IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

GLAMIS GOLD LTD.,	
Claimant/Investor,	
and	
UNITED STATES OF AMERICA,	
Respondent/Party.	

CONFIDENTIAL INFORMATION REDACTED

REPLY MEMORIAL OF CLAIMANT GLAMIS GOLD LTD.

Alan W.H. Gourley
R. Timothy McCrum
Alexander H. Schaefer
David P. Ross
Sobia Haque
Jessica Hall
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2500

Counsel for Claimant/Investor

December 15, 2006

TABLE OF CONTENTS

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

GLAMIS GOLD LTD.,	)
Claimant/Investor,	)
and	)
UNITED STATES OF AMERICA,	)
Respondent/Party.	)

REPLY MEMORIAL OF CLAIMANT GLAMIS GOLD LTD.

In accordance with the Tribunal's Procedural Order No. 9, dated October 31, 2006, Claimant, Glamis Gold Ltd. ("Glamis") respectfully submits this Reply Memorial in response to the Counter-Memorial submitted by Respondent, the United State of America, on September 19, 2006.

INTRODUCTION

1. Glamis' original Memorial presented a clear and straight-forward (if long) description of how Respondent's measures violated Articles 1110 and 1105 of the North American Free Trade Agreement ("NAFTA") in destroying the entire value of Glamis' investment in the Imperial Project gold mine. Glamis, a Canadian gold mining company, through its U.S. subsidiary, made significant high-risk investments over many years in exploring and proving the existence of valuable gold deposits located on federal lands in the California desert at the Imperial Project site. Glamis complied with all the then-existing rules for

establishing its mining claims and seeking an approved plan of operations. The site chosen was, from a geographical, environmental and cultural perspective, similarly-situated to many other open-pit gold mines in the California desert, including two that were within ten miles of the Project site. Glamis' reclamation plan included backfilling and waste pile recontouring consistent with the award-winning reclamation that Glamis itself conducted at the neighboring Picacho Mine.

2. Nonetheless, the U.S. Department of the Interior ("Interior") has never approved the Imperial Project mine, and what Glamis' valuation expert, Behre Dolbear, has reconfirmed was valued at $49.1 million as of December 12, 2002, is now worthless. Glamis' loss is directly attributable to Secretary Babbitt's January 17, 2001 Record of Decision denying approval of Glamis' Plan of Operations, Interior's failure promptly to correct this unlawful act and approve the mine, and the California legislation (SB 22) and its emergency regulation – both of which imposed retroactively on Glamis' pending Project mandatory complete backfilling and site recontouring for the express, undisguised and undisputed purpose of killing the Imperial Project.

3. Respondent does not deny these events happened, and it specifically admits that Glamis has a property right in the proven gold mineral deposits (although it seeks to read out of Glamis' property interest the right to extract the minerals). Nowhere does it contest the conclusions of Glamis' expert Thomas Leshendok, or otherwise contend that Glamis' Plan of Operations fell short of the federal 43 C.F.R. Subpart 3809 regulations or differed materially from those of similarly-situated mines for which approval was granted. Nor can it escape from Interior's own conclusion that, as of September 27, 2002 – shortly before the California measures finally destroyed the value of the mine – Glamis had every reasonable expectation and assurance that, under U.S. mining law and applicable regulations, the Project would be approved:

> We conclude that Glamis has found minerals within the boundaries of the 187 load mining claims and the evidence is of such character that "a person of ordinary prudence would be justified in the further expenditure of labor and means, with a reasonable prospect of success, in developing a valuable mine." The requirements of the mining laws of the United States have been satisfied . . . .[1]

4. Instead, Respondent seeks to undermine Glamis' claims by portraying Glamis as a reckless investor that simply lost out in a fair and democratic political process in which it actively engaged before thereafter abandoning its pursuit of the Project in favor of this expensive arbitration. As to the claimed lack of Glamis' reasonable expectations of approval, even cursory examination of the many record references Respondent cites to support this revisionist history demonstrates that a factual basis does not exist. As detailed extensively in the sections that follow, and supported by the expert opinions of Dr. Lynne Sebastian, the extensive ethnographic and cultural resource studies – both preceding and concurrent with Glamis' investment – did not provide any basis from which Glamis could suspect that, in late 1997, a previously unknown Trail of Dreams would become associated with a few trail segments at or around the site or that this "trail," whether spiritual or physical, would take on such cultural or religious significance as to justify the extraordinary measures that both the federal government and California employed to stop the mine. Respondent tries desperately to ground these measures in some background legal principles – even dredging up a 1976 California statute (which it names the Sacred Sites Act) that no one, even California, had previously suggested even applied to federal lands – but, as the expert opinions of Professor Wälde and former U.S. Solicitor General Olson show, none of these alleged principles is sufficiently definite or specific to defeat Glamis' claim that the

---

[1] U.S. Department of the Interior, Bureau of Land Management, *Mineral Report: Discovery, Use and Occupation, and Mineral and Character Determination of 187 Load Mining Claims and 277 Mill Sites, Owned by Glamis-Imperial Gold Company, Imperial County, California,* 3 (Sept. 27, 2002), Claimant Ex. 255 (emphasis added).

measures are tantamount to an expropriation under either international law or U.S. Constitutional law.

5. Furthermore, the process to which Glamis was subjected was anything but fair and democratic – although we agree it was political. In the United States, as in any country desirous of attracting foreign investment, projects such as major mineral extraction projects are to be considered under the rule of law, and that is precisely what the Bureau of Land Management's ("BLM's") and the Imperial County staffers did until the process was hijacked by political appointees at Interior. From that point in 1998 onward, the "process" was neither fair nor legal. First, Interior arbitrarily and unlawfully changed the rules on which Glamis had relied in making its investment, giving to itself for the first time discretionary authority to stop the mine, culminating in former Interior Secretary Babbitt's unlawful denial of the Glamis Imperial Project on January 17, 2001. This was not, as Respondent would have the Tribunal believe, some careful balancing of competing interests within an existing legal framework – it was a backroom reconstruction of the legal framework in order to specifically achieve the predetermined result.

6. Similarly, the California measures, adopted on an "emergency" and "urgency" basis between December 2002 and April 2003, mandating complete backfilling and site recontouring, are not rationally related to any one of the many different rationales that Respondent offers – frankly citing a different one whenever it suits its purposes. Significantly, the one rationale that Respondent would like the Tribunal to ignore is the honest appraisal repeatedly offered by the Governor and others – to stop the Imperial Project in its tracks. But even evaluated at face value, the other proffered objectives do not support Respondent's claim that they are reasonable and proportional such as to excuse Respondent from compensating Glamis for its loss. Mandatory backfilling and site recontouring only protects Native American sacred sites (the alleged

rationale for SB 22) by making any hardrock mining cost-prohibitive; *i.e.*, stopping the mine. Otherwise, the local artifacts are at a minimum disturbed and likely buried by the more extensive spreading of the waste rock.

7. The unstudied safety, environmental or end use concerns associated with open-pits for hardrock mines (the alleged rationales for the emergency regulation) are unsupported by any scientific study and are totally at odds with the 1999 conclusions of the National Academy of Sciences/National Research Council ("NAS/NRC") study which had rejected mandatory backfilling, finding no basis to contradict its longstanding conclusion (from 1979) that complete backfilling of large metallic ore open pits is "generally not feasible for non-coal minerals or has limited value because it is impractical, inappropriate or economically unsound . . . ." In any event, Respondent fails to provide any basis to conclude the alleged safety and other concerns would not apply equally to the numerous other open-pit mining operations in California for gravel and industrial minerals (*e.g.*, Boron) left unaffected by the emergency and subsequent permanent regulation.

8. Finally, it is simply untrue that Glamis caused any delay in the consideration of its Plan of Operations or is today responsible for Respondent's failure to act. While Glamis did once – as California was passing its expropriatory measure – seek an alternative solution in order to avoid litigation, the fact is that Respondent refused to halt its consideration (and ultimately the settlement approach). Nor has Glamis at any time since filing its Notice of Claim suggested that Respondent abandon consideration of the Plan of Operations. To the contrary, it firmly expected that Respondent would proceed to redress the harm that it has caused.

9. It is not our intention in this Reply Memorial to address seriatim each stray shot coming from Respondent's blunderbuss Counter-Memorial. While Respondent would have this

Tribunal believe that the United States is somehow above the customary international law defining expropriation and fair and equitable treatment, the following analysis shows – and is supported by the expert legal opinions of Professor Wälde and former U.S. Solicitor General Olson – that the measures for which Respondent is responsible defeated Glamis' reasonable investment-backed expectations with respect to commencement of gold mining operations, unfairly subjected Glamis' Imperial Project to a new regulatory regime applied only after it had completed its costly high-risk mineral exploration, eliminated any chance for Glamis to extract its gold, and destroyed all economic value in the Imperial Project mine – all in order to save a small segment of the vast desert for another use. Its goal may be legitimate, and even laudable, but neither relieves Respondent of its obligation under international law to compensate Glamis for its loss.

