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## NEWS: GLAMIS GOLD LTD. V. UNITED STATES OF AMERICA: TRIBUNAL SETS A HIGH BAR FOR ESTABLISHING BREACH OF "FAIR AND EQUITABLE TREATMENT" UNDER NAFTA

By Elizabeth Whitsitt and Damon Vis-Dunbar

A protracted dispute between the United States of America and Glamis Gold Ltd., a Canadian gold mining company, was settled in June by an arbitral tribunal constituted under Chapter 11 of NAFTA.

In a unanimous 355-page decision, the Tribunal dismissed Glamis' claims that the US expropriated its rights to mine gold in southeastern California and that the US denied Glamis "fair and equitable treatment" in its attempt to utilize those rights.

The Glamis claim rested on a series of regulatory measures imposed by federal and state agencies in response to concerns over the environmental and cultural impacts of its mining project (the Imperial Project). The open pit mining project was controversial in California, drawing particular opposition from the Quenchan Indian Nation due to its location in an area sacred to the Native American tribe.

Glamis argued that federal mining agencies departed from well-established precedent when they declined to approve Glamis' plan of operation. Glamis also objected to measures introduced by the State of California in 2003, which it claimed were arbitrary and discriminatory, designed to block the Imperial Project rather than genuinely address environmental and cultural concerns associated with mining activities generally.

In considering Glamis' expropriation claim, the Tribunal extensively analyzed the value of the mining project in light of the additional costs required to meet the environmental criteria demanded by the State of California.

*"The Tribunal's insistence that claimants, like Glamis, must demonstrate an evolution in the customary international law standard of "fair and equitable treatment" in order to support their case sets a heavier burden than past NAFTA tribunals have required."*

Glamis argued that the cost associated with completely backfilling the Imperial mine, as required under the California measures, reduced the project to a negative value. However, the Tribunal rejected Glamis' valuation, concluding that the mining project was valued at over US\$20 million (Glamis had estimated the value of the project at US\$49 million without the backfilling measures prescribed in the California measures).

Given the "significantly positive valuation", the Tribunal concluded that "the first factor in any expropriation

## NEWS: SOUTH AFRICAN TRADE DEPARTMENT CRITICAL OF APPROACH TAKEN TO BIT-MAKING

By Damon Vis-Dunbar

A position paper published by the Government of South Africa takes a critical posture towards the country's bilateral investment treaties (BITs).

"Existing international investment agreements are based on a 50-year-old model that remains focused on the interests of investors from developed countries," writes the Department of Trade and Industry (DTI). "Major issues of concern for developing countries are not being addressed in the BIT negotiating processes."

The DTI has formed a task force to review of the country's policies toward the promotion and protection of foreign investment in order to ensure that they are in harmony with social and economic objectives.

The DTI task force observes that the South African government has demonstrated a "lack of understanding regarding the real nature and consequences of BITs...", and finds that negotiations have not been guided by a common approach or strategic planning.

The DTI task force embarked on a review of South Africa's BIT policy in October 2008, with a goal to making policy recommendations to South Africa's Cabinet.

The government position paper published in June, "Bilateral Investment Treaty Policy Framework Review", is the result of interviews with the various

agencies responsible for developing international investment policies, as well as analysis of BITs that have been concluded, ratified or are under negotiation.

The DTI takes a dim view of the provisions standard in South Africa's investment treaties, including settling disputes with foreign investors through binding international arbitration.

*"The DTI task force observes that the South African government has demonstrated a "lack of understanding regarding the real nature and consequences of BITs...", and finds that negotiations have not been guided by a common approach or strategic planning."*

"There is no compelling reason why review of an investor's claim cannot be undertaken by the institutions of the state in question – provided these are independent of the public authority that is in dispute and they discharge their duties in accordance with basic principles of good governance, including an independent judiciary," writes the DTI.

In charting a way forward, the DTI suggests that South Africa might take

lessons from other countries who have conducted reviews of their commitments under BITs.

The DTI also notes that "many of the initial BITs signed after 1994 will soon expire and this may be an opportunity for the RSA to reassess its position regarding the form and content of such agreements".

