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Abstract

On June 9, 2009, a controversial and longstanding North American Free Trade Agreement ("NAFTA") arbitration was resolved in favor of the United States. Overviews of the dispute and NAFTA investor-state arbitrations are set forth in Parts I and II, respectively. Part III explains that the process employed was commendably transparent, especially in accommodating tribal interests, and should serve as a model for future proceedings. The award positively advances two international legal protections: regulatory takings and "fair and equitable treatment." Although the takings analysis described in Part IV confirms that NAFTA claimants have procedural advantages over domestic litigants, its pro-government framework goes beyond the U.S. law from which it derives to maximize the ability to regulate and should be adopted worldwide. The "fair and equitable treatment" analysis, detailed in Part V, sophisticatedly equates modern-day customary international law with the standard articulated in 1926 and confusingly incorporates regulatory takings concepts.

STRIKING NAFTA GOLD: *GLAMIS* ADVANCES INVESTOR-STATE ARBITRATION

*Jordan C. Kahn**

INTRODUCTION

On June 9, 2009, a controversial and longstanding North American Free Trade Agreement (“NAFTA”) arbitration was resolved in favor of the United States. The arbitral tribunal constituted under chapter 11 of NAFTA unanimously rejected both claims by a Canadian investor frustrated in its efforts to mine a portion of the California desert that Native Americans hold sacred.¹ Overviews of the dispute and NAFTA investor-state arbitration are set forth in Parts I and II, respectively. Part III explains that the process employed was commendably transparent, especially in accommodating tribal interests, and should serve as a model for future proceedings. The award positively advances two international legal protections: regulatory takings and “fair and equitable treatment.” Although the takings analysis described in Part IV confirms that NAFTA claimants have procedural advantages over domestic litigants, its pro-government framework goes beyond the U.S. law from which it derives to maximize the ability to regulate and should be adopted worldwide. The “fair and equitable treatment” analysis, detailed in Part V, sophistically equates modern-day customary international law with the standard articulated in 1926 and confusingly incorporates regulatory takings concepts. However, this reasoning facilitates foreign direct investment by recognizing customary norms when states become liable. Investors now have greater certainty as to the circumstances when they will have

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1. See *Glamis Gold Ltd. v. United States*, Award (NAFTA Arb. Trib. 2009), <http://www.state.gov/documents/organization/125798.pdf>.

recourse for conduct by their host government. *Glamis Gold Ltd. v. United States* is the gold standard for investor-state arbitration.

I. *THE DISPUTE*²

Glamis focuses on a stretch of the California desert known as Indian Pass.³ This land is located west of the Colorado River and near the Quechan Tribe reservation; tribal members return there “to practice their cultural and religious traditions” as they have since time immemorial.⁴ In the late 1980s,⁵ the publicly held Canadian corporation Glamis Gold Ltd., through its Nevadan subsidiary,⁶ acquired rights to mine in the vicinity of Indian Pass.⁷ These rights were obtained through the General Mining Act of 1872 that allows U.S. citizens to mine federal lands without having to pay royalties.⁸ The Federal Land Policy and Management Act of 1976 (“FLPMA”)⁹ “amends and supersedes” the Mining Act of 1872 by directing the Secretary of the U.S. Department of the Interior (“DOI”) to protect against environmental harm.¹⁰ FLPMA designates a California Desert Conservation Area (“CDCA”),¹¹ within which projects must not create “undue impairment”;¹² this term is undefined.¹³ Indian

2. This part provides only the information necessary to understand the award; for a thorough account, see Jordan C. Kahn, *A Golden Opportunity for NAFTA*, 16 N.Y.U. ENVTL. L.J. 380, 381–403 (2008).

3. See *Glamis*, Award, ¶¶ 31–52.

4. Counter-Memorial of Respondent United States of America, *Glamis*, at 41–47, (Sept. 19, 2006), <http://www.state.gov/documents/organization/73686.pdf> [hereinafter Counter-Memorial of Respondent]; see also Kahn, *supra* note 2, at 389.

5. See *Glamis*, Award, ¶ 32; see also Kahn, *supra* note 2, at 390–91.

6. See *Glamis*, Award, ¶ 27–29; see also Kahn, *supra* note 2, at 390 n.55. For simplicity, this Article uses “Glamis” to refer collectively to the Canadian corporation Glamis Gold Ltd., its U.S. subsidiary Glamis Imperial, and the Canadian company Goldcorp Inc., which acquired Glamis Gold Ltd. in 2006 while this arbitration was ongoing.

7. See *Glamis*, Award, ¶ 52. Glamis’s right to the land was not basis of the dispute. *Id.* ¶ 15 (“It is not contested in this proceeding that Glamis still formally possesses its federally granted mining right. Glamis claims that, although it is still in possession of this right as a formal matter, the value of the right was so diminished by governmental action that it was expropriated in fact.”).

8. General Mining Act of 1872 § 1, 30 U.S.C. § 22 (2006); see also *Glamis*, Award, ¶ 36; Kahn, *supra* note 2, at 381–82, 388.

9. Federal Land Policy and Management Act of 1976, 43 U.S.C.A. §§ 1701–87 (West 2007 & Supp. 2009).

10. *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 33 (D.D.C. 2003); see also *Glamis*, Award, ¶ 43 (citing 43 U.S.C. § 1732(b) (2006)).

11. See *Glamis*, Award, ¶ 44 (citing 43 U.S.C. § 1781(a)(1)–(3)).

12. 43 U.S.C. § 1781(f) (2006).

Pass is located in the CDCA and portions of it are designated as wilderness by another federal law, the California Desert Protection Act of 1994 (“CDPA”).¹⁴

In 1994, Glamis applied to extract gold from within one mile of Indian Pass.¹⁵ Its “Imperial Project” was proposed on 1631 acres of federal land east of San Diego, within the CDCA¹⁶ but outside of a CDPA wilderness area.¹⁷ Glamis’s Plan of Operations (“POO”) described the excavation of 150 million tons of ore and 300 million tons of waste rock from three open pits,¹⁸ using the inefficient and deleterious cyanide heap leach process.¹⁹ Glamis proposed to “completely backfill” two of the three pits—restoring them to their original contours after mining—while “the third pit would be partially backfilled” and thereby remain scarred.²⁰ The Imperial Project required permits from both the DOI under FLPMA,²¹ and California under the Surface Mining and Reclamation Act of 1975 (“SMARA”).²² SMARA mandates the “reclamation” of mining sites through means that “may require backfilling”²³ and directs the State Mining and Geology Board (“SMGB”) to adopt necessary regulations.²⁴ Before either the federal or California permits could issue, both governments must conduct environmental review under the National Environmental Policy Act of 1969

13. See *Glamis, Award*, ¶ 635. Glamis argued throughout the case that the “undue impairment” standard equated with the Federal Land Policy and Management Act of 1972 (“FLPMA”) “unnecessary or undue degradation” standard that is defined as that of a “prudent operator.” See *id.* ¶¶ 57, 635, 638; see also 43 U.S.C. § 1732(b) (stating the “unnecessary or undue degradation” standard); 43 C.F.R. § 3809.0-5(k) (2000) (stating the “prudent operator” standard). By contrast, the United States maintained “that the ‘undue impairment’ and ‘unnecessary or undue degradation’ standards were never viewed as equivalent.” *Glamis, Award*, ¶ 655.

14. See *Glamis, Award*, ¶ 67; California Desert Protection Act (CDPA) of 1994, 16 U.S.C. §§ 410aaa–410aaa-83 (2006).

15. See *Glamis, Award*, ¶¶ 52, 95. Prior to submitting its application, Glamis stated that “it spent nearly [US]\$2 million on the Imperial Project, with most of these costs incurred on the acquisition of the mining claims and the early exploration drilling program.” *Id.* ¶ 88.

16. See *id.* ¶ 31.

17. *Id.* ¶¶ 66–67; see also Kahn, *supra* note 2, at 391, 447 n.400.

18. See *Glamis, Award*, ¶¶ 33, 86.

19. See *id.* ¶ 33 n.57; see also Kahn, *supra* note 2, at 391–92.

20. *Id.* ¶ 34.

21. 43 U.S.C. § 1732(b) (2006).

22. CAL. PUB. RES. CODE § 2770 (West 2006); *Glamis, Award*, ¶ 74.

23. CAL. PUB. RES. CODE § 2733 (West 2006).

24. *Id.* § 2755; *Glamis* ¶ 75.

(“NEPA”)²⁵ and the California Environmental Quality Act of 1970 (“CEQA”),²⁶ respectively. These laws require the study and disclosure of significant adverse impacts through means that include consideration of alternatives and public hearings.²⁷

Evaluation of cultural impacts factored prominently in the environmental review of the Imperial Project.²⁸ The NEPA and CEQA processes intersect with other laws that protect Native American resources,²⁹ including the National Historical Preservation Act (“NHPA”).³⁰ NHPA-mandated meetings with tribal members at the site disclosed that the POO would create significant unmitigated adverse cultural impacts.³¹ The Quechan

25. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370f (2006); *Glamis*, Award, ¶ 56.

26. California Environmental Quality Act of 1970, CAL. PUB. RES. CODE §§ 21000–06 (West 2006).

27. See 42 U.S.C. § 4332(2)(C) (requiring an environmental impact statement for “major Federal actions significantly affecting the quality of the human environment”); CAL. PUB. RES. CODE § 21080(d) (requiring an environmental impact report if there is “substantial evidence . . . that the project may have a significant effect on the environment”); see also 40 C.F.R. §§ 1503.1–.4 (2008); *Glamis* ¶¶ 63–64, ¶¶ 69–70, ¶ 102.

28. Kahn, *supra* note 2, at 393.

29. See *Glamis* ¶¶ 79–82; Kahn, *supra* note 2, at 386–87. The California Native American Historical, Cultural and Sacred Sites Act of 1976 mandates that:

No private party using or occupying private property . . . shall in any manner whatsoever . . . cause severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, except on a clear and convincing showing that the public interest and necessity so require.

CAL. PUB. RES. CODE § 5097.9 (West 2006).

30. The National Historic Preservation Act of 1966 directs the Interior Secretary “to expand and maintain a National Register of Historic Places,” which includes areas significant in Native American history, archaeology, and culture. See 16 U.S.C. § 470a(a)(1)(A) (2006). The law further establishes an Advisory Council on Historic Preservation (“ACHP”) to serve as the federal liaison with “any Indian Tribe . . . that attaches religious and cultural significance to properties . . . determined to be eligible for inclusion on the National Register.” *Id.* § 470a(d)(6)(A)–(B), 470i; see *Glamis*, Award, ¶¶ 76–78. The Imperial Project site was potentially eligible for inclusion on the National Register. See *Glamis*, Award, ¶¶ 92, 108.

31. The ACHP rendered this conclusion. See *Glamis*, Award, ¶¶ 119–27; Record of Decision for the Imperial Project Gold Mine Proposal, BLM Case File No. CA 670-41027, at 12 (Jan. 17, 2001) [hereinafter Record of Decision], available at http://www.blm.gov/ca/pdfs/elcentro_pdfs/Glamis_ROD_final_1-01.pdf (concluding that the “mitigation measures would ‘do little to reduce the devastating impacts on historical properties and their environmental and fall short of compensating for the loss of traditional, religious, and cultural values’” (quoting app. A, Letter from Cathryn Buford Slater, Chairman, Advisory Council on Historic Preservation, to Bruce Babbitt, Sec’y of the Interior 3 (Oct. 19, 1999))); see also U.S. DEP’T OF THE INTERIOR, OFFICE OF THE SOLICITOR, M-36999, REGULATION OF HARDROCK MINING 2–3 (1999), <http://www.doi.gov/solicitor/>

Tribe expressed great concern that the Imperial Project “would destroy the Trail of Dreams”³²—a sacred area historically that is presently used by tribe members.³³ During a meeting with DOI officials,³⁴ the “Quechan Tribal Historian described the importance of the area to the Quechan people’s cultural resources and religious values; he likened the religious significance of the area to ‘Jerusalem or Mecca.’”³⁵ Being confronted with Mining Act of 1872 rights and identified adverse impacts to cultural resources, DOI staff was unsure of its “decision-making parameters and legal responsibilities”³⁶ and turned to the DOI Solicitor for guidance.³⁷

DOI Solicitor John Leshy provided the legal authority to deny Glamis’s application. His December 1999 legal opinion (“Leshy Opinion”) concluded that DOI could deny the POO based on significant adverse cultural impacts pursuant to the undue impairment standard in FLMPA.³⁸

opinions/M-36999, Regulation of Hardrock Mining-1999.pdf [hereinafter Leshy Opinion], *reprinted in* Record of Decision, *supra*, app. B (“If implemented, the [Imperial Project] would be so damaging to historic resources that the Quechan Tribe’s ability to practice their sacred traditions as a living part of their community life and development would be lost. Overall, the [ACHP] is convinced that the cumulative impacts of the proposed mine . . . even with the mitigation measures proposed by the company, would result in a serious and irreparable degradation of the sacred and historic values of the [land] that sustains the tribe. Therefore the [ACHP] concludes that the Glamis Imperial Project would effectively destroy the historic resources in the project area, and recommends that Interior take whatever legal means available to deny approval for the project.” (quoting Letter from Cathryn Buford Slater to Bruce Babbitt, *supra*, at 3, *reprinted in* Record of Decision, *supra*, app. A.)).

32. *Glamis*, Award, ¶ 107.

33. *See id.* ¶¶ 103, 105.

34. The Bureau of Land Management is the agency within the U.S. Department of the Interior (“DOI”) that processed the Imperial Project application submitted by Glamis on behalf of the federal government. *See* Mineral Pol’y Ctr. v. Norton, 292 F. Supp. 2d 30, 32 n.2 (D.D.C. 2003); *Glamis*, Award, ¶ 96.

35. *Glamis*, Award, ¶ 111 (citation omitted).

36. Counter-Memorial of Respondent, *supra* note 4, at 81 (quoting Memorandum from Ed Haste, State Dir., Bureau of Land Mgmt., to John Leshy, Solicitor, DOI (Jan. 5, 1998)).

37. *Glamis*, Award, ¶ 114 (citing Memorandum from Ed Haste to John Leshy, *supra* note 36, at 1).

38. *See* Leshy Opinion, *supra* note 31, at 19, *reprinted in* Record of Decision, *supra* note 31, app. B; *see also* *Glamis*, Award, ¶¶ 144–45. The Leshy Opinion is formally referred to as the “M-Opinion.” *See id.* ¶ 140.

In April 2000, Glamis initiated litigation challenging the Leshy Opinion.³⁹ The following October, the district court preliminarily dismissed the lawsuit because DOI had not yet rendered a decision about the Imperial Project.⁴⁰ Under U.S. law, a challenge against government must “ripen” through final agency action, before it may be heard in federal court.⁴¹ The district court criticized Glamis’s premature and “impermissible judicial interference in an ongoing administrative process.”⁴² Glamis was required to await final agency action on its Imperial Project application, which occurred in January 2001 when DOI denied the permit based on the Leshy Opinion.⁴³ Secretary of the Interior Bruce Babbitt explained that the site was “within a Native American ‘spiritual pathway’ . . . and . . . that tribal members believed the proposed mine would ‘impair the ability to travel, both physically and spiritually’ along [the] ‘Trail of Dreams.’”⁴⁴

In March 2001, Glamis once again sued the federal government, this time with a final agency action and therefore a ripe challenge.⁴⁵ However, upon persuading the administration of President George W. Bush to rescind the permit denial, Glamis withdrew its case.⁴⁶ After meetings between Glamis and new DOI officials, DOI Secretary Gale Norton rescinded the denial in November 2001.⁴⁷ This DOI action was criticized for

39. See Complaint for Declaratory and Injunctive Relief, *Glamis Imperial Corp. v. Babbitt*, No. 00-0196 (D. Nev. Apr. 13, 2000); see also *Glamis*, Award, ¶ 146; Counter-Memorial of Respondent, *supra* note 4, at 83.