ARGUMENT

10. Below, Glamis will demonstrate that, contrary to Respondent's assertions in its Counter-Memorial, (1) Respondent has breached its obligations under NAFTA Article 1110 by taking measures tantamount to expropriation of Glamis' investment without payment of compensation; (2) Respondent has breached its obligations under NAFTA Article 1105 by denying Glamis fair and equitable treatment; and (3) Respondent's asserted affirmative defenses lack merit.

I. Glamis' Valuable Property Rights Have Been Expropriated And Compensation Therefore Is Owing Under Article 1110 Of NAFTA

11. Respondent's Counter-Memorial opens with its understanding of the nature of this case: "[t]his case is about the efforts of the federal and California governments, through regular and democratic processes, to minimize the damage to the environment and cultural sites of

significant religious importance to Native Americans posed by open-pit gold mining."[2] By framing the case in this way, Respondent manages to entirely ignore the central question, which is whether Respondent's "efforts" violated NAFTA's investment protections. As Professor Thomas Wälde observes in his expert opinion accompanying this Reply Memorial,

> The case is not about restricting a sovereign state's essential freedom of action to develop its regulatory regime as it seems fit and proper. It is, however, about identifying when such change creates an obligation to pay financial compensation by those whose rights are sacrificed for the public good. Moreover, it is about the application of international treaty obligations that the United States has accepted in order to promote foreign investment in the U.S. by providing investment protection enforceable by a NAFTA Chapter XI tribunal.3

12. Respondent's refusal to directly engage on these core issues is a theme that runs throughout its discussion of Glamis' 1110 (expropriation) claim. Glamis' Memorial showed that it held property rights in the form of valuable mining claims determined to be valid by the United States in 2002, and Glamis' ownership of those rights is not in dispute.[4] Glamis further established that the California and federal governments undertook a series of actions (and inactions) specifically and explicitly designed to stop the Imperial mine, thereby completely devaluing those property rights. Glamis' own records and the valuation performed by its experts

---

2 *Glamis Gold Ltd. v. United States*, NAFTA/UNCITRAL, Counter-Memorial of Respondent United States, at 1 (Sept. 19, 2006) [hereinafter "Counter-Memorial"].

3 Expert Report of Professor Thomas W. Wälde ("Wälde Report"), Executive Summary at I-8 (December 15, 2006). Professor Wälde is Professor of International Economics, Natural Resources and Energy Law and Jean-Monnet Chair of the Centre for Energy, Petroleum and Mineral Law at the University of Dundee, Scotland, U.K. An expert on both mining and international investment law with over 30 years of experience in international mining law, Professor Wälde was the United Nations Interregional Adviser on Mineral and Investment Law & Policy from 1980 to 1990. Professor Wälde is Managing Editor of the *Journal for Energy and Natural Resources Law*, Co-Editor of *International & Comparative Mining Law and Policy* (2004), Associate Editor of the *Journal of World Investment & Trade*, founder and co-moderator of GLOMIN (the leading international mineral law and policy internet forum) and TDM (the leading international investment disputes internet forum), and acted as Director of the English section of the research seminar on international investment law by the Hague Academy of International Law in 2004.

confirm that these efforts to devalue the property rights succeeded completely. As a matter of international law, once these facts are established, no further inquiry is required to find a compensable expropriation. As Professor Wälde notes,

> There is probably agreement that a deprivation that leaves the owner with nothing useful to do with the property "goes too far," while interference with economically relevant uses of the property that leaves the owner with enough alternative uses may not be enough to pass the threshold, unless other conditions (in particular the frustration of legitimate expectations) are met.
>
> My own reading of relevant case law and authoritative commentary is that full deprivation leads to a *per se* finding of expropriation, while substantial (but less than full) deprivation leads to a balancing test.[5]

13. Because Glamis has established (1) its property right; and (2) the full deprivation that "leads to a *per se* finding of expropriation," Glamis has made its *prima facie* showing of a compensable expropriation under Article 1110.

14. Respondent does not meaningfully dispute either of these key facts. With respect to the first key fact (Glamis' ownership of the property rights themselves), since Respondent cannot dispute Glamis' ownership, its only alternative is to seek refuge in distortions of both the nature of those rights and the legal regime under which they arose. Specifically, Respondent argues that Glamis' property rights were so circumscribed – either by inherent limitations or by pre-existing "background principles" – that the government's devaluation of those rights does not trigger Article 1110's compensation obligation. These arguments find no support in NAFTA or customary international law. International arbitral tribunals in both the NAFTA and non-NAFTA investment treaty context have found consistently that in order to limit property rights,

---

[4] *See, e.g.,* Counter-Memorial at 120 ("The property rights held by Glamis – unpatented mining claims located on federal lands – are possessory interests subject to wide-ranging federal, state, and local regulations.").

[5] Wälde Report at III-25.

ex ante restrictions on the exercise of such rights must be specific, transparent, and legally binding[6] – Respondent's alleged "background principles" meet none of these criteria.

15. Respondent's analysis is not even supported by the domestic U.S. takings jurisprudence that gives rise to the "background principles" concept. Former U.S. Solicitor General and noted Constitutional law scholar Theodore Olson, in his expert opinion accompanying this Reply Memorial, examines the U.S. Supreme Court decision in *Lucas v. South Carolina Coastal Council*[7] (in which the "background principles" framework was laid out), as well as the larger corpus of Fifth Amendment "takings" jurisprudence. Mr. Olson concludes that

> Glamis does have a property interest in being able to extract minerals from the area of its mining claims, and that the reclamation requirements imposed by SB 22 and the SMGB Regulations do not reflect "background principles" that inhere in the definition of the scope of the mining claims and prevent the creation of a property interest. Accordingly, I believe California has effected a taking of private property that would be compensable under the Fifth Amendment to the U.S. Constitution, as construed and applied by the U.S. Supreme Court.[8]

16. Because Respondent's analysis is unsupported by customary international law, NAFTA precedent, or U.S. takings jurisprudence, in order to reach its conclusion, Respondent simply miscontrues the precedent in all three areas.

17. With respect to the second key fact (the full deprivation of the property value), Respondent attempts to undermine the valuation methodology employed by Behre Dolbear in order to fabricate residual value and downplay the effect of its measures. That attempt, however,

---

6 *See id.* I-17 (noting that *ex ante* limitations must be "restrictions which from the outset were legally binding restrictions (not a broad legal principle which later can justify virtually anything); also, they must have been clear, transparent and ascertainable by the investor on the basis of a normal professional due diligence.").

7 505 U.S. 1003 (1992).

is riddled with factual and methodological errata. Moreover, it ignores the "objective indicators of value" (*i.e.*, Glamis' accounting treatment of the mining claims and the market's post-measure valuation of those claims) that Professor Wälde notes "should be preferred."[9]

18. Notwithstanding that Respondent cannot rebut Glamis' claim that (1) it held valuable property rights; and (2) the California and federal governments deprived Glamis of all the value of those rights, Respondent attempts to avoid its Article 1110 compensation obligation by first undermining Glamis' legitimate, investment-backed expectations and then defending the measures based on their "regulatory character." Under international law, neither exercise is relevant because, as Professor Wälde notes, given the full deprivation there is no need for further "balancing" or inquiry into either the reasonableness of Glamis' expectations or the character of the government's actions.[10]

19. Nevertheless, should the Tribunal consider these factors, the case for finding an expropriation becomes clearer still. As to Glamis' legitimate expectations, the record demonstrates that Glamis acted at all times as a prudent, reasonable investor in pursuing its claims, and its expectation that it would be able to mine at the Imperial Project site was reasonable based on the available facts, as well as the structure of the applicable provisions of the mining law.

20. Finally, the "regulatory character" of the measures does not obviate the need for compensation in this case. First, it is not clear that the prevailing standards of customary international law provide any immunity from the usual compensation requirements for

---

8 Expert Report of Theodore B. Olson ("Olson Report") ¶ 26 (December 14, 2006).

9 Wälde Report at III-31.

10 *See Tecnicas Medioambientales Tecmed S.A.* ("*Tecmed*") *v. The United Mexican States*, Case No. ARB(AF)/00/2, ¶ 116 (Award) (May 29, 2003) ("The government's intention is less important than the (continued…)

expropriatory "regulations." In any event, in order for such immunity to attach, any such regulations would have to be *bona fide*, non-discriminatory, and generally applicable; in the instant case, however, Respondent is unable to rebut Glamis' demonstration that the measures were specifically targeted at Glamis and designed to render the Imperial Project economically unviable.

