be no doubt then that Annex B.10 would not apply to measures aimed at protecting lands and resources in order to preserve aboriginal rights and title.

37. Most significantly though, Canada fails to acknowledge that there is a very real possibility that Annex B.10 will be entirely negated by the fact that the CCFIPPA permits an investor to take advantage of expropriation and other clauses in earlier FIPPAs that do not include the same language as Annex B.10. As Professor Van Harten explains, Article 8 of the CCFIPPA allows the Most Favoured Nation obligation to apply to the provisions of FIPPAs negotiated after 1994. This may enable tribunals under FIPPA to entirely ignore the limiting language of Annex B.10, since it was not included in Canada's FIPPAs between 1994 and 2004. Canada did not challenge Professor Van Harten on this point in cross-examination. Mr. MacKay agreed that this is true with respect to the minimum standard of treatment provisions discussed below. Significantly, the 2004 Model FIPPA would not have extended the MFN obligation to rights acquired in FIPPAs prior to that date.[23]

38. Thus, while as Canada says, Annex B.10 was adopted in response to decisions under NAFTA, there is a very good chance that the expropriation provision in the CCFIPPA will be interpreted in the same manner as the expropriation provision in the NAFTA decisions which caused Canada concern. Given that measures to protect rights and title are not even mentioned in Annex B.10, it is most certainly the case that if a measure is aimed at protecting the rights of aboriginal people, it will not benefit at all from Annex B.10. Canada argues that the Applicant has not demonstrated that it is Canada's practice to expropriate lands to satisfy land

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[22] MacKay Cross, p. 70, AR Vol. II, p. 535

[23] Van Harten Affidavit, Ex C, AR Vol. I, p. 85; MacKay Cross, pp. 44-45, AR Vol. II, pp. 509-10

claims. But there is no doubt that the CCFIPPA provisions will define as expropriation measures which would be only regulatory and may not require compensation under Canadian law.[24]

39. Canada says that the Applicant's arguments about the minimum standard of treatment are "similarly misleading." Canada then quotes from one recent NAFTA tribunal about what is included in the MST protection. However, Canada fails to acknowledge that the content of the minimum standard of treatment, and the concept of fair and equitable treatment are highly uncertain, and that many tribunals have rejected Canada's arguments about the content of those standards. In the *Pope & Talbot* case, a NAFTA tribunal found Canada to be in breach of the minimum standard of treatment as a result of interactions between the investor and Canada's Softwood Lumber Division.[25]

40. As Canada notes at para. 39, the FTC Note of Interpretation was adopted after, and in response to the "expansive" interpretation given to the minimum standard of treatment article in NAFTA by the *Pope and Talbot* tribunal. The FTC Note states, *inter alia*, that "The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." Canada states that this clarification was incorporated into the 2004 Model FIPPA, and this FIPPA specifically.

41. However, as noted above, Mr. MacKay confirmed on cross examination that because of the MFN clause in Article 8, a Chinese investor would be entitled to a fair and equitable treatment standard without the limiting language set out in the CCFIPPA and the FTC Note. As a result, tribunals interpreting the CCFIPPA may very well interpret the minimum standard of treatment and fair and equitable

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[24] *Metalclad*, AR Vol. IV, pp. 1291-1322

[25] *Pope & Talbot Inc. v. The Government of Canada,* NAFTA Ch. 11 Panel, Notice of Intent, 24 December 1998, R BOA, Vol. III, Tab 76; *Pope & Talbot Inc. v. The Government of Canada,* NAFTA Ch. 11 Panel, Award in Respect of Damages, 31 May 2002, R BOA, Vol. III, Tab 77

treatment in the same "expansive" manner as NAFTA panels before the Note of Interpretation was adopted.[26]

42. Canada has not accurately described the reservation in Article 33. This will not provide a general exemption for environmental measures. In order to obtain the benefit of the exemption relating to the protection of human health, plant or animal life, a state must demonstrate a specific risk and satisfy a tribunal that the measure is *necessary* to address that risk.[27]

43. Canada argues that the NAFTA experience demonstrates that it is too speculative to assert that a claim may be made involving measures to recognize or protect aboriginal rights and title. Canada chooses its words carefully when it states, at paras. 72 and 121, that none of the claims submitted against Canada under NAFTA have involved measures to protect aboriginal rights and interests. But it is not careful, and just plain wrong, when it states, at para. 133, that "[t] here has been no case in which a claim has been made, much less a decision issued, where it was alleged that measures relating to aboriginal rights and title constituted an indirect expropriation." In fact, the case relied on by Canada's own expert, *Glamis Gold*, involved a claim for indirect expropriation as well as for breach of the minimum standard of treatment, respecting regulation to protect Native sacred sites in California. The tribunal found that in that case there was no expropriation, because there was not a sufficient impact on the investment. The tribunal **did not** determine that there could be no expropriation because the legislation was aimed at protecting aboriginal concerns. If the mining had not just become more expensive, but had instead been made impossible because the permit had been revoked, it may very well have constituted expropriation.[28]

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[26] In any event, even after the FTC Note was issued, some tribunals have continued to reject Canada's arguments about the limited nature of the provisions; see, for example, *Merrill & Ring Forestry LP v. The Government of Canada,* NAFTA Ch. 11 Panel, Award, 31 March 2000, R BOA Vol. III, Tab 74; and M.C. Ryan, "*Glamis Gold, Ltd. v. The United States* and the Fair and Equitable Treatment Standard", (2011) 56:4 McGill L.J. 919 ("*Glamis Gold*"), Appendix A

[27] See Newcombe and Paradell, *Law and Practice of Investment Treaties*, Wolters Kluwer, pp. 500-506

[28] *Glamis Gold*, Appendix A

44. The impacts of the recognition and protection of Aboriginal Rights and Title on Canadian domestic law and on government decision making about resource management are only just beginning to be felt in the years since *Haida* was decided. It is therefore not particularly surprising that this particular fact pattern has not been the subject of a NAFTA claim against Canada, and in any event, the fact that it has not arisen is certainly not a principled reason for saying it will not arise in the investment treaty context in the future. This is especially true with the CCFIPPA, given the significant new and increasing Chinese investment in natural resources, mining and energy sectors.

Evidentiary Issues and Remedy

45. The expert opinion of Professor Van Harten is provided in order to assist the Court in understanding how the CCFIPPA operates and what actions or legislative measures may be subject to its provisions. The fact that Professor Van Harten has been a critic of investor-state arbitration in his academic work should properly have no bearing on the weight to be given to his opinion in this case, particularly when his decision to maintain academic objectivity by refusing paid work in the arbitration field is contrasted with the background and work of Canada's expert. We also submit that the other affidavit material before the Court is of assistance in, *inter alia*, addressing Canada's argument that the individual circumstances of the HFN are too speculative to trigger the duty to consult.

46. In light of Canada's assurance that a declaration will be a sufficient remedy in this case, the Applicant does not request the Court to issue an injunction as well. While Canada argues that a broader declaration involving other First Nations would be inappropriate, requiring other First Nations to bring forward similar claims would seem inconsistent with the principle of judicial economy.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: May 28, 2013

Mark G. Underhill
and Catherine J. Boies Parker
Solicitors for the Applicant

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3. *Council of Canadians v. Canada (Attorney General)* (2006), 217 O.A.C. 316 (QL), aff'g *Council of Canadians v. Canada (Attorney General)*, [2005] O.J. No. 3422 (QL (ON SC), leave to appeal ref'd [2007] S.C.C.A. No. 48

4. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, 3 S.C.R. 511

5. *Merrill & Ring Forestry LP v. The Government of Canada,* NAFTA Ch. 11 Panel, Award, 31 March 2000

6. *Mexico v. Metalclad Corp.*, 2001 BCSC 664, 89 B.C.L.R. (3d) 359

7. *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada,* NAFTA Ch. 11 Panel, Decision on Liability and on Principles of Quantum, 22 May 2012

8. *Pope & Talbot Inc. v. The Government of Canada,* NAFTA Ch. 11 Panel, Notice of Intent, 24 December 1998

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GLAMIS GOLD, LTD. V. THE UNITED STATES AND THE FAIR AND EQUITABLE TREATMENT STANDARD

*Margaret Clare Ryan**

This article critiques the arbitral tribunal's decision in *Glamis Gold, Ltd. v. The United States of America* on the basis of its interpretation of the fair and equitable treatment standard (FET) owed by state parties to foreign investors under NAFTA article 1105.

Part I outlines the post-WWII development of the FET standard in relation to the restrictive, customary international law of minimum standard of treatment (MST). The author traces the expansive treatment of the FET standard by tribunals in both bilateral investment treaty and NAFTA disputes. Despite a binding Free Trade Commission Note of Interpretation limiting the scope of article 1105, NAFTA tribunals had consistently interpreted the FET standard more broadly until the award in *Glamis*.

Part II evaluates the tribunal's reasoning in *Glamis*, arguing that it departs from a growing body of jurisprudence on the FET standard under NAFTA without sufficient justification. The author also criticizes the tribunal's decision to place an unprecedented evidentiary burden on the claimant by requiring proof of both state practice and *opinio juris* of the FET standard.

The conclusion suggests that the decision of the tribunal in *Merrill & Ring Forestry L.P. v. Canada* may provide a better approach to balancing governments' legitimate regulatory objectives and foreign investors' treaty rights.

L'auteure critique la décision du tribunal d'arbitrage dans la cause *Glamis Gold, Ltd. v. The United States of America* en raison de son interprétation de la norme du traitement juste et équitable (TJE). Selon l'article 1105 de l'ALÉNA, les États membres doivent le TJE aux investisseurs étrangers.

La Partie I trace les grandes lignes du développement de la norme du TJE après la Seconde Guerre mondiale en ce qui a trait à la norme minimale de traitement (NMT), une norme restrictive et coutumière du droit international. L'auteure retrace l'interprétation large de la norme du TJE par les tribunaux lors de disputes impliquant les traités bilatéraux d'investissement et l'ALÉNA. Malgré une Note d'interprétation contraignante émise par la Commission du libre-échange sur la portée de l'article 1105, les tribunaux de l'ALÉNA avaient, jusqu'à la décision *Glamis*, interprété la norme du TJE plus largement, et ce, de façon constante.

La Partie II évalue le raisonnement du tribunal dans *Glamis* et soutient que celui-ci s'éloigne sans justification d'une jurisprudence croissante sur la norme du TJE dans le cadre de l'ALÉNA. L'auteur critique aussi la décision du tribunal d'imposer au demandeur un fardeau de preuve sans précédent en exigeant qu'il prouve à la fois la pratique étatique et l'*opinio juris* relatifs à la norme du TJE.

La conclusion suggère que la décision du tribunal dans la cause *Merrill & Ring Forestry LP v. Canada* présente peut-être une meilleure approche pour atteindre l'équilibre entre les objectifs légitimes des gouvernements en matière de réglementation et les droits issus des traités des investisseurs étrangers.

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Citation: (2011) 56:4 McGill LJ 919 ~ Référence : (2011) 56 : 4 RD McGill 919

Introduction

In a recent award rendered under chapter 11 of the North American Free Trade Agreement (NAFTA),[1] the arbitral tribunal in *Glamis Gold, Ltd. v. The United States of* America[2] renewed the unsettled discussion surrounding the fair and equitable treatment (FET) standard in investment treaty arbitration. Bringing an end to the protracted dispute between the Canadian gold mining company and the United States, the tribunal dismissed the claims of Glamis that the United States had expropriated its mining rights in southeastern California and had breached its FET obligations under article 1105 of NAFTA. The tribunal's assessment of Glamis's article 1105 claim raises important issues regarding the content and interpretation of the FET standard under NAFTA and the appropriate test for determining its breach. The award represents a decisive shift in NAFTA case law because it restricts the scope of article 1105 and adopts an evidentiary approach, requiring a claimant to bring evidence of customary international law in order to succeed.