40. See *Glamis Imperial Corp. v. Babbitt (Glamis I)*, No. 00-cv-1934 (S.D. Cal. Oct. 31, 2000); see also *Glamis*, Award, ¶ 147; Counter-Memorial of Respondent, *Glamis*, at 84.

41. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 620–21 (2001); *Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 190–91 (1985); see also *infra* Parts IV.A–B.

42. *Glamis I*, No. 00-cv-1934, slip. op. at 7.

43. See Record of Decision, *supra* note 31, at 3–4; see also *Glamis*, Award, ¶¶ 153–55.

44. Memorial of Claimant *Glamis Gold Ltd.*, *Glamis*, 182 (May 5, 2006) [hereinafter Memorial of Claimant] (quoting Record of Decision, *supra* note 31, at 10).

45. See Complaint for Declaratory and Injunctive Relief, *Glamis Imperial Corp. v. U.S. Dep’t of the Interior (Glamis II)*, No. 01-cv-00530 (D.D.C. Mar. 12, 2001); see also *Glamis*, Award, ¶ 156; Kahn, *supra* note 2, at 398.

46. See *Glamis II*, No. 01-cv-00530 (Dec. 18, 2001); see also Counter-Memorial of Respondent, *supra* note 4, at 86.

47. See *Glamis*, Award, ¶ 159 (citing Gale A. Norton, Sec’y of the Interior, Rescission of Record of Decision for the Imperial Project Gold Mine Proposal (Nov. 23, 2001)). This rescission was based on an opinion from the new DOI Solicitor that disagreed with the interpretation of the FLMPA in the Leshy Opinion. See *Glamis*,

lacking “transparency” because it occurred after DOI and the applicant met privately and without the participation of other interested groups; U.S. Senator Barbara Boxer stated that “[a]lthough the initial permit denial took 6 years and hundreds of hours of consultation, the decision to reopen the permit involved no public input and took only a few months.”⁴⁸ Following the rescission, the federal government began moving towards authorizing the Imperial Project.⁴⁹

With the federal permit ready to issue, the government of California, the “Golden State,”⁵⁰ sprang into action.⁵¹ Pursuant to SMARA, SMGB introduced emergency regulations on December 12, 2002.⁵² These became permanent in April 2003,⁵³ requiring complete backfilling for all open-pit metallic mines in California, including Glamis’s proposed Imperial Project.⁵⁴ That same

Award, ¶¶ 157–58; *see also* U.S. DEP’T OF THE INTERIOR, OFFICE OF THE SOLICITOR, M-37007, SURFACE MANAGEMENT PROVISIONS FOR HARDROCK MINING 8–13 (Oct. 23, 2001), http://www.doi.gov/solicitor/opinions/M-37007_Surface_Management_Provisions_for_Hardrock_Mining-2001.pdf. Solicitor Myers’s FLPMA interpretation was subsequently rejected by a reviewing court. *See* Mineral Policy Ctr. v. Norton, 292 F. Supp. 2d 30, 41–44 (D.D.C. 2003).

48. *See The Protection of Native American Sacred Places As They Are Affected By Department of Defense Undertakings: Hearing Before the S. Comm. on Indian Affairs*, 107th Cong. 2–5 (2002) (statement of Sen. Boxer, Member, S. Comm. on Indian Affairs).

49. *See Glamis, Award*, ¶¶ 163, 165; Kahn, *supra* note 2, at 398–99.

50. *See* CAL. GOV’T CODE § 420.75 (West 2006).

51. *See* Kahn, *supra* note 2, at 387, 401–03; *see also Glamis, Award*, ¶ 175. The body responsible for introducing these measures acted under the urgency of Glamis’s Imperial project:

“These changes to statute are urgently needed to stop the Glamis Imperial mining project in Imperial county proposed by Glamis Gold, Ltd., a Canadian-based company. The project is a massive, open-pit, cyanide heap-leach gold mine on 1,500 acres of public land that would destroy sacred sites of critical religious and cultural importance to the Quechan Indian Tribe”

Id. ¶ 176 (quoting S. NATURAL RES & WILDLIFE COMM., BILL ANALYSIS, S.B. 22, at 4–5 (Jan. 10, 2003), http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0001-0050/sb_22_cfa_20030110_115605_sen_comm.html).

52. *See* CAL. CODE REGS. tit. 14 § 3704.1 (2003), 14 CA ADC s 3704.1 (Westlaw); *see also Glamis, Award*, ¶ 181.

53. *See* CAL. CODE REGS. tit. 14 § 3704.1, history 3, 14 CA ADC s 3704.1 (Westlaw); *see also Glamis, Award*, ¶ 184; Kahn, *supra* note 2, at 401.

54. *See* CAL. CODE REGS. tit. 14 § 3704.1(a), 14 CA ADC s 3704.1 (Westlaw). The regulation specifically provides that all metallic minerals must be “backfilled to achieve not less than the original surface elevation” and cannot “exceed in height the pre-mining surface contour elevation by more than 25 feet.” *Id.* § 3704.1(a), (e). Although these regulations have both a “grandfather clause,” *see id.* § 3704.1(i), 14 CA ADC s 3704.1 (Westlaw); Kahn, *supra* note 2, at 401 n.135, and a “variance” process, *see* CAL. CODE REGS. tit. 14, § 3704.1(h), 14 CA ADC s 3704.1 (Westlaw); Kahn, *supra* note 2, at

month, California passed Senate Bill 22 (“SB 22”), which amends SMARA to require complete backfilling for mining projects located within “one mile of any Native American sacred site.”⁵⁵ In signing the SMARA amendment, California Governor Gray Davis announced that the “measure sends a message that California’s sacred sites are more precious than gold.”⁵⁶ While the SMARA amendment and SMGB regulations (collectively the “California measures”) were being enacted, Glamis requested that DOI suspend the permitting process for the POO.⁵⁷ Glamis attempted to negotiate a buyout through which the federal government would purchase and acquire its property interests, although these efforts were not successful.⁵⁸

In July 2003, Glamis filed a NAFTA chapter 11 arbitration claim against the United States.⁵⁹ Glamis asserted that DOI and California “have, through a series of measures, failed to approve the plan of operation and erected barriers that have effectively destroyed all economic value of Glamis Imperial’s established mineral rights.”⁶⁰ Acknowledging DOI’s “steps to reverse” the alleged wrongdoing, Glamis contended that the federal government has “to date still has not approved” its proposal or compensated “for the loss of its investment.”⁶¹ According to Glamis, the “discriminatory and expropriatory . . . backfilling mandates . . . completely destroy the economic value of [its]

401 n.135, neither applied to the Imperial Project. *See id.* California regulations apply to federal mining claims because states may impose “a higher standard of protection for public lands” under the Mining Act of 1872. 43 C.F.R. § 3809.3 (2008); *see* 30 U.S.C. § 26 (2006); *Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 589 (1987).

55. CAL. PUB. RES. CODE § 2773.3(a) (West 2006); 2003 Cal. Stat. ch. 3, at 1; Counter-Memorial of Respondent, *supra* note 4, at 95.

56. Press Release, Office of the Governor of the State of Cal., Governor Davis Signs Legislation to Stop Proposed Gold Mine Near “Trail of Dreams” Sacred Site 4/7/2003 (Apr. 7, 2003), <http://www.graydavis.com/viewlibraryitem.aspx?id=3892>.

57. *Glamis*, Award, ¶ 164. Glamis requested that DOI suspend the permitting process on December 9, 2002. *See id.* The government responded on January 7, 2003, that it would suspend processing if Glamis waived any legal liability from the suspension. *See id.* Glamis replied in March 2003 by informing DOI “that it would not reconfirm its suspension request.” *Id.*

58. *See id.* ¶ 164 & n.487.

59. *See* Notice of Arbitration Under the Rules of the United Nations Commission on International Trade Law and the North America Free Trade Agreement, *Glamis*, at 7 (Dec. 10 2003) [hereinafter Notice of Arbitration].

60. *Id.*

61. *Id.*

significant investment.”⁶² Glamis requested “not less than US\$50 million in compensation” and also costs, fees, and interest.⁶³

II. NAFTA ARTICLES 1110 AND 1105 JURISPRUDENCE

NAFTA came into force in 1994 between the United States, Canada, and Mexico.⁶⁴ Chapter 11 of NAFTA allows claimant investors from one NAFTA state to arbitrate alleged violations of rights protected by NAFTA directly against another NAFTA state hosting the investment.⁶⁵ These proceedings employ rules from either the United Nations Commission on International Trade Law (“UNCITRAL”) or the International Centre for Settlement of Investment Disputes (“ICSID”).⁶⁶ Respondent states are responsible for actions of their political subdivisions that violate investor rights.⁶⁷ Among the guarantees in chapter 11 of NAFTA is article 1110, which protects against expropriation, including indirect expropriation or a “regulatory taking,” by mandating compensation in the form of fair market value.⁶⁸ Article 1110 is

62. *Id.* at 10.

63. *Id.* at 11.

64. See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 [hereinafter NAFTA]. See generally RALPH FOLSOM, NAFTA AND FREE TRADE IN THE AMERICAS IN A NUTSHELL (3d ed. 2008). The mechanics of the North American Free Trade Agreement (“NAFTA”) are beyond the scope of this Article, as is an assessment of NAFTA’s utility.

65. NAFTA, *supra* note 64, art. 1117(1) (“An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation.”).

66. *Id.* art. 1120(1)(a)–(c); see also ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 570–71 (2d ed. 2008). Glamis employed the United Nations Commission on International Trade Law (“UNCITRAL”) Arbitration Rules, although the proceedings were administered by the International Centre for Settlement of Investment Disputes (“ICSID”). See Glamis Gold Ltd. v. United States, Award, ¶¶ 187, 196 (NAFTA Arb. Trib. 2009), <http://www.state.gov/documents/organization/125798.pdf>.

67. NAFTA, *supra* note 64, art. 105; see also Glamis, Award, ¶ 30.

68. See NAFTA, *supra* note 64, art. 1110; Glamis, Award, ¶ 356 (“This proceeding involves the particularly thorny issue of what is commonly known as a regulatory taking.”). NAFTA article 1110 reads in relevant part:

Article 1110: Expropriation and Compensation

1. No party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;

strikingly similar to the Takings Clause of the Fifth Amendment to the U.S. Constitution.⁶⁹

Another common investor protection is the guarantee in NAFTA article 1105(1) of “fair and equitable treatment.” Article 1105 is captioned as the “Minimum Standard of Treatment” and is explicitly tied to international law by providing: “Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment”⁷⁰ This right is analogous to the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution,⁷¹ although the remedy differs because tribunals can only award damages and cannot invalidate government action.⁷² Tribunals finding violations of article 1105 have wide discretion in awarding damages.⁷³

(c) in accordance with due process of law and Article 1105(1); and

(d) on payment of compensation

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“date of expropriation”)

NAFTA, *supra* note 64, art. 1110.

This protection is contained in each of the more than two thousand bilateral investment treaties (“BITs”) in force around the world, in addition to NAFTA chapter 11. LOWENFELD, *supra* note 66, at 554, 559.

69. See Kahn, *supra* note 2, at 412–13 (the “public purpose” requirement is directly lifted from the Fifth Amendment and the “fair market value” requirement from its jurisprudence).

70. NAFTA, *supra* note 64, art. 1105(1).

71. See John D. Echeverria, *The Real Contract on America*, ENVTL. F., July–Aug. 2003, at 33 (calling NAFTA article 1105 an “international equivalent of the Due Process Clause”).

72. See BARRY APPLETON, NAVIGATING NAFTA: A CONCISE USER’S GUIDE TO THE NORTH AMERICAN FREE TRADE AGREEMENT 152 (1994).

73. See S.D. Myers, Inc. v. Canada, Partial Award, 40 I.L.M. 1408, 1443 (NAFTA Arb. Trib. 2000), available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/myerscanadapartialaward_final_13-11-00.pdf (“By not identifying any particular methodology for the assessment of compensation in cases not involving expropriation, the Tribunal considers that the drafters of the NAFTA intended to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case, taking into account the principles of both international law and the provisions of the NAFTA. In some . . . cases, a tribunal might think . . . that the application of the fair market value standard is not a logical, appropriate or practicable measure of the compensation to be awarded.”).

More than a decade of NAFTA investor-state arbitration has produced considerable jurisprudence.⁷⁴ Although chapter 11 dictates that each proceeding stands alone,⁷⁵ the awards provide important guidance for tribunals and parties in subsequent proceedings.⁷⁶ Every “NAFTA tribunal, while recognizing that there is no precedential effect given to previous decisions, should communicate its reasons for departing from major trends present in previous decisions.”⁷⁷ Despite the “case-specific mandate” of each NAFTA tribunal,⁷⁸ awards are rendered “with sensitivity to the position of future tribunals and an awareness of other systemic implications.”⁷⁹ The resultant *de facto* reconciliation of previous awards under NAFTA is demonstrated by the interplay between two prominent chapter 11 arbitrations: the 2000

74. For an overview of articles 1110 and 1105 jurisprudence before *Glamis*, see LOWENFELD, *supra* note 66, at 556–63, 567–68; Kahn, *supra* note 2, at 411–37.

75. NAFTA, *supra* note 64, art. 1136(1) (“An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.”). The tribunal in *Glamis* concisely explained this principle:

The Tribunal sees its mandate under Chapter 11 of the NAFTA as similar to the case-specific mandate ordinarily found in international commercial arbitration. . . . An arbitral tribunal is not confronted with the task of reconciling its later decisions with its earlier ones. Notwithstanding the likelihood that numerous arbitrations would arise under Chapter 11 of the NAFTA, the three states of North America did not establish a standing adjudicative body but rather chose to have arbitrations resolved by distinct arbitral panels.

Glamis Gold Ltd. v. United States, Award, ¶ 3 (NAFTA Arb. Trib. 2009), <http://www.state.gov/documents/organization/125798.pdf>.

76. See *Glamis*, Award, ¶ 8 n.7 (“Given that there is no precedent, a tribunal may depart from even major previous trends. Unlike institutions with a closed docket of cases where consistency between the various claimants is often of paramount importance, the NAFTA regime’s effort at consistency is one that both looks backward to major trends in past decided disputes and forward towards disputes that have not yet arisen. The appeal process (in the sense that it corrects a statement of the law) in arbitration runs forward in time over several cases rather than upwards in one particular case until a supreme judicial authority settles a question for a time. It is for these reasons that as a tribunal departs from past trends, it should indicate the reasons for doing so.”). *Id.*

77. *Id.* ¶ 8.

78. *Id.* ¶ 3; see *supra* note 75 and accompanying text.

79. *Glamis*, Award, ¶ 6. *Glamis* explains that “[t]he ultimate integrity of the Chapter 11 system as a whole requires a modicum of awareness of each of these tribunals for the system as a whole.” *Id.* ¶ 5. However, the tribunal “in no way views its awareness of the context in which it operates as justifying (or indeed requiring) a departure from its duty to focus on the specific case before it.” *Id.* ¶ 9.

*Metalclad Corp. v. Mexico*⁸⁰ and the 2005 *Methanex Corp. v. United States*.⁸¹

The *Metalclad* claimant was a California corporation that in 1993 purchased property in Mexico to operate a landfill.⁸² That year the federal government granted a permit.⁸³ However, subsequent actions by political subdivisions stopped the project: the municipality in 1995 denied a permit,⁸⁴ and the province in 1997 issued an ecological decree that “effectively and permanently precluded operation of the landfill.”⁸⁵ The *Metalclad* tribunal determined that these actions constituted an indirect expropriation pursuant to article 1110, and a violation of the guarantee of “fair and equitable treatment” in article 1105.⁸⁶ The claimant was awarded more than US\$16 million, the amount of its investment.⁸⁷ *Metalclad* sparked a perception that NAFTA chapter 11 casts a “chilling effect on regulators” and serves “as a weapon by some multinational corporations against environmental protection.”⁸⁸

Five years after *Metalclad*, *Methanex* eased environmentalists’ fears.⁸⁹ There the tribunal upheld California’s prohibition of the

80. *Metalclad Corp. v. United Mexican States*, Award, 40 I.L.M. 36 (NAFTA Arb. Trib. 2000), available at http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/casos_mexico/metalclad/laudo/laudo_ingles.pdf.