21. Because Respondent can not rebut Glamis' basic 1110 claim elements (the valuable property right and the devaluation thereof), and because Respondent's asserted defenses and justifications are irrelevant and unsupported, NAFTA Article 1110 requires that Glamis be awarded full compensation for the expropriation of its investment. These conclusions were first set forth in the Memorial and are reiterated in response to Respondent's arguments below.

A. Glamis Held A Valid Property Right In The Form Of Valuable Mining Claims

22. In its Memorial, Glamis established that its mining claims are "property in the fullest sense of that term,"[11] conferring upon Glamis "the exclusive right of possession and enjoyment of all the surface of the land *and the minerals thereunder*."[12] In other words, Glamis' property rights in the mining claims also include the right to extract the gold deposits (*i.e.*, the enjoyment). Observing that under general international law, "[P]roperty is seen . . . from an economic, financial-asset-based perspective," Professor Wälde notes that "[t]he *de facto* expropriated right must have a financial value that can be realized by sale or by development into something that will generate a financial return – *e.g.,* a plot of land into a building, a factory or

---

effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures. . . .").

11 *Glamis Gold Ltd. v. United States*, NAFTA/UNCITRAL, Memorial of Claimant Glamis Gold Ltd., ¶ 400 (May 5, 2006) [hereinafter "Memorial"] (citing *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306, 316 (1930)).

12 Memorial ¶ 400 (citing *Cook v. United States*, 37 Fed.Cl. 435, 437 (1997)) (emphasis added).

other commercial facility or a geological discovery into a commercially viable operating mine."[13] Respondent cannot contest that Glamis owned the mining claims – including the accompanying right to engage in mining activities to extract the gold reserves therein – and its Counter-Memorial does not attempt to do so.

23. Instead, Respondent distorts the nature of Glamis' property rights, reading out its right to extract and attempting to read into Glamis' claims interests that Glamis has not asserted and need not possess for the protections of Article 1110 to attach. Respondent states, for example, that Glamis "has no property right to engage in mining activities free from the reclamation requirements imposed by [the California] measures."[14] Elsewhere, Respondent contends that Glamis has "no right to have a particular plan of operations or reclamation plan approved by governmental authorities."[15] In still another mischaracterization, Respondent asserts that Glamis' rights "never included the right to limit California's authority to accommodate Native American religious practices, or to mine in a manner that that [*sic.*] irreparably damage[d] Native American cultural and religious sites . . . or to fail to reclaim mined lands to a usable condition. . . ."[16] These arguments ignore Glamis' established property right in the interest of providing Respondent with analytical targets that it can more easily dismiss.

24. To be clear, Respondent's arguments notwithstanding, Glamis has never contended that California and the federal government may not regulate its (or any) mining activity, nor that they may not accommodate religious freedom (assuming that these are accurate characterizations

---

13 Wälde Report at III-24.

14 Counter-Memorial at 119.

15 *Id.* at 120.

16 *Id.* at 136.

of the measures at issue here, about which there is substantial doubt). The fact is that Glamis need not possess nor assert any such rights to establish a *prima facie* compensable expropriation, because as a matter of international law, where such regulation or accommodation rises to the level of an expropriation of an established property right, compensation under Article 1110 is required. As the *Tecmed* tribunal noted, "[T]hat the actions of the Respondent are legitimate or lawful or in compliance with the law from the standpoint of the Respondent's domestic laws does not mean that they conform to the Agreement or to international law."[17]

25. Respondent does not cite any international authority for the proposition that Glamis' mining claims are not property interests whose expropriation is compensable. Instead, Respondent invokes U.S. takings decisions in an effort to diminish Glamis' property interests. Respondent's theory apparently is that these cases demonstrate that Glamis' property rights do not qualify for protection from takings under the Fifth and Fourteenth Amendments of the U.S. Constitution or, by extension, Article 1110. This analysis fails, however, because the cited cases have no application to the property rights at issue in this case.

26. Respondent does not contest that the U.S. Supreme Court's decision in *Lucas v. South Carolina Coastal Council*[18] is the law of the land with respect to Fifth Amendment takings where an environmental protection related regulatory action destroys all value associated with a property right. As the Supreme Court aptly stated, "[I]n the case of land, however, we think the notion . . . that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact

---

[17] *Tecmed* Award ¶ 120 (citing International Court of Justice, *Elettronica Sicula s.p.a. (ELSI) (United States v. Italy)*, judgment dated July 20, 1989, ICJ Reports, 1989, 73; *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, at 26, 78 (Award) (Dec. 16, 2002)).

[18] *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992).

recorded in the Takings Clause that has become part of our constitutional culture."[19] Curiously, Respondent's expert on U.S. Constitutional law, Professor Sax, has nothing to say about *Lucas,* and Respondent has little to say about *Lucas* generally, other than pointing out its "recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by . . . 'existing rules or understandings.'"[20] As discussed below, this recognition is irrelevant to this proceeding because there is no such "proscription." Respondent likewise makes little effort to explain why the *Whitney Benefits*[21] analysis does not apply.[22] This is, to say the least, surprising, given that the very purpose of the California measures was to ensure the permanent economic infeasibility of the Imperial Project, just as the legislation in *Whitney Benefits* was targeted at preventing all economically viable surface mining of specific coal properties.[23]

27. Although Respondent ignores *Lucas,* it does rely on the *Seven Up Pete Venture* decision, issued by a Montana state court in 2005.[24] In that case, the court held that a statewide ban on cyanide heap leach mining did not effect a taking of the plaintiffs' state mineral leases because it concluded that plaintiffs did not have a property interest in the right to approval of their mining permit. Respondent fails to note, however, that the court's primary focus in evaluating the property rights was the wide discretion afforded the regulatory authority under the state lease at issue. Thus, the court cited Montana precedent to the effect that "a property-holder

---

19 *Id.,* at 1028.

20 Counter-Memorial at n. 606.

21 *Whitney Benefits Inc. v. United States,* 18 Cl. Ct. 394, *aff'd,* 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied* 502 U.S. 952 (1991).

22 Counter-Memorial at 201.

23 *Whitney Benefits,* 926 F.2d at 1173 (quoting BLM *Federal Register* statement that "development of the [Whitney] coal was halted by the passage of [SMCRA]").

24 *Seven Up Pete Venture v. Montana*, 327 Mont. 306, 114 P.3d 1009 (Mont. 2005).

possesses a legitimate claim of entitlement to a permit or approval . . . [if] under state and municipal law, the local agency lacks all discretion to deny issuance of the permit or to withhold its approval."[25] The court then determined that under the express terms of the state mineral lease Montana had broad discretion to approve or deny the permit applications: "[T]he State had *wide discretion* to reject the Venture's permit application, *even without the enactment of I-137* [the prohibition]."[26]

28. Moreover, to the extent that *Seven Up Pete* may suggest more generally that a property owner who is prohibited from carrying out all economically viable land development has no compensable property right unless a regulatory permit authorizing that land development is held, such a ruling would be in direct conflict with the Supreme Court's more authoritative takings jurisprudence as set forth in *Lucas.* The *Lucas* case is in accord with the rulings of the federal courts in the closely analogous circumstances of the *Whitney Benefits v. United States* litigation, where the U.S. Federal Circuit Court of Appeals held: "When Congress prohibited [surface] mining of that coal, it did not merely regulate it, it took, all the property involved. . . ."[27]

29. By contrast, in the instant case, provided Glamis' mining Plan of Operations satisfied all applicable requirements – as it did – the pre-existing law provided the federal and state governments with no unfettered discretionary authority to deny Glamis its right to extract the gold reserves at the Project site. Indeed, it was precisely the absence of such authority that

---

[25] *Id.* at 1018 (internal citations omitted).

[26] *Id.* at 1019 (emphasis added).

[27] *Whitney Benefits,* 926 F.2d 1169, 1172 (Fed. Cir. 1991).

gave rise to (first) the 1999 Leshy Opinion (now rescinded by Interior) and (later) SB 22.[28] In his expert report submitted with Glamis' Memorial, Mr. Leshendok concludes,

> The sequence and substance of Glamis's acquisition of mineral rights, exploration, predevelopment activities, plan preparation, review, application of technically and economically feasible mitigation measures and proposed operating and reclamation practices were consistent with the pattern and practices of other active open pit gold mining plans approved within the California Desert Conservation Area by BLM, the Counties and State.[29]

30. Respondent has not challenged Mr. Leshendok's findings, leaving it undisputed that Glamis did indeed satisfy all of the applicable requirements. Moreover, as the State of California admitted when it was enacting its "urgency" legislation to block the Glamis Imperial Project: the "project would otherwise be allowed to go forward under current law."[30] Thus, Glamis' federal mining claims were a fundamentally different property interest from those at issue in the Montana case, because BLM and California lacked the wide discretionary veto authority that the *Seven Up Pete* court found had limited the state property interest at issue there.