The following analysis of the *Glamis* award is in two parts. Part I provides a context for the award, first introducing the questions in dispute and then explaining the origins of the FET standard and its important place in the growing number of investment instruments that have promoted economic liberalization since the Second World War. Part I will also introduce the key interpretive debate surrounding the FET standard, namely, its place within the general body of international law and its specific relation to the customary international law minimum standard of treatment (MST). This debate has generated significant uncertainty in the contemporary context of investor-state disputes, as will be illustrated by comparing the treatment of the FET standard by tribunals constituted under bilateral investment treaties (BITs) with those under NAFTA. An overview of the early NAFTA treatment of the FET standard will provide a context for a discussion of the binding Note of Interpretation issued by the Free Trade Commission (FTC) in 2001, which limited the scope of article 1105. The final section of Part II will underline the growing consensus in the NAFTA case law that dealt with these issues before *Glamis*. NAFTA awards rendered after 2001, though following the FTC Note of Interpretation in light of its binding character, continued to adopt a permissive stance on article 1105 with an expansive reading of the obligations it entailed. As will be shown, tribunals consistently rejected the restrictive

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1 *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289 (entered into force 1 January 1994) [*NAFTA*].

2 *Glamis Gold, Ltd v United States of America*, Award of 8 June 2009, [2009] 48 ILM 1039 (International Centre for Settlement of Investment Disputes) [*Glamis*].

test advanced by the respondent parties for determining breaches of the MST, and insisted on the evolutionary character of customary international law and a wider scope of legal sources as being relevant to the determination of article 1105.

A detailed examination of the *Glamis* ruling on article 1105 at the end of Part I will set the stage for a critical assessment of the tribunal's conclusions in Part II. Proceeding from an analysis of the question of the operation of precedent in investment treaty arbitration and the tribunal's comments on its own role as an adjudicative institution, this article will argue that the *Glamis* tribunal departed from a growing body of jurisprudence on the FET standard under NAFTA without fully justifying its approach. Adopting an unfamiliar evidentiary method for article 1105, the *Glamis* tribunal accepted the United States' contention that the claimant to a chapter 11 arbitration had the burden of proving the evolution of customary international law by bringing evidence of state practice and *opinio juris*. Concluding that Glamis had not met this burden, the tribunal accepted the NAFTA party submissions regarding the content of the contemporary MST that denied its evolution since the 1920s, and dismissed the applicability of prior NAFTA awards interpreting the same provision. Questioning the suitability of a restricted interpretation of article 1105 in the current climate of foreign investment and the Treaty's overall objectives, this article will analyze whether the *Glamis* approach strikes an appropriate balance between the legitimate regulatory role of states and the interests of NAFTA investors. The final section will highlight the general problems raised by applying the customary MST to foreign direct investment and will consider whether a newly issued NAFTA award, *Merrill & Ring Forestry L.P. v. Canada*,[3] moves beyond the *Glamis* approach and presents a potential solution to these issues.

I. The Context of *Glamis*

A. *The Questions in Dispute*

The *Glamis* decision, issued on June 8, 2009, concerned a dispute over the Imperial Project, a mining investment located on federal lands in southeastern California. Glamis is a gold mining company incorporated in British Columbia in 1972. Its wholly owned subsidiaries have operated open-pit gold and silver mines in Nevada and Latin America since the early 1980s. In preparation for the Imperial Project, Glamis had been

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3 *Merrill & Ring Forestry LP v Canada* (2010), 48 ILM 1038 (International Centre for Settlement of Investment Disputes) (NAFTA Chapter 11 Panel), online: Private Forest Landowners Associations <http://www.pfla.bc.ca> [*Merrill*].

working to acquire mining rights in southeastern California pursuant to the US mining law of 1872,[4] and secured full ownership of these claims by 1994. During the investment's projected life span from 1998 to 2017, Glamis planned to remove 150 million tons of ore and 300 million tons of waste rock from three large open-pit mines and to extract gold on site.[5]

The Imperial Project was controversial from its inception. It met particular resistance because of its location near designated Native lands known as the "Indian Pass" near the Arizona and Mexico borders. Glamis's opponents argued that the proposed mine would destroy portions of the Trail of Dreams and other areas used by the Native Quechuan people for ceremonial and educational purposes. Adding to the controversy, the Indian Pass was protected within the California Desert Conservation Area (CDCA), an area of land designated under the 1976 *Federal Land Policy and Management Act (FLMPA)*[6] to be protected as scenic and biologically important public land. Under this act, the area at Indian Pass was given a "limited use" designation. Any mining operations within the area would be subject to regulations "to protect the scenic, scientific, and environmental values of the public lands ... against undue impairment, and to assure against the pollution of the streams and waters."[7]

To implement the Imperial Project, Glamis had submitted to the Bureau of Land Management (BLM) seven separate plans of operation for the exploration of potential gold resources in southeastern California.[8] These plans had been approved based on the determination that Glamis's exploration would not cause "unnecessary or undue degradation" to the lands in question.[9] Glamis submitted its Plan of Operations for the Imperial Project (Plan) in 1994, proposing a three-pit mine, two of which would be sequentially mined and backfilled. The third pit was to be partially backfilled. The BLM prepared a Draft Environmental Impact Study (DEIS) and ultimately recommended approving the Plan, provided that Glamis appropriately mitigated the impact of its operations. Glamis continued its explorations and pursued the necessary environmental permits,

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4 1 Rev Stat tit 32, ch 6, § 2319, (1875).

5 *Glamis*, *supra* note 2 at para 33.

6 11 USCA tit 43 §§1701-84 at §1781 (1976).

7 *Glamis*, *supra* note 2 at para 48.

8 *Glamis*, Notice of Intent to Submit Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, 23 July 2001 at para 10, online: NAFTA Claims <http://www.naftaclaims.com>.

9 *Glamis*, Memorial of Claimant Glamis Gold, 6 May 2006 at para 180, online: US Department of State <http://www.state.gov>.

investing more than $18.6 million in the Imperial Project by the end of 1997.[10]

As required by statute, the issuance of the DEIS was followed by a consultation period. Concerns about the effects of the Imperial Project on the Quechuan and other Native Americans were voiced at two public hearings,[11] ultimately prompting the BLM to withdraw the draft DEIS. Persuaded by a legal opinion concerning the effects of the Imperial Project (known as the "M-Opinion") and additional consultations with the Quechuan, the Department of the Interior ordered the removal of the Imperial Project area and surrounding public lands from further mineral entry for twenty years. In 2001, Bruce Babitt, the United States Secretary of the Interior formally denied the Imperial Project on the grounds that the land would suffer undue degradation and impairment and hence that the sacred Quechuan Native American site would be irreparably damaged.[12]

The cultural review of the Imperial Project took place alongside the enactment of state regulations designed to mitigate environmental and aesthetic damage resulting from open-pit mining. Most significant were the December 2000 State Mining and Geology Board emergency regulations requiring the backfilling of all mines. These regulations came into effect with the passage of *Senate Bill 22* in April 2003,[13] which specified that a lead agency could not approve any proposed operations "located on, or within one mile of, any Native American sacred site and located in an area of special concern" unless the reclamation plan provided for the backfilling of excavations and re-grading of the site, and unless financial assurances sufficient to provide for these measures were made.[14] The *Glamis* tribunal summarized as follows:

> Analyses of the bill recognized the measure would "permanently prevent the approval of the Glamis Gold Mine project and any other metallic mineral projects that presented an immediate threat to sacred sites located in areas of special concern." They also recognized that, with respect to the Imperial Project, the Project would have otherwise been allowed to "go forward" under the then current law.[15]

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10 *Glamis*, *supra* note 2 at para 98.

11 *Ibid* at para 102.

12 *Ibid* at para 154.

13 US, SB 22, *An act to repeal Sections 5 and 8 of Chapter 1154 of the Statutes of 2002, relating to mining, and declaring the urgency thereof, to take effect immediately*, 2003-2004, Cal, 2002 (enacted), online: California State Senate <http://www.leginfo.ca.gov>.

14 *Ibid* at para 175.

15 *Ibid* at para 177 [footnotes omitted].

In response to the federal and state government actions, Glamis (which had merged in 2006 with Goldcorp, Inc., also a Canadian company) filed a Notice of Intent to Submit a Claim to Arbitration under chapter 11 of NAFTA on 21 July 2003. Glamis claimed that California's mining regulations and statutes violated its investment rights under chapter 11, arguing that (i) the Imperial Project had been so radically deprived of economic value as to constitute an expropriation in violation of article 1110 ("Expropriation and Compensation"), and (ii) the measures taken by California, viewed both individually and collectively, were arbitrary and meant to single out its investment, thereby violating its right to receive fair and equitable treatment under article 1105 ("Minimum Standard of Treatment"). To provide a context for the discussion of the tribunal's ruling on Glamis's second claim, a brief introduction to the FET treatment standard in investment treaty arbitration is necessary.

B. The Fair and Equitable Treatment Standard

FET has emerged as the most important, and hotly debated, standard of protection in investment treaty arbitration. While a growing number of arbitral awards have elucidated its meaning and content, different interpretations of FET continue to be advanced by scholars, government officials, and parties to investment disputes. The following section will account for the origins and key features of the FET standard and its contemporary evolution in arbitral awards rendered under BITs and under NAFTA.

1. Origins and Basic Features of FET

The obligation of state parties to accord each other's investments "fair and equitable treatment" gained currency after the Second World War. The first reference to "equitable" treatment appeared in the 1948 *Havana Charter for an International Trade Organization* (*Havana Charter*),[16] prepared as the basis for the establishment of the International Trade Organization (ITO). Among the *Havana Charter*'s provisions concerning foreign investment, article 11(2)(a) provided that the ITO "make recommendations for and promote bilateral or multilateral agreements on measures designed ... to assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another." This obligation was consistent with one of the ITO's principal

[16] *Havana Charter for an International Trade Organization*, 24 March 1948, UN Doc ICITO/1/4 at 11(2)(a) [*Havana Charter*].

objectives, which was to foster "the international flow of capital for productive investment."[17]

Although the *Havana Charter* did not become law, its use of the terms "just" and "equitable" became the preferred approach of capital-exporting countries in establishing basic protections for their investments abroad.[18] Throughout the 1950s, the term "fair and equitable treatment" appeared in various US treaties on friendship, commerce, and navigation.[19] The 1967 *Draft Convention on the Protection of Foreign Property* (*OECD Draft Convention*)[20] proposed by the Organization for Economic Co-Operation and Development (OECD), included a similar standard. Article 1(a) of the *OECD Draft Convention*, entitled "Treatment of Foreign Property", stated, "Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties." Although it was never formally adopted, the *OECD Draft Convention* "represented the collective view and dominant trend of OECD countries on investment issues and influenced the pattern of deliberations on foreign investment in that period."[21]

Beginning in the late 1960s, provisions for FET became a regular feature of BITs signed by capital-exporting and capital-importing countries. Today, the vast majority of the 2,600 BITs in force contain a provision for FET.[22] The FET obligation also appears in a number of multilateral trea-

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17 *Ibid*, art 1.

18 Stephen Vasciannie, "The Fair and Equitable Treatment Standard in International Investment Law" (1999) 17 Brit YB Int'l L 99 at 100.

19 See Kenneth J Vandevelde, "The Bilateral Investment Treaty Program of the United States" (1988) 21 Cornell Int'l LJ 201.

20 *Draft Convention on the Protection of Foreign Property*, 14 December 1960, OECD Publication No 23081, 7 ILM 117 [*OECD Draft Convention*].

21 OECD Directorate for Financial and Enterprise Affairs, "Fair and Equitable Treatment Standard in International Investment Law" in *Working Papers on International Investment*, Working paper No 2004/3 (2004) at 4-5 ["Working Paper"].