The DTI task force is inviting the public to comment on the position paper no later than 24 July 2009. For a copy of the paper, and information on how to submit comments, see: <http://www.thedti.gov.za/ads/bi-lateral.htm>

South Africa is currently involved in an investment dispute with several Italian citizens and a Luxembourg corporation who hold interests in South African granite quarrying companies.\* They claim that legislation enacted in 2004 to increase the participation of historically disadvantaged South Africans effectively "extinguished" their mineral rights without providing adequate compensation.

The claim, registered with the International Centre for Settlement of Investment Disputes in 2007, is pursuant to the Italy-South Africa and Benelux-South Africa bilateral investment treaties.

\* *Piero Foresti, Laura de Carli and others v. Republic of South Africa* (ICSID Case No. ARB(AF)/07/1)

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analysis is not met: the complained of measures did not cause a sufficient economic impact to the Imperial Project to effect an expropriation of the Claimant's investment."

The Tribunal also went on to reject Glamis' claim that the United States had violated Article 1105(1) of NAFTA, which provides that "[e]ach Party shall

accord to investments or investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

In considering this provision, the Tribunal noted that "[t]here is no disagreement among the State Parties to the NAFTA, nor the Parties to [this

case], that the requirement of fair and equitable treatment in Article 1105 is to be understood by reference to the customary international law minimum standard treatment of aliens."\* Thus, the Tribunal characterized the issue before it under Article 1105 as one which required a determination of the customary international law minimum standard of treatment owed by a

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## NEWS: ARBITRATORS CLASH ON QUESTION OF INTERPRETATION IN HRVATSKA ELECTROPRIVREDA D.D. V. THE REPUBLIC OF SLOVENIA

*By Elizabeth Whitsitt*

On 12 June 2009 the majority of a Tribunal convened pursuant to a Request for Arbitration under the ICSID Arbitration Rules issued a partial award finding the Republic of Slovenia liable (subject to further proceedings)\* to Hrvatska Elektroprivreda d.d. (HEP), the national electric company of Croatia, for the financial value of undelivered electrical power from 1 July 2002 to 10 April 2003.

The dispute between HEP and Slovenia concerns the ownership and operation of a nuclear power plant in Slovenia, the Krško Nuclear Power Plant ("Krško NPP"). Krško NPP was designed and built with funds contributed equally by the national power industries of both Slovenia and Croatia when both Republics formed part of the former Yugoslavia.

At that time, the financing, construction, operation, management and use of Krško NPP was regulated by four inter-related agreements entered into by Slovenia and Croatia together with representatives of their national power industries (the Governing Agreements).

Under the Governing Agreements, co-investors in Krško NPP were to be 50:50 partners in all aspects of the plant's construction, management, use and operation. As a result, each investor had the right to receive 50 percent of the power output of the plant at prices to be determined in accordance with the Governing Agreements.

After Slovenia and Croatia declared their independence from Yugoslavia in 1991, disputes regarding the management and operation of Krško NPP began to arise. On 30 July 1998 the Slovenians terminated all electricity deliveries from Krško NPP to HEP and issued a governmental decree

which HEP claims affected its rights as a 50 percent owner and manager of Krško NPP.

Subsequently, the governments of both countries entered into negotiations aimed at restoring HEP's rights; however, those efforts stalled over financial issues associated with the continued operation of Krško NPP. In late 2001 negotiations between Slovenia and Croatia were renewed and culminated in the prime ministers of both republics recording an agreement (the 2001 Agreement) along the following lines: (i) all sums claimed by the parties as a result of past financial differences would be waived as of an agreed date, (ii) HEP would be recognized as co-owner and co-manager of Krško NPP, and (iii) deliveries of electricity to HEP would resume as of an agreed date.

While the intention of both parties was that the 2001 Agreement would be ratified and in force by the end of 2001 or during the first quarter of 2002, Croatia ratified the agreement on 3 July 2002 and Slovenia ratified the agreement on 23 February 2003. The agreement subsequently came into force and electricity deliveries from Krško NPP to HEP resumed.