31. Respondent also points to the *Kinross Copper* case, notwithstanding that it featured a specific, pre-existing prohibition unlike any at issue here. In *Kinross Copper*, a 1977 administrative rule (promulgated prior to the plaintiff's acquisition of its mining claims) expressly prohibited "'any new or increased waste discharges' to the Clackamas, McKenzie, or North Santiam River Subbasins."[31] Not surprisingly, the court found that Kinross' mining claims did not invest it with the right to violate this prohibition by discharging mining wastes into one of those very rivers, particularly given that another piece of antecedent legislation had

---

28 Memorial ¶ 460 (citing SOF ¶ 243).

29 Leshendok Report, Executive Summary at 5.

30 Memorial ¶ 374 (quoting Governor's Office of Planning & Research, Enrolled Bill Report of SB 22, Claimant Ex. 279).

"severed water rights from the other rights conferred by the granting of the mining claims and required that water rights be obtained in accordance with applicable state water laws."[32] With respect to Glamis' property interests, however, Respondent has not identified any pre-existing prohibition comparable to the discharge restrictions in *Kinross* that conflicted with Glamis' right to extract the Imperial gold reserves.

32. More broadly, Respondent has failed to identify any pre-existing prohibition that in *any* way implicated Glamis' proposed mining activity. The absence of any such specific restrictions substantially undermines Respondent's argument that it does not owe compensation for its expropriatory activity, because in the main that argument is predicated on a line of international and U.S. takings cases that presuppose such restrictions. As a result, Respondent's "background principles" argument is unavailing, since it is based on factual predicates that Respondent cannot show in this case.

B. No "Background Principles" Justify The Expropriation Of Glamis' Property Interest

33. In the instant case, there simply is no pre-existing health, safety, environmental, religious accommodation, or nuisance law that prohibited any aspect of Glamis' mining activity, nor does Respondent contend that there was.[33] Respondent also does not argue that (prior to the issuance of the Leshy Opinion) the presence of cultural resources could form the basis for the denial of a mining plan of operations that satisfied all applicable regulatory requirements.

---

31 *Kinross Copper Corp. v. Oregon*, 160 Or.App. 513, 981 P.2d 833, 835 (1999) (citing OAR 340-41-470(1)).

32 *Id*. at 840.

33 *See* Wälde Report at III-34 ("The reference to pre-existing "principles" suggests that there were indeed, as Glamis claims, no specific pre-existing legal restrictions in terms of complete backfilling or avoiding the asserted "sacred sites." Had there been more than "principles" – which are substantially more amorphous than definitive legal restrictions – the U.S. presumably would have identified them.")

Finally, Respondent does not argue that the pre-existing reclamation laws required or even contemplated mandatory full backfilling.

34. Absent any such restrictions, Respondent is left to rely on broader "background principles" of federal and state law, asserting that those principles created inherent limitations on the "bundle of rights" associated with Glamis' mining claims. Respondent then concludes that the California measures were merely the "specification" of these pre-existing limitations, and argues therefore that the measures could not have been expropriatory. As discussed below, however, what Respondent claims are pre-existing limitations did not implicate Glamis' property interests; accordingly, it does not follow that the "specification" of such limitations could result in a non-compensable taking.

1. Under International Law, Only Specific, Predictable Pre-Existing Legal Limitations Can Circumscribe Property Interests

35. In analyzing the role of pre-existing restrictions in the international law context, Professor Wälde notes that

> from an international law perspective, one can only accept as "inherent limitations or reservations" such restrictions which from the outset were legally binding restrictions (not a broad legal principle which later can justify virtually anything); also, they must have been clear, transparent and ascertainable by the investor on the basis of a normal professional due diligence.[34]

36. Professor Wälde goes on to emphasize the need for a high level of specificity to distinguish pre-existing restrictions from the state's generalized right to regulate particular industries or regions. It is important that such principles be "clear and predictable," since "otherwise, nearly any *post hoc* restriction could be justified. . . ."[35] The arbitral decisions that

---

[34] Wälde Report at I-18.

[35] *Id.* at III-32.

Respondent cites confirm that only specific legally binding restrictions that can be identified by an investor in advance can limit after-acquired property interests.

37. As a threshold matter, Glamis notes that in the *Tradex Hellas* decision, cited approvingly by Respondent, the tribunal did not, in fact, find a pre-existing limitation. That case involved a series of acts that claimant alleged resulted in the expropriation by the State of Albania of its property interests.[36] The tribunal explicitly concluded that the alleged measures, whether evaluated separately or in sum, did not constitute an expropriation because they either (1) did not result in any deprivation of claimant's property rights; or (2) were not attributable to the State of Albania.[37] The only discussion of pre-existing limitations was in the tribunal's observation that there was a pre-existing land law that conceivably could be relevant; in light of that law, the decision noted that

> should the Tribunal find . . . that an expropriation of Tradex' rights has in fact been made by the Albanian State, it would have to examine whether such rights were indeed acquired by Tradex or were covered by the reference to the Land Law and thus from the very beginning of the investment subject to possible privatization measures.[38]

38. The tribunal thus made no finding that "a pre-existing Albanian land law limited the property rights at issue," as Respondent asserts,[39] nor did it even examine the question. Rather, it simply observed – in *obiter dicta* – that such an inquiry would be appropriate *if* an expropriation was found.

39. In *International Thunderbird Gaming Corp. v. United Mexican States*, by contrast, the tribunal did consider the significance of a pre-existing limitation, specifically a law that

---

36 *Tradex Hellas S.A. v. Republic of Albania*, Case No. ARB/94/2, ¶¶ 57-58, 137-190 (Award) (Apr. 29, 1999).

37 *Tradex Hellas* Award ¶ 198.

38 *Id.* ¶ 131.

prohibited the operation of gaming machines. The tribunal concluded that a pre-existing law prohibiting gaming machines clearly implicated claimant's rights to operate such machines.[40] Based on this nexus between the legal proscription of the activity and the claimant's pursuit of that very activity, the *Thunderbird* tribunal concluded that there could be no expropriation, as the claimant "could not have operated based on a legitimate expectation in Mexico."[41] This is clearly distinguishable from the instant case in which, as noted above, Respondent has failed to identify any pre-existing law specifically (or even generally) prohibiting any aspect of Glamis' mining activity.

40. Likewise, in *Marvin Feldman v. Mexico*, although the panel noted that the only significant aspect of the investment at issue was the right to receive tax rebates on cigarette exports,[42] as in *Thunderbird*, the pre-existing law contained a specific requirement implicating that activity; namely, a provision that required the presentation of certain invoices to secure such rebates.[43] Given this pre-existing requirement, the *Feldman* tribunal found, as Respondent points out, that "this is not a situation in which the Claimant can reasonably argue that post investment

---

39 Counter-Memorial at 133 (citing *Tradex Hellas* Award).

40 *Int'l Thunderbird Gaming Corp. v. United Mexican States,* NAFTA/UNCITRAL, ¶ 164 (Award) (Jan. 26, 2006) ("It cannot be disputed that Thunderbird knew when it chose to invest in gaming activities in Mexico that gambling was an illegal activity under Mexican law. By Thunderbird's own admission, it also knew that operators of similar machines (Guardia) had encountered legal resistance from SEGOB. Hence, Thunderbird must be deemed to have been aware of the potential risk of closure of its own gaming facilities and it should have exercised particular caution in pursuing its business venture in Mexico.").

41 *Int'l Thunderbird* Award ¶ 208. Although in the cited paragraph the *Thunderbird* panel referenced the absence of a "vested" property right, it is noteworthy that the majority of the panel's discussion revolved around the reasonableness of claimant's expectation that it would be allowed to engage in and profit from an activity explicitly prohibited by Mexican law. The reasonableness of Glamis' expectations are discussed further below, but in short there was certainly no basis for Glamis to conclude that the activity at issue – hardrock open-pit mining – was prohibited under U.S. or California law, and in fact quite the contrary is true. As such, whether evaluated in terms of reasonable expectations or the nature of the property right at issue, the *Thunderbird* decision does not speak to the facts in this case.

42 *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, ¶ 118 (Award) (Dec. 16, 2002).