22 The number of existing BITs is currently estimated at over 2,600. See Damon Vis-Dunbar & Henrique Suzy Nikiema, "Do Bilateral Investment Treaties Lead to More Foreign Investment?", *News and Commentary* (30 April 2009) online: Investment Treaty News <http://www.investmenttreatynews.org>. On the preponderance of the FET standard, see OECD, "Working Paper", *supra* note 21 at 5. See also Christoph Schreuer, "Fair and Equitable Treatment in Arbitral Practice" (2005) 6:3 Journal of World Investment & Trade 357 at 359; Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford: Oxford University Press, 2008) at 15-51. The FET standard is not always included in BITs negotiated by Asian countries; for example, some treaties signed by Romania or Japan. See e.g. *Agreement Between the Government of Islamic Republic of Pakistan and the Government of Romania on the Promotion and Reciprocal Protection of Investments*, 10 July 1995, online: Board of Investment—Government of Pakistan <http://investinpakistan.

ties in force, including the 1985 *Convention Establishing the Multilateral Investment Agency*,[23] the 1994 NAFTA,[24] and the 1995 *Energy Charter Treaty*.[25]

Basic features of the FET standard have been accepted in investment arbitration case law. Tribunals regard FET as a legal and not an equitable standard. A tribunal may not determine an FET claim *ex aequo et bono* or based on "an unfettered discretion to decide for itself, on a subjective basis, what was 'fair' or 'equitable' in the circumstances of each particular case."[26]

FET is regarded as a non-contingent standard that fixes a level of treatment owed to foreign investors regardless of how a host state treats its own nationals.[27] Non-contingent standards require a host state to accord an absolute degree of protection to foreign investors, regardless of changes in the host state's law or its potential lapses with respect to treatment of its own nationals and companies. FET thus differs from contingent standards of investment protection such as the most-favoured nation standard or national treatment standard.

In theory, FET offers a stable point of reference for states and foreign investors to define treatment owed and expected under international law. However, treaty language incorporating FET must accommodate a range of possible infringements of an investor's position. Provisions for FET are broadly worded, without defining the meaning of "fair" or "equitable". As the *Mondev* tribunal stated:

> A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case. It is part

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pk/pdf/BIT/Romania.pdf>; *Agreement Between the Government of Japan and the Government of the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investment*, 12 February 1992, 212 UNTS 1995 (entered into force 12 March 1993).

23 *Convention Establishing the Multilateral Investment Guarantee Agency*, art 12 ("Eligible Investments"), online: Multilateral Investment Guarantee Agency <http://www.miga.org>.

24 *Supra* note 1, art 1105(1) ("Minimum Standard of Treatment").

25 *The Energy Charter Treaty*, 12 December 1994, 34 ILM 381, art 10 ("Promotion, Protection and Treatment of Investments").

26 *Mondev International Ltd v United States*, Award of 11 October 2002, ARB(AF)/99/2, [2002] 6 ICSID Reports 192 at para 119 [*Mondev*]. See also *ADF Group Inc v United States*, Award of 9 January 2003, [2003] 6 ICSID Reports 470 at para 184 [*ADF*]; Schreuer, *supra* note 22 at 365.

27 Meg Kinnear, "The Continuing Development of the Fair and Equitable Treatment Standard" in Andrea K Bjorklund, Ian A Laird & Sergey Ripinsky, eds, *Investment Treaty Law: Current Issues III* (London, UK: British Institute of International and Comparative Law, 2009) 209 at 223-24.

> of the essential business of courts and tribunals to make judgments such as these.[28]

Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (*VCLT*) govern the interpretation of an FET clause.29 Pursuant to article 31 *VCLT*, the interpretation of an FET clause must be in good faith and must take into account the ordinary meaning of the treaty's terms in their context and in light of the treaty's object and purpose, as well as any subsequent agreements of the parties. Article 32 *VCLT* allows the tribunals to have recourse to "supplementary means of interpretation" such as the *travaux préparatoires* to an agreement. Such evidence may only be used to "confirm" the meaning that is suggested by an article 31 analysis or in circumstances where application of article 31 leads to an ambiguous or manifestly absurd result.

2. FET and Customary International Law

The specific place of the FET standard in the body of international law remains contested. The relationship of FET to the international MST under customary international law has generated particular debate. Under customary international law, states must respect a minimum set of principles when dealing with foreign nationals and their property regardless of their domestic legislation or practices.[30] Treatment that falls short of the minimum standard results in the international responsibility of the host state. J.C. Thomas explains the emergence of the international MST as follows:

> The idea of a minimum standard of treatment ... arose well over a century ago because of the concern of some states that the treatment that was accorded to their nationals in other states could on occasion fall below that which should be tolerated. This concern included not only injury to the person of the alien but also to the alien's ... property and commercial activities. Thus, if a state permitted aliens to enter its territory and to engage in commercial activity, certain basic obligations of treatment were said to arise.[31]

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28 *Mondev*, *supra* note 26 at para 118. See also Vasciannie, *supra* note 18 at 103-104.

29 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) [*VCLT*]. The *VCLT* is binding on investment arbitration tribunals as a matter of customary international law or by virtue of being directly binding on the parties to a treaty. See Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford: Oxford University Press, 2007) at 223.

30 For the history of the MST, see Vasciannie, *supra* note 18; JC Thomas, "Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators" (2002) 17:1 ICSID Rev 21.

31 Thomas, *supra* note 30 at 22-23.

The judicial treatment of the MST began not in investment disputes but rather in treatment of aliens cases. The 1926 decision of the United States-Mexico Claims Commission in *Neer v. Mexico* is considered the foundational expression of the content of the MST under customary international law.[32] Neer was an American murdered by a gang of armed men on his way home from a mine where he worked as superintendent. Dismissing the claim by Neer's family that "the Mexican authorities showed an unwarrantable lack of diligence or an unwarrantable lack of intelligent investigation in prosecuting the culprits," the Commission characterized the MST in the following terms:

> [T]he 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.[33]

As noted, the precise relationship of the FET standard to the MST has been widely debated.[34] Given the *Neer* threshold, requiring conduct that amounts to "outrage", "bad faith", and "willful neglect of duty", the question arises whether the FET standard creates additional substantive rights for an investor by requiring treatment that exceeds the customary MST. Two general approaches to FET have emerged from this debate: what can be considered the "traditional approach" and the "additive approach".[35]

The traditional approach considers the FET standard as equivalent to the customary, international law MST. State respondents to investment claims consistently advance this approach because it results in the narrowest interpretation of FET.[36] They argue that an arbitral tribunal considering an alleged violation of an FET clause must assess the impugned state conduct using the threshold test applicable to the customary MST. The content of the FET obligation, in turn, is limited to the elements of

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[32] *LFH Neer and Pauline Neer (USA) v United Mexican States* (1926), 4 Reports of International Arbitral Awards 60 (United Nations) [*Neer*].

[33] *Ibid* at 61-62.

[34] See generally Schreuer, *supra* note 22; Vasciannie *supra* note 18; Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (The Hague: Kluwer Law International, 1995).

[35] See e.g. Katia Yannaca-Small, "Fair and Equitable Treatment: Recent Developments" in August Reinisch, ed, *Standards of Investment Protection* (Oxford: Oxford University Press, 2008) 111 at 113ff.

[36] See Vasciannie, *supra* note 18 at 143-44; Kinnear, *supra* note 27 at 221; Andrea K Bjorklund, "Contract Without Privity: Sovereign Offer and Investor Acceptance" (2001) 2 Chicago J Int'l L 183 at 191. The tendency of respondent states to advance the traditional approach to FET will be highlighted throughout my discussion.

customary international law defined by article 38(1)(b) of the *Statute of the International Court of Justice*.[37] As the International Court of Justice (ICJ) and most commentators agree, international custom is comprised of two elements: (i) the concordant practice of a number of states; and (ii) the conception that the practice is required by or consistent with the prevailing law (what is known as *opinio juris*).[38] Accordingly, in order for a customary minimum standard to emerge, states must act uniformly with respect to the treatment of aliens and their property with the belief that they have a legal obligation to accord them such conduct. Part I.B.2. will further consider the relationship of the FET standard to customary international law.

In contrast to the traditional approach, the additive approach considers FET as an independent and self-contained standard applicable to conduct beyond that proscribed by the MST. F.A. Mann was an early proponent of this interpretation.[39] Mann argued that it was misleading to equate FET with the MST because

> [t]he terms "fair and equitable treatment" envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard

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[37] *Statute of the International Court of Justice*, 26 June 1945, 3 TI Agree 1179, 59 Stat 1031, TS 993, 39 AJIL Supp 215 (entered into force 24 October 1945) [*ICJ Statute*]. Article 38(1) of the ICJ Statute states:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[38] See the *North Sea Continental Shelf Cases (Federal Republic of Germany v Netherlands, Federal Republic of Germany v Denmark)* [1969] ICJ Rep 3 and *The Case of the SS "Lotus"* (1927), PCIJ, (Ser A) No 10 at 4. For commentary, see James L Brierly, *The Law of Nations: An Introduction to the International Law of Peace, 6th ed* (Oxford: Oxford University Press, 1963) at 61; Ian Brownlie, *Principles of Public International Law, 6th ed* (Oxford: Oxford University Press, 2003) at 6-10; Pierre-Marie Dupuy, *Droit international public, 8th ed* (Paris: Dalloz, 2006) §§314-15.

[39] Vasciannie, *supra* 18 at 131.

> than any previously employed form of words. ... The terms are to be understood and applied independently and autonomously.[40]

The additive approach employs a plain-meaning interpretation of an FET clause by reference to the *VCLT* principles, and does not invoke any threshold test. Depending on the wording and context of a treaty, an FET provision may demand more comprehensive duties from the host state than the international MST, including positive undertakings such as the obligation to act in good faith, to protect an investor's legitimate expectations, or to ensure the transparency and predictability of its legal system.[41] In this approach, a number of legal sources may inform the content of FET, including general principles of international law and the decisions of arbitral tribunals. The subsequent discussion will highlight how investor claimants often advance the additive approach to FET.

3. Contemporary Evolution of FET in Bilateral Investment Treaties

The majority of contemporary BITs make reference to the FET standard.[42] BITs are agreements between two contracting states, often negotiated on the basis of one state's model text, which is taken as a blueprint.[43] The precise formulation of the FET obligation, and thus its scope and content, is therefore subject to variation. A number of studies have identified different models of the FET obligation in contemporary BITs.[44] While some BITs contain a simple reference to "fair and equitable treatment",[45] others articulate the standard together with a reference to the obligation of full protection and security[46] or to standards of non-discrimination.[47]

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40 FA Mann, "British Treaties for the Formation and Protection of Investment" (1981) 52 Brit YB Int'l L 241 at 244. This approach has also been advanced by Schreuer, *supra* note 22 at 360 and Dolzer & Stevens, *supra* note 34 at 58.

41 See Mann, *supra* note 40; see also "Working Paper", *supra* note 21 at 25ff.

42 See *supra* note 22.

43 The *OECD Draft Convention* was recommended to member states as a model for preparing BITs.

44 See UNCTAD, "Bilateral Investment Treaties 1995-2006: Trends in Investment Rule-Making" (2007) UCTAD/ITE/IIT/2006/5 at 28-33, which identifies seven basic models for the FET obligation. See also Tudor, *supra* note 22 at 15-51.

45 For example, article 4 of the Argentina-Australia BIT states: "Each Contracting Party shall at all times ensure fair and equitable treatment to investments" (*Agreement Between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments*, 23 August 1995, 4 ATS 1995, (entered into force 11 January 1997)).

46 See e.g. the US Model BITs of 1992 and 1994. The US Model BIT of 1992 is reproduced in Dolzer & Stevens, *supra* note 34 at 167. The United States Model BIT of 1994 is reproduced in Kenneth J Vandevelde, *US International Investment Agreements* (Oxford: Oxford University Press, 2009) at 817.