Commencing arbitral proceedings in November 2005, HEP sought compensation for alleged financial losses it claims to have suffered due to non-delivery of electricity from 1 July 2002 to 19 April 2003.

In support of its contention, HEP relied on provisions addressing the settlement of financial issues between Slovenia and Croatia within the 2001 Agreement to argue that the agreed deadline between the parties for the restoration of electricity deliveries as well as the deadline for the waiver of all financial claims was 30 June 2002.

In response to HEP's allegations, Slovenia argued that the 2001 Agreement did not expressly define a starting date for the supply of power, and therefore HEP had no right to receive electricity after 30 June 2002. Rather, Slovenia contended that HEP's rights under the agreement were only activated upon its entry into force on 10 March 2003.

Noting that the appropriate framework through which to interpret the 2001 Agreement is found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), the majority of the Tribunal focused their analysis on the financial settlement provisions of the agreement. In particular, the majority of the Tribunal reasoned that the settlement of financial issues in the agreement created a balance between the parties on all other issues, including the supply of electricity to HEP and the waiver of all financial claims, as of 30 June 2002, irrespective of the Treaty's ratification.

In so finding, the majority of the Tribunal appears to ground its interpretation on the basis of implied rather than explicit language in the 2001 Agreement. To that extent, the majority of the Tribunal postulates that under Articles 31 and 32 of the VCLT "[n]o greater or lesser force resides in a [treaty] term by virtue of the relative magnitude of the clarity with which it has been (or has not been) written."

In a dissenting opinion, Jan Paulsson flatly rejects the majority of the Tribunal's decision imposing liability on Slovenia (subject to further proceedings) to compensate HEP for the financial value of undelivered electrical power from July 1, 2002 to April 19, 2003. While Mr. Paulsson disagrees with a number of aspects of the majority's decision, the crux of his dissent appears to centre upon

## NEWS: GREENPEACE PRESSURES GERMAN GOVERNMENT FOR TRANSPARENCY IN VATTENFALL DISPUTE

By Damon Vis-Dunbar

Arbitration proceedings between the Government of Germany and the Swedish energy utility Vattenfall should be conducted transparently, argue a coalition of non-governmental organizations.

*“Greenpeace Germany and the World Economy, Ecology and Development organization are pressing the German Government to reverse its policy of not commenting or disclosing information related to the Vattenfall arbitration proceedings”*

Greenpeace Germany and the World Economy, Ecology and Development organization are pressing the German Government to reverse its policy of not commenting or disclosing information related to the Vattenfall arbitration proceedings. Earlier this month, Greenpeace sent a letter to the German Minister of Economics and Technology, Dr. Karl-Theodor Freiherr zu Guttenberg, requesting assurances that his ministry would endorse transparency in the Vattenfall v. Germany arbitration.

“This dispute poses a real danger to critical environmental measures and for that reason alone needs to be conducted in an open and transparent manner,” said Juergen Knirsch of Greenpeace Germany, in an interview with ITN.

Vattenfall brought the German government to international arbitration in April over a dispute related to measures imposed on a coal-fired power plant under construction near the Elbe River.

Specifically, Vattenfall argues that restrictions imposed by the City of Hamburg on cooling water used and discharged by the plant would make the project uneconomical, and run counter to earlier assurances provided by Hamburg officials.

A city official defends the restrictions in the water permit, however, explaining to ITN that they are necessary under a European Union directive on water quality, the EU Water Framework Directive. All industries along the Elbe River have also faced restrictions in an effort to reach the “ambitious” goals required under the EU directive, said this person.

According to Vattenfall’s request for arbitration, the Swedish firm seeks approximately 1.4 billion Euros in compensation for alleged violations of the Energy Charter Treaty (ECT). The ECT is a multilateral agreement governing investments in the energy sector, and contains investment protections similar to those found in bilateral investment treaties.