81. *Methanex Corp. v. United States*, Final Award, 44 I.L.M. 1345 (NAFTA Arb. Trib. 2005), available at <http://www.state.gov/documents/organization/51052.pdf>.

82. See *Metalclad*, Award, ¶¶ 30, 35.

83. See *id.* ¶ 35.

84. See *id.* ¶ 50.

85. *Id.* ¶ 59.

86. See *id.* ¶ 101, ¶ 112; see also LOWENFELD, *supra* note 66, at 557, 559–60.

87. See *Metalclad*, Award, ¶ 131; see also LOWENFELD, *supra* note 66, at 566.

88. Paul Stanton Kibel & Jonathan R. Shultz, *Rio Grande Designs: Texans’ NAFTA Water Claims Against Mexico*, 25 BERKELEY J. INT’L L. 228, 247 (2007) (quoting Gustavo Alanis-Ortega, *Citizen Panel Sees Faults and Suggests Reform*, ENVTL. F., July–Aug. 2003, at 34, 38); see also Echeverria, *supra* note 71; Lauren Godhsall, Note, *In the Cold Shadow of Metalclad: The Potential for Change to NAFTA’s Chapter Eleven*, 11 N.Y.U. ENVTL. L.J. 264 (2002).

89. Despite being eased, environmentalists’ concerns over NAFTA chapter 11 remain after *Methanex* and *Glamis*. See Rossella Brevetti, *NAFTA Arbitration Panel Rejects Claim By Canadian Mining Firm Under Chapter 11*, 26 INT’L TRADE REP. (BNA) 826 (June 18, 2009) (“Earthjustice, Earthworks, Public Citizen and Sierra Club said June 9 that the dismissal of the Canadian firm’s claim does not remedy the serious problem of NAFTA providing foreign investors special rights to attack domestic health and environmental laws. Further, the groups cautioned that four other NAFTA challenges are pending against the United States in which foreign investors are demanding more than [US]\$6 billion . . .”).

gasoline additive methyl tertiary butyl ether, a suspected carcinogen, in a challenge brought by a Canadian manufacturer of the prime ingredient of the additive, methanol.⁹⁰ Although this ban devalued the claimant's investment and benefitted competing ethanol manufacturers, it did not violate NAFTA. In rejecting the article 1110 claim, the *Methanex* tribunal emphasized the absence of assurances against regulatory change:

[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.

....

No such commitments were given to Methanex. . . .

... Hence this ... is not [a case] where specific commitments respecting restraints on certain future regulatory actions were made to induce investors to enter a market and then those commitments were not honoured.⁹¹

This standard employed by *Methanex* is referred to in shorthand as "specific assurances."⁹² NAFTA tribunals use this standard to distinguish *Metalclad*, as shown by these passages from a 2002 award denying compensation under article 1110:

Metalclad had relied on the representations of the Mexican federal government of its exclusive authority to issue permits for hazardous waste disposal facilities. . . .

....

... The assurances received by the investor from the Mexican government in *Metalclad* were definitive, unambiguous and repeated, in stating that the federal

90. See *Methanex Corp. v. United States*, Final Award, 44 I.L.M. 1345, pt.IV, ch. F, ¶¶ 5–6 (NAFTA Arb. Trib. 2005), available at <http://www.state.gov/documents/organization/51052.pdf>.

91. *Id.*, pt. IV ch. D ¶¶ 7, 9–10.

92. See Kahn, *supra* note 2, at 425 (citing *Methanex*, pt. IV ch. D ¶¶ 7, 9–10).

government had the authority to authorize construction and operation of hazardous waste landfills.⁹³

NAFTA jurisprudence in this way has developed to find states liable if they renege upon “specific assurances” given to prospective investors.⁹⁴ This standard allows for *Metalclad* to remain intact albeit minimizing its application to a particular circumstance.⁹⁵ *Metalclad* is the only NAFTA investor-state arbitration that found an article 1110 violation,⁹⁶ although three subsequent tribunals likewise found violations of article 1105.⁹⁷ Investors have had much greater success challenging “fair and equitable treatment” than takings under NAFTA.⁹⁸

The content of NAFTA’s “fair and equitable treatment” guarantee is the subject of intense debate.⁹⁹ In November 2000, an award decision alarmingly interpreted article 1105 as “additive to the requirements of international law. That is, investors under NAFTA are entitled to the international law minimum *plus* the fairness elements.”¹⁰⁰ This reasoning prompted the United States, Canada, and Mexico to act collectively through the Free Trade Commission (“FTC”).¹⁰¹ In July 2001, FTC issued an interpretation—which chapter 11 makes expressly binding on

93. Feldman v. United Mexican States, Award, 42 I.L.M. 625, ¶¶ 146, 148, (NAFTA Arb. Trib. 2002), available at http://www.economia-snci.gob.mx/sphp_pages/importa/sol_controlo/consultoria/casos_mexico/marvin/laudo/laudo_ingles.pdf.

94. See Kahn, *supra* note 2, at 425–28, 447–48.

95. See *id.* at 425.

96. See Jack Coe, *Taking Stock of NAFTA Chapter 11 in its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 VAND. J. TRANSNAT’L L. 1381, 1401 (2003).

97. See Loewen Group, Inc. v. United States, Award, 42 I.L.M. 811, ¶ 137 (NAFTA Arb. Trib. 2003), available at <http://www.state.gov/documents/organization/22094.pdf> (reasoning that the statements concerning the article 1105 violation constituted dicta because the challenge was dismissed on procedural grounds); Pope & Talbot, Inc. v. Canada, Award on the Merits of Phase 2, 7 ICSID (W. Bank) 148, ¶ 195 (NAFTA Arb. Trib. 2001), available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/award_merits-e.pdf; S.D. Myers, Inc. v. Canada, Partial Award, 40 I.L.M. 1408, ¶ 268 (NAFTA Arb. Trib. 2000), available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/myerscanadapartialaward_final_13-11-00.pdf.

98. See Kahn, *supra* note 2, at 432.

99. See, e.g., Glamis Gold Ltd. v. United States, Award, ¶ 538 (NAFTA Arb. Trib. 2009), <http://www.state.gov/documents/organization/125798.pdf> (“The scope and reach of what is required of a Party by [the fair and equitable treatment] standard has been addressed in numerous arbitrations and debated by scholars; this case is no different.”).

100. *Pope & Talbot*, Award on the Merits of Phase 2, ¶ 110.

101. See FOLSOM, *supra* note 64, at 171.

tribunals¹⁰²—that article 1105 requires only “the customary international law minimum standard of treatment of aliens.”¹⁰³ Such treatment is epitomized by the 1926 arbitral award *Neer v. Mexico*.¹⁰⁴ There, armed men killed a U.S. citizen working in a mine in Mexico, and the United States pursued claims on behalf of his survivors.¹⁰⁵ Because the United States was unable to prove that Mexico lacked diligence in bringing those responsible to justice, relief was denied.¹⁰⁶ *Neer* articulated the following standard to assess government conduct:

[G]overnmental acts . . . , 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.¹⁰⁷

The FTC’s interpretation left unresolved whether the protection that NAFTA article 1105 affords foreign investors has evolved beyond the *Neer* standard.¹⁰⁸

III. GLAMIS SHOULD BE A MODEL FOR INVESTOR-STATE PROCEEDINGS

The process employed by the *Glamis* tribunal is exemplary in a number of aspects. From the outset, *Glamis* avoided the conflict

102. NAFTA, *supra* note 64, art. 1131(2) (“An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.”).

103. Free Trade Comm’n [FTC], *Free Trade Commission Clarifications Related to NAFTA Chapter 11*, § B(1), [1 Chapter 11: Investor-State Arb.] N. Am. Free Trade Agreements (Oxford Univ. Press) Booklet C.19.1, at 1, 2 (July 31, 2001); *see also Glamis*, Award, ¶ 599.

104. *Neer v. United Mexican States*, 4 R. Int’l Arb. Awards 60 (Gen. Claims Comm’n (U.S.-Mex.) 1926).

105. *See* R. DOAK BISHOP ET AL., FOREIGN INVESTMENT DISPUTES 1063 (2005).

106. *See id.*

107. *Neer*, 4 R. Int’l Arb. Awards at 61–62.

108. *Glamis*, Award, ¶ 600 (“The question thus becomes: what does this customary international law minimum standard of treatment require of a State Party vis-à-vis investors of another State Party? Is it the same as that established in 1926 in *Neer v. Mexico*? Or has Claimant proven that the standard has ‘evolved’? If it has evolved, what evidence of Custom has Claimant provided to the Tribunal to determine its current scope?”); *see also* LOWENFELD, *supra* note 66, at 558 (“As of mid-year 2007, no court or arbitral tribunal had ruled on a claim involving the revised formulation, and in particular whether the effect of the revised formulation is to freeze the standard of ‘customary international law’ at any particular date.”).

of interest problems sometimes found in investor-state arbitration.¹⁰⁹ The United States selected Professor David D. Caron from the University of California at Berkeley (Boalt Hall) and, in conjunction with Glamis, selected University of Utah President Michael K. Young to serve as the tribunal president.¹¹⁰ However, the United States challenged Glamis's selection of Donald L. Morgan because of an alleged conflict of interest and initiated the mechanism through which the ICSID Secretary-General determines whether an arbitrator may remain on a tribunal.¹¹¹ Mr. Morgan thereafter voluntarily resigned from the tribunal, dispensing with the need for a determination.¹¹² The United States did not object to Glamis's subsequent selection of Kenneth D. Hubbard to serve on the tribunal.¹¹³ Although Mr. Morgan's resignation positively avoided a potential conflict of interest, a systemic approach is needed to address this problematic aspect of international arbitration.¹¹⁴

The tribunal operated with commendable transparency. NAFTA chapter 11 does not require that proceedings be public or that nongovernmental organizations be able to participate.¹¹⁵ However, the 2001 FTC interpretation clarifying the substantive protection of article 1105 also set forth a procedural obligation that chapter 11 tribunal documents be made public subject to

109. See Fiona Marshall & Howard Mann, *Revision of the UNCITRAL Arbitration Rules* 4–5 (2006), available at http://www.iisd.org/pdf/2006/investment_uncitral_rules_rrevision.pdf.

110. See *Glamis*, Award, ¶ 188, at 91–92; see also Berkeley Law, Faculty Profiles: David C. Caron, <http://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=145> (last visited Nov. 1, 2009); Univ. of Utah, Michael K. Young: President, University of Utah, http://www.admin.utah.edu/president/pres_bio.html (last visited Nov. 1, 2009).

111. See *Glamis*, Award, ¶ 188 n.548 (citing NAFTA, *supra* note 64, art. 1124(1); UNCITRAL Arbitration Rules, G.A. Res. 31/98, art. 12(1), U.N. Doc. A/RES/31/98 (Dec. 15, 1976) [hereinafter UNCITRAL Arbitration Rules]).

112. See *id.* ¶ 188.

113. *Id.* Mr. Hubbard is a private practitioner with a Colorado law firm. See MARTINDALE-HUBBELL LAW DIRECTORY CO142B (2007), available at Marhub CO 4050772 (LEXIS).

114. See Marshall & Mann, *supra* note 109, at 9 (suggesting reforms to the selection and challenging of arbitrators to improve the impartiality of investor-state arbitration).

115. Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 46–47 (2003). NAFTA does permit the states not party to the action to participate in the proceedings. NAFTA, *supra* note 64, art. 1128.

the redaction of confidential information.¹¹⁶ In 2003, the FTC issued a statement providing the procedure for tribunals to allow nondisputing party participation.¹¹⁷ *Glamis* explained that *amicus* participation “should be granted liberally”¹¹⁸ and accepted submissions from the Quechan Tribe,¹¹⁹ environmentalists,¹²⁰ and the mining industry.¹²¹ Arbitration documents were timely published on the U.S. Department of State website, although sensitive information was redacted.¹²²

Arbitral hearings took place at the World Bank office in Washington, D.C. over nine days during August and September 2007.¹²³ “[T]he public was invited to view the proceedings in a separate room via closed circuit television.”¹²⁴ Although the live feed was stopped during the disclosure of confidential information, Quechan Tribe members had their own viewing

116. FTC, *supra* note 103, § A(2)(b).

117. Free Trade Comm’n, *Statement of the Free Trade Commission on Non-Disputing Party Participation*, [I Chapter 11: Investor-State Arb.] N. Am. Free Trade Agreements (Oxford Univ. Press) Booklet C.19.1, at 12 (Oct. 7, 2003).

118. *Glamis*, Award, ¶ 286.

119. *Id.* ¶ 274; *see also*, *Glamis*, Decision on Application and Submission by Quechan Indian Nation (Sept. 16, 2005), <http://www.state.gov/documents/organization/53592.pdf>; Submission of Non-Disputing Party Quechan Indian Nation, *Glamis* (Oct. 16, 2006), <http://www.state.gov/documents/organization/75016.pdf>.

120. *See Glamis*, Award, ¶ 286; *see also* Submission of Non-Disputing Parties Sierra Club and Earthworks, *Glamis* (Oct. 16, 2006), <http://www.state.gov/documents/organization/74832.pdf>.

121. *See Glamis*, Award ¶ 28; *see also* Submission of Non-Disputing Party National Mining Association, *Glamis* (Oct. 13, 2006), <http://www.state.gov/documents/organization/75179.pdf>. Despite allowing *amicus* submissions, the tribunal did not address the submissions in the award. While it “appreciate[d] the thoughtful submissions made by a varied group of interested non-parties,” the tribunal found that the *amicus* submissions were beyond the scope of what was necessary to resolve the dispute and elected to “confine its decision to the issues presented.” *Glamis*, Award, ¶ 8.

122. *See* U.S. Dep’t of State, *Glamis Gold Ltd. v. United States of America*, <http://www.state.gov/s/1/c10986.htm> (last visited Nov. 1, 2009). For a sampling of the information that was redacted, *see Glamis*, Award, ¶¶ 50, 91–93, 94 n.229, 100–01, 101 n.252, 103–08, 105 n.277, 106 nn.289–92, 108 n.301. This included the location of the Trail of Dreams, which the Quechan Tribe did not want made public. *See id.* ¶ 282.

123. *Glamis*, Award, ¶¶ 299, 303. The place of arbitration is critical because it is where parties to chapter 11 proceedings can seek to annul the award in a domestic court. *See* NAFTA, *supra* note 64, art. 1136(3)(a)(ii); Kahn, *supra* note 2, at 417 n.225; *see also* Coe, *supra* note 96, at 1389 (observing that *Metalclad* is the only NAFTA award to be successfully challenged in a domestic court and, even there, the reviewing Canadian court found an alternate basis to substantively uphold most of the award).

124. *Glamis*, Award, ¶ 290, at 132; *see also Glamis*, Procedural Order No. 11, ¶ 25 (July 9, 2007), <http://www.state.gov/documents/organization/88173.pdf>. The author of this Article observed the hearings.

room to observe discussion of their culture that the general public could not.¹²⁵ This accommodation was made in response to a request from the Quechan Tribe.¹²⁶ The tribunal should be commended for its open proceedings that respected important confidences, and allowing *amicus* participation of interested non-disputing parties. *Glamis* achieved its objective that “‘proceedings under NAFTA should strive for increased transparency.’”¹²⁷

The glaring shortcoming of the *Glamis* process is the large lag between the final hearing in September 2007 and the issuance of the award in June 2009.¹²⁸ However, this period appears reasonable given that the tribunal worked thoroughly with the parties, primarily to resolve disputed discovery. Despite the lack of firm rules for discovery in arbitration,¹²⁹ the tribunal recognized early on that the attorney-client,¹³⁰ deliberative process,¹³¹ and work-product privileges¹³² could protect documents sought by both parties.¹³³ The tribunal instructed the parties to maintain privilege logs and guided them towards resolution of discovery disputes through an “iterative process.”¹³⁴ This approach yielded admirable results, as “only a small number

125. *Glamis*, Award, ¶ 290; *Glamis*, Procedural Order No. 11, ¶ 25.