43 *Id.*

changes in the law destroyed the Claimant's investment, *since the IEPS law at all relevant times contained the invoice requirements*."[44] Thus, the *Feldman* decision is of limited utility with respect to Respondent's "background principles" argument given that in Glamis' case, there was no pre-existing requirement that Glamis failed to satisfy.

41. In short, none of the decisions cited by Respondent alter the conclusion that a background principle must be a specific pre-existing restriction that makes conditional the property right asserted. Here, neither exclusion of mining to accommodate sites held sacred by Native Americans nor mandatory complete backfilling and site regarding were established or even contemplated when Glamis made its significant $15 million investment in high-risk mineral exploration.

2. No Domestic U.S. Law Provides The Specific, Predictable And Pre-Existing Limitation Required By International Law To Circumscribe Glamis' Right to Extract Gold At The Imperial Project Site

42. It bears repeating that Respondent has not provided a single applicable legal prohibition implicated by Glamis' mining claims that was in place when Glamis acquired those claims. Nevertheless, Respondent argues that as a matter of international law, the "background principles" that it identifies were sufficiently clear, predictable and legally binding to limit Glamis' property rights in its mining claims to such an extent that even a deprivation of the full value of those claims via the "specification" of these principles is not compensable as an expropriation. [45]

---

[44] Counter-Memorial at 134 (citing *Feldman* Award ¶ 119) (emphasis added).

[45] *Id.* at 120.

43. Yet, as Mr. Olson's opinion reveals, even under U.S. takings law (the origin of the "background principles" framework), the pre-existing restrictions Respondent identifies would be insufficient to avoid the just compensation requirements of the Fifth Amendment. If Respondent cannot demonstrate that these "background principles" were sufficiently clear and specific to limit Glamis' property rights under U.S. takings law, then *a fortiori* it cannot show that they limited Glamis' property rights under international law.

a. The Background Principles Alleged By Respondent Are Insufficient To Circumscribe Glamis' Rights Under U.S. Domestic Takings Law

44. In his comprehensive examination of U.S takings law, Mr. Olson concludes that "California has effected a taking of private property that would be compensable under the Fifth Amendment to the U.S. Constitution, as construed and applied by the U.S. Supreme Court."[46] Mr. Olson's basis for this conclusion is that (1) Glamis' mining claims are property protected by the Takings Clause of the U.S. Constitution; (2) Glamis has suffered a "categorical" taking of that property (meaning that it has been deprived of the entirety of its value);[47] and (3) Respondent has failed to prove its "affirmative defense," *i.e.*, that "background principles" prevented Glamis from securing a property interest in its right to exploit its mining claims.[48]

45. In his discussion of the notion of "background principles," Mr. Olson points out that this qualification of the usual obligation to provide just compensation for takings stems from the U.S. Supreme Court's holding in *Lucas v. South Carolina Coastal Council*, which held that compensation for a complete taking is not required "only if the logically antecedent inquiry into

---

46 Olson Report ¶ 26.

47 *Id.* ¶¶ 36-46 (noting that Glamis has suffered a taking under both the *Lucas* and *Penn Central* tests).

48 *Id.* ¶¶ 45-58.

the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[49] As Mr. Olson points out, however,

> [T]he Court emphasized that "to win its case [the government] must do more than proffer the legislature's declaration that the uses [the property owner] desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as sic utere tuo ut alienum no laedas [so use your own as not to injure another's property]." Even in the context of "nuisance," the Court said that an alleged background principle may serve as an effective defense "only" if "an objectively reasonable application of relevant precedents would exclude [the property owner's] beneficial uses in the circumstances in which the land is presently found."[50]

46. Thus, the *Lucas* formulation echoes Professor Wälde's caution that pre-existing restrictions must be more specific than mere "broad legal principle[s] which later can justify virtually anything."[51]

47. The U.S. takings cases cited by Respondent do not advance its "background principles" argument; indeed, they closely follow Mr. Olson's conclusion that the "background principles" identified by the courts are in fact specific legal prescriptions or prohibitions. In *American Pelagic Fishing Co. v. United States*, for example, the pre-existing regulatory regime (1) abrogated any common law right to fish in a particular Atlantic "zone" and (2) established the federal government's discretion to permit or restrict fishing in that zone, including the authority to issue revocable, non-transferable permits.[52] The court held, first, that the claimant had no property interest in the permits themselves, as they were non-transferable and revocable – this

---

49 *Id.* ¶ 32 (citing *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992)).

50 *Id.* ¶ 33 (citations omitted).

51 Wälde Report at I-18.

52 *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1380 (Fed. Cir. 2004), *cert. denied*, 125 S.Ct. 2963 (2005).

portion of the holding has no application to the real property interests at issue here.[53] The claimant's remaining argument was that a right to fish in the zone was part of the bundle of rights associated with its ownership of a fishing vessel designed for that purpose.[54] Not surprisingly, the court disagreed, holding that there was no compensable taking because the claimant's ownership of the vessel did not include a right to fish in a particular zone where the pre-existing law, as administered, provided the government with the discretion to prohibit outright that activity.[55] *American Pelagic* is clearly distinguishable from the situation here, where Glamis' real property interests (the mining claims) by definition included the right to extract the underlying minerals, and where once the company had complied with all existing regulations, the government had no discretion to restrict or prohibit the activity.

48. Respondent also cites *Hunziker v. Iowa*, in which the court held that where a pre-existing law prohibited the disinterment of human remains, denial of a previously granted building permit that would necessarily have resulted in such disinterment could not constitute a taking.[56] In other words, the pre-existing law created a risk that if human remains were found, the property owner would be unable to undertake activity that included disinterment. Here, Respondent identifies no such particularized risk associated with Glamis' property interest. It can point only to the general possibility that, given the truism that the government has the power

---

53 *Id.* at 1374. As Professor Wälde points out, the *Lucas* court distinguished between personal property about which "by reason of the State's traditionally high degree of control over commercial dealings, he (the citizen) ought to be aware of the possibility that new regulation might even render his property economically worthless . . ." and real property, holding that "the notion . . . that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture. . . ." Wälde Report at III-48 (citing *Lucas,* 505 U.S. 1003, 1027 (1992)).

54 379 F.3d at 1374.

55 *Id*. at 1381.

56 *Hunziker v. Iowa*, 519 N.W.2d 367, 371 (Iowa 1994), *cert. denied*, 514 U.S. 1003 (1995).

to regulate, Glamis' property interest was circumscribed by the possibility that California or the federal government would regulate in such a way as to effectively destroy Glamis' property interest.

49. Respondent also mischaracterizes the *M & J Coal* case to support its claim that Glamis' property rights were circumscribed from the start. In its discussion of *M & J Coal*, Respondent correctly notes that the Department of Interior's Office of Surface Mining Reclamation and Enforcement ("OSM"), pursuant to its authority under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA") required the plaintiff (via the issuance of a cessation order) "to alter the subsidence mining technique it was using, so as to restore the strength of the subsided land above the mine and protect the public from surface cracks *on adjacent properties*."[57] What Respondent omits from its case summary, however, is that OSM issued the cessation order only *after* reports of subsidence damage that included a severed gas line, a broken water line, and stretched power lines. Indeed, prior to issuing the cessation order, OSM officials visited the site and determined that "the public was at risk of injury from large cracks in the ground, collapsing structures, and breaks in gas, water, and electrical lines."[58] In short, the situation in *M & J Coal* represented a clear application of the 1977-enacted SMCRA authority to issue cessation orders and, if necessary, affirmative obligations to "abate the imminent danger or the significant environmental harm" where the activity represented "an imminent danger to the health or safety of the public. . . ."[59] Thus, the pre-existing law provided for precisely the measures that OSM undertook in the *M & J Coal* case – in Glamis' case,

---

[57] Counter-Memorial at 131 (emphasis added) (citing *M & J Coal Co. v. United States*, 47 F.3d 1148 (Fed. Cir. 1995), *cert denied*, 516 U.S. 808).

[58] *M & J Coal Co. v. United States*, 47 F.3d 1148, 1151 (Fed. Cir. 1995).

