Glamis Gold’s application of the minimum standard: A Neer Miss?

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Minimum Standard of Treatment

- Established principle of Customary International Law (CIL) regarding treatment of aliens
- Absolute floor
  - Applies even if host-country nationals are treated no better
  - Unlike national treatment or MFN
Recent growth of BITs and FTAs incorporating Min. Standard

- Dramatic growth of international investment agreements in 1980s and 1990s.
  - BITs
  - FTAs
- Provide legal protection for foreign investors, directly enforceable in arbitration against host state.
- Generally include minimum protection, often using formulae guaranteeing “fair & equitable treatment”, “full protection & security,” etc.

- NAFTA Parties: US, Canada, and Mexico
- NAFTA Chapter Eleven provides investment protection, similar to BITs.
- **Article 1105: Minimum Standard of Treatment**

  1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.
Early NAFTA Art. 1105 cases

- **SD Myers, Inc. v. Canada**
  - Equated fair and equitable treatment with minimum standard.

- **Pope & Talbot v. Canada (Merits) ¶¶116-118 (10 April 2001)** –
  - Interprets 1105 fairness as separate and “additive” to int’l law minimum standard.
  - Holds no threshold limitation that government conduct be “egregious” “outrageous” “shocking” or otherwise extraordinary.
2001 Interpretation of Art. 1105

On July 31, 2001, NAFTA Parties (as Free Trade Commission) adopted interpretation of Chapter Eleven:

- **B. Minimum Standard of Treatment in Accordance with International Law**
  1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
  2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
  3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).
Post-2001 NAFTA Awards

- **Pope & Talbot**, Damages Award, 31 May 2002
- **Mondev v. USA** (Stephen, Crawford, Schwebel) Award, 11 Oct 2002.
  - “both the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is *unconvincing to confine the meaning of ‘fair and equitable treatment’* and ‘full protection and security’ of foreign investments *to what those terms* – had they been current at the time – *might have meant in the 1920s* when applied to the physical security of an alien. To the modern eye, what is *unfair or inequitable need not equate with the outrageous or the egregious*. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.”

- **ADF v. USA**, 9 Jan 2003 (Feliciano, deMestral, Lamm)
- **The Loewen Group and Raymond L. Loewen v. USA** (2003) (Mason, Mikva, Mustill) (judicial proceedings)
Waste Management II (2004)

Waste Management (II) Award, 30 April 2004 (Crawford, Civiletti, Magallón Gómez) surveyed Ch. Eleven cases:

“despite certain differences of emphasis a general standard for Article 1105 is emerging. Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed [...] if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.
Int’l Thunderbird (2006)

Int’l Thunderbird Gaming Corp. v. Mexico (UNCITRAL)
Award, Jan 26, 2006 (van den Berg, Waelde, Portal)

- Manifest arbitrariness

- Gross denial of justice

- Legitimate Expectations
  - Tribunal found no legitimate expectations upon which claimant could reasonably rely.
Glamis Gold (2009)

Glamis Gold v. U.S.A. (UNCITRAL) Award, June 8, 2009

- Tribunal:
  - Michael Young (Pres); David Caron, Kenneth Hubbard

- Facts:
  - Mining case, brought against U.S. by Canadian claimant
  - Regulatory and Legislative actions of federal government and State of California at issue

- Claims under 1105 and 1110 (Expropriation)
Neer case (1926)

- U.S. citizen, superintendent of mine, shot dead in Mexico.
- Survivors brought claim against Mexico, claiming
  - “unwarrantable lack of diligence or an unwarrantable lack of intelligent investigation in prosecuting the culprit”
- Mixed Commission held that:
  - “the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, 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.”
  
Glamis Tribunal’s Application of Neer

- Tribunal considers two possible types of evolution since Neer:
  - Evolution in the minimum standard itself.
  - Evolution in the kind of conduct viewed as violating that standard.
Glamis Tribunal’s Reasoning on Min Standard – Burden on Claimant

- Parties agree standard is at least that of *Neer*
- Places burden on Claimant to show evolution in customary international law from *Neer*.
- Finds Claimant has not established such an evolution.
- Tribunal holds that fundamentals of *Neer* standard apply today, but brings in strand of legitimate expectations.
Glamis Tribunal’s application of Neer standard

“fundamentals of the Neer standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking —

- a gross denial of justice,
- manifest arbitrariness,
- blatant unfairness,
- a complete lack of due process,
- evident discrimination, or
- a manifest lack of reasons

— so as to fall below accepted international standards and constitute a breach of Article 1105(1).”

-- Gemis Gold, Award ¶¶ 22, 616, 627
Glamis’ application of Neer (cont’d)

- Tribunal qualifies its application of Neer:
  - Bad faith not required for FET violation (though conclusive of such)—evolution since Neer.
  - Although standard remains as stringent as in Neer, Tribunal states that “it is entirely possible [that] we may be shocked by State actions now that did not offend us previously.”
Glamis, Article 1105 and Legitimate Expectations

Beyond Neer, Tribunal identifies a legitimate expectations element protected under Article 1105, but articulates a restrictive view of such expectations:

- F&ET breach must be based on “objective criteria that apply equally among States and between investors.”
- Award refers to “objective expectations” created by State “in order to induce investment.”
- Tribunal finds no specific assurances made to induce reasonable and justifiable expectations.
Implications of *Glamis* Award

- The *Glamis* Award’s application of minimum standard
  - Applies high standard for 1105 violation
  - However, standard need not be applied as if it were 1926; bad faith not required
  - Language suggests restrictive view of legitimate expectations – refers to “objective expectations” created by State “*in order to induce* investment.”

- Potential limitations of Award
  - *Glamis* tribunal asserted narrow mission for itself, and relied *inter alia* on claimant’s failure to meet burden on CIL
  - NAFTA 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.

- Another Chapter 11 Tribunal rejects claim against U.S. regulation.
Where’s *Elsi*?

- **Elsi** Case (U.S. v. Italy) (ICJ 1989):
  - ICJ proceeding based on FCN treaty between US and Italy barring “arbitrary or discriminatory measures” preventing effective control and management of enterprises or impairing rights and interests therein.

- ICJ finds challenged requisition not “arbitrary”
  - “Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law.”
  - “It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.” [par. 128]
Conclusions and Questions

- Divergence in NAFTA Cases versus BITs?
- Glamis: A *Neer* Miss?
- Where’s ELSI?
  - Transparency and the Rule of Law
- Facts versus law and CIL challenges for Claimants
- What Expectations are Legitimate in the NAFTA Context?