126. *Glamis*, Award, ¶ 290 n.614.

127. *See id.* ¶ 282.

128. *See Kahn, supra* note 2, at 441 n.350 (anticipating award issuance in June 2008 based on a statistical average).

129. *Glamis*, Award, ¶ 206 (“Article 24 is general in its terms, making clear the authority of the Tribunal to order the production of ‘documents, exhibits or other evidence’ but providing only skeletal guidance as to the exercise of that authority.” (quoting UNCITRAL Arbitration Rules, *supra* note 111, art. 24)).

130. *Id.* ¶ 222.

131. *Id.* ¶ 224.

132. *Id.* ¶ 227.

133. Although the parties “agree[d] that the privilege law of the United States should be looked to by the tribunal for guidance as to the law of privilege in this arbitration,” they disputed which specific jurisdiction. Decision on Parties’ Requests for Production of Documents Withheld on Grounds of Privilege, *Glamis*, ¶ 19 (Nov. 17, 2005), <http://www.state.gov/documents/organization/57342.pdf>. The tribunal

reviewed the case law of numerous United States jurisdictions . . . and attempted to identify general consensus between courts that might be helpful in defining what the Parties would reasonably expect to apply in this situation. The Tribunal then used this information, combined with its knowledge of an appreciation for the differences between court proceedings and international arbitration, to craft standards that can assist the Parties in assessing their claims of privilege and their objections to such claims.

Id. ¶ 20 (citation omitted).

134. *Glamis*, Award, ¶ 12.

of documents required individual production decisions by the tribunal.”¹³⁵ Discovery rulings narrowed the number documents subject to disagreement as the arbitration progressed.¹³⁶ Only six documents remained disputed at the September 2007 hearings, at which time Glamis renewed its request that the United States produce them.¹³⁷

In March 2008 the tribunal ordered the United States to produce the outstanding documents,¹³⁸ which the United States produced in August 2008.¹³⁹ Three of these documents had portions redacted.¹⁴⁰ According to the United States, California mandated the redactions and even refused to disclose the redacted portions to federal attorneys.¹⁴¹ Glamis thereafter requested that the tribunal “draw an adverse inference” from the redactions,¹⁴² prompting the United States to offer “an in camera review . . . if the Tribunal were to determine that such a review would be helpful.”¹⁴³ The tribunal found party consent to be a prerequisite for in camera review and asked if Glamis so desired.¹⁴⁴ In October 2008 Glamis declined the offer and instead “respectfully requested the Tribunal make its ruling on the redactions and proceed with the issuance of the decision on the merits.”¹⁴⁵

This approach positively resulted in the production of all documents that the tribunal found discoverable and avoided a federalist showdown over the redactions. The United States denied possession of the redacted documents and explained that

135. *Id.*

136. *See id.* ¶ 231–47; *see also Glamis*, Decision on Requests for Production of Documents and Challenges to Assertions of Privilege (Apr. 21, 2006), <http://www.state.gov/documents/organization/75784.pdf>. In its April 2006 decision, the tribunal “decided on each request or, in some instances where a request required the weighing of the Parties’ interests, deferred decision.” *Glamis*, Award, ¶ 231.

137. *See Glamis*, Award, ¶ 303; *see also* Transcript of Hearing on the Merits, *Glamis*, at 1793 (Sept. 17, 2007), <http://www.state.gov/documents/organization/93408.pdf>.

138. *See Glamis*, Award, ¶ 248, ¶ 682 n.1440; *Glamis*, Procedural Order No. 13 (NAFTA Arb. Mar. 21, 2008), *available at* <http://www.state.gov/documents/organization/110307.pdf>.

139. *See Glamis*, Award, ¶ 251, ¶ 682 n.1440.

140. *See id.* ¶ 252.

141. *See id.* ¶¶ 711–12, 751 & n.1648, 753–54, (argument based on California’s explanation for the redactions).

142. *Id.* ¶ 252.

143. *Id.* ¶ 253.

144. *See id.* ¶ 255.

145. *Id.* ¶ 256 (quoting Claimant’s Letter to the Tribunal, *Glamis* (Oct. 15, 2008)).

California produced “thousands of documents” in a “spirit of voluntary cooperation,” as opposed to being “party to this arbitration.”¹⁴⁶ The tribunal was ultimately able to resolve the discovery matter without upsetting the delicate relationship between the United States and California; although Glamis objected to the redactions, it chose not to pursue the offer in camera review. Thus the tribunal was not compelled to force the U.S. federal government to invoke supremacy over its political subdivision, California.¹⁴⁷

The delay associated with the tribunal’s time-intensive approach to discovery was offset by the beneficial outcome.¹⁴⁸ Similarly, in March 2008, the tribunal sought additional clarification from the parties on a central issue—the financial assurances available to Glamis for securing state and federal authorization of its POO.¹⁴⁹ The parties provided submissions by May 2008.¹⁵⁰ Given the tribunal’s diligence in seeking clarification on an important issue and resolving discovery, the award issuance in June 2009 constituted a reasonable time frame instead of undue delay. Future investor-state arbitration tribunals should follow this *Glamis* pattern by rendering their decisions in a timely fashion and documenting the basis for delay if there is a significant gap between the final hearing and award issuance.

Lastly, *Glamis* exemplifies model investor-state arbitration by requiring the losing party to pay two-thirds of the costs. Although both of Glamis’s claims were denied, the tribunal thereafter recognized its discretion in terms of awarding costs.¹⁵¹ *Glamis* required the loser to pay two-thirds of the nonattorney costs of arbitration as opposed to the entire amount because the

146. *Id.* ¶ 751.

147. NAFTA appears to give tribunals this authority based on its systematic supremacy of federal governments. See NAFTA, *supra* note 64, art. 105 (“The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance . . . by state and provincial governments.”). Nevertheless, *Glamis* should be commended for avoiding an unnecessary mandate.

148. See *Glamis*, Award, ¶ 12 (“The extensive Party-driven document production aspect of this proceeding required time, but it is the Tribunal’s view that the active involvement of the Tribunal in providing guidance to the Parties both expedited and limited the extent of the effort.”).

149. See *id.* ¶¶ 304–05.

150. See *id.* ¶ 308.

151. See *id.* ¶ 832.

“Claimant raised difficult and complicated claims based in at least one area of unsettled law, and both Parties well argued their positions with considerable legal talent and respect for one another, the process and the Tribunal.”¹⁵² This statement invites future investor-state tribunals to similarly take into consideration claim strength and party conduct in allocating arbitration costs. Claimants, as well as defending governments, are on notice that frivolous allegations will be penalized and behavior during the arbitration will factor into the ultimate distribution of costs. Given its overwhelmingly positive process and its substantive analyses described below, *Glamis* was rightfully well received by U.S. officials.¹⁵³

IV. THE GLAMIS REGULATORY TAKINGS ANALYSIS GOES BEYOND U.S. LAW TO GIVE GOVERNMENTS CONFIDENCE TO REGULATE WITHOUT FEAR OF COMPENSATION

Glamis affirms the relationship between U.S. takings law and article 1110. NAFTA takings claimants have procedural advantages over U.S. domestic litigants. For example, *Glamis* had the merits of its challenge arbitrated despite two jurisdictional defects that would likely preclude such consideration by a U.S. court. However, any procedural disadvantage to government is more than offset by the substantive takings analysis that *Glamis* employs. Applying its “inverse *Lucas*” framework, the tribunal found the economic impact in question to be insufficient to require compensation, without even having to consider any other factors. This approach gives governments confidence to regulate and should be used to assess takings challenges worldwide.

A. U.S. Takings Law

The Takings Clause in the U.S. Constitution originally compensated property owners when the government physically took their land.¹⁵⁴ The Supreme Court, in 1922, extended this

152. *Id.* ¶ 833.

153. *See* Brevetti, *supra* note 89, at 826 (quoting government officials and congressmen as positively reacting to the award).

154. *See* U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”); Kahn, *supra* note 2, at 403, 405. This protection is applied to the states through the Fourteenth Amendment. *See* U.S. CONST. amend. XIV;

protection to actions short of actual acquisition, explaining that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”¹⁵⁵ This language “generated decades of uncertainty as to when a regulation . . . triggers the constitutional obligation to compensate.”¹⁵⁶ In 1978 the Supreme Court set forth an analytical framework to assess regulatory takings claims in *Penn Central Transportation Corp. v. New York City*.¹⁵⁷ The plaintiff challenged the denial of a permit to construct a large office building above Grand Central.¹⁵⁸ The structure was a designated architectural landmark—“one of New York City’s most famous buildings” and “a magnificent example of the French beaux-arts style.”¹⁵⁹ The Supreme Court denied compensation,¹⁶⁰ and over time crafted a three-factor framework to assess whether a regulatory taking has occurred:¹⁶¹ (1) economic impact of the regulation¹⁶²—a sufficiently large devaluation is required for a taking, and a greater economic impact increases the likelihood of compensation;¹⁶³ (2) “reasonable investment-backed expectations”¹⁶⁴ (“RIBEs”)—an objective assessment as to whether the government action complained of was “foreseeable” or could have been “reasonably anticipated” considering the

Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, 239 (1897) (applying the protection to state and local government).

155. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

156. Kahn, *supra* note 2, at 405.

157. 438 U.S. 104 (1978).

158. *See id.* at 116–17.

159. *Id.* at 115.

160. *See id.* at 138.

161. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (citing *Penn Cent.*, 438 U.S. at 124).

162. *Id.* (citing *Penn Cent.*, 438 U.S. at 124).

163. John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL’Y 171, 178 (2005) (“Generally speaking, the greater the economic impact of a government action the greater the likelihood of a taking. Furthermore, in the absence of a very significant economic impact, a regulatory taking claim will generally fail; as the Supreme Court has explained, takings recovery is limited to ‘extreme circumstances.’” (quoting *United States v. Riverside Bayview Homes*, 474 U.S. 121, 124 (1985))).

164. *Palazzolo*, 533 U.S. at 617 (citing *Penn Cent.*, 438 U.S. at 124).

“regulatory environment” context;¹⁶⁵ and (3) “character of the government action”¹⁶⁶—analyzing the regulation under review.¹⁶⁷

This *Penn Central* framework was revisited in the 1992 case *Lucas v. South Carolina Coastal Council*.¹⁶⁸ There the plaintiff was unable to develop his fragile beachfront property because of erosion concerns.¹⁶⁹ The Supreme Court found a taking because of “total” economic deprivation, concluding that regulations are compensable “where the government has deprived a landowner of all economically beneficial uses.”¹⁷⁰ Given the enormity of the economic impact, a taking was found without inquiry as to RIBEs or the character of the government action.¹⁷¹ *Lucas* therefore modifies the *Penn Central* framework such that a severe economic impact will result in a taking without consideration of the remaining factors.¹⁷²

In 2002, one decade after *Lucas*, the Supreme Court confined its applicability in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.¹⁷³ Forming a border between California and Nevada, Lake Tahoe is “the fairest picture the whole earth affords.”¹⁷⁴ The Tahoe Regional Planning Agency (“TRPA”) imposed a thirty-two month planning moratorium to preserve environmentally sensitive lands while it undertook a

165. *Appollo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (quoting *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001)); Echeverria, *supra* note 163, at 184.

166. *Palazzolo*, 533 U.S. at 617 (citing *Penn Cent.*, 438 U.S. at 124).

167. The *Penn Central* character factor, initially understood as evaluating the legitimacy and effectiveness of the subject government regulation, was narrowed to eliminate these considerations in *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528, 543–48 (2005). See Echeverria, *supra* note 163, at 199. In the wake of *Lingle*, the precise content of the factor is subject to debate. See Michael B. Kent, Jr., *Construing the Canon: An Exegesis of Regulatory Takings Jurisprudence After Lingle v. Chevron*, 16 N.Y.U. ENVTL. L.J. 63, 99–101 (2008). Nevertheless, the focus of this factor is clearly whether the regulation can be characterized as “so onerous that its effect is tantamount to a direct appropriation or ouster.” *Lingle*, 544 U.S. at 537.

168. 505 U.S. 1003 (1993).

169. *See id.* at 1007–08.

170. *Id.* at 1018.

171. *See Echeverria, supra* note 163, at 178.

172. *See id.*

173. *See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

174. MARK TWAIN, *ROUGHING IT* 169 (Signet Classics 1994) (1872).

comprehensive planning process for the watershed.¹⁷⁵ At issue was whether this moratorium constituted a taking. With all three *Penn Central* factors weighing in favor of TRPA,¹⁷⁶ the Supreme Court denied compensation.¹⁷⁷ *Tahoe-Sierra* clarifies that *Lucas* will require compensation only in the “extraordinary case,” whereas *Penn Central* remains the “default rule” and “polestar” to evaluate regulatory takings.¹⁷⁸

Apart from the substantive analysis, U.S. takings law has developed jurisdictional prerequisites that must be fulfilled before a claim can be pursued. U.S. claimants seeking compensation must establish a cognizable property interest upon which a regulatory action allegedly affects a taking. *Lucas* requires this “antecedent inquiry” as to whether “the proscribed use interests were . . . part of [the owner’s] title to begin with.”¹⁷⁹ Additionally, U.S. courts will only consider the merits of a “ripe” challenge to government action. As evidenced when the district court dismissed the lawsuit Glamis initiated to challenge the Leshy Opinion, claims ripen after “the administrative agency has arrived at a final, definitive position regarding how it will apply regulations at issue to the particular land in question.”¹⁸⁰ The Supreme Court explains that this requirement is especially strict in the takings context:

A landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner’s first having followed reasonable and necessary steps to allow

175. See *Tahoe-Sierra*, 535 U.S. at 302; see also Jordan C. Kahn, *Lake Tahoe Clarity and Takings Jurisprudence: the Supreme Court Advances Land Use Planning in Tahoe-Sierra*, 26 ENVTL. L. & POL’Y J. 33 (2002).

176. *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 34 F. Supp. 2d 1226, 1242 (D. Nev. 1999) (finding against takings liability using the *Penn Central* analysis). Because the district court found takings liability under *Lucas* and the plaintiffs did not appeal the *Penn Central* holding, neither the Ninth Circuit nor the U.S. Supreme Court had the opportunity to review the district court’s *Penn Central* conclusion. See Kahn, *supra* note 175, at 50.

177. *Tahoe-Sierra*, 535 U.S. at 334.

178. *Id.* at 332, 336–37.

179. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1993).

180. *Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 190–91 (1985).

regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law.¹⁸¹

Without the plaintiff first demonstrating both a ripe claim and a cognizable property interest, U.S. courts will not evaluate the merits of a claim under the Takings Clause.

B. *Glamis Confirms that NAFTA Takings Claims Have Procedural Advantages*

Whereas the tribunal arbitrated Glamis's article 1110 claim on its merits, a U.S. court would likely have procedurally dismissed the claim had Glamis pursued it under the Takings Clause. In April 2005, the United States sought bifurcation of the proceedings with preliminary consideration of its jurisdictional defenses including the lack of a ripe claim.¹⁸² The tribunal denied the request in May 2005, exercising its discretion to proceed with consideration of the merits.¹⁸³ The United States continued during the merits phase to argue that Glamis's article 1110 claim suffered jurisdictional defects.¹⁸⁴ Under U.S. precedent, owners of mineral rights do not have recognized property interests in the ability to mine free from compliance with subsequently enacted environmental regulation.¹⁸⁵ The

181. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620–21 (2001).