Some BITs enunciate the FET standard in relation to general international law. For example, article 3 of the Argentina-France BIT states,

> Each of the Contracting Parties undertakes to grant ... fair and equitable treatment according to the principles of international law to investments made by investors of the other Party.[48]

A more recent approach found in Canadian and US Model BITs is to define FET expressly as the customary international law MST applicable to aliens and their property.[49] This approach has also been adopted in recent US bilateral free trade agreements (FTAs). Article 5 of the United States-Uruguay BIT, for example, specifies that FET is a part of the customary international law MST and details the scope of the obligations governed by that standard.[50]

This variety of treaty language precludes any authoritative statement on the FET standard in the BIT context. Arbitral tribunals constituted under BITs[51] have generally adopted the additive approach to FET, proceeding by way of a plain reading of the treaty's terms. The award in *MTD Equity v. Chile* illustrates this tendency.[52] MTD, a Malaysian company, alleged that the Chilean government had breached its FET obligation by approving and subsequently frustrating MTD's investment through the enactment of local urban development policies. The tribunal interpreted the FET clause in the BIT (which contained a simple reference to the standard) pursuant to the *VCLT* principles, considering that the ordinary meaning of "fair" and "equitable" was equivalent to "just",

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47 Tudor, *supra* note 22 at 29.

48 Unofficial translation of the Argentina/France BIT: see App 1 in *Compañía de Aguas del Aconquija, SA & Compagnie Générale des Eaux v Argentine Republic*, ICSID Case No ARB/97/3 (2000), Award of 21 November 2000, 40 ILM 426, 26 YB Comm Arb 61 (International Centre for Settlement of Investment Disputes), (Arbitrators: Thomas Buergenthal, Francisco Rezek, Peter D Trooboff).

49 See e.g. the 2004 Canadian Model FIPA, art 5, online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca>; the 2004 United States Model BIT, art 5, online: US Department of State <http://www.state.gov>.

50 *Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment*, 4 November 2005, online: Office of the United States Trade Representative <http://www.ustr.gov>.

51 BITs usually provide an investor with a choice of dispute resolution mechanisms. The institutional form of arbitration most frequently mentioned is arbitration at the International Center for the Settlement of Investment Disputes (ICSID). Often, a BIT will also provide for ad hoc arbitration without an administering institution.

52 Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Austin: Kluwer, Law International, 2009) at 269. *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile* (2004), 44 ILM 91 (International Centre for Settlement of Investment Disputes).

"even-handed", "unbiased", or "legitimate".[53] It then turned to the context of the treaty:

> As regards the object and purpose of the BIT, the Tribunal refers to its Preamble where the parties state their desire "to create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party" ... Its terms are framed as a pro-active statement'—"to promote", "to create", "to stimulate"—rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors.[54]

Emphasizing the parties' stated desire to encourage reciprocal investment between their territories, the tribunal gave an additive reading of the FET obligation, concluding that, on the facts, Chile had violated the clause.[55]

BIT tribunals interpreting FET clauses that contain specific references to international law have adopted a similar approach. *Vivendi v. Argentina*,[56] for example, concerned a long-standing dispute over a concession agreement to privatize water and sewage treatment in the province of Tucumán. The investor, Vivendi, argued that the Tucumán authorities had breached the France-Argentina BIT by subjecting it to tariffs and fines. Article 3 of the BIT provided that each of the state parties undertook "to grant ... fair and equitable treatment according to the principles of international law to investments made by investors of the other Party."[57] The tribunal adopted a plain-meaning approach, interpreting the provision with reference to the object and purpose of the BIT. It noted that the reference to international law in article 3 "supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard alone," ultimately concluding that Argentina had violated its FET obligation.[58]

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53 *Ibid* at para 113.

54 *Ibid*.

55 *Ibid* at para 166. Chile moved to have the award annulled by an ICSID ad hoc committee, claiming *inter alia* that the tribunal's ruling on the FET claim had failed to apply international law, but rather relied on a "dictum" from the award *Tecnicas Medioambientales Tecmed SA v The United Mexican States* (2003), Award of 29 May 2003, 43 ILM 133 (International Centre for Settlement of Investment Disputes) [*Tecmed*]. Dismissing the annulment claim, the committee concluded that the original tribunal had not exceeded its powers in determining the FET standard. See *MTD v Chile* (2007), Decision on Annulment of 21 March 2007, 13 ICSID Reports 500.

56 Kinnear, *supra* note 27 at 221. See also *Compañía de Aguas del Aconquija, SA and Vivendi Universal SA v Argentine Republic* (2007), Award of 20 August 2007, ICSID Case No ARB/97/3 (France/Argentina BIT).

57 Cited in *ibid*, s 7.4.1.

58 *Ibid*, s 7.4.7.

Very few BIT tribunals have followed the traditional approach that equates the FET with the MST or have read down a reference to international law in an FET clause to customary international law.[59] The prevalent additive approach in BIT case law allows a tribunal to take into account the precise wording of an FET clause and the purpose and context of the particular treaty. The drawback of this approach, however, is that "fairness" and "equity", in their plain meaning, neither connote a clear set of legal prescriptions, nor refer to an established body of legal precedents. Therefore, on the one hand, there are valid concerns that this approach may not equip a tribunal with a technical understanding of FET and may open the door to subjective appreciations of the standard.[60] On the other hand, it is not clear that the application of the threshold test for a violation of the MST is clearer or less subjective. As will be seen, tribunals applying the *Neer* test grapple with the same difficulties of applying abstract notions such as "egregiousness" to concrete and typically complex factual situations underlying investment claims.

4. Contemporary Evolution of FET under NAFTA

NAFTA is a regional trade agreement between the governments of Canada, the United States, and the United Mexican States. Negotiations for NAFTA began in 1991, two years after the Canada-United States Free Trade Agreement had come into effect. Both Canada and the United States sought to participate in the liberalization of the Mexican economy, which had been following a program of structural reform, deregulation, and privatization since the late 1980s. In the face of serious objections and public scrutiny within all three states and several rounds of negotiations, NAFTA was signed in late 1993 and came into force on 1 January 1994.[61] The parties undertook to "ensure a predictable commercial framework for business planning and investment,"[62] "increase substantially investment

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59 See e.g. *MCI Power Group LC and New Turbine, Inc v Republic of Ecuador (2007)*, Award of 31 July 2007, ICSID Case No ARB/03/6 (US/Ecuador BIT). Other BIT tribunals have questioned whether substantial differences result from this characterization: see *Azurix v Argentine Republic* (2006), Award of 14 July 2006, 14 ICSID Reports 374 (United States/Argentina BIT) and *Saluka Investments BV (The Netherlands) v The Czech Republic (2006)*, Partial Award, at paras 291-92 (Permanent Court of Arbitration), online: PCA <http://www.pca-cpa.org>.

60 See Vasciannie, *supra* note 18 at 104.

61 Charles H Brower II, "Investor-State Disputes Under NAFTA: The Empire Strikes Back" (2001) 40 Colum J Transnat'l L 43 at 48 [Brower II, "Investor-State Disputes"].

62 *NAFTA*, *supra* note 1, "Preamble".

opportunities in the[ir] territories", and "create effective procedures for the resolution of their disputes."[63]

Chapter 11 ("Investment") implements these objectives by permitting an investor of one NAFTA party to seek monetary damages for conduct of one of the other NAFTA parties that allegedly violates its provisions.[64] Like other investment treaties, chapter 11 establishes standards of investment protection and dispute settlement procedures. It also includes two important features. First, pursuant to article 1128, any one of the three parties "may make submissions to a Tribunal on a question of interpretation of [the] Agreement," even if that party is not a respondent to the particular dispute. Second, pursuant to article 1131(2), NAFTA parties have the collective authority to formulate binding interpretations of chapter 11 through the NAFTA Free Trade Commission (FTC).[65]

Chapter 11 is divided into three sections. Section A defines the scope and content of obligations owed by NAFTA parties to investors.[66] The provision for FET is found in the first subsection of article 1105 ("Minimum Standard of Treatment"), which reads:

> 1. 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.
>
> 2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

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63 *Ibid*, art 102(c)(e).

64 Chapter 11 is one of four dispute resolution chapters under NAFTA. Chapter 20 implements state-to-state dispute settlement providing first recourse to the Free Trade Commission (FTC). Chapter 19 provides for the establishment of bi-national panels to review final decisions of each of the parties' administrative authorities. Chapter 14 covers financial services and incorporates the dispute resolution mechanisms of chapter 11 (*ibid*).

65 Article 1136(3) contemplates that a losing NAFTA party may seek revision or annulment, but not appeal, of awards by municipal courts at the seat of arbitration (*ibid*).

66 Article 1101 indicates that chapter 11 applies to measures adopted or maintained by a NAFTA member relating to (a) investors of another party; (b) investments of another party in the territory of the party; and (c) with respect to articles 1106 and 1114, all investments in the territory of the party. Unlike BITs, which in theory allow for both states and investors to file claims, under NAFTA only investors may bring claims against the state parties (*ibid*).

> 3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).[67]

Read in conjunction with article 1116, article 1105 gives investors the right to seek damages before an independent tribunal whenever a NAFTA host party's conduct falls below the announced standard.[68] Pursuant to article 1121, an investor bringing a claim under chapter 11 waives further recourse to local remedies in the host state.

In contrast to the BIT context, NAFTA has generated a body of case law where the same treaty provisions are repeatedly interpreted.[69] Article 1131(1) directs tribunals to decide the issues in a particular dispute in accordance with "this Agreement and applicable rules of international law."[70] While this affords the potential for coherent interpretation, the treatment of article 1105 has been far from consistent. The case law is best considered in two stages: before and after the 2001 FTC Note of Interpretation.[71]

Metalclad Corporation v. United Mexican States,[72] the first substantive decision on article 1105 in favour of an investor, represents the early approach to the FET standard.[73] The dispute concerned a waste management station in the municipality of Guadalcazar. The claimant alleged that Mexico had wrongfully refused to permit its subsidiary to operate the facility, even though the project was allegedly built in response to the invitation of certain Mexican officials and allegedly met all Mexican legal requirements. Exhausting its local remedies against the municipality, Metalclad initiated a claim under NAFTA for, *inter alia*, a breach of article 1105. The claimant advanced an additive interpretation of the FET standard, alleging that article 1105 incorporated the obligations of predictability and transparency. Mexico, in turn, insisted that in assessing whether its conduct violated article 1105, the tribunal should take into

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67 *Ibid*, art 1105.

68 Subject to the nationality requirement, investors may accept the NAFTA parties' standing offer to arbitrate by submitting disputes to arbitration under the Convention on the Settlement of International Disputes (ICSID Convention), the Additional Facility Rules of the ICSID Convention, or the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (*ibid*, art 1120).

69 As I will explore in Part II.A, however, NAFTA tribunals are not bound by a formal doctrine of *stare decisis*.

70 *NAFTA*, *supra* note 1.

71 Kinnear, *supra* note 27 at 216.

72 *Metalclad Corporation v Mexico* (2001), Award of 30 August 2000, 40 ILM 36 (International Centre for Settlement of Investment Disputes) [*Metalclad*].

73 Kinnear, *supra* note 27 at 216.

account the provisions of NAFTA aimed at environmental protection and the subsequent agreements of the parties in order to "make its assessment in the light of all relevant facts and circumstances."[74] The tribunal's analysis reflected the prevalent approach of BIT case law. It accepted the claimant's interpretation, noting the reference to predictability and transparency in the preamble to NAFTA and found that the treaty was to be interpreted in accordance with the ordinary meaning to be given to its terms. Although the tribunal concluded that Mexico and its local governments had interfered with the development and operation of the project in breach of its FET obligation, it did not comment on the customary MST and its bearing upon article 1105.[75]

The interpretation of article 1105 in *Pope & Talbot v. Canada* was the most expansive of all NAFTA awards.[76] The case arose out of Canada's temporary settlement of a trade dispute with the United States over the alleged subsidization of softwood lumber. The investor, an American company, alleged that several features of Canada's export control regime violated article 1105.[77] Relying on the *S.D. Myers* award,[78] the investor argued that the FET standard under NAFTA was broader than the customary MST and that it subsumed other sources of law, including general principles of international law, international treaties, and the concept of

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74 *Metalclad*, Mexico's Counter-Memorial, 17 February 1998, at para 841, online: NAFTA <http://www.naftalaw.org>. The party submissions of Canada and the United States did not address the interpretation of article 1105.