[59] *Id*. at 1150 (citing 30 U.S.C. § 1271 (1988)).

however, Respondent has not identified a single pre-existing law of which Glamis' Imperial Project was ever found to be in violation, or that conferred upon the government the authority to effect a *de facto* prohibition of the mine without having to provide compensation. Finally, Respondent again points to *Kinross Copper*,[60] although as noted above that case featured a specific, pre-existing prohibition unlike any at issue here.[61]

50. A survey of the domestic U.S. cases cited by Respondent, as with the *Feldman* and *Thunderbird* cases, shows that these cases involved pre-existing limitations that were sufficiently transparent, specific and ascertainable so as to allow the courts and panels to conclude that the claimants knew or should have known *ex ante* that their property rights were circumscribed, if they existed at all. To apply the *Lucas* Court's language, in each of those cases, "an *objectively reasonable application* of relevant precedents would exclude [the property owners'] beneficial uses in the circumstances in which [their property interests were] presently found."[62] As such, they follow Professor Wälde's formulation for identifying pre-existing limitations:

> The survey by the U.S. of these cases and the need for specificity outlined above together suggest the proper test to apply: Were the Claimant's mining rights innately restricted by specific – and thus clearly identifiable – prior legal restrictions? In other words, did California "merely implement" such "pre-existing limitations" – if so , then no regulatory surprise – or did California create, through its two pieces of legislation, a *de novo* rule which, from the perspective of a prudent observer, did not exist when the investment was made? [63]

51. In this case, as discussed in the next sections, there was no pre-existing legal prohibition excluding Glamis' beneficial use of its property rights. Respondent's allegations

---

60 Counter-Memorial at 132.

61 *Kinross Copper Corp. v. Oregon,* 981 P.2d 833, 835 (1999).

62 *Lucas*, 505 U.S. at 1032.

63 Wälde Report at III-35.

amount to little more than "conclusory assertion[s]," which the *Lucas* court rejected as creating "background principles of nuisance and property law. The so-called "background principles" set forth by Respondent are in fact so vague and generalized that their "specification" necessarily constituted, to borrow Professor Wälde's phrase, "regulatory surprise."[64] These alleged "background principles" are examined in turn below.

b. In Any Event, There Is No "Background Principle" Of Accommodation Of Religious Expression In The U.S. Or California State Constitutions That Implicates Glamis' Unpatented Mining Claims

52. Respondent asserts first that California's mandatory backfilling regulations were merely the state's implementation of the " pre-existing principle of religious accommodation enshrined in the First Amendment of the United States Constitution and Article I of the California Constitution.[65] This analysis, however misapprehends the Constitution, which does not create any affirmative obligation on the government's part to accommodate religious expression. Rather, it simply provides the government with *discretion* to accommodate free exercise claims where it so chooses. Mr. Olson summarizes this discretion as follows:

> The accommodation of religion is not constitutionally compelled, because the First Amendment prohibits the "establishment of religion, or prohibiting the free exercise thereof" (emphasis added), but it does not mandate additional steps to accommodate religion. Because such accommodations are not required by the Constitution, no constitutional principle here trumps a conflicting lawful use of property or the application of another constitutional right [such as the right to compensation for a taking under the Fifth Amendment].[66]

53. Moreover, as Mr. Olson notes, even if a particular accommodation of religious expression were required under the First Amendment, "the ability to compensate ensures that

---

64 *Id.* at III-32.

65 Counter-Memorial at 137.

neither the right protected by the First Amendment *nor* the just-compensation right protected by the Fifth Amendment need give way."[67]

54. Seen in this light, Respondent's statement that "Glamis' unpatented mining claims do not confer upon Glamis a right to impair Native American religious practice"[68] is beside the point – the real question (in U.S. jurisprudence) is whether the government's discretionary ability to accommodate those practices can trump Glamis' property rights and override the Fifth Amendment's prohibition of uncompensated takings. Mr. Olson observes that this would only be possible where the government had exercised its discretion to accommodate religion in creating the mining law.[69] Seeing no evidence that it did so – and there is none – Mr. Olson concludes that "[B]ecause the discretion to accommodate religion has not previously been made into a generally (or even specially) applicable rule in this context, it cannot function as a "background principle" to defeat a taking claim."[70]

55. Respondent and Professor Joseph Sax, Respondent's "expert on the [United States'] constitutional law of takings,"[71] offer a very different, and unsupported, view; namely, that third-party property interests necessarily give way to subsequent decisions to accommodate religious expression. Their principal authority for this proposition is the 2005 Supreme Court decision of *Cutter v. Wilkinson*.[72] Yet, as discussed in further detail below, *Cutter v. Wilkinson* undermines

---

66 Olson Report ¶ 47 (citations omitted).

67 *Id.* ¶ 49.

68 Counter-Memorial at 138.

69 Olson Report ¶ 48 ("The relevant question here is not whether federal mining law limits the government's 'authority to accommodate free exercise claims,' but the converse: Did Congress exercise its discretionary authority to accommodate free exercise claims when it created the relevant mining law (*i.e.*, the law that was in effect when Glamis's mining claims came into being)? There is no evidence at all that it did.")

70 *Id.* ¶ 50.

71 Sax Report ¶ 1.

72 *See* Counter-Memorial at 137, 142.

their argument, in that it explicitly *precludes* the overriding of third-party interests by governmental accommodation of religious expression.

56. Professor Sax notes (not surprisingly) that *Cutter* stands for the following proposition: "[G]overnment is allowed 'to accommodate religion beyond free exercise requirements.'"[73] But from this, he draws the bold conclusion that California has duly legislated so as "to accommodate the free exercise of religion on the public lands in its 1976 Sacred Sites Act. . . ."[74] As a preliminary matter, this is a gross misapplication of the referenced 1976 state legislation,[75] which has no application to Glamis' property interests on federal lands, as discussed below. That aside, the question again is not whether government is "allowed" to accommodate religion beyond free exercise requirements; rather, the key issue is what must happen where such accommodation necessarily conflicts with other legitimate property interests.

57. At issue in *Cutter* was a provision of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") that provides, in part, "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest," and does so by "the least restrictive means." The Court held that, on its face, the provision was compatible with the Establishment Clause – *i.e.*, not prohibited by the First Amendment – because it alleviates exceptional governmental burdens on private exercise of religion and that "[p]roperly applying RLUIPA, *courts must take adequate account of the burdens a requested accommodation may impose on*

---

73 Sax Report ¶ 14.

74 *Id*.

75 Respondent's reference to this legislation as the "Sacred Sites Act" is somewhat misleading, as the legislation does not in fact have a title. Hereinafter, we will refer to the legislation as the "Sacred Shrines Act," which we believe to be more in keeping with its scope.

nonbeneficiaries . . . and they must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths."[76] Although Professor Sax overlooks this issue, the *Cutter* Court recognized that a governmental choice to accommodate religion under the First Amendment does not automatically prevail over other significant interests, including the protection of property rights under the Fifth Amendment. The Court expressly acknowledged, "We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. *Our decisions indicate that an accommodation must be measured so that it does not override other significant interests.*"[77] Thus, *Cutter* provides no support for – and indeed explicitly repudiates – Respondent's position that when the government wishes to accommodate religion, other significant interests must simply give way.[78]

58. In short, *Cutter* cannot be stretched beyond its holding as to accommodation – it does not provide license for the government to violate other constitutional protections, including the Fifth Amendment right to just compensation for takings. Indeed, numerous domestic U.S. cases have acknowledged that accommodation which impinges even non-constitutional third-party interests may go too far and become an impermissible establishment.[79] California's failure

---

[76] *Cutter v. Wilkinson,* 544 U.S. 709, 720 (2005).

[77] *Id.* at 722.

[78] The remaining cases cited by Respondent in support of its position that "various state and federal agencies have taken measures more restrictive than those contained in SB 22 to accommodate Native American religious practices," are all distinguished on the basis that the plaintiffs in those cases neither had nor alleged that they had a property interest that preceded the accommodating measures. Counter-Memorial at 143. In *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969 (9th Cir. 2004), plaintiff challenged the government's policy against using plaintiff's aggregate materials in state construction projects as a violation of the Establishment Clause of the First Amendment. Plaintiff never contended it had a right, protected by the Fifth Amendment, to sell its materials to the state. Similarly, in *Indep. Petroleum Assoc. of Amer. v. U.S. Forest Service*, 12 Fed. App'x 498 (9th Cir. 2001) and *Wyo. Sawmills, Inc. v. U.S. Forest Service*, 179 F. Supp. 2d 1279 (D. Wyo. 2001), plaintiffs challenged the government's decision not to offer particular lands for oil and gas leasing and the government's decision to withdraw a planned timber sale, respectively, not a decision that resulted in the taking of private property without just compensation.