182. *See* Request for Bifurcation of Respondent United States of America, Glamis Gold, Ltd. v United States, at 4–5 (NAFTA Arb. Trib. Apr. 8, 2005), <http://www.state.gov/documents/organization/45119.pdf>. The United States also sought bifurcation based on acts challenged by Glamis being outside of NAFTA's three-year statute of limitations. *See id.* at 2–3; *see also* NAFTA, *supra* note 64, art. 1117(2). The tribunal eventually determined that the events occurring more than three years from the initiation of arbitration were not time barred, but instead “were raised merely as ‘factual predicates’” that properly provide “context” for Glamis's claims. *Glamis*, Award, ¶¶ 13, 349 (2009). *Glamis* thus recognizes that NAFTA's three-year statute of limitations is flexible. *Id.* ¶ 347.

183. *Glamis*, Procedural Order No. 2, ¶ 16 (May 31, 2005), <http://www.state.gov/documents/organization/47249.pdf>; *see also* UNCITRAL Arbitration Rules, *supra* note 111, art. 21(4) (“In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.”).

184. *See* Counter-Memorial of Respondent, *supra* note 4, at 108–19; Rejoinder of Respondent United States of America, *Glamis*, at 3–11 (Mar. 15, 2007), <http://www.state.gov/documents/organization/82700.pdf>.

185. This precedent exists pursuant to the Fifth Amendment, *see* *Reeves v. United States*, 54 Fed. Cl. 652, 669 (2002) (dismissing takings challenge where federal

United States relied on these cases,¹⁸⁶ which Glamis distinguished in reply.¹⁸⁷

In its award, the tribunal did not address whether Glamis had a cognizable property interest in its Mining Act of 1872 claims.¹⁸⁸ This jurisdictional shortcoming could have prevented merits consideration of Glamis's takings claim in U.S. courts.¹⁸⁹ The tribunal's disregard of this issue and denial of the bifurcation request reveal that NAFTA takings claimants have procedural advantages over domestic litigants in that the scope of NAFTA chapter 11 is broader. This result is attributable to NAFTA's exceptionally broad "investment" definition,¹⁹⁰ which "covers a great deal more than the property interests traditionally protected by the Fifth Amendment."¹⁹¹

The tribunal found ripeness to be a prerequisite for NAFTA takings claims, albeit one that is looser than under U.S. law. *Glamis* explained the NAFTA ripeness requirement in the following respect:

Through the language of Article 1117(1), the State Parties conceived of a ripeness requirement in that a claimant needs to *have* incurred loss or damage in order to bring a claim for compensation Claims only arise under NAFTA Article 1110 when actual confiscation follows, and thus mere threats of expropriation or nationalization are not sufficient to make

government denied application to explore and mine pursuant to unpatented mining claims), and state constitutions that contain takings clauses with language identical to the Fifth Amendment. *See Seven Up Pete Venture v. State*, 114 P.3d 1009, 1017 (Mont. 2005) (dismissing challenge to the state's prohibition on cyanide heap leach mining enacted through voter initiative by plaintiff who had invested heavily in mineral rights acquired before the prohibition but had not yet obtained any permit to authorize mining because "an owner cannot maintain an action for loss of a property right" that it never had); *Kinross Copper Corp. v. State*, 981 P.2d 833, 836 (Or. Ct. App. 1999) (dismissing takings challenge where state government denied wastewater discharge permit to lessee of unpatented mining claims).

186. *See* Counter-Memorial of Respondent, *supra* note 4, at 123–33.

187. *See* Reply Memorial of Claimant Glamis Gold, *Glamis*, at 14–15 (Dec. 15, 2006) (arguing that *Seven Up Pete* involved Montana state mineral leases).

188. *See Glamis*, Award, ¶¶ 309–52 (ruling on "Preliminary Objections" and not addressing the U.S. argument that Glamis lacked a cognizable property interest protected under the takings doctrine).

189. *See Kahn*, *supra* note 2, at 465–69.

190. *See NAFTA*, *supra* note 64, art. 1139.

191. *Been & Beauvais*, *supra* note 115, at 42; *see also Echeverria*, *supra* note 71, at 28, 33 (explaining that "essentially every type of law, regulation, contract, policy decision, or other governmental action affecting the investor" is subject to article 1110).

such a claim ripe; for an Article 1110 claim to be ripe, the governmental act must have directly or indirectly taken a property interest resulting in actual present harm to an investor.¹⁹²

The tribunal perceived the ripeness rationale as facilitating economic impact evaluation: “[w]ithout a governmental act that moves beyond a mere threat of expropriation to an actual interference with a property interest, it is impossible to assess the economic impact of the interference.”¹⁹³ The tribunal connected the ripe claim requirement to the first *Penn Central* factor by concluding that “the inquiry into ripeness in this case leads directly to the threshold inquiry of any expropriation analysis: evaluation of the economic impacts of the complained of measures.”¹⁹⁴

The tribunal held Glamis’s takings challenge to be sufficiently ripe.¹⁹⁵ The United States emphasized both the lack a final agency action applying the California measures to the project and Glamis’s ability to submit a modified POO that could profitably comply with the complete backfill requirement.¹⁹⁶ The tribunal nevertheless determined that the Imperial Project “likely would be affected by the legislation should its application progress to the point at which those requirements would be applied.”¹⁹⁷ Moreover, Glamis’s expropriation claim was determined to be ripe as of December 12, 2002, because the tribunal could assess the economic impact of the California measures as of that date.¹⁹⁸ The conclusion that NAFTA ripeness

192. *Glamis*, Award, ¶ 328. The relevant NAFTA language makes as a prerequisite for a claim “that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.” NAFTA, *supra* note 64, art. 1117(1).

193. *Glamis*, Award, ¶ 331.

194. *Id.* ¶ 342.

195. *See id.* ¶¶ 333, 342.

196. *See id.* ¶ 340.

197. *Id.* ¶ 336.

198. *See id.* ¶ 342. Assessment of the economic impact as of December 12, 2002, was facilitated by the parties’ agreement that the gold price was US\$326 per ounce on that date. *See id.* ¶¶ 474, 479. The tribunal declined as unnecessary consideration of economic impact using the present gold price. *See id.* ¶ 478–79 (“[T]he Tribunal need not consider the relevance, if any, of the current price of gold to this dispute The relevance of future gold prices, though debated intensely between the Parties, does not aid in this inquiry.”). The tribunal specifically rejected as unripe any contention that California would never authorize the project because Glamis did not present sufficient

is satisfied by the mere passage of restrictions as opposed to their specific application deviates from U.S. ripeness that ordinarily requires final agency action.¹⁹⁹ The tribunal focuses exclusively on requiring ripe claims to facilitate economic assessment and ignores another critical rationale of efficacy. Litigation or arbitration may be avoided altogether if the government has the opportunity to achieve an acceptable resolution in the permitting process, and will proceed more efficiently if there is a complete record to review.²⁰⁰

Glamis contributes to the emerging international ripeness doctrine by articulating such a prerequisite for NAFTA article 1110 claims.²⁰¹ However, consideration of *Glamis*'s takings challenge notwithstanding the lack of final agency action applying the California measures demonstrates that NAFTA ripeness is looser than U.S. law. Given the bifurcation request denial and unwillingness to even address the existence of a cognizable property interest under the Mining Act of 1872 in having to comply with subsequent environmental requirements, *Glamis* confirms that NAFTA takings claimants have procedural advantages over U.S. litigants. The *Glamis* outcome is jarring because the challenge brought by a Canadian was predicated on Mining Act of 1872 rights exclusively for U.S. citizens.²⁰²

evidence that "no viable option could be developed some time in the future, with improved technology and, in particular, increased gold prices." *Id.* ¶ 342.

199. *Glamis* argued that further application processing was "futile"—an exception to the ripeness requirement recognized in *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1170–72 (Fed. Cir. 1991). See *Glamis*, Award, ¶ 326. In addressing the *Whitney Benefits* argument, the tribunal concluded that *Glamis* did not need to have its application formally acted upon because "it is almost certain that such final decision would be a denial." *Id.* ¶ 339. However, *Whitney Benefits* is distinguishable because there the legislation "expressly precluded a permit for surface mining." *Whitney Benefits*, 926 F.2d at 1170–72. By contrast, the California measures impose environmental reclamation requirements as opposed to an outright prohibition on mining. See Transcript of Hearing on the Merits, *Glamis*, at 1837–39, 2088–89 (Sept. 17, 2007), <http://www.state.gov/documents/organization/93408.pdf>.

200. See Kahn, *supra* note 2, at 471–72.

201. See *Glamis*, Award, ¶¶ 328–31 (discussing ripeness requirement under international law).

202. See Submission of Non-Disputing Parties Sierra Club and Earthworks, *Glamis*, ¶ 18 (Oct. 16, 2006), <http://www.state.gov/documents/organization/74832.pdf>; Alison Ochs, Note, *Glamis Gold Ltd.—A Foreign United States Citizen?: NAFTA and its Potential Effect on Environmental Regulations and the Mining Law of 1872*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 495, 502–04 (2005) (arguing that *Glamis* should not be treated superior to U.S. citizens concerning rights under the Mining Act of 1872). Environmentalists continue to attack *Glamis* on the basis that the claimant simultaneously pursued rights

Nevertheless, any procedural disadvantages to the United States in defending NAFTA takings challenges is more than offset by its substantive analysis that makes article 1110 compensation significantly less likely than through the Fifth Amendment.

C. *Glamis Employs an “Inverse-Lucas” Analysis To Deny Compensation*

Glamis begins its article 1110 takings discussion by acknowledging *Penn Central*.²⁰³ This reference to U.S. law is unsurprising given that the three-factor framework for assessing takings is set forth in the U.S. Model BIT.²⁰⁴ However, *Glamis* modifies the setup by explaining that the “severity of the economic impact and the duration of that impact” is a “foundational threshold inquiry” to be conducted before consideration of RIBEs and the “character of the government actions taken.”²⁰⁵ The tribunal elaborates that the takings “analysis should begin with determining whether the economic impact of the complained of measures is sufficient to potentially constitute a taking at all.”²⁰⁶ This approach is similar to *Lucas* in that it starts with the economic impact factor and, in certain circumstances, resolves the takings challenge without having to consider the remaining *Penn Central* factors. Both consider only economic impact, but reach opposite results. While *Lucas*

afforded exclusively to either U.S. or Canadian citizens. See Brevetti, *supra* note 89, at 827 (“Margrete Strand Ranges, director of the Sierra Club’s Responsible Trade program, said . . . that the fact that *Glamis*’s claim was even possible shows why foreign investor rules in trade agreements must be altered.”).

203. *Glamis*, Award, ¶ 356 n.703.

204. See OFFICE OF THE U.S. TRADE REPRESENTATIVE [USTR], U.S. MODEL BIT Annex B ¶ 4(a) (2004), available at [http://www.ustr.gov/sites/default/files/U.S.model BIT.pdf](http://www.ustr.gov/sites/default/files/U.S.model%20BIT.pdf). (“The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.”); David Schneiderman, *Property Rights and Regulatory Innovation: Comparing Constitutional Cultures*, 4 INT’L J. CON. L. 371, 387 (2006) (observing the inclusion of *Penn Central* factors in modifications to bilateral investment treaties (“BIT”) between the United States and Chile, Morocco, and Singapore).

205. *Glamis*, Award, ¶ 356.

206. *Glamis*, Award, ¶ 357.

considers this factor alone to require compensation,²⁰⁷ *Glamis* focuses exclusively on economic impact as a basis for eliminating takings liability. *Glamis* thereby follows an “inverse-*Lucas*” approach.

The tribunal recognizes the takings law precept that compensation is only mandated if there is a substantial devaluation.²⁰⁸ It describes its takings task as having “[t]o determine whether Claimant’s investment in the Imperial Project has been so radically deprived of its economic value to Claimant as to constitute an expropriation and violation of Article 1110.”²⁰⁹ Before dissecting the economic impact of the California measures, *Glamis* quickly denied compensation for federal government actions. The award explained that the 2001 denial

was quickly reversed and therefore of short duration. This does not constitute an expropriation under NAFTA Article 1110. The Tribunal therefore denies Claimant’s claim that the delay and temporary denial occasioned by the federal government either individually or in combination with subsequent complained of measures of the State of California were violations of Article 1110.²¹⁰

The tribunal then proceeds to the key question “of whether there has been a radical diminution in value of the Imperial Project, which is ascertained by the analysis of the entitlements and value that remain with Claimant after the enactment of these [California] measures.”²¹¹

The tribunal worked through *Glamis*’s valuation methodology. According to *Glamis*, the Imperial Project reduced in value from US\$49.1 million to negative US\$8.9 million as a

207. *Lucas v. S.C. Coastal Council* 505 U.S. 1003, 1018 (1993); Echeverria, *supra* note 71, at 178.

208. See *Glamis*, Award, ¶ 357; see also *Fireman’s Fund Ins. Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/1 ARB (AF)/02/1, Award, ¶ 176(c) n.157 (NAFTA Arb. Trib. July 17, 2006), http://www.naftaclaims.com/Disputes/Mexico/Fireman/FiremansFund-Mexico-Final_Award.pdf. (observing that in explaining the requisite degree of economic deprivation, NAFTA “tribunals employ the adjective ‘significant,’ ‘fundamental,’ ‘radical’ or ‘serious’”); Echeverria, *supra* note 71, at 178 (“[I]n the absence of a very significant economic impact, a regulatory takings claim will generally fail.”).

209. *Glamis*, Award, ¶ 358.

210. *Id.* ¶ 360.

211. *Id.* ¶ 361.

result of the California measures.²¹² The tribunal examined each valuation element “one-by-one” in conjunction with the corresponding U.S. position,²¹³ describing and qualifying its undertaking as follows:

This approach—namely, the Tribunal’s acceptance of Claimant’s assumptions as a starting point—is a best case scenario for Claimant. In essence, this approach asks: “Even if the Tribunal accepts Claimant’s pre-backfilling measures valuation as correct and further accepts Claimant’s characterization of the factors resulting in a reduced value, does a review of the claimed reduction and the resulting adjustments by the Tribunal result in a radical diminution in the value of the Imperial Project?”

... [T]he Tribunal’s goal in this inquiry into Claimant’s valuation model is not to determine if there *was* an expropriation, but to determine if there *was not* significant economic impact. ... [T]he question ... is not what is the exact value of the Imperial Project following the complained of measures, but is the value of the post-backfilling Imperial Project positive *even* if such an issue is decided in Claimant’s favor.²¹⁴

The tribunal concluded that “the California backfilling measures did not result in a radical diminution in the value of the Imperial Project.”²¹⁵ Through its valuation analysis, *Glamis* determined that “the post-backfilling valuation of the Imperial Project exceeds [US]\$20 million.”²¹⁶ The tribunal reached this calculation only after painstakingly considering each value component and adjusting *Glamis*’s methodology as appropriate. Specifically, the tribunal reduced the backfilling cost from the 35.3 U.S. cents per ton figure that *Glamis* used to 28.44 U.S. cents per ton, in accordance with the “bottom up” approach advocated by the United States;²¹⁷ halved the claimed cost of equipment refurbishment to US\$7.7 million after being

212. *See id.* ¶ 362.

213. *Id.* ¶ 16.

214. *Id.* ¶¶ 364–65; *see also id.* ¶ 364 n.719 (noting that “this methodology would not apply at a damages phase, where the Tribunal would be required to reach a final definitive number; whereas in this situation the Tribunal need only reach the conclusion that substantial value remained.”).

215. *Id.* ¶ 366.

216. *Id.* ¶ 535.