75 In 2001, the Supreme Court of British Columbia set aside the *Metalclad* award in part. Tysoe J criticized the tribunal's reasoning, concluding that the protections owed under article 1105 were limited to the customary international law MST. Arguing that the *Metalclad* tribunal had cited no authority to demonstrate that the transparency obligation was a customary norm, he set aside the tribunal's ruling on article 1105. See *United Mexican States v Metalclad Corp*, 2001 BCSC 664, [2001] 89 BCLR (3d) 359.

76 *Pope & Talbot Inc v Government of Canada* (2000-2002), Award on the Merits of Phase 2 of 10 April 2001, 7 ICSID Reports 43 at 105ff (NAFTA Chapter 11 Tribunal) [*Pope & Talbot (Merits)*]. This decision came in the wake of *SD Myers v Canada*, in which a different tribunal unanimously held that Canada had violated NAFTA article 1102 ("National Treatment") by prohibiting the export of PCBs and PCB wastes to the United States for remediation. The majority of the tribunal also held that this denial of national treatment violated the investor's right to FET under article 1105. In doing so, it rejected the party submissions of Mexico and Canada that the reference to "international law" in article 1105 ought to be limited to "customary international law". See *SD Myers, Inc v Canada* (2002), Final Award of 30 December 2002, 8 ICSID Reports 172 (NAFTA) [*SD Myers*].

77 The investor also brought claims under article 1106 ("Performance Requirements") and article 1102 ("National Treatment"). See *Pope & Talbot (Merits)*, *supra* note 76 at para 105. These are beyond the scope of our discussion.

78 *SD Myers*, *supra* note 76.

"good faith".[79] Canada maintained that article 1105 incorporated only the customary MST and that in order to breach the standard, state conduct "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."[80] The United States, pursuant to its powers to make submissions under article 1128, made similar contentions.[81]

At the merits stage, the tribunal rejected the parties' submissions and interpreted article 1105 based on the parties' presumed intention to provide a higher standard of treatment than the MST. The tribunal stated:

> [A] possible interpretation of the presence of the fairness elements in Article 1105 is that they are *additive* to the requirements of international law. That is, investors under NAFTA are entitled to the international law minimum, *plus* the fairness elements.[82]

The tribunal recognized that the wording of article 1105 provides expressly—by using the word "including"—that "fair and equitable treatment" is subsumed within "customary international law". The tribunal considered, however, that because "the language of article 1105 grew out of the provisions of bilateral commercial treaties negotiated by the United States and other industrialized countries," the investor was entitled to the "benefits of the fairness elements under ordinary standards applied in the NAFTA countries."[83] Accordingly, "fair and equitable treatment" under article 1105 was "additive to the MST" and was to be interpreted free of any threshold test.[84] Although the tribunal dismissed the investor's allegations regarding the export control regime, it considered that the acts of Canadian government officials after the commencement of the arbitration (in particular, its targeted auditing of the investor's operational and financial records) violated its FET obligations under article 1105.

Because of a concern over these increasingly liberal interpretations of article 1105, on 31 July 2001, the NAFTA FTC issued a binding Note of Interpretation (FTC Note) in its first exercise of authority under article 1131(2).[85] The FTC Note stated as follows:

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79 *Pope & Talbot (Merits), supra* note 76 at para 107.

80 *Pope & Talbot*, Phase 2 Counter-memorial at para 309.

81 *Pope & Talbot (Merits), supra* note 76 at para 114.

82 *Ibid* at para 110.

83 *Ibid* at paras 110, 118.

84 *Ibid* at para 110.

85 NAFTA Free Trade Commission, *Notes of Interpretation of Certain NAFTA Chapter 11 Provisions*, (31 July 2001), online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca > [FTC Note]. The FTC Note also clarified chapter 11's position on confidentiality and publication of documents relating to arbitrations.

> **Minimum Standard of Treatment in Accordance with International Law**
>
> 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.
>
> The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
>
> A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).[86]

Making it clear that the obligation under article 1105 in future cases was equivalent to the MST under customary international law, the FTC Note required tribunals to abandon the additive approach to FET and to interpret the provision by applying the MST threshold test to the state conduct in question.

While most NAFTA tribunals before *Glamis* accepted that the FET under article 1105 is equivalent to the customary MST, they consistently disagreed with NAFTA party submissions over its content and the applicable threshold test to determine its breach. This trend began with the 2002 *Pope & Talbot* Award on Damages,[87] where the tribunal considered the validity of the FTC interpretation and its effect on its prior finding under article 1105.[88] At the merits stage, Canada had held out the *Neer* decision as the applicable threshold for the international MST. In its Award on Damages, the tribunal rejected this "static conception" on the grounds that "there has been an evolution in customary international law concepts since the 1920s" when *Neer* was decided.[89] In particular, it considered that the growing number of BITs established that the concept of FET had expanded with state practice. It also relied on the 1989 *Case*

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[86] *Ibid.*

[87] *Pope & Talbot Inc v Government of Canada*, (2000-2002), Award on Damages of 31 May 2002, 7 ICSID Reports 43 at 148 (NAFTA Chapter 11 Tribunal) [*Pope & Talbot (Damages)*].

[88] After the FTC Note was issued, a controversy ensued regarding its status as a reasonable interpretation falling within, or as an amendment falling outside of, the FTC's mandate. See generally Charles H Brower II, "Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105" (2006) 46 Va J Int'l L 347 [Brower II, "FTC Notes of Interpretation"]; Ian A Laird, "Betrayal, Shock and Outrage—Recent Developments in NAFTA Article 1105" in Todd Weiler, ed, *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Ardsley, NY: Transnational Publishers, 2004) 49 at 49.

[89] *Pope & Talbot (Damages)*, *supra* note 87 at paras 58-59.

Concerning Elettronica Sicula S.P.A. (ELSI) to confirm the evolution of the international MST since *Neer*. The ICJ Panel stated in *ELSI*:

> Arbitrariness is not so much something opposed to a rule of law, but the rule of law. This idea was expressed by the Court in the *Asylum* case, when it spoke of "arbitrary action" being "substituted for the rule of law". It is a willful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety.[90]

The *Pope & Talbot* tribunal argued that the *ELSI* formulation was preferable to *Neer* because it required that the impartial observer "no longer be outraged, but only surprised by what the government has done." Moreover, by referring to a concept of "due process" (rather than "governmental action"), the *ELSI* case was "more dynamic and responsive to evolving and more rigorous standards for evaluating what governments do to people and companies" and therefore more suited to the contemporary context of foreign investment protection.[91]

The tribunal in *Mondev*[92] echoed these comments, adopting the prevailing approach to article 1105 in case law preceding *Glamis*. The *Mondev* arbitration, which was initiated before the FTC Note, concerned a commercial real estate investment by a Canadian company, and the courts' treatment of the company's breach of contract claim against the city of Boston. The tribunal heard extensive arguments on the scope of article 1105. The investor characterized the FTC Note as an amendment to the treaty, questioning whether the United States could in good faith "change the meaning of a NAFTA provision in the middle of the case in which that provision plays a major part."[93] The NAFTA party submissions questioned the *Pope & Talbot* tribunal's reliance on BITs as evidence of the MST. The tribunal ultimately followed *Pope & Talbot* and rejected the argument that the *Neer* decision was the standard applicable to article 1105, stating that

> *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

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90 *Case Concerning Elettronica Sicula SPA (ELSI) (United States of America v Italy)*, [1989] ICJ Rep 15 at para 128 [citations omitted] [*ELSI*]. The *ELSI* case concerned the temporary requisitioning by the mayor of Palermo of an industrial plan belonging to a US company controlled by US shareholders. This issue in the case did not concern the FET standard, although arbitrary and discriminatory measures were prohibited in a clause of the BIT.

91 *Pope & Talbot (Damages)*, *supra* note 87 at para 64.

92 *Supra* note 26.

93 *Ibid* at para 102.

> have since come to be. ... To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious.[94]

Insisting that "Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection," the *Mondev* tribunal relied on the reasoning in the *ELSI* case to formulate the modern customary MST.[95]

The tribunal's comments in *Mondev* were cited and adopted with approval in *ADF Group v. the United States*.[96] The *ADF* arbitration concerned the "buy America" provision in United States regulations requiring that federal-aid highway construction projects only use domestically produced steel products. The investor, a Canadian company, was a successful bidder for a contract to supply custom-built steel components for a highway interchange in Virginia. Though initially agreeing to use American steel, it sought a waiver of the domestic manufacturing requirement on the ground that its United States fabrication facilities were inadequate to produce the products. Local transport authorities denied the request, forcing the investor to perform the contract by manufacturing the steel in the United States. Claiming that the "Buy America" requirements infringed its investment rights under NAFTA chapter 11, the investor alleged violations of article 1102 ("National Treatment") and article 1106 ("Performance Requirements"), as well as the MST under article 1105.

The tribunal rejected each of the investor's claims, resolving all but the article 1105 claim by adopting a broad construction of an exemption contained within article 1108.[97] The tribunal's analysis of article 1105 signalled another measured reply to the FTC Note of Interpretation. The tribunal rejected the United States' restrictive interpretation of article 1105, insisting upon the evolutionary character of the MST, and dismissing any "logical necessity" or "concordant state practice" supporting the view that the *Neer* formulation could automatically extend to the contemporary context.[98] Building on the ruling in *Mondev*, it considered that the obligation to accord FET "was based upon State practice and judicial or arbitral case law or other sources of customary or general international law."[99]

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94 *Ibid* at para 116.

95 *Ibid* at para 127.

96 *ADF*, *supra* note 26 at 184.

97 The *ADF* tribunal ruled that article 1108 exempts procurements that are also investments from certain chapter 11 requirements, including article 1102 and requirements to achieve specified domestic content under article 1106 (*ibid* at para 179).

98 *Ibid* at para 181.

99 *Ibid* at para 184.

Other NAFTA awards before *Glamis* adopted relatively permissive interpretations of article 1105 and rejected the narrow approach advanced in NAFTA party submissions. In 2004, a tribunal was established to consider the second phase of the arbitration in *Waste Management Inc. v. Mexico*.[100] *Waste Management II* concerned the Mexican government's alleged breach of article 1105 in relation to a concession contract for waste removal in Acapulco. Although concluding that the facts of the case did not lead to a violation of article 1105, the tribunal dismissed the respondent's argument that the international MST was "confined to the kind of outrageous treatment referred to in the *Neer* case."[101] The tribunal explained the evolution of article 1105 in NAFTA case law as follows:

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety ... Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case.[102]

The synthesis in *Waste Management II* was accepted in three subsequent awards interpreting article 1105. The tribunal in *GAMI Investments v. Mexico*[103] drew from this formulation, as well as the decision in *ADF*, to reject the continued applicability of the *Neer* standard. Ruling on a dispute over the operation of Mexico's sugar-production regime, the tribunal considered that "[a] claim of maladministration would likely violate article 1105 if it amounted to an 'outright and unjustified repudiation' of the relevant regulations."[104] In the subsequent award, *Methanex v. United States*, the tribunal acknowledged the *Waste Management II* tribunal's

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[100] *Waste Management Inc. v United Mexican States (Number 2)* (2004), Award of 30 April 2004, 43 ILM 967 (International Centre for Settlement of Investment Disputes) [*Waste Management II*]. This award followed the controversial ruling in *Loewen*, where another NAFTA tribunal had found a substantive violation of article 1105 but denied relief to the investor on the grounds it had not exhausted its local remedies against the United States: *Loewen Group, Inc and Raymond L Loewen v United States* (2003), Award on Merits of 26 June 2003, 42 ILM 811 (International Centre for Settlement of Investment Disputes) [*Loewen*]. In considering the article 1105 claim, the *Loewen* tribunal cited *Mondev* with approval and applied the *ELSI* standard in assessing the conduct of the United States (*ibid* at para 133).