[79] Thus, in its seminal *Estate of Thornton v. Caldor, Inc.* decision, the Supreme Court struck down as an impermissible establishment a statute that "decreed that those who observe Sabbath any day of the week as (continued…)

to respect Glamis' property rights in the course of its accommodation of the Quechan tribe's religious expression therefore finds no support in the Constitution or in *Cutter*.[80]

59. In addition to being unsustainable as a U.S. Constitutional law matter, the idea that third-party property rights must give way where states seek to protect cultural resources and indigenous peoples is also inconsistent with the international law instruments designed for that purpose. As Professor Wälde observes, "soft law" sources concerned with cultural-resource protection are not intended to deprive third-party property holders of their legitimate interests:

> In any event, none of the texts from the resolutions quoted suggest that governments can or should abrogate existing property rights without paying compensation in order to provide greater support to indigenous people or cultural heritage sites. To the contrary, they suggest that governments should themselves implement effective compensation mechanisms and make available budgetary resources if necessary to buy

---

a matter of religious conviction must be relieved of the duty to work on that day, no matter what burden or inconvenience this imposes on the employer or fellow workers." 472 U.S. 703, 708-09 (1985); *see also Natural Arch & Bridge Society v. Alston*, 209 F. Supp. 2d 1207, 1223-27 (D. Utah 2002) (upholding a policy whereby visitors were asked – but not required – to not walk under the "Rainbow Bridge" but noting that if the request had instead been a prohibition it "could possibly be said that the Park Service had abandoned neutrality and intentionally promoted Native American religious beliefs over those of other cultures"); *Bear Lodge Multiple Use Ass'n v. Babbitt,* 2 F. Supp. 2d 1448, 1455 (D. Wyo. 1998) (noting that if the government "is, in effect, depriving individuals of their legitimate use of the monument in order to enforce the tribes' rights to worship, it has stepped beyond the permissible accommodation and into the realm of promoting religion."), *aff'd on other grounds,* 175 F.3d 814 (10th Cir. 1999), *cert. denied* 120 S.Ct. 1530 (2001).

[80] Although both Professor Sax (at ¶ 14) and Respondent (at 142) attempt to dismiss the Supreme Court's decision in *Lyng* as inapplicable, that decision also relates to the proper analysis of First Amendment claims on federal public lands, insofar as the plaintiffs in that case argued, similarly to the Quechan Tribe in this case, that "the disruption of the natural environment caused by the [Government's] road will diminish the sacredness of the [Native American] area in question and create distractions that will interfere with training and ongoing religious experience of individuals using sites within the area for personal medicine and growth . . . and as integrated parts of a system of religious belief and practice which correlates ascending degrees of personal power with a geographic hierarchy of power." *Lyng v. Northwest Indian Cemetery Protective Assoc., et al.*, 485 U.S. 439, 448 (1988) (internal brackets and quotations omitted). Indeed, it was undisputed that the proposed Governmental actions in that case would have "severe adverse effects on the practice of [Native American] religion." *Lyng v. Northwest Indian Cemetery Protective Assoc., et al.*, 485 U.S. at 447. The Court held, nevertheless, that the Government had a right to go forward with the challenged road and related timber harvesting, as planned, notwithstanding these sacred site claims. *Id.* at 453. Although the decision was couched in terms of the free exercise of religion, and accommodation policies are generally challenged as impermissibly establishing religion, the Free Exercise Clause and the Establishment Clause of the First Amendment are two sides of the same coin.

> out existing property rights in favour of the legitimate aspirations of indigenous people and valuable heritage and cultural sites.[81]

60. Given that the weight of U.S. (and international) law requires the balancing of religious freedoms with other significant interests, Respondent cannot credibly claim that there is a "background principle" under U.S. law that justifies wholesale taking of third-party property interests in the name of religious accommodation, nor can it argue, in turn, that the California measures merely "specified" this non-existent background principle.

c. Other State Laws Identified By Respondent Do Not Constitute "Background Principles" Justifying The Expropriation Of Glamis' Property Rights Without Compensation

61. Respondent and Professor Sax argue that SB 22 and the SMGB regulations represent the "specific articulation of the broad standards set" by two California state laws, one (the Sacred Shrines Act) related to protection of Native American sacred shrines and the other (the Surface Mining and Reclamation Act, or "SMARA") related to surface mining and reclamation policy.[82] This argument does not withstand scrutiny under either U.S. or international law. In his expert opinion, Mr. Olson notes that under U.S. takings law, SB 22 and the SMGB regulations are untenable as articulations of pre-existing background principles for two reasons:

> First, it is not clear that [the statutes] were actually capable of redefining the fundamental nature of a federal-law property interest. Second, the 2002 and 2003 "specific articulation[s]" of the alleged background principles cannot serve that purpose, because they contain grandfather clauses that require their rules to be applied in a way that is inconsistent with the nature of generally applicable background principles, inconsistent

---

81 Wälde Report at V-3.

82 Sax Report ¶ 24; Counter-Memorial at 145-153.

> with the nuisance-law paradigm that Professor Sax invokes, and unlike any of the examples cited in the United States' Counter-Memorial.[83]

U.S. law problems aside, the fact is that Respondent cannot demonstrate that either statute involved any pre-existing legal prohibition on Glamis' beneficial use of its property rights. As discussed below, the Sacred Shrines Act does not apply to federal lands – accordingly, any "specification" of its broad principles that involved its application to Glamis' property interests (let alone its deprivation of those interests) was by definition undue regulatory surprise.

62. SMARA, meanwhile, contains no requirement of, or reference to, mandatory complete backfilling. Moreover, in over 25 years of interpretation and application of SMARA's reclamation requirement to mining plans of operation, California had never once effected a complete backfilling requirement on any open-pit mining plan. As a result, with respect to SMARA, Respondent is arguing that SB 22 and the SMGB regulations "specified" a background principle that never existed. Because the "background principles" that Respondent identifies either were inapplicable or did not exist, as a matter of international law they could not have limited Glamis' property rights so as to preclude a finding of expropriation. The problems with Respondent's "background principles" argument as to these statutes are discussed in further detail below.

(1) The Sacred Shrines Act Does Not Constitute A "Background Principle" Whose "Specification" Is Immunized From Compensation Requirements

63. Respondent asserts that SB 22 represents the "specification" of the "background principle" of protection of Native American sacred sites in California.[84] To support this position,

---

[83] Olson Report ¶ 51.

[84] Counter-Memorial at 145-146.

Respondent points to a 1976 California statute "prohibiting irreparable damage to Native American sites on public land absent a showing of necessity," and argues that under this statute, Glamis never had a "right . . . to mine in a manner that irreparably damage[d] Native American cultural or religious sites. . . ."[85] But nowhere does Respondent show that the "public land" referenced in the statute includes federal lands, and in fact, no entity – including the State of California – ever has suggested that it does, even in the context of seeking to halt Glamis' Imperial Project.[86]

64. Both international law (as noted by Professor Wälde) and U.S. takings law (as noted by Mr. Olson) thus require that pre-existing restrictions be legally binding *vis à vis* the property interest at issue. Respondent cannot evade its compensation obligation by pointing to an inapplicable statute (the Sacred Shrines Act) as somehow forming the basis for a later-specified policy.

(a) The Sacred Shrines Act Does Not Apply To Federal Lands

65. Without showing that California's 1976 Sacred Shrines Act has ever been applied to federal land, Respondent simply assumes that it would apply to the Glamis Imperial Project.[87] This novel contention is inconsistent with the structure of the Act, its legislative history and its longstanding interpretation by the agency responsible for its implementation.

66. First and foremost, the language of the 1976 Sacred Shrines Act – as one would expect in a federal system – leaves no doubt that the Act's prohibitions apply only to *state-owned*

---

85 *Id.* at 136.

86 Interestingly, Professor Sax, Respondent's expert, assumes (at ¶ 7) that Glamis' project would contravene the Act, but nowhere does he analyze whether the Act even applied to federal lands.

87 *See, e.g.,* Counter-Memorial at 146.

lands. Those prohibitions bar a public agency or private party that is using, occupying or operating on "public property" from "interfer[ing] with the free expression or exercise of Native American religion as provided in the United States Constitution and the California Constitution."[88] In addition, the statute provides that no public agency or party shall "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. . . ."[89] Although the Act does not expressly define "public property," the Legislature took care in the statute to distinguish the term "public property" from "federal lands." Thus, with respect to "federal lands," the Native American Heritage Commission ("NAHC"), which was also established by the Act, may only "assist state agencies in any negotiations with agencies of the federal government for the protection of Native American sacred places that are located on *federal lands*" – such consultations would be unnecessary if the Act's prohibition applied directly.[90]

67. Second, the Act uses the terms "public property" and "public lands" interchangeably, and in other closely related parts of the Code, the Legislature has expressly defined "public lands" to mean "state-owned lands."[91] Indeed, at the time of enactment, the Legislature freely (and interchangeably) used both the terms "public property" and "public lands" (while at the

---

88 CAL. PUB. RES. CODE § 5097.9

89 *Id.* By its terms, the Act is concerned only with the following categories of sites: (1) sanctified cemeteries, (2) places of worship, (3) religious or ceremonial sites, and (4) sacred shrines.