217. *See id.* ¶¶ 371, 416, 534.

convinced by the United States that only a single refurbishment was necessary;²¹⁸ replaced the “swell factor”—the amount by which material expands when removed from the pits, thereby affecting reclamation costs²¹⁹—of 35% that Glamis used with 30.2%, resulting in a reduction of the claimant’s estimated tonnage to be hauled by six million tons;²²⁰ included the US\$6.43 million valuation for the Singer Pit that Glamis counted in the prebackfill scenario in the postbackfill scenario also, although 18.7 million tons were added “to the total estimated tonnage to be moved and backfilled to account for this additional mining”;²²¹ adjusted Glamis’s valuation model to use as financial assurances “a letter of credit at a fee of 1% per annum for the entire reclamation amount posted prior to the commencement of any mining activity,” as opposed to the cash collateralization that Glamis contended was necessary;²²² and replaced the discount rate of 6.5% that Glamis used with a rate of 9.283%, pursuant to the capital asset pricing model advocated by the United States.²²³

The tribunal thereby used Glamis’s own economic valuation methodology to deny compensation. With adjustments rendering the Imperial Project worth in excess of US\$20 million on December 12, 2002, the takings claim was denied without having to consider RIBEs or the character of the government action, or even a different valuation methodology than that employed by Glamis.²²⁴ From this valuation, the tribunal held that the first *Penn Central* factor was not satisfied because “the complained-of measures did not cause a sufficient economic impact to the Imperial Project to effect an expropriation of Claimant’s investment.”²²⁵ *Glamis* demonstrates the inverse-*Lucas* approach

218. *See id.* ¶¶ 418–19, 534.

219. *See id.* ¶ 420.

220. *See id.* ¶¶ 383, 423, 431, 534.

221. *Id.* ¶¶ 495, 534.

222. *Id.* ¶¶ 485–88, 514, 534. Arbitrator Hubbard dissented from this aspect of the award but concurred that no compensation was required, expressing his “feel[ing] that Claimant met its burden of proving that its financial assurances would have required cash collateral. As this determination did not alter the overall conclusion of the Tribunal with respect to its finding of no breach of Article 1110, however, arbitrator Hubbard has chosen to join this decision.” *Id.* ¶¶ 355, 511 n.1044.

223. *See id.* ¶¶ 517, 520, 532, 534.

224. *See id.* ¶¶ 535–36.

225. *Id.* ¶ 536.

to takings that can deny compensation based solely upon the first *Penn Central* factor.

D. *Glamis Gives Governments Confidence to Regulate Without Fear of Takings Liability*

The *Glamis* takings framework is remarkable. It presents a focused approach to assessing whether compensation is required. Because “economic impact” is the “most important” *Penn Central* factor, it should logically function as the analytical starting point.²²⁶ Resort to the other factors is not necessary where takings liability can be eliminated based on an insufficient economic impact. By preventing consideration of unnecessary factors before finding the prerequisite economic impact, *Glamis* tightens the takings analysis. Under the Fifth Amendment, a litigant may attempt to bolster an otherwise insufficient devaluation by demonstrating interference with RIBEs and characterizing the government as acting negatively. In its “inverse-*Lucas*” approach, *Glamis* goes beyond U.S. law to preclude a claimant from invoking the RIBEs and character factors unless a substantial economic impact is first proven.

The critical query arising from the *Glamis* takings analysis is what remaining value will avoid takings liability. The tribunal found US\$20 million to be sufficient, even though it was obviously less than the investment value without the California measures. This begs the question of what is the requisite amount, both to eliminate the possibility of a taking altogether or to enable consideration of RIBEs and character.²²⁷ These sums will necessarily depend on the “context” and “circumstances” of each challenge.²²⁸ Nevertheless, governments can act in advance to minimize the likelihood of being required to compensate. With economic inquiry at the forefront of the takings inquiry, governments should emphasize the postregulatory residual value for affected investments. Governments can proactively provide such investors with value through tools such as transferable

226. See Echeverria, *supra* note 71, at 209.

227. *Glamis*'s takings analysis suggests that there is a value range wherein compensation is not automatically denied based upon economic impact, but instead enables consideration of the expectations and character factors.

228. *Glamis*, Award, ¶ 356 n.705 (quoting *Saluka v. Czech Republic*, Partial Award, ¶ 264 (Perm. Ct. Arb. Mar. 17, 2006), http://www.pca-cpa.org/showfile.asp?fil_id=105).

development rights (“TDRs”).²²⁹ In appropriate circumstances, governments may elect to negotiate buyouts—as was contemplated with Glamis.²³⁰ Even if significantly less than the maximum valuation scenario, TDRs and buyout offers can be used to demonstrate residual value and therefore withstand takings liability. Most urgently, governments should undertake economic forecasting during their regulatory processes to provide contemporaneous documentation that regulated investments retain residual value, so that subsequent takings challenges are best able to be defended against.

The *Glamis* takings approach gives governments confidence to regulate without fear of having to compensate affected investors. While significant value remains, there is no takings liability. If the value is found to be insufficient, governments can still avoid having to compensate by arguing the lack of RIBEs and positive characterization of its action. The “inverse-*Lucas*” framework thereby works to the advantage of governments as they enact regulations in this era of pressing environmental concern. Additionally, *Glamis*’s quick dismissal of takings liability for a delayed federal permitting process strongly endorses the ability of government to swiftly address imminent threats.²³¹ This aspect of the award is in accord with *Tahoe-Sierra*, in which TRPA did not have to compensate property owners for the temporary freeze on the development of sensitive land.²³² *Glamis* thereby contributes to international jurisprudence that supports environmental planning and protection.

Courts and tribunals worldwide should adopt *Glamis*’s takings analysis. The affinity between the Takings Clause and international expropriation law is evident; the Restatement recognizes that, “[i]n general, the line in international law is similar to that drawn in United States jurisprudence for purposes of the Fifth . . . Amendment to the Constitution in determining

229. The plaintiff being given transferable development rights (“TDRs”) factored against finding takings liability in *Penn Central Transportation Corp. v. New York City*, 438 U.S. 104, 137 (1978). For a description of the TDRs program at Lake Tahoe, see Kahn, *supra* note 175, at 39–40.

230. See *Glamis*, Award, ¶ 164 n.487.

231. See *id.* ¶ 360.

232. See *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 334–42 (2002).

whether there has been a taking requiring compensation.”²³³ This connection is shown by the *Penn Central* framework making its way into the U.S. Model BIT and *Glamis*.²³⁴ Just as U.S. takings law influences international expropriation law, the reverse can be realized. When the U.S. Supreme Court next considers the Takings Clause, it should adopt the “inverse-*Lucas*” approach employed by *Glamis*. Moreover, this method should be used in future investor-state takings challenges under NAFTA and bilateral investment treaties. Such a logical and simplified takings analysis will positively maximize the confidence of governments to regulate without fear of having to compensate. Given our precarious environmental situation, the stakes are too great for governments to be afraid of acting.

V. THE “FAIR AND EQUITABLE TREATMENT” ANALYSIS IN GLAMIS, DESPITE DISINGENUOUSLY EQUATING ARTICLE 1105 WITH NEER, PROMOTES FOREIGN DIRECT INVESTMENT

The tribunal decided that the customary international minimum standard of treatment embodied in article 1105 is the same as *Neer*. However, the standard is viewed in the modern context such that governments today can cause violations through actions that were not shocking in 1926. *Glamis* sets forth two distinct approaches to evaluating modern-day *Neer* violations that align with the “character of the government action” and “expectations” factors in the *Penn Central* framework.²³⁵ The character inquiry asks whether the actions under review can be described as specified types of government malfeasance that are deemed article 1105 violations. *Glamis* concluded that the challenged federal and California actions pass this standard. *Glamis* further found no intergovernmental collusion that could

233. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 reporters’ note 6 (2009).

234. See USTR, *supra* note 204, annex B ¶ 4(a); *Glamis*, Award, ¶ 356 n.703.

235. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001), (citing *Penn Cent. Trans. Corp. v. New York City*, 438 U.S. 104, 124 (1978)); *Glamis*, Award, ¶ 627 (“Such a breach may be exhibited by a ‘gross denial of justice or manifest arbitrariness falling below acceptable international standards;’ or the creation by the State of objective expectations *in order to induce* investment and the subsequent repudiation of those expectations.” (quoting *Int’l Thunderbird Gaming Corp. v. United Mexican States*, Final Award, ¶ 194, [1 Chapter 11: Investor-State Arbitration] N. Am. Free Trade Agreements (Oxford Univ. Press) Booklet C.19Z, at 1, 38 (Jan. 26, 2006))).

violate article 1105 even where each underlying action in isolation does not. The federal and California governments also withstood challenge against the expectations-based article 1105 standard that *Glamis* articulates by morphing RIBEs from U.S. takings law and “specific assurances” from NAFTA article 1110 awards. Although the equation of these expectations and character inquiries with *Neer* is pure sophistry, the result is an analytical framework that positively promotes foreign direct investment.

A. *Glamis Equates Article 1105 with Neer, Albeit in the Modern Context*

The tribunal initially determined that article 1105 protects foreign investors in accordance with the *Neer* standard.²³⁶ *Glamis* concluded that, “although situations presented to tribunals are more varied and complicated today than in the 1920s, the level of scrutiny required under *Neer* is the same.”²³⁷ Therefore, in order to violate the internationally recognized minimum standard of treatment, “an act must be sufficiently egregious and shocking . . . so as to fall below accepted international standards and constitute a breach of Article 1105(1).”²³⁸ *Glamis* did not carry its burden of establishing that customary international law has since evolved beyond *Neer*.²³⁹ As a practical matter, this applicability of *Neer* precludes the tribunal from considering investor-state awards that rely on BIT-based “fair and equitable treatment”

236. *Glamis*, Award, ¶ 612 (“It appears to this Tribunal that the NAFTA State Parties agree that, at a minimum, the fair and equitable treatment standard is that as articulated in *Neer*.”).

237. *Id.* ¶ 22.

238. *Id.* ¶ 616.

239. *See id.* ¶ 614 (“[T]he Tribunal finds that the evidence provided by Claimant does not establish such an evolution.”). The tribunal also went on to declare that *Glamis* failed to establish that a standard other than *Neer* should serve as a benchmark. *See id.* ¶ 627 (“The Tribunal holds that Claimant has not met its burden of proving that something other than the fundamentals of the *Neer* standard apply today.”). As to this latter point, the tribunal took care to note at the outset the difficulty in identifying a shift in customary international law. *See id.* ¶ 602 (“The Tribunal acknowledges that it is difficult to establish a change in customary international law. As Respondent explains, establishment of a rule of customary international law requires: (1) ‘a concordant practice of a number of States acquiesced in by others,’ and (2) ‘a conception that the practice is required by or consistent with the prevailing law (*opinion juris*).’” (citation omitted)).

formulations that, unlike article 1110, are “autonomous” from—or unconstrained by—international law.²⁴⁰

Glamis thereby recognizes a schism in international investment protection. As clarified by the 2001 FTC interpretation,²⁴¹ the customary standard of article 1105 is distinct from BIT formulations that afford investors greater protection.²⁴² This demonstrates that “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.”²⁴³ The tribunal reasoned that “[t]he fair and equitable treatment promised by Article 1105 is not dynamic; it cannot vary between nations as thus the protection afforded would have no minimum.”²⁴⁴

240. *See id.* ¶ 611 (“The Tribunal therefore holds that it may look solely to arbitral awards—including BIT awards—that seek to be understood by reference to the customary international law minimum standard of treatment, as opposed to any autonomous standard.”). To reach this conclusion, *Glamis* reasoned:

[T]he Tribunal finds that arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom. The various BITs cited by Claimant may or may not illuminate customary international law; they will prove helpful to this Tribunal’s analysis when they seek to provide the same base floor of conduct as the minimum standard of treatment under customary international law; but they will not be of assistance if they include different protections that those provided for in customary international law.

Id. ¶ 608.

241. Scholars critical of the 2001 interpretation of the Free Trade Commission will likely be displeased with *Glamis*. *See* LOWENFELD, *supra* note 66, at 558 (criticizing the interpretation for “apparently transforming the minimum standard of international law from the floor to a ceiling of what is required of host states, and creating a possible discrepancy between the treaties by adopting this formula and the larger number of BITs with the simpler formulation”); Charles H. Brower, II, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, 46 VA. J. INT’L L. 347, 356–63 (2006) (arguing that the interpretation improperly redefines “international law” in NAFTA).

242. *See Glamis*, Award, ¶¶ 609. The tribunal specifically identified Tecnicas Medioambientales TECMED S.A. v. Estados Unidos Mexicanos, Award, 43. I.L.M. 133, 174, ¶ 155 (Agreement on the Promotion and Reciprocal Prot. of Invs. Arb. Trib. 2003), as an award employing the autonomous standard from a BIT between Mexico and Spain, and therefore inapplicable in resolving article 1105 disputes. *See Glamis*, Award, ¶ 610.

243. *Id.* ¶ 615; *see id.* ¶ 619 (“[This] is an absolute minimum, a floor below which the international community will not condone conduct.”).

244. *Id.* ¶ 615.

Glamis then proceeded to place the *Neer* standard in a modern-day setting. Although the level of review remains highly deferential,²⁴⁵ the tribunal held 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.”²⁴⁶ *Glamis* elaborates that “[t]he standard for finding a breach of the customary international law minimum standard of treatment therefore remains as stringent as it was under *Neer*; it is entirely possible, however, that, as an international community, we may be shocked by State actions now that did not offend us previously.”²⁴⁷ *Glamis* sets forth two distinct inquiries for assessing modern-day *Neer* violations in the context of a dispute between a foreign investor and its host government. The first focuses on the character of the government action and the second examines investor expectations.²⁴⁸ The tribunal articulates these standards and applies them to the challenged measures, concluding that neither the United States nor California violated article 1105 “as it currently stands.”²⁴⁹

B. *Glamis Does Not Characterize the Government Actions as Violating Article 1105*

The tribunal lists characterizations that, if found applicable to government action under review, will “violat[e] the customary international law minimum standard of treatment, as codified in Article 1105.”²⁵⁰ According to *Glamis*, when government acts are characterized in the following ways, the conduct is “sufficiently egregious and shocking” to constitute modern-day *Neer*

245. *See id.* ¶ 617 (“The idea of deference is found in the modifiers ‘manifest’ and ‘gross’ that makes this standard a stringent one; it is found in the idea that a breach requires something more than mere arbitrariness, something that is surprising, shocking, or exhibits a manifest lack of reasons.”).

246. *Id.* ¶ 613.

247. *Id.* ¶ 616.

248. *See id.* ¶ 627.

249. *Id.* ¶ 829, at 353. The tribunal qualified its holding by observing that “[t]he State Parties to the NAFTA can always choose to negotiate a higher standard against which their behavior will be judged. It is very clear, however, that they have not yet done so and therefore a breach of Article 1105 still requires acts that exhibit a high level of shock, arbitrariness, unfairness or discrimination.” *Id.*

250. *Id.* ¶ 627.

violations;²⁵¹ “a gross denial of justice”;²⁵² “manifest arbitrariness”;²⁵³ “blatant unfairness”;²⁵⁴ “a complete lack of due process”;²⁵⁵ “evident discrimination”;²⁵⁶ or “manifestly lacking in reasons.”²⁵⁷

Glamis explains that bad faith is not a prerequisite, but can establish conclusive evidence of an article 1105 violation under the modern-day *Neer* standard.²⁵⁸ The tribunal then applied this standard to each federal and California action under review, both individually and collectively.²⁵⁹

1. The Federal and California Actions Are Found Not To Individually Violate Article 1105

Glamis’s challenge to the underlying environmental review did not result in an article 1105 violation.²⁶⁰ It “allege[d] that, during the government’s cultural review of the Imperial Project, Claimant was subjected to arbitrary and nontransparent treatment.”²⁶¹ The United States, however, convinced the tribunal “that the Imperial Project was, in fact, unique among its neighbors with respect to cultural significance.”²⁶² The contested “decisions were reached based upon []mandated cultural studies

251. *Id.* ¶¶ 22, 616, 627.

252. *Id.* ¶¶ 616, 627, 824, 828.

253. *Id.* ¶¶ 616, 626–27, 824, 828 (“[T]here is an obligation of each of the NAFTA State Parties inherent in the fair and equitable treatment standard of Article 1105 that they do not treat investors of another State in a *manifestly* arbitrary manner. The Tribunal thus determines that Claimant has sufficiently substantiated its arguments that a duty to protect investors from arbitrary measures exists in the customary international law minimum standard of treatment of aliens; though Claimant has not sufficiently rebutted Respondent’s assertions that a finding of arbitrariness requires a determination of some act far beyond the measure’s mere illegality, an act so manifestly arbitrary, so unjust and surprising as to be acceptable from the international perspective.”).