The International Institute for Sustainable Development, the publishers of ITN, have prepared a legal brief for Greenpeace on the Vattenfall dispute, featuring a discussion of the ECT’s implications for environmental law and policy making.\*\*

The Vattenfall dispute has garnered wide-spread coverage in the German news media in recent weeks, including a feature in the online edition of the German weekly Der Spiegel.\*\*\*

\*Vattenfall’s request for arbitration is available here: <http://www.investmenttreatynews.org/documents/p/162/download.aspx>

\*\*The IISD’s Background paper on the Vattenfall v. Germany dispute is available here: <http://www.iisd.org/investment/>

(An updated version of the IISD background paper, taking into account the information contained in Vattenfall’s request for arbitration, will be made available next week. )

\*\*\*The Der Spiegel feature on the Vattenfall dispute with Germany, published on 11 July 2009, is available here: <http://www.spiegel.de/wirtschaft/0,1518,635520,00.html>

## NEWS: VENEZUELA CONSENTS TO ARBITRATION IN NEW BIT WITH RUSSIA

By Fernando Cabrera Diaz

A new bilateral investment treaty between Venezuela and Russia provides consent to international arbitration for settling disputes pursuant to the treaty, despite President Chavez's criticism of international investor-to-state arbitration.

Article 9 of the Russia-Venezuela BIT, published in Venezuela's Official Gazette on 2 June 2009, allows investors to elect arbitration at a tribunal in the host country, an ad hoc tribunal under UNCITRAL Rules or at the Arbitration Institute at the Stockholm Chamber of Commerce.

Venezuela is under pressure to accept these types of arbitration clauses to attract much needed foreign investment, as massive social spending and failure to invest in sufficient drilling are leading to a gradual decline in Venezuela's oil production, said energy analyst James L. Williams in an interview with ITN.

Foreign Direct Investment in Venezuela has plummeted in the last few years, going from a high of US\$ 2.58 billion in 2005 to 646 million in 2007 according to the latest available figures from the

United Nations Conference on Trade and Development (UNCTAD).

Venezuela has actively courted Russian investment, with some recent success. The June 2nd Official Gazette announced a joint venture between state-owned oil company PDVSA and the Russian National Petroleum Consortium Ltd. to exploit two blocks in the Orinoco Oil Belt.

Also in June, Venezuelan newspapers reported that the Las Cristinas gold project, originally awarded to Canadian mining firm Crystallex International, will now be developed by a joint venture between Venezuela and a Russian mining firm. Crystallex International said in May that it was preparing an ICSID claim against Venezuela over the project.

The Russia-Venezuela BIT does not include ICSID as a potential forum for setting disputes: the World Bank arbitration facility that President Chavez has accused of promoting modern-day imperialism.

Venezuela currently faces 7 cases before ICSID tribunals, most as a result of the forced nationalizations

in industries such as petroleum and mining.

Although Venezuela has often sought to compensate foreign investors, its offers have usually been rejected as too low.

In this context, Article 5 of the Venezuela-Russia BIT, which calls for compensation at market value in cases of expropriation, is noteworthy. This is a departure from many of Venezuela's previous BITs, such as those with the UK, Canada and Sweden, which refer to 'adequate and effective compensation' based on "genuine value."

Venezuela has often offered to compensate companies for nationalizations using the usually lower book value instead of market value, notes Andres Mezgravis, a Caracas-based lawyer. This may hurt Venezuela's nationalization efforts because investors from countries protected by BITs with national treatment clauses could demand compensation at market value by referencing the Russia-Venezuela BIT, said Mr. Mezgravis.

UNCTAD data available at: [http://www.unctad.org/sections/dite\\_dir/docs/wir08\\_fs\\_ve\\_en.pdf](http://www.unctad.org/sections/dite_dir/docs/wir08_fs_ve_en.pdf)

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the approach utilized by the majority of the Tribunal to interpret the 2001 Agreement.

Citing the majority's interpretive approach as "nothing less than revolutionary", Paulsson finds that "[t]he majority says, in effect, that one may postulate an outcome and force-fit it into the actual text. Nuances and omissions in the text are of no moment. In the result, the majority retains from Article 31(1) of the VCLT only the elements that confirm their subjective gloss (perceptions of good

faith and object and purpose), ignoring those which are of an objective nature (textual terms and context)."