90 *Id*. § 5097.94(j) (emphasis added).

91 The section of the California Public Resources Code immediately preceding the Sacred Shrines Act and enacted prior to the Sacred Shrines Act, defines "public lands" to mean "lands owned by, or under the jurisdiction of, the state, or any city, county, district, or public corporation, or any agency thereof." That section also directs that "[n]o person shall knowingly and willfully excavate upon, or remove, destroy, injure, or deface, any historic or prehistoric ruins, burial grounds, archaeological or vertebrate paleontological site . . . situated on public lands, except with the express permission of the public agency having jurisdiction over the lands . . . ." *Id.* § 5097.5(a) and (b).

same time restricting its use of the term "federal lands").[92] It is clear from these various provisions that the Legislature intended the NAHC to exercise its full power over state lands, but envisioned that the body would serve only an advisory function as to sites on federal lands. This legislative intent is also evident in the Enrolled Bill Report, authored by the Office of the Secretary within the Department of Resources and submitted to the Legislature just prior to passage of the Act.[93] According to the Department of Resources: "These provisions would give the proposed commission strong control over all *state and local government properties* containing sites thought to be of any Native American significance by the commission."[94]

68. Finally, the very agency charged with duties under the Sacred Shrines Act – the Native American Heritage Commission – has consistently interpreted the Act as imposing substantive restrictions only upon *state lands*. In a statutorily mandated 1979 Report, the NAHC acknowledged its more limited role with respect to federal lands.[95] As it explained, on the one hand, the NAHC can "bring legal action to prevent damage to and to assure the Native American access to sanctified cemeteries, places of worship, religious or ceremonial sites, and sacred

---

92 As explained, the Act prohibits a public agency or private party from causing "severe or irreparable damage to any Native American . . . sacred shrine located on public property. *Id*. § 5097.9 (emphasis added). At the same time, the Act empowers the NAHC to "assist Native Americans in obtaining appropriate access to sacred places that are located on public lands for ceremonial or spiritual activities." *Id.* § 5097.94(i) (emphasis added). It directs the NAHC to "prepare an inventory of Native American sacred places that are located on public lands." *Id*. § 5097.96 (emphasis added). Finally, the Act empowers the NAHC to "bring an action to prevent severe or irreparable damage to . . . [a] sacred shrine located on public property." *Id*. § 5097.94(g). If such an action is brought, the NAHC must "introduce evidence that such cemetery, place, site, or shrine has been historically regarded as a sacred or sanctified place by Native American people and represents a place of unique historical and cultural significance to an Indian tribe or community." *Id.*

93 Enrolled Bill Report, Department of Resources, at 1 (Office of Secretary) (Sept. 21, 1976), Claimant Ex. 312.

94 *Id.* (emphasis added).

95 This administrative interpretation of the Act merits special deference because it occurred just three years after passage of the Act, in a comprehensive Report submitted to the Legislature under the express terms of the Act. The Sacred Shrines Act directed the NAHC to submit a report to the Legislature no later than January 1, 1979, recommending actions that the NAHC deemed "necessary to preserve [Native American] (continued…)

shrines located on *public property administered by the State*."[96] On the other hand, the NAHC is directed to "aid state agencies in any negotiations with federal agencies for the protection of Native American sacred places on *federally administered land* in California."[97] The Report also recognized that the Act's general prohibition against "severe and irreparable damage to any Native American sanctified cemetery " only applies to state public property: "Public agencies and private parties using *state public property* [are] prohibited after July 1, 1977, from interfering with the free exercise of Native American religion and from causing severe and irreparable damage to designated types of sacred sites."[98] Indeed, the California Court of Appeals has recently affirmed that NAHC's authority over "public property" is the authority "to seek such relief to mitigate proposed development of *state-owned land* so the development will not irreparably damage, or prevent appropriate access to, the land for Native American religious worship."[99]

69. In short, the Sacred Shrines Act does not, and was never intended to apply to activities – including those at Glamis' Imperial Project site – located on federal land.

---

sacred places and to protect the free exercise of Native American religions." CAL. PUB. RES. CODE § 5097.96.

96 Report to the Legislature by the Native American Heritage Commission on Protection of Native American Sacred Places in California, at 5 (Jan. 1, 1979) (emphasis added), Claimant Ex. 313.

97 *Id.* (emphasis added).

98 *Id*. at 4 (emphasis added).

99 *Native American Heritage Commission, et al. v. Bd. of Trs. of the Cal. State Univ.,* 51 Cal. App. 4th 675, 677 (Cal. Ct. App. 1996) (emphasis added).

(b) Neither The U.S. Nor California Government Ever Contemplated The Applicability Of The Sacred Shrines Act To The Glamis Imperial Project Until This Arbitration

70. Despite Respondent's quick and flawed assumption that the Sacred Shrines Act was applicable to Glamis' Project, Respondent has offered no rationale as to why neither the federal nor California government ever raised the applicability of the Sacred Shrines Act at any time during the nearly decade-long review of the Imperial Project, including in any of the draft versions of the Project's EIS/EIR in 1996 and 1997, or in the Final EIS/EIR in 2000. For that matter, Respondent's reliance on the Sacred Shrines Act cannot be reconciled with the fact that the State of California did not seek to rely on the Act when it challenged (in 1982) the Forest Service's decision to construct a road that "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of the Northwest Californian Indian Peoples."[100]

71. The failure of BLM and Imperial County (acting as the lead agency for California under CEQA and SMARA) to mention the Sacred Shrines Act in the context of Glamis' Project is particularly significant given that in the draft and final EIS/EIR documents, the agencies expressly identified applicable federal and state laws. These included statutes pertaining to "Biological Resources" (such as the Federal Endangered Species Act and the California

---

[100] *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 442 (1988) (rejecting the State of California's and other respondents' First Amendment challenge to a logging road used in a sacred area). The NAHC and the Resource Agency brought the action on behalf of the State of California. *See Northwest Indian Cemetery Protective Ass'n v. Peterson*, 565 F. Supp. 586 (D.C.Cal 1983).

Endangered Species Act)[101] as well as laws pertaining to "Cultural and Paleontological Resources" (such as the National Historic Preservation Act).[102]

72. The Sacred Shrines Act, by contrast, was not listed by the agencies as a state law applicable to the Imperial Project. Nonetheless, Respondent suggests to the Tribunal that "[h]ad Imperial County approved a reclamation plan that caused severe and irreparable damage to sacred sites in the Imperial Project area, the Native American Heritage Commission could have sought an injunction pursuant to the Act's provisions."[103] Respondent further speculates that "[b]y requiring that Glamis reclaim the land to its approximate original contours, SB 22 merely specifies what could otherwise have been developed through litigation by the California Native American Heritage Commission. . . ."[104] The short answer to Respondent's speculation, however, is that had the State of California believed that the Act gave the NAHC power to block the mine, it never would have needed to resort to the subterfuge of the emergency regulations or SB 22.[105]

73. In fact, the NAHC did not believe that it had such power. Rather, following the Act's mandate to consult with respect to sacred sites on federal land, the NAHC offered comments to the BLM during its review of the Imperial Project. The fact that the NAHC never invoked its specific investigative or recommendation powers in the context of the Imperial

---

101 *See Final EIS/EIR for the Glamis Imperial Project*, at 3-40 to 3-42 (Sept. 2000), Claimant Ex. 324

102 *Id*. at 3-86. Despite California's failure to list the Sacred Shrines Act as a law applicable to the Imperial Project, Respondent hopes to persuade the Tribunal that "[h]ad Imperial County approved a reclamation plan that caused severe and irreparable damage to sacred sites in the Imperial Project area, the Native American Heritage Commission could have sought an injunction pursuant to the Act's provisions." Counter-Memorial at 146-47. Respondent further maintains that "[b]y requiring that Glamis reclaim the land to its approximate original contours, SB 22 merely specifies what could otherwise have been developed through litigation by the California Native American Heritage Commission. . . ." *Id.* at 147.

103 Counter-Memorial at 146-47.

104 *Id.* at 147.

105 As noted in Glamis' Memorial, the State of California expressly acknowledged that absent SB 22, Glamis' Imperial "project would otherwise be allowed to go forward under current law." Memorial ¶ 374, citing (continued…)

Project, let alone seek an injunction – and no federal or state agency ever made mention of them during the Project's review – further demonstrates that the Sacred Shrines Act's prohibitions are limited to state-owned properties. Given that the Sacred Shrines Act had no applicability to the Imperial Project, Respondent's argument that the Act nevertheless served as a background principle whose "specification" by SB 22 did not constitute a compensable expropriation