254. *Id.* ¶¶ 616, 627, 824, 828.

255. *Id.*

256. *Id.*

257. *Id.* ¶¶ 616, 627, 776, 824, 828.

258. *Id.* ¶ 616. (“The Tribunal notes that one aspect of evolution from *Neer* that is generally agreed upon is that bad faith is not required to find a violation of the fair and equitable standard, but its presence is conclusive evidence of such. Thus, an act that is egregious or shocking may also evidence bad faith, but such bad faith is not necessary for the finding of a violation.”).

259. *See id.* ¶¶ 630, 757.

260. *See id.* ¶ 788.

261. *Id.* ¶ 631.

262. *Id.* ¶ 781.

and the guidance of professional archeologists and researchers.”²⁶³ The tribunal held that “Claimant did not prove that these processes and the decisions based upon them were either arbitrary or manifestly lacking in reasons.”²⁶⁴ In response to Glamis’s allegations that the finding of unmitigated significant adverse environmental impacts was “predetermined,”²⁶⁵ the tribunal countered that it did not “view the public hearings or site visits as ‘shams.’”²⁶⁶ To the contrary, “Respondent acted without arbitrariness, with sufficient reasons, and fairly in designing the public meetings regarding the Imperial Project [POO] and the site visit to the Imperial Project itself.”²⁶⁷ The tribunal reinforced the limited function of assessing whether government deprives an investor of “fair and equitable treatment”:

It is not the role of this Tribunal, or any international tribunal, to supplant its own judgment for that of a qualified domestic agency. Indeed, our only task is to decide whether Claimant has adequately proven that the agency’s review and conclusions exhibit a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons so as to rise to the level of a breach of the customary international law standard embedded in Article 1105.²⁶⁸

The Leshy Opinion easily prevailed in a challenge using the tribunal’s modern-day *Neer* formulation.²⁶⁹ It “was not arbitrary” and “did not exhibit a “manifest lack of reasons,” given its detailed analysis of applicable law such as the FLPMA “undue impairment” standard.²⁷⁰ Because the Leshy Opinion is “of

263. *Id.*

264. *Id.*

265. *Id.* ¶ 650.

266. *Id.* ¶ 787.

267. *Id.*

268. *Id.* ¶ 779. The tribunal reinforced this point on several other occasions. *See id.* ¶ 783 (“[T]he Tribunal holds that Respondent was justified in relying upon the opinion of the professionals it engaged in the way that it did, as these professionals appear quite qualified for the task and they provided substantial evidentiary support for their conclusions.”); *id.* ¶ 786 (“[I]t is not for this Tribunal to assess the veracity of evidentiary support for domestic governmental decisions; the Tribunal may assess only whether there was reasonable evidence, and thus the government’s reliance on such was not obviously and actionably misplaced.”).

269. *See id.* ¶ 762.

270. *Id.* ¶ 763–64.

general applicability,” it did not “exhibit blatant unfairness or evident discrimination to this particular investor Whether anyone might disagree with Solicitor Leshy’s opinions or conclusions is not the issue; [his] Opinion does not rise to the level of a violation of the requirement of fair and equitable treatment under international law.”²⁷¹ Because the 2001 DOI permit denial was based on the Leshy Opinion, the tribunal concluded that it also did not violate article 1105.²⁷² Because the Leshy Opinion and permit denial were subsequently revisited by DOI and changed in Glamis’s favor, Glamis’s argument that there had been “a complete lack of due process” was without merit.²⁷³

The tribunal additionally concluded that the federal permitting process did not violate article 1105.²⁷⁴ Specifically, the time period from the 1994 POO submission through the July 2003 initiation of NAFTA arbitration was found acceptable albeit slow; the pace justifiable because “this was a particularly complicated, contested issue in which numerous parties took an interest.”²⁷⁵ DOI’s suspension of review upon Glamis’s recourse through NAFTA chapter 11 did not violate article 1105: “the Tribunal does not find that such a failure of a governmental body to diligently pursue administrative review while also defending an arbitration with respect to that same review is manifestly arbitrary, completely lacking in due process, exhibiting evident discrimination, or manifestly lacking in reasons.”²⁷⁶

Turning to the California measures, Glamis was equally unsuccessful.²⁷⁷ The tribunal determined that SB 22 did not violate article 1105.²⁷⁸ Glamis claimed unfair targeting because SB 22 only applied to its proposal,²⁷⁹ allegedly intending to render the Imperial Project “economically infeasible.”²⁸⁰ Although “clear to the Tribunal that the Imperial Project was indeed on the minds of the legislators drafting” SB 22, that did

271. *Id.* ¶ 765.

272. *See id.* ¶ 772.

273. *See id.* ¶ 771.

274. *See id.* ¶¶ 776.

275. *Id.* ¶ 774.

276. *Id.* ¶ 776.

277. *See id.* ¶¶ 807, 811, 815, 817–18.

278. *See id.* ¶ 807.

279. *See id.* ¶¶ 681, 677, 793.

280. *Id.* ¶ 683.

not necessarily equate with “proof of targeting.”²⁸¹ Rather, the legislation’s general applicability persuaded *Glamis*:

The Tribunal determines that, *on its face*, SB 22 appears to apply to potentially several mines, if not yet at present, then in the future. . . .

. . . .

Whether, *in reality*, this bill will only serve to limit operation of the Imperial Project, this Tribunal cannot say. The Tribunal notes that it appears that it might affect solely the Imperial Project at present, but the Tribunal is not prescient and cannot look to the future to see that such a condition will continue for the life of the bill.

. . . Claimant has not established that Senate Bill 22 targets solely the Imperial Project.²⁸²

In denying the article 1105 challenge to SB 22, *Glamis* affords wide latitude for government solutions. *Glamis* contended that in the case of the Imperial Project, SB 22’s complete backfill mandate would actually result in greater land disturbance than the POO.²⁸³ *Glamis* quickly dispenses with the notion that legislation must perfectly achieve its objectives by concluding, “even if more land is disturbed in this situation—of which the Tribunal is not certain—Claimant has not proven that this will be the situation with each mine that falls under SB 22’s purview.”²⁸⁴ *Glamis* further claimed that SB 22 frustrated the stated legislative objective of protecting Native American sacred sites because backfilling causes disturbance to artifacts.²⁸⁵ The tribunal rejected this contention, holding that “the government had a sufficient good faith belief that there was a reasonable

281. *Id.* ¶ 791.

282. *Id.* ¶¶ 794, 796–97; *see id.* ¶ 828 (“The Imperial Project, although certainly highlighted as a triggering event for some of the measures, was not the subject of discriminatory targeting.”).

283. *See id.* ¶ 687.

284. *Id.* ¶ 806. In addition, “this is also the conclusion with respect to Claimant’s argument that SB 22 is so arbitrary as to be in contravention of international law because more land will actually be disturbed by the complete backfilling measures. Such a result, even if it were assured, does not preclude the Bill from protecting sacred sight lines and viewsheds. The Tribunal also recognizes that this legislation is of general application” *Id.*

285. *See id.* ¶¶ 687, 805.

connection between the harm and the proposed remedy.”²⁸⁶ The tribunal endorses the ability of government to reach compromise between participants having incompatible goals and emphasized the high standard to establish an article 1105 violation:

The Tribunal agrees with Respondent’s assertion that governments must compromise between interests of competing parties and, if they were bound to please every constituent with each piece of legislation, they would be bound and useless.

... The fact that SB 22 mitigates some, but not all, harm does not mean that it was manifestly without reason or arbitrary; it more likely means that it is a compromise between the conflicting desires and needs of the various affected parties.²⁸⁷

Glamis fared no better in its article 1105 challenge to the SMGB regulations.²⁸⁸ The tribunal explained that “they have in fact been applied to another project . . . and thus they are proven of general application.”²⁸⁹ Glamis argued that the regulations’ application to only metallic mines evinced arbitrariness.²⁹⁰ The tribunal discerned otherwise: “SMGB had legitimate concerns that there were distinct and greater problems with metallic, as opposed to non-metallic mines.”²⁹¹ Finally, Glamis advanced a challenge based on the SMGB regulations being initially adopted on an emergency basis.²⁹² The tribunal rejects this assertion:

The finding of an emergency is similar to that of the need for interim measures. Such a determination is different from deciding the merits of a case; it is a temporary measure

286. *Id.*; *see id.* ¶ 803 (“The Tribunal finds that Respondent has presented a prima facie showing that SB 22 was rationally related to its stated purpose and reasonably drafted to address its objectives. It is Claimant’s burden to prove a manifest lack of reasons for the legislation, and the Tribunal holds that it has not met this burden.”).

287. *Id.* ¶¶ 804, 805. This language builds upon *Methanex* in terms of affording government wide latitude to fashion compromise. *See id.* ¶ 726.

288. *See id.* ¶¶ 811, 815, 817–18.

289. *Id.* ¶ 820 (noting the application of regulations to “the Golden Queen Soledad Mountain Project”).

290. *See id.* ¶¶ 697–98.

291. *Id.* ¶ 817. (“In addition, the Tribunal finds that there was a prima facie showing that only the issue of metallic mines was presented to the SMGB and it is the customary practice of the board to address solely the issue of the petition before it and not broaden its scope.”).

292. *See id.* ¶¶ 695–96.

addressing a pending event while the final determination is made and the permanent regulations can be put into place. With respect to the backfilling requirements, it is undisputed that the primary emergency was that the Imperial Project was pending and the government wanted to freeze the Project until the regulations were finalized; though the SMGB acknowledged its additional intent to prevent any other similarly positioned project that might be in the permitting stage and unknown to the board.²⁹³

This endorsement of government ability to enact interim measures is reminiscent of *Tahoe-Sierra*, despite the non-takings context. TRPA was not liable for its moratorium on the development of sensitive lands.²⁹⁴ *Glamis* in its article 1105 analysis similarly facilitates government reaction to imminent threats by promoting the use of emergency rulemaking. Indeed, the tribunal states that “it is difficult to see” how temporary measures “largely connected to subsequent legislation . . . could independently violate international law.”²⁹⁵ With this language, *Glamis* builds on *Tahoe-Sierra* by finding legal norms to support environmental planning. Governments far beyond Lake Tahoe should have confidence to tackle urgent concerns using interim measures that may prove imperfect with hindsight. Given that the NAFTA “fair and equitable treatment” is equated with the global minimum,²⁹⁶ governments worldwide should be encouraged to act immediately.

293. *Id.* ¶ 814. The tribunal determined that the regulation was not speculative because “at least one project was known and presented a potential danger to Native American sacred sites, and the possibility existed of other potentially disruptive projects, yet unknown.” *Id.*

294. *See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 334–42 (2002).

295. *Glamis*, Award, ¶ 815. But the tribunal reserved the possibility that interim legislation might transgress international law. *Id.* (“The Tribunal notes that it is possible that the preceding regulations—whether interim or emergency—could violate international law even when subsequent final legislation would not. This might happen, for instance, if the temporary regulations eliminated all foreign businesses . . . and the subsequent measure addressed the problem without such an adverse result.”).

296. *See supra* notes 236–42 and accompanying text.

2. The Federal and California Actions Are Found Not To Collectively Violate Article 1105

Collusion amongst governments is a foremost concern in the *Glamis* article 1105 character inquiry. Although the list of actions that the tribunal determined could violate article 1105 appears extraordinarily difficult to establish, the tribunal explains that individual actions not rising to the standard may collectively be elevated to constitute breach:

The Tribunal determines that, for acts that do not individually violate Article 1105 to nonetheless breach that article when taken together, there must be some additional quality that exists only when the acts viewed as a whole, as opposed to individually. . . .

In this factual situation, the Tribunal holds that it cannot see that the conduct as a whole would be in violation of the fair and equitable treatment standard when the individual acts comprising that whole are not, without a finding of intent.²⁹⁷

The tribunal concluded that this added element of coordinated intergovernmental intent was not present. Glamis relied upon the redacted California documents in its assertion that “there was close coordination and intersection between passage of SB 22 and the adoption of the SMGB regulation.”²⁹⁸ This attempt to obtain an adverse inference was rejected:

The Tribunal does not believe that it is likely that the limited redactions of these three documents would provide sufficient evidence to refute the entire rest of the record in this case and prove that SB 22 and the SMGB Regulations were in fact coordinated efforts to halt the Imperial Project²⁹⁹

The tribunal similarly rejected Glamis’s argument that the federal and California governments were working in lockstep; “[a]lthough one set of events definitely appears to pick up where the other left off, they appear to the Tribunal more as separate factual clusters, factual groupings that on their own do not breach Article 1105 and also do not when viewed together.”³⁰⁰ Based on this absence of collusion, the government actions not

297. *Glamis*, Award, ¶¶ 825–26.

298. *Id.* ¶ 822.

299. *Id.*

300. *Id.* ¶ 827.

independently characterized as violating article 1105 were not also violations when considered collectively.³⁰¹

C. *Glamis Finds That Investor Expectations Are Insufficient to Violate Article 1105*

The tribunal articulates a separate, expectations-based approach to evaluating modern-day *Neer* violations. As the tribunal explains:

[W]ith respect to reasonable investor relations, a State Party's duty under Article 1105 arises only when the State has induced these expectations in a quasi-contractual manner. In this way, a State may be tied to the objective expectations that it creates *in order to induce* investment. Such an upset of expectations thus requires something greater than mere disappointment; it requires, as a threshold condition, the active inducement of a quasi-contractual expectation.³⁰²

Glamis stated that "a violation of Article 1105 based on unsettling of reasonable, investment-backed expectation requires . . . at least a quasi-contractual relationship between the State and the investor, whereby the State has purposefully and specifically induced the investment."³⁰³ A "mere contract breach, without something further" is "normally" not enough.³⁰⁴ Likewise, "not living up to expectations cannot be sufficient to find a breach Instead, Article 1105(1) requires the evaluation of whether the State made any specific assurance or commitment to the investor so as to induce its expectations."³⁰⁵ The tribunal asks "whether Claimant's reasonable expectations may have been induced by . . . specific assurances."³⁰⁶

301. *See id.* ¶ 828 ("[A]ddressing the record as a whole, the Tribunal holds that Claimant has not established that the acts complained of fall short of the customary international law minimum standard of treatment. The complained-of acts were not egregious and shocking . . .").

302. *Id.* ¶ 799.

303. *Id.* ¶ 766.

304. *Id.* ¶ 620.

305. *Id.*

306. *Id.* ¶ 800.

1. *Glamis's* Expectations-Based Article 1105 Standard and Its Origins in Takings Law

The tribunal employs a standard comprised of a two-part inquiry. As a threshold matter, the claimant must first establish RIBEs.³⁰⁷ This “prerequisite to any breach of Article 1105 by repudiation of investor expectations”³⁰⁸ requires an objective assessment as to whether a reasonable investor would have formed expectations based on government conduct.³⁰⁹ Only if RIBEs are found will the tribunal proceed to the second, subjective question of whether the government repudiated assurances received by the claimant. In articulating this article 1105 expectations standard, *Glamis* draws from takings law. Objectively reasonable investor expectations are from Fifth Amendment precedent,³¹⁰ and “specific assurances” from NAFTA article 1110 jurisprudence.³¹¹ However, *Glamis's* “specific assurances” approach does not subjectively evaluate the interaction between claimant and defending government as in prior article 1110 awards.³¹² Rather, the expectations-based

307. *See id.* ¶ 766.

308. *Id.* ¶ 802.

309. *See id.* ¶¶ 621, 627 (framing inquiry in terms of “objective expectations” created by the state “in order to induce investment”).

310. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (citing Penn Central Transportation Corp. v. New York City 438 U.S. 104, 128 (1978)). *Glamis* is not the first NAFTA tribunal to reference reasonable, investment-backed expectations. Fireman's Fund Ins. Co. v. United Mexican States, ICSID Case No. ARB(AF)/02/1 ARB (AF)/02/1, Award, ¶ 176(c), (k) (NAFTA Arb. Trib. July 17, 2006), available at http://www.naftaclaims.com/Disputes/Mexico/Fireman/FiremansFund-Mexico-Final_Award.pdf (finding the term to describe factor for evaluating violations of NAFTA article 1110).