[101] *Waste Management II*, *supra* note 100 at para 93.

[102] *Ibid* at paras 98-99.

[103] *Gami Investments, Inc v Mexico* (2004), 44 ILM 545 (NAFTA Chapter 11 Tribunal). On the evidence before it, the tribunal found that the claimant had not proven an "outright or unjustified repudiation" of its regulations (*ibid* at para 104).

[104] *Ibid* at para 103.

"difficult task of synthesizing the post-interpretation jurisprudence of Article 1105" and quoted its formulation with approval.[105] In a 2006 award in *International Thunderbird v. Mexico*, the tribunal noted the evolution of the customary law since the *Neer* case, and, relying on *Waste Management II*, stated that acts that give rise to a breach of the MST are those "that amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards."[106]

This summary allows one to draw a number of conclusions with respect to the development of NAFTA case law on the FET standard under article 1105 prior to the *Glamis* award. Early NAFTA tribunals (*Metalclad, Pope & Talbot*) followed the approach prevalent in BIT case law, regarding FET as an autonomous standard whose interpretation could have a range of legal sources, including arbitral awards and general principles of international law. The 2001 FTC Note, by pronouncing the FET standard under NAFTA as equivalent to the customary international law MST, attempted to contain this interpretive trend. Beginning with the *Pope & Talbot* Award on Damages, subsequent NAFTA tribunals would acquiesce to the FTC Note, all the while insisting upon the evolutionary character of the MST and looking beyond the strict sources of customary international law to determine the content of article 1105. The *Mondev, ADF,* and *Waste Management II* tribunals rejected submissions by the NAFTA parties who attempted to restrict the sources of law relevant to the interpretation of article 1105 and to advance an historical conception of the MST dating from the 1920s.

C. *The Glamis Ruling on Article 1105*

The parties in *Glamis* advanced familiar arguments on the legal aspects of article 1105. Glamis insisted that "the duty to accord fair and equitable treatment and the minimum standard of treatment are dynamic standards,"[107] and that the protection provided hy article 1105 had evolved beyond the *Neer* formulation. The tribunal summarized Glamis's argument that the customary MST was synonymous with any autonomous treaty standard for FET found in BITs:

> Claimant agrees that there is a difference between the autonomous and customary international law standards and that the standard articulated in NAFTA Article 1105 is the customary international

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[105] *Methanex v United States* (2005), 44 ILM 1345 at 1452 (NAFTA Chapter 11 Tribunal).

[106] *International Thunderbird Gaming Corporation v Mexico* (2006), Award of 26 January 2006, at para 194 (Chapter 11 Panel), online: US Department of State <http://www.state.gov> [*International Thunderbird*].

[107] *Glamis, supra* note 2 at paras 547-48.

> law minimum standard of treatment of aliens, but it argues that the two sources of law, at this point, require the same conduct of states. Claimant thus asserts that this dispute between "customary international law" and "international law" is unnecessary, as "BIT jurisprudence has converged with customary international law in this area."[108]

Glamis argued that "the customary standard referenced in the NAFTA has been influenced by the many BITs that require fair and equitable treatment."[109] It also referred to the *OECD Draft Convention* as a source of customary international law recognized by the United States and incorporated in its various bilateral free trade agreements.[110] According to Glamis, all of these sources had become relevant to the determination of article 1105, and together evidenced a universe of commonly accepted international law principles, including "the duty to act in good faith, due process, transparency and candor, and fairness and protection from arbitrariness."[111] It argued the current content of the FET obligation encompassed two particular duties: (i) the protection of an investor's legitimate expectations; and (ii) the protection against arbitrary measures. Glamis cited various BIT and NAFTA awards[112] for the proposition that "a foreign investor expects its host State to act consistently, free from ambiguity and 'totally transparently' in its relations with the investor."[113]

In response, the United States advanced the traditional approach to FET, insisting that article 1105 requires only the customary international law MST, and nothing more.[114] It questioned the relevance of BIT awards to the customary MST, highlighting the significant textual differences among treaties, many of which include stand-alone FET provisions making no reference to international law. Referring the tribunal to the two elements comprising customary international law (state practice and *opinio juris*), it argued that the meaning of the MST could not be informed by decisions of international tribunals because they do not constitute state practice. The United States insisted that "a rule only crystallizes into cus-

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[108] *Ibid* at para 551.

[109] *Ibid* at para 552.

[110] *Ibid* at para 551.

[111] *Ibid* at para 545.

[112] Glamis (see *ibid* at para 578) relied on *Tecmed* (*supra* note 55); Glamis (see *Glamis*, *supra* note 2 at para 570) also relied on *International Thunderbird* (*supra* note 106); and, finally, Glamis (see *Glamis*, *supra* note 2 at 569) additionally relied on *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No ARB/01/8 (US/Argentina BIT), Award, 17 July 2003.

[113] *Glamis*, *supra* note 2 at para 573 (citing *Tecmed*, *supra* note 55 at para 154) [footnotes omitted].

[114] *Ibid* at para 555.

tomary international law over time through a general and consistent practice of States that is adhered to form a sense of legal obligation."[115] In bringing a claim under article 1105, Glamis had the burden of proving the existence of customary international law rule and the United States' violation of that rule.[116] According to the United States, the awards cited by Glamis did not establish that the protection it claimed had become part of the MST because they did not constitute evidence of custom.

The tribunal reviewed and accepted each of the United States' contentions in its ruling. It declared that a claimant has the burden to prove that the MST has evolved to require something more than the "egregious" standard asserted in *Neer*. The tribunal held that the establishment of a rule of customary international law requires state practice and *opinio juris*, and concluded that Glamis had not made this out. In particular, the tribunal took issue with Glamis's reliance on BIT case law to demonstrate the more expansive scope of the current FET standard, as the "entire method of reasoning" in these cases "does not bear on an inquiry into custom," but rather "into an analysis of the treaty language and its meaning."[117] It recognized that "what the international community views as 'outrageous' may change over time" and 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."[118] According to the tribunal, however, this did not entail that customary international law had itself moved the *Neer* standard. The tribunal explained:

> 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.[119]

Concluding that the "fundamentals of the *Neer* standard still apply today," the tribunal questioned whether the FET standard under NAFTA subsumed the specific obligations identified by Glamis. With respect to the asserted duty to protect the legitimate expectations of investors, it noted that "[a]rticle 1105(1) requires the evaluation of whether the State made any specific assurance or commitment to the investor so as to induce its expectations."[120] Although the tribunal did not look to *ELSI* in ar-

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115 *Ibid* at para 567.

116 *Ibid* at para 553.

117 *Ibid* at paras 608, 606.

118 *Ibid* at paras 612-13.

119 *Ibid* at para 615.

120 *Ibid* at para 620 [footnotes omitted].

ticulating the general standard of treatment under article 1105, it did acknowledge the panel's finding that "a certain level of arbitrariness [may] violate the obligations of a State under the fair and equitable treatment standard."[121] It nonetheless upheld "the high level of deference" afforded by NAFTA tribunals to the decision making of domestic courts, concluding that "a finding of arbitrariness requires ... an act so manifestly arbitrary, so unjust and surprising as to be unacceptable from the international perspective."[122]

As noted, the *Glamis* tribunal ultimately held that federal and state agencies had not met the required levels of misconduct in their dealings with Glamis to amount to a breach of article 1105. Glamis had argued that it held legitimate expectations that its Plan would be approved, based not only on the mining regime as it stood under pre-existing California regulations, but also based on earlier findings in its investment review process. According to the tribunal, there had been no arbitrary or evidently discriminatory conduct or unreasonable delay with respect to the assessment of the Plan, nor did the assessment frustrate any expectations formed by a quasi-contractual relationship between Glamis and the United States that would engender its legitimate expectations.[123] In particular, the California *Senate Bill 22* and the emergency regulations that preceded it did not upset Glamis's expectations, as these expectations were not created by specific assurances.[124] In response to Glamis's argument that the Imperial Project had been treated differently from other mining operations during its cultural review, the tribunal found that the process was undertaken by qualified professionals who issued well-reasoned opinions concerning the effect of the investment on the Quechuan people.[125] It arrived at similar conclusions with regard to the Department of Interior M-Opinion.[126] Conceding that the Imperial Project and its anticipated effects may have inspired the passing of California *Senate Bill 22*, the tribunal concluded that the legislation was of general application and did not directly target the Imperial Project. Rejecting Glamis's claim under article 1105, as well as its claim under article 1110, the tribunal ordered Glamis to pay two-thirds of the arbitral costs and denied any other requests for compensation.

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[121] *Ibid* at para 625.

[122] *Ibid* at paras 589, 626.

[123] *Ibid* at paras 762-72

[124] *Ibid* at paras 789-807.

[125] *Ibid* at para 781.

[126] *Ibid* at paras 758-72.

II. Critical Response to the *Glamis* Award

This paper's critical response to *Glamis* will focus on two significant aspects of the award—the tribunal's position on the evolution of customary international law and its evidentiary approach to article 1105—and will highlight how it deviated from the growing body of NAFTA case law analyzed in Part I.B. Setting out from a discussion of the operation of precedent in investment treaty arbitration, it will question whether the *Glamis* tribunal adequately justified its departure from former cases and whether its conclusions are tenable given the economic and regulatory interests underlying NAFTA. Considering the more general question of the restriction of protections under article 1105 to the customary international law MST, it will conclude with a brief consideration of a newly issued NAFTA award, *Merrill & Ring Forestry L.P. v. Canada*,[127] that departs from the approach adopted in *Glamis* and offers a potential solution to the problems *Glamis* presents.

A. *The Tribunal's Unconvincing Treatment of Precedent*

Since publication of the *Glamis* award in June 2009, commentary on the award has centered upon its divergent approach to article 1105 in relation to existing NAFTA case law.[128] In order to critically reflect upon *Glamis*, it is necessary to consider the extent to which the tribunal was obligated to follow previous NAFTA awards. The operation of precedent in investment treaty arbitration is a difficult and increasingly relevant topic given the growing challenges to the legitimacy of the NAFTA and ICSID systems.[129] As with any adjudicatory process, there are reasons why arbi-

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[127] *Merrill*, *supra* note 3.

[128] See Elizabeth Whitsitt & Damon Vis-Dunbar, "*Glamis Gold Ltd v United States of America*: Tribunal Sets a High Bar for Establishing Breach of 'Fair and Equitable Treatment' under NAFTA", *Investment Treaty News* (15 July 2009) online: Investment Treaty News <http://www.investmenttreatynews.org>; Luke Eric Peterson, "Glamis Gold's Chapter 11 Suit Flops", *Embassy* (22 July 2009) online: Embassy Magazine <http://www.embassymag.ca>. See also Charles H Brower II, "Hard Reset vs Soft Reset: Recalibration of Investment Disciplines Under Free Trade Agreements" *Kluwer Arbitration Blog* (16 December 2009) (blog), online: <http://kluwerarbitrationblog.com/blog>.