Having so decided, Mr. Paulsson further indicates that the majority's approach is one "with which [he] cannot associate himself" and in fact "lies at the heart of [his] reason for producing [his] Individual Opinion."

Accordingly, Mr. Paulsson would have found that Slovenia had no duty to supply electricity to HEP after 30 June 2002 given the fact that the 2001

Agreement did not contain such an express undertaking.

\* The majority's finding regarding the liability of Slovenia is subject "to the Tribunal determining in subsequent proceedings...whether or not, and, if so the extent to which: (i) HEP has waived such liability by acquiescence...or (ii) Slovenia's liability has been satisfied by offers of electrical power made to HEP... on June 24, 2002 and November 13, 2002."

## NEWS: ICSID TRIBUNAL ACCEPTS ECUADOR'S OBJECTIONS TO JURISDICTION IN DISPUTE WITH ELECTRICITY FIRM

By Fernando Cabrera Diaz

A tribunal at the International Centre for Settlement of Investment Disputes (ICSID) has accepted Ecuador's objections to jurisdiction in an arbitration commenced by Empresa Eléctrica del Ecuador, Inc (EMELEC). In a ruling handed down on June 2 the tribunal held that the claimant Mr. Miguel Lluco was not authorized to commence the claim on behalf of EMELEC.

EMELEC, an electricity company incorporated in the state of Maine, signed a 60-year concession contract in 1925 to produce, transmit and distribute electricity to Guayaquil, Ecuador's second largest city. When the contract ended in 1985 EMELEC continued to operate in Ecuador under provisional permits.

According to the claimants, on 23 March 2000 the company's assets were frozen by an order of Ecuador's National Council for Electricity (CONELEC). CONELEC claimed to have taken this action in response to, among other things, EMELEC's failure to finalize a new concession contract in the time frame provided under the Electric Sector Law.

Mr. Lluco responded by lodging a claim against Ecuador in 2004, alleging that EMELEC's assets had been expropriated in violation of the Ecuador-United States bilateral investment treaty.

Before the Tribunal examined the alleged expropriation, Ecuador challenged its jurisdiction on several grounds. Ecuador's principle argument was that Mr. Lluco was not authorized to launch the claim because EMELEC was owned by trust to which he was not a party.

Mr. Lluco, however, claimed to be the trustee of a trust allegedly set up by EMELEC's previous owner, Fernando Aspiazu, which held EMELEC as an asset.

*"The decision represents a rare victory for Ecuador at ICSID, and comes as the country has moved to exit the World Bank's arbitration facility citing a perceived bias in that body on behalf of foreign investors."*

The tribunal was presented with complex and conflicting accounts of the history of the ownership of EMELEC. According to the tribunal neither side disputed the fact that in January of 1993 Fernando Aspiazu bought EMELEC through the Bahamian company NEPEC. Six years later a bank owned by Mr. Aspiazu, Banco del Progreso S.A., was taken over by Ecuador, and Mr. Aspiazu was charged with embezzlement and ordered to pay back all depositors.

In response, Mr. Aspiazu set up the Progreso Repatriation Trust (PRT I), a revocable trust whose beneficiaries were to be first the depositors at the failed bank, followed by himself and his wife.

What happened next is disputed. According to Ecuador, Mr. Aspiazu and his wife dissolved this first trust in February of 2000 and created the Progreso Depositors Trust (PDT) with the same assets. This second trust is irrevocable for at least 6 years, and therefore still owns EMELEC.

The claimant, however, argues that this second trust was never formed with the proper consent of Mr. and Mrs. Aspiazu and that instead a third trust was formed with the relevant assets in 2003. As the appointed trustee of this alleged third trust, Mr. Lluco contends he is empowered to commence the current arbitration.

Ultimately the tribunal sided with Ecuador, holding that Mr. and Mrs. Aspiazu did authorize the creation of the irrevocable second trust in 2000 and that their consent was evident in several letters written to instruct the trustee of that trust.