311. *See supra* notes 92–98 and accompanying text.

312. In their “specific assurances” analyses, both *Methanex* and *Feldman* focus on the interaction between the host government and the particular claimant, as opposed to the creation of objectively reasonable expectations. *Methanex Corp. v. United States, Methanex Corp. v. United States, Final Award*, 44 I.L.M. 1345, pt. IV, ch. D ¶ 7 (NAFTA Arb. Trib. 2005), available at <http://www.state.gov/documents/organization/51052.pdf> (“[A] foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative investor contemplating investment that the government would refrain from such regulation.”); *Feldman v. United Mexican States, Feldman v. United Mexican States, Award*, 42 I.L.M. 625, ¶¶ 146, 148 (NAFTA Arb. Trib. 2002), available at <http://www.state.gov/documents/organization/16639.pdf> (distinguishing *Metalclad*, in which claimant itself “had relied on the representations of the Mexican federal government,” focusing on “[t]he assurances received by the investor” without reference to an objectively reasonable investor).

article 1105 standard that *Glamis* articulates focuses initially on an objectively reasonable investor and moves the subjective inquiry to the subsequent determination of whether repudiation occurred.

Glamis curiously conflates its article 1105 expectations analysis with previous awards assessing investor expectations under article 1110. The tribunal relies on the *Methanex* rejection of takings liability as support for the proposition that article 1105 asks “whether Claimant’s reasonable expectations may have been induced by . . . specific assurances.”³¹³ In its “fair and equitable treatment” analysis, *Glamis* references the takings discussion from *Metalclad* and another NAFTA chapter 11 award, concluding without explanation that the takings expectations inquiry presents a lower standard than does article 1105.³¹⁴ While this statement indicates that RIBEs are more easily established for a taking, without clarifying the comparison, *Glamis* injects perplexity as to how the protections differ from one another. By transposing the article 1110 reasoning of previous awards and combining that standard with RIBEs, *Glamis* engenders uncertainty as to the expectations-based article 1105 standard that it fashions.

Despite confusingly melding takings concepts from U.S. and NAFTA jurisprudence, *Glamis* appropriately recognizes expectation protection as a component of “fair and equitable treatment.” Host governments are understood as acting unfairly and inequitably when they repudiate certain actions that induce foreign investment. Moreover, expectation protection is better evaluated under “fair and equitable treatment” than takings because of the wide discretion that tribunals have in awarding damages for violations;³¹⁵ the expropriation remedy of “fair market value” may not be function as appropriate relief in all circumstances where an investor proves that its host government unfairly reneged.³¹⁶ Therefore, notwithstanding its awkward pairing of RIBEs with a reformulated “specific assurances” standard, *Glamis* positively advances the customary international

313. *Glamis*, Award, ¶ 620 n.1266.

314. *Id.* ¶ 802 (citing *Feldman*, Award, ¶ 148).

315. See *supra* note 73 and accompanying text.

316. See NAFTA, *supra* note 64, art. 1110(2).

law of “fair and equitable treatment” protection for foreign investors.

2. Glamis Lacked the Reasonable Expectations Necessary to Violate Article 1105

The tribunal found that Glamis lacked the requisite RIBEs for either the United States or California to have denied “fair and equitable treatment.” Because Glamis failed to establish sufficient evidence of governmental actions that would have legitimately created such an expectation, the tribunal took no position “on the type or nature of repudiation measures that would be necessary to violate international obligations.”³¹⁷ *Glamis* consequently did not need to address the second prong of the inquiry.³¹⁸ The heavily regulated nature of the subject industry factored against the creation of RIBEs; “Claimant was operating in a climate that was becoming more and more sensitive to the environmental consequences of open-pit mining.”³¹⁹ The tribunal rejected the Leshy Opinion and 2001 permit denial as bases for violating article 1105:

[T]he federal government did not make specific commitments to induce Claimant to persevere with its mining claims. It did not guarantee Claimant approval of its claims, nor did it offer Claimant any benefit to pursuing such claims beyond the customary chance to exploit federal land for possible profit. There did not exist, therefore, the quasi-contractual inducement that the Tribunal has found is a prerequisite for consideration of a breach of Article 1105(1) based upon repudiated investor expectations.³²⁰

The California measures likewise did not constitute an expectations-based violation of article 1105. *Glamis* concluded that while SB 22 “may have surprised Claimant, no specific assurances were provided to Claimant by the State of California so as to create a duty on behalf of the State to not upset

317. *Glamis*, Award, ¶ 627 n.1278.

318. *See id.*; *see also id.* ¶ 622 (“[T]he Tribunal determines below that no specific assurances were made to induce Claimant’s ‘reasonable and justifiable expectations,’ [and therefore] the Tribunal need not determine the level, or characteristics, of state action in contradiction of those expectations that would be necessary to constitute a violation of Article 1105.”).

319. *Id.* ¶ 767.

320. *Id.*

Claimant's reasonable expectations."³²¹ Similarly, with respect to the SMGB regulations, "[t]he Tribunal does not doubt that this imposition of mandatory backfilling surprised Claimant and upset its expectations."³²² *Glamis*, however, once more declined to find a violation, explaining its narrow task and elaborating on the standard:

The inquiry as to whether the California's requirement of mandatory backfilling repudiates Claimant's reasonable, investment-backed expectations turns again on the threshold inquiry of whether or not there were specific assurances from the State of California that it would not enact such a regulation.

....

Whether these expectations were reasonable or not is not an inquiry that the Tribunal need make, however. The inquiry . . . is solely whether California, or the federal government, made specific assurances to Claimant that such that a requirement would not be instituted in order to induce Claimant's investment in the Imperial Project. . . . Respondent has presented a prima facie showing that no such specific assurances were given to Claimant and Claimant has failed to rebut this showing. As no duty of the State was thus created ensuring maintenance of Claimant's reasonable expectations, the Tribunal also need not address what level of repudiation of this duty would be required to find such an act a violation of State obligations under Article 1105.³²³

The tribunal provides insight into the "specific assurances" necessary to prevail under its expectations-based article 1105 standard. *Glamis* claimed such assurances based on the federal CDPA designating areas in the California desert as wilderness—not including the proposed Imperial Project site—and explicitly stating that there were "no buffer zones."³²⁴ The tribunal rejected this position and explained why the CDPA fell short of creating the requisite specific assurances:

321. *Id.* ¶ 807.

322. *Id.* ¶ 810.

323. *Id.* ¶¶ 809, 811.

324. See Memorial of Claimant *Glamis Gold Ltd.*, *Glamis*, ¶ 262 (May 5, 2006); see also CDPA, *supra* note 14, § 103(d).

The “no buffer zone” language cited by Claimant is not a specific inducement of investment in mineral exploration and exploitation. . . . It makes no assurance that such activities will not be regulated for other reasons, irrespective of their impact on wilderness areas.

In addition, this is not the type of specific inducement necessary to create the duty that is a prerequisite to any breach of Article 1105 by repudiation of investor expectations. The asserted assurances made to Claimant are not equivalent to the assurances in *Metalclad*, which were found to be “definitive, unambiguous and repeated” and thus were sufficient to create the threshold State obligation.³²⁵

The tribunal did not address Glamis’s other argument that it had received oral specific assurances from DOI. Glamis’s top executive testified that a BLM official “looked [him] in the eyes” and said the permit would be forthcoming.³²⁶ The tribunal’s disregard of this statement demonstrates that it is not “the active inducement of a quasi-contractual expectation” necessary to assure a reasonable investor.³²⁷ The statement was allegedly made during the permitting process that subsequently changed course upon disclosure of adverse environmental impacts. Oral expressions of one government official before a permit is issued, such as that argued by Glamis and ignored by the tribunal, are doubtful to form the requisite objective expectations. As 2002 drew to a close, Glamis was close to obtaining a permit from the federal government for its POO.³²⁸ This would have enabled the tribunal to reach the second prong of its expectations-based article 1105 standard: whether the California measures constituted a repudiation of the specific assurances embodied in the federal permit.³²⁹

325. *Glamis*, Award, ¶¶ 801–02.

326. Transcript of Hearing on the Merits, *Glamis*, at 178 (Sept. 12, 2007), <http://www.state.gov/documents/organization/93408.pdf>; see also *Glamis*, Award, ¶¶ 636–37 (referencing this argument in setting forth Glamis’s position, although failing to subsequently address this argument in the article 1105 reasoning).

327. *Glamis*, Award, ¶ 799.

328. See *id.* ¶ 165.

329. See *id.* ¶ 622 n.1280.

3. *Glamis* Emphasizes Permit Issuance in Accordance With *Metalclad* and *Methanex*

The tribunal's focus on the term "quasi-contract" indicates that permit issuance establishes the RIBEs necessary to support an article 1105 claim.³³⁰ Once a permit is obtained, the claimant has objectively reasonable expectations to proceed with its investment and protection against future repudiation. *Glamis* casts doubt that action short of permit issuance will violate article 1105: "Assuming there was no quasi-contractual relationship, the Tribunal finds that a claimant cannot have a legitimate expectation that the host country will not pass legislation that will affect it."³³¹ Future NAFTA awards can be expected to further develop this expectations-based article 1105 doctrine; claimants will be best positioned for damages if they have at least one permit coupled with government acts that can be described as repudiating their RIBEs.

Glamis builds on *Methanex* and leaves *Metalclad* intact. The *Metalclad* claimant had a federal permit prior to the repudiation by political subdivisions that violated article 1105.³³² *Methanex* distinguished *Metalclad*, and held that the heightening of requirements in a highly regulated industry will not violate NAFTA.³³³ *Glamis* echoes this result but modifies the inquiry by rejecting the expectations-based "fair and equitable treatment" challenge where the claimant lacked RIBEs that it could proceed with the investment induced by "specific assurances" of its host government.³³⁴ Notwithstanding the imprecision of the *Glamis* article 1105 expectations analysis that is likely to engender

330. See *id.* ¶¶ 24, 766–67, 799, 812–13.

331. *Id.* ¶ 813.

332. *Metalclad Corp. v. United Mexican States*, Award, 40 I.L.M. 36, ¶¶ 74–101 (NAFTA Arb. Trib. 2000), available at http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/casos_mexico/metalclad/laudo/laudo_ingles.pdf.

333. See *Methanex Corp. v. United States*, Final Award, 44 I.L.M. 1345, pt. IV, ch. D ¶¶ 9 (NAFTA Arb. Trib. 2005), available at <http://www.state.gov/documents/organization/51052.pdf> ("Methanex entered a political economy in which it was widely known, if not notorious, that government environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons.").

334. See *Glamis*, Award, ¶¶ 799–800.

confusion, protection against the repudiation of “specific assurances” embodied in a permit is now solidified as a key component of NAFTA jurisprudence.

D. *Glamis Disingenuously Equates Article 1105 with Neer*

Glamis’s equation of article 1105 with the 1926 *Neer* standard is not genuine. *Neer* requires that government actions “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.”³³⁵ The tribunal acknowledged that customary international law now can be violated through actions falling short of this 1926 standard by explaining that *Neer* violations are to be evaluated in the modern context.³³⁶ The specified types of government action deemed violations in *Glamis’s* character-based article 1105 standard are plausibly “shocking” or “egregious” today despite not being so when *Neer* was decided. However, these characterizations are better classified as a separate standard than a modern variation on *Neer*. Tellingly, although “bad faith” is a central component of the *Neer* standard,³³⁷ *Glamis* deemphasizes its role by explaining that “a finding of bad faith is not a requirement for a breach of Article 1105(1).”³³⁸

The tribunal’s expectations-based article 1105 standard is especially removed from *Neer*. The resultant protection against government repudiating RIBEs-based specific assurances represents a unique standard. Strands of takings law are woven together to comprise a basis for violating article 1105 that does not resemble *Neer*. It is disingenuous to equate this standard with “shocking” or “outrageous” behavior, whether the conduct is judged by 1926 or modern sensibilities. While *Glamis*

335. *Neer v. United Mexican States*, 4 R. Int’l Arb. Awards 60 (Gen. Claims Comm’n (U.S.-Mex.) 1926).

336. *See Glamis*, Award, ¶¶ 613, 616.

337. The *Neer* standard lists the following types of “governmental acts” that constitute violations: (1) “outrage”; (2) “bad faith”; (3) “willful neglect of duty”; or (4) “an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.” *Neer*, 4 R. Int’l Arb. Awards at 60. However, these categories either require “bad faith” or an equally malfeasant government act.

338. *Glamis*, Award, ¶ 627.

commendably recognizes expectation protection as a feature of article 1105, its view that the combination of language from U.S. and NAFTA takings jurisprudence equates with *Neer* is preposterous.

E. *Glamis's "Fair and Equitable Treatment" Promotes Foreign Direct Investment*

Despite its sophistry, the tribunal's article 1105 is a positive development that will promote foreign direct investment.³³⁹ Its artificial construct of *Neer* enables the tribunal to avoid finding that customary international law has evolved while holding that article 1105 affords protection against government conduct that is now universally understood to be unfair. The character-based article 1105 standard guarantees investor protection against the list of malfeasant types of government actions. If the treatment received by a foreign investor can be so characterized, its host state will be liable. The standard is exceptionally high, but nevertheless gives foreign investors confidence that extreme government misconduct will not be tolerated under customary international law—that is, in the absence of any particular agreement. Moreover, the tribunal's focus on intergovernmental collusion informs foreign investors of a factual predicate that will increase the likelihood of a "fair and equitable treatment" violation. By giving future claimants this clue and finding that protection against specified unfair government action is a part of custom, *Glamis's* character-based article 1105 standard will promote foreign direct investment.

Glamis, notwithstanding its *Neer* charade, advances international law in favor of investor protection. The tribunal sends a strong signal that customary norms do not tolerate government repudiation of RIBEs formed by specific assurances to induce investment. Although the contours of this standard will be refined in the future, it is now apparent that if a permit issued by a federal government is subsequently repudiated, liability will accrue. Despite its spurious underpinnings, *Glamis's* expectations-based article 1105 standard will engender foreign

339. "Foreign direct investment" refers to investment that is owned by nationals of a different state than the state where the investment is located. See generally Organisation for Economic Co-operation and Development [OECD], *OECD Benchmark Definition of Foreign Direct Investment*, <http://www.oecd.org/dataoecd/10/16/2090148.pdf>.

direct investment. Those contemplating direct investment abroad can take comfort that legal recourse is available in the event that a permit is reneged upon. This enhancement of investment is not limited to North America and its minimal “fair and equitable treatment” guarantee; given the tribunal’s finding that this protection is a part of customary international law,³⁴⁰ *Glamis* will stimulate foreign investment worldwide.

CONCLUSION

Glamis is the gold standard for investor-state arbitration. Future proceedings should model themselves after its commendably transparent process that accommodated interested non-parties, particularly the Quechan Tribe. Its article 1110 reasoning confirms that NAFTA takings claimants have procedural advantages over U.S. litigants, but any disadvantage to government is more than offset by the substantive takings approach. *Glamis* employs an “inverse-*Lucas*” framework that denies compensation after considering only economic impact. Because this analysis avoids considering unnecessary factors and maximizes the ability of government to regulate, it should be adopted worldwide. *Glamis* articulates two inquiries under article 1105: an assessment of whether the government action can be characterized as specified types of malfeasance, and an expectations evaluation that asks whether government reneged upon RIBEs-based specific assurances. Despite disingenuously equating these standards with *Neer*, the tribunal positively promotes foreign direct investment. The character aspect enshrines as custom protection against government conduct deemed universally unacceptable and emphasizes intergovernmental collusion. The expectations approach is confusing but solidifies permit repudiation as a basis for liability. *Glamis*’s analyses, while subject to future refinement, are golden contributions to international law.

340. See *Glamis*, Award, ¶¶ 620–21, 627, 799–800.