[129] On precedent, see generally Emmanuel Gaillard & Yas Banifatemi, eds, *Precedent in International Arbitration* (New York: Juris Publishing, 2008). See also Tai-Heng Cheng, "Precedent and Control in Investment Treaty Arbitration" (2007) 30 Fordham Int'l LJ 1014; the May 2008 issue of *Transnational Dispute Management* devoted to this topic, online: Transnational Dispute Management <http://www.transnational-dispute-management.com>. On legitimacy, see generally Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007); Charles H Brower II, "Structure, Legitimacy, and NAFTA's Investment Chapter" (2003) 36 Vand J Transnat'l L 37 [Brower II, "NAFTA's Investment Chapter"]; Susan D Franck, "The Legiti-

tral tribunals should align their decisions with existing case law on a given issue. As Schreuer and Weiniger comment, "Reliance on past decisions ... plays an important role in securing the necessary uniformity and stability of the law ... [and] strengthens the predictability of decisions and enhances their authority."[130] These goals are particularly important for investment treaty tribunals due to the absence of any appellate body with the jurisdiction to review awards and to correct errors of law made in the first instance. Critics such as Gus Van Harten have further argued that the unique combination of state responsibility and private adjudication that characterizes investment arbitration places an increased onus on tribunals to guard against inconsistent decision making.[131]

Nonetheless, arbitral tribunals consistently maintain that there is no doctrine of binding precedent in international law and that they are not obligated to follow the rulings of prior awards. The *Glamis* tribunal addressed this question in the introductory section of its award entitled "The Tribunal's Understanding of Its Task".[132] In this unusual act of self-reflection, the tribunal contrasted its role to that of "a standing adjudicative body which addresses multiple disputes." According to the tribunal, its "mandate under Chapter 11 of the NAFTA [is] similar to the case-specific mandate ordinarily found in international commercial arbitration" and it could not be "confronted with the task of reconciling its ... [decision] with .... earlier ones."[133] Relating this mandate to the intention of the NAFTA parties, it continued:

> Notwithstanding the likelihood that numerous arbitrations would arise under Chapter 11 of the NAFTA, the three states of North American ... chose to have arbitrations resolved by distinct arbitral panels. In this sense, it is clear that this Tribunal is asked to have a case-specific focus as it proceeds to address this dispute.[134]

While denying the precedential effect of NAFTA awards, the tribunal acknowledged its awareness of the "larger context in which it operates"

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macy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73 Fordham L Rev 1521.

[130] Christoph Schreuer & Matthew Weiniger, "Conversations Across Cases—Is There a Doctrine of Precedent in Investment Arbitration?" (2008) 5:3 Transnational Dispute Management 1 at 1, online: <http://www.transnational-dispute-management.com>.

[131] Van Harten, *supra* note 129 at 166-67. Van Harten argues that the lack of coherence in investment arbitration awards "benefits large firms in their political bargaining with government, by exacerbating the regulatory chill that is otherwise generated by the threat of a damages award against the state" (*ibid*).

[132] *Glamis*, *supra* note 2 at paras 3-9.

[133] *Ibid* at para 3.

[134] *Ibid*.

and the "systemic implications" of its decisions for future tribunals, for NAFTA state parties and investors, and in fostering public faith in the integrity of the process of arbitration.[135] This context, it noted, "guides and aids the Tribunal in simultaneously supporting the system of which it is only a temporary part." The tribunal accordingly acknowledged its duty to "communicate its reasons for departing from major trends in previous decisions,"[136] citing a passage from the separate opinion of Thomas Wälde in *International Thunderbird*[137] to illustrate this constraint. The passage stated in part:

> In international and international economic law—to which investment arbitration properly belongs—there may not be a formal "stare decisis" rule as in common law countries, but precedent plays an important role. Tribunals and courts may disagree and are at full liberty to deviate from specific awards, but it is hard to maintain that they can and should not respect well-established jurisprudence.[138]

In short, the *Glamis* Tribunal communicated its nuanced understanding of operation of precedent in investment treaty arbitration and under NAFTA. On the one hand, it was free to deviate from previous NAFTA awards, but on the other, it was under a duty to justify such deviations given the larger context in which it operates. Regrettably, the tribunal's ruling on article 1105 failed to fully draw on these insights. In particular, its reassertion of the *Neer* standard as the applicable threshold test for finding a violation of article 1105 represents a major deviation, which the tribunal did not fully justify, from NAFTA awards rendered after the FTC interpretation. As shown in Part II.B, NAFTA tribunals constituted after 2001 consistently rejected the applicability of the *Neer* standard, establishing an important trend among tribunals of asserting a wider and more developed scope of investment protection under customary international law. While Glamis cited awards such as *ADF*, *Mondev*, *Waste Management II*, *GAMI*, and *International Thunderbird* to demonstrate the evolved state of customary international law, the tribunal chose not to follow their approach, considering that they were to be given at most persuasive authority:

> Arbitral awards ... do not constitute State practice and thus cannot create or prove customary international law. They can, however, serve as illustrations of customary international law if they involve

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[135] *Ibid* at paras 4, 6, 8.

[136] *Ibid* at para 8. Furthermore, NAFTA article 1136(1) states: "An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case" (*supra* note 1). The tribunal did not cite this provision.

[137] *Supra* note 106.

[138] *Ibid* at para 129, cited in *Glamis*, *supra* note 2 at para 8.

> an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation.[139]

The tribunal acknowledged that an arbitral award could be relevant if the treaty underlying the dispute was to be interpreted by reference to customary international law. While this strongly suggests that a prior NAFTA ruling on article 1105 could be a suitable interpretive source, the tribunal considered that prior case law lacked sufficient evidentiary weight. Therefore, even though prior awards had explicitly rejected *Neer*, the *Glamis* tribunal deemed these awards to only demonstrate "a change in the international view of what is shocking and outrageous."[140] Prior awards could not, in its view, prove or even "illustrate" the evolution of customary international law on the applicable standard for the MST.

The *Glamis* tribunal's reliance on *Neer* raises the further question of whether *Neer* reflected contemporary customary international law when it was decided in 1926, at least pursuant to the requirements of the traditional theory of custom. The commission in *Neer*, when assessing the conduct of the Mexican authorities, made no inquiry into the content of custom by analyzing state practice and *opinio juris*. Rather, it elaborated its threshold test on the basis of two short statements by international law publicists.[141] The *Glamis* tribunal, in turn, did not explain why the *Neer* case (which concerned a murder investigation and not the economic rights of a foreigner) should be accepted as the definitive pronouncement on the content of customary international law, either in 1926 or in 2009. Indeed, the tribunal's refusal to rely on statements by arbitral tribunals that had not required a strict proof of custom (this was its rationale for dismissing the NAFTA case law before it) would exclude any consideration of *Neer*.

B. The Tribunal's Unqualified Acceptance of NAFTA Party Submissions

By reinstating the *Neer* standard, *Glamis* represents the first chapter 11 award to incorporate NAFTA party submissions on the appropriate content of the MST. Absent the claimant's successful proof of its evolution, the tribunal accepted the statement by Canada and Mexico that "the test in *Neer* does continue to apply."[142] The *Glamis* tribunal not only took into

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[139] *Ibid* at para 605.

[140] *Ibid* at para 613. Rather, the *Glamis* tribunal considered these awards relevant to the extent that the "adjective modifiers" describing the acts that would breach the MST (such as a "*gross* denial of justice" and "*manifest* arbitrariness") evidenced the standard's enduring strictness (*ibid* at para 614).

[141] The commission looked to a 1910 citation from John Bassett Moore and a 1923 citation from De Lapradelle and Politis, conceding that its analysis would only "go a little further than the authors quoted" (*Neer*, *supra* note 32 at 61).

[142] See *Glamis*, *supra* note 2 at para 601.

account this statement, but also their submissions to the *ADF* and *Pope & Talbot* arbitrations, submissions which had been explicitly rejected by those earlier tribunals. In the author's opinion, the tribunal attributed to these statements more than their due weight. Although non-disputing parties' right of participation under article 1128 has been recognized as a means of ensuring the doctrinal integrity of NAFTA awards,[143] these parties' submissions are not binding in the same way as the FTC interpretive powers. Considering non-party submissions as such is unjust to claimants, given that the NAFTA parties share an interest in successfully defending chapter 11 claims and invariably assert the narrowest possible construction of its provisions. Moreover, it is unclear why an independent arbitral tribunal would accept the contentions of non-disputing parties on the content of customary international law instead of making its own determination. Because these interventions are submitted in the course of a dispute, to ascribe such weight to them approaches an abuse of process, as it enables NAFTA parties to change the rules of the game in the middle of a pending arbitration.[144]

C. *The Tribunal's Onerous Evidentiary Approach to Article 1105*

The tribunal's acceptance of the United States' position on the correct evidentiary approach to article 1105 represents a problematic aspect of the award and another significant departure from previous NAFTA case law. As outlined in the analysis of *Glamis* in Part I.C, the United States had submitted that an article 1105 claimant bears the burden of proving the existence of a specific rule of customary international law that the respondent has breached and, as a related matter, the burden of proving the evolution of customary international law to encompass the protection it claims. While the United States had advanced the same argument in earlier arbitrations such as *Mondev* and *ADF*,[145] both tribunals implicitly re-

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[143] See Brower II, "Investor-State Disputes", *supra* note 61 at 79. See also Martin Hunter & Alexei Barbuk, "Procedural Aspects of Non-Disputing Party Interventions in Chapter 11 Arbitrations" in Todd Weiler, ed, *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Ardsley, NY: Transnational Publishers, 2004) 151.

[144] We should note that the same criticism was directed at the FTC Notes of Interpretation. Charles Brower II, for example, has described the FTC Note "as a crude and self-interested form of political intervention designed to influence the outcome of pending disputes" (see Brower II, "FTC Notes of Interpretation", *supra* note 88 at 354-55). See also Todd Weiler, "NAFTA Article 1105 and the Free Trade Commission: Just Sour Grapes, or Something More Serious?" (2001) 29 Int'l Bus Law 491.

[145] In response to the investor's claim in *ADF* that the requirement for the domestic manufacturing of the steel was unfair and inequitable in the context of NAFTA, the United States insisted that "the Investor, if it is to succeed in its claim based on [article 1105], must show a violation of *a specific rule of customary international law relating to foreign*

jected this approach by conducting their own inquiry into customary international law and by taking notice of its content without placing such a burden on the claimant. Accepting the United States' contention, at the outset of its decision the *Glamis* tribunal noted "as a threshold issue" that the claimant had the burden of showing the evolution of customary international law by bringing proof of concordant state practice and *opinio juris*. Instead of explaining or justifying its reasons for adopting this approach, the tribunal acknowledged the challenges it presented:

> [I]t is difficult to establish a change in customary international law.
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> ...
>
> 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.[146]

As we have seen in Part I.B, a general consensus exists among legal scholars that custom is a joining of state practice and *opinio juris*.[147] As the tribunal noted above, while the practice of states is often easy to identify, *opinio juris*, or the intent behind state actions, is more elusive.[148] While the ICJ continues to require proof of *opinio juris*,[149] it has provided little guidance or detailed discussion of the evidence supporting the establishment of custom when proclaiming a rule of customary international law. Some scholars adhering to the traditional method have dismissed the requirement of proving *opinio juris* when state practice is uniform and widespread.[150] Other scholars have contrasted the traditional method of

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investors and their investments" (*ADF*, *supra* note 26 at para 182.). The United States advanced the same argument in the *Mondev* arbitration: see *Mondev, International Ltd v United States*, Counter-Memorial on Competence and Liability of Respondent United States of America of 1 June 2001, ARB(AF)/99/2, at 33ff, online: US Department of State <http://www.state.gov>.

146 *Glamis*, *supra* note 2 at paras 602-603.

147 An extensive treatment of customary international law is beyond the scope of this discussion. Doctrine and case law confirm that state practice has to be constant, uniform, and general (though not unanimous). *Opinio juris*, the subjective element of custom, requires that states act in certain ways as evidence of a belief that this practice is rendered obligatory by the rule of law. See generally, Brigitte Stern, "Custom at the Heart of International Law" (2001) 11 Duke J Comp.& Int'l L 89.

148 *Glamis*, *supra* note 2 at para 603.