Based on this finding the tribunal determined that the third trust could not have been created in 2003 as the claimant contends, given that the assets in question already belonged to the second trust which was irrevocable at the time. As such, the tribunal determined that Mr. Lluco lacked authority to represent EMELEC as claimant in the arbitration, concluded the tribunal.

The decision represents a rare victory for Ecuador at ICSID, and comes as the country has moved to exit the World Bank's arbitration facility citing a perceived bias in that body on behalf of foreign investors.

The award in *Empresa Eléctrica del Ecuador, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/05/9 is available in Spanish here: <http://ita.law.uvic.ca/documents/EmpresaElectricaAwardSpanish.pdf>

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NAFTA State Party to an investor of another State Party.

Glamis and the US, along with the two other NAFTA State Parties, agreed that the customary international law standard was at least that as delineated in 1926 in *Neer v. Mexico*.\*\* Glamis and the US disagreed, however, as to whether and how that customary standard has since evolved.

Glamis contended that the duty to accord investors “fair and equitable treatment” and the minimum standard of treatment are dynamic standards, informed by the proliferation of more than 2,000 bilateral investment treaties and many treaties of friendship and commerce. Accordingly, Glamis argued that the Tribunal in this case could look to decisions of other tribunals interpreting the “fair and equitable treatment” standard under those treaties to establish that the same standard under NAFTA Article 1105 required something less than the “egregious”, “outrageous”, or “shocking” threshold enunciated during the 1920s.

For its part, the US noted that customary international law requires proof of: (i) state practice and (ii) *opinio juris*, and contended that Glamis had not met its burden of establishing an evolution in the customary standard of “fair and equitable treatment.” Specifically, the US attacked Glamis’ use of treaties and other tribunals’ interpretation of the “fair and equitable treatment” standard under those treaties as evidence of the customary international law standard of “fair and equitable treatment” under NAFTA Article 1105.

In agreement with the US, the Tribunal would distinguish the task of determining the meaning of “fair and equitable treatment” by way of treaty interpretation from the task of determining the content of customary international law, explaining that:

“[a] tribunal confronted with the question of treaty interpretation can, with little input from the parties provide a legal answer. It has two necessary elements to do so, namely the language at issue and rules of interpretation. A tribunal confronted with the task of ascertaining custom, on the other hand, has a quite different task because ascertainment of the content of custom involves not only questions of law but also questions of fact, where custom is found in the practice of States regarded as legally required by them.”

While the Tribunal acknowledged that it is difficult to establish a change in customary international law, it nonetheless maintained that claimants, like Glamis, arguing for an evolution of the customary “fair and equitable treatment” standard under NAFTA Article 1105 have a heavy burden to prove such an assertion.

In this case, the Tribunal concluded that Glamis failed to prove that “fair and equitable treatment” has evolved under customary international law since it was articulated in *Neer v. Mexico*. As such, the Tribunal determined that a high threshold would have to be met by Glamis in order to prove a breach of the “fair and equitable treatment” standard, holding that a violation “requires an act that is sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons ...”.

Ultimately, the Tribunal found no evidence that federal and state agencies met these levels of misconduct in their dealings with Glamis.

The Tribunal’s insistence that claimants, like Glamis, must demonstrate an evolution in the

customary international law standard of “fair and equitable treatment” in order to support their case sets a heavier burden than past NAFTA tribunals have required. To the degree that subsequent NAFTA tribunals adopt a similar approach, claimants seeking refuge under NAFTA Article 1105 will have a difficult time successfully establishing their claims.

The award in *Glamis Gold Ltd. v. United States of America* is available from the website if the US State Department: <http://www.state.gov/s/l/c10986.htm>

\* In support of this proposition, the Tribunal referenced the Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, § B(2) (31 July 2001) which states that “Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.”

\*\* See *Neer v. Mexico*, 4 R. Int’l Arb. Awards (15 October 1926) at p. 4 where the arbitral tribunal stated that: “[t]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”

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