149 See e.g. *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14 at 97.

150 See in particular Hersch Lauterpacht, *The Development of International Law by the International Court* (New York: Praeger, 1958) 380.

proving custom through an inductive analysis of state practice and *opinio juris* with a modern "*deductive* process that begins with general statements of rules rather than particular instances of practice."[151] Given these debates, the *Glamis* approach to proving custom is regrettably facile. While the tribunal identified sources that could be relevant proof of *opinio juris* (treaty ratification language, statements of governments, treaty practice, and pleadings in certain cases)[152] it did not resolve any uncertainties regarding the evidentiary weight to be given to these sources or the standard of proof of *opinio juris* that would satisfy the claimant's burden. Nor did the tribunal consider whether it could assume a more active role in recognizing new categories of custom using a modern deductive process or question whether the method of proving custom might itself have evolved beyond the traditional two elements theory. In short, under the *Glamis* evidentiary approach to article 1105, claimants are charged with the heavy burden of ascertaining and proving the customary MST, which is a complex and uncertain task.

D. The Tribunal's Support of Regulatory Authority under NAFTA

Over and above its deviations from previous NAFTA case law, the *Glamis* award must be assessed in the wider context of the economic and regulatory goals underlying NAFTA. Significantly, the *Glamis* tribunal advanced an interpretation of FET obligation narrower than any FET obligations found in BITs between NAFTA parties and third party states. It is debatable whether the NAFTA parties would seek to curtail their mutually guaranteed investment standards given that the treaty's objective of creating close economic ties between the parties far exceeds any of their bilateral endeavours. This question was raised by *Pope & Talbot* at the merits stage, where it asserted that the

> basic unlikelihood that the Parties to NAFTA would have intended to curb the scope of Article 1105 *vis à vis* one another when they (at least Canada and the United States) had granted broader rights to other countries that cannot be considered to share the close relationships with the NAFTA parties that those Parties share with one another ... it would be difficult to ascribe the NAFTA Parties with an intent to provide each other's investments more limited protections than those granted to other countries not involved jointly-in a continent-wide endeavor aimed, among other things, at "increase[ing]

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[151] Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation" (2001) 95 AJIL 757 at 758 [emphasis omitted]. On the evolution of methods used by international tribunals in establishing custom, see Lauterpacht, *supra* note 150.

[152] See *Glamis*, *supra* note 2 at para 603.

> substantially investment opportunities in the territories of the Parties".[153]

While the *Glamis* ruling on article 1105 makes little sense in light of the parties' economic objectives, it can be explained by reference to the development of chapter 11 arbitration and its relation to the parties' regulatory goals. A provision for MST appeared in NAFTA's earliest negotiating texts and mirrors longstanding United States, and to a certain extent Canadian, practices at the bilateral level.[164] The references to MST, and to the chapter 11 provisions in general, were aimed at ensuring adequate protections of Canadian and US investments in Mexico, the developing country partner in the regional association with no BIT practice prior to entering NAFTA.[165] However, since the first substantive award rendered against Mexico in *Metalclad*,[166] article 1105 has been increasingly invoked by investors against Canada and the United States to challenge their regulatory legislation as inconsistent with the FET standard.[167] Charles Brower comments:

> Although virtually no one foresaw Chapter 11's capacity to interfere with the legislative, executive, and judicial systems of the NAFTA Parties, particularly Canada and the United States, investors have now submitted ... claims, which seek billions of dollars in damages; challenge measures that ostensibly protect public health, safety, and the environment; and attack the legitimacy of important governmental services ... This unexpected proliferation of claims has disturbed many observers who continue to denounce the purportedly "aggressive" use of investor-state arbitration as an "offensive" weapon that has "chilled" the exercise of regulatory authority and caused an "alarming" loss of sovereignty.[168]

Narrowing the scope of the investment protection provisions in NAFTA may relieve the United States, Canada, and Mexico from respon-

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[153] *Pope & Talbot (Merits)*, *supra* note 76 at para 115.

[164] Meg Kinnear, Andrea Bjorklund & John F G Hannaford, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Austin: Kluwer, Law International, 2006) at 1105-1.

[165] M Sornarajah, *The International Law on Foreign Investment*, 2d ed (Cambridge: Cambridge University Press, 2004) at 334.

[166] See Part I.B.4.

[167] Already in 2004, David Gantz reported that actions by US investors against Canada, or Canadian investors against the United States, account for roughly sixty per cent of NAFTA chapter 11 disputes (David A Gantz, "The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement" (2004) 19 Am U Int'l L Rev 679 at 697-98). The number of arbitrations filed against these parties has increased significantly since 2004. See also Todd Weiler, *NAFTA Claims*, online: NAFTA Claims <http://www.naftaclaims.com>.

[168] Brower II, "NAFTA's Investment Chapter", *supra* note 129 at paras 45-46.

sibility when they are respondents under those provisions and allow governments to maintain control over their regulatory role. Indeed, the circumstances surrounding *Glamis* are a good example of when a NAFTA party should justifiably seek to limit its responsibility to foreign investors in order to advance environmental and cultural concerns as well as the interests of indigenous people. The question remains whether the *Glamis* tribunal's reading of article 1105 strikes the appropriate balance between legitimate regulatory goals and the interests of investors. While the *Glamis* tribunal acknowledged these important policy concerns surrounding the Imperial Project,[159] it may have adopted too strict an approach to article 1105, particularly given the circumstances of the case where, on the facts, Glamis may not have succeeded even under the more expansive reading adopted in *Mondev*, *ADF*, and *Waste Management II* (where no violations of article 1105 were found).

E. The New Approach to the MST in Merrill & Ring

Both the treatment of article 1105 in *Glamis* and its rigid adherence to the FTC Note of Interpretation renew the question of whether it makes sense to bind the FET standard under article 1105 to the customary international law MST. As explained in Part II.B, in 2001 the NAFTA parties, through their powers under article 1131(2), required tribunals to abandon the additive approach to FET by limiting the protections under article 1105. The FTC Note has been widely criticized for its interpretation that restricted the term "international law" under article 1105 to "customary international law", only one of the components of article 38(1) of the ICJ Statute.[160] In light of its historical purpose in international case law, it remains unclear whether the customary MST is in fact a more suitable standard for the current field of foreign investment protection than the FET obligation. On the one hand, the MST was developed in the early twentieth century to respond to situations where national treatment provided inadequate protection for aliens and their property and was intended to function in a schema of state-to-state dispute settlement, organized as the mechanism of diplomatic protection.[161] The FET standard, on

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159 See *Glamis*, *supra* note 2 at para 8.

160 For criticisms of the FTC Note, see Brower II, "FTC Notes of Interpretation", *supra* note 88; Laird, *supra* note 88. The FTC Note has been criticized as contravening NAFTA article 102(2), which instructs the parties to "interpret and apply the provisions of this Agreement ... in accordance with applicable rules of international law" (*supra* note 1) and therefore binds the FTC to follow the principles of interpretation in the *VCLT*. These commentators have also accused the FTC of exceeding its interpretive powers by producing an amendment of NAFTA that cannot enter into force without ratification in accordance with the constitutional principles of each country.

161 Tudor, *supra* note 22 at 63.

the other hand, was developed in the period following the Second World War to meet the specific needs of investors concluding BITs. As the tribunal declared in *PSEG v. Turkey*, the FET standard "has acquired prominence in investment arbitration as a consequence of the fact that other standards traditionally provided by international law might not in the circumstances of each case be entirely appropriate."[162] Ioana Tudor notes that the main problem with equating the two standards

> is that it limits the scope of FET. The IMS provides for action only in extreme cases. In other words, the rights of the foreign Investor have to be violated in a serious manner in order for the Investor to obtain reparation from the host State. In contrast, it appears that FET offers the foreign Investor a type of guarantee which is much more generous and designed to be operational.[163]

In a recent chapter 11 award, the tribunal in *Merrill*[164] has offered a new perspective on the scope of the customary MST under article 1105, one that offers a potential solution to the problems in *Glamis*. The claimant in the *Merrill* dispute, a US firm, argued that Canada's measures relating to the implementation of its Log Export Regime in British Columbia breached its obligations under NAFTA, including the FET standard under article 1105.[165] Dismissing each of the investor's claims, the tribunal emphasized that "customary international law has not been frozen in time and that it continues to evolve in accordance with the realities of the international community."[166] For the tribunal, this evolved state of customary law is true even in light of the 2001 FTC Note, which it did not consider to narrow the protection against unfair and inequitable treatment "to an international minimum standard requiring outrageous conduct of some kind."[167] While Canada's response to the article 1105 claim had not invoked *Neer*, the tribunal was careful to note that these historical cases dealt with the limited situations "concerning due process of law, denial of justice and physical mistreatment."[168] What the tribunal referred to as the "first track" in the evolution of the MST, however, became increasingly obsolete as the system of "diplomatic protection gradually gave

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[162] *PSEG Global, Inc and Konya Ilgin Electrik Uretim ve Ticaret Limited Sirketi v Turkey* (2007), ICSID Case No ARB/02/5 at para 238.

[163] Tudor, *supra* note 22 at 63.

[164] *Merrill*, *supra* note 3.

[165] The claimant also alleged breaches of article 1102 ("National Treatment"), article 1103 ("Most Favored Nation Treatment"), article 1106 ("Performance Requirements"), and article 1110 ("Expropriation") (*Merrill*, *supra* note 3 at para 1).

[166] *Ibid* at para 193.

[167] *Ibid* at para 212.

[168] *Ibid* at para 197.

way to specialized regimes for the protection of foreign investment."[169] With this development there emerged a "second track" of the customary MST, which should be applied to article 1105. The *Merrill* Tribunal elaborated:

> State practice with respect to the standard for the treatment of aliens in relation to business, trade and investments ... has generally endorsed an open and non-restricted approach to the applicable standard to the treatment of aliens under international law. At the same time it shows that the restrictive *Neer* standard has not been endorsed or has been much qualified.[170]

According to the *Merrill* tribunal, the FTC Interpretation does not mandate the restrictive approach to article 1105 upheld in *Glamis*. NAFTA tribunals can adhere to the FTC Note while still asserting a dynamic notion of the MST that is tailored to the needs of investment protection. In so holding, the tribunal rejected any distinction between the FET standard and the customary MST: "In the end," it argued, "the name assigned to the standard does not really matter."[171] Taking notice of the evolution of the MST, without requiring the claimant to bring proof of state practice or *opinio juris*, the tribunal concluded:

> [T]he applicable minimum standard of treatment of investors is found in customary international law and that, except for cases of safety and due process, today's minimum standard is broader than that defined in the *Neer* case and its progeny. Specifically this standard provides for the fair and equitable treatment of alien investors within the confines of reasonableness. The protection does not go beyond that required by customary law, as the FTC has emphasized. Nor, however, should protected treatment fall short of the customary law standard.[172]

Conclusion

This discussion of *Glamis Gold, Ltd. v. The United States of America* has underscored the importance of the fair and equitable treatment standard in the law of foreign direct investment. The contemporary evolution of the FET standard in the BIT and NAFTA case law, however, reveals that its scope and content are still a matter of debate. It remains to be seen whether the solution offered in *Merrill*, which recognizes a more dynamic MST standard than *Glamis*, will create a climate of greater certainty for NAFTA parties, investors, and tribunals. As has been shown,

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169 *Ibid* at para 205.

170 *Ibid* at para 209.

171 *Ibid* at para 210.

172 *Ibid* at para 213.

the NAFTA parties, through the powers of the FTC, have rejected any expansive interpretation of FET under article 1105 by binding the standard to the customary MST. Tribunals prior to *Glamis*, however, continued to recognize the importance of FET in the contemporary investment climate and resisted attempts to restrict its ambit. The *Glamis* award therefore represents an important moment in chapter 11 arbitration by introducing an orthodox reading of FET under NAFTA and a significant divergence from a growing body of jurisprudence on the correct approach to article 1105. Most notable are the *Glamis* tribunal's assertion of a heavy evidentiary burden on investors bringing article 1105 claims, and its uncritical acceptance of the NAFTA parties' submissions regarding the contemporary status of the MST and the ongoing applicability of the *Neer* standard. While it has been argued that this approach makes little sense given NAFTA's overall objectives of substantially tightening the parties' economic ties, it may be understood in light of recent developments under chapter 11 arbitration and the growing concern that investor claims are encroaching on the parties' legitimate regulatory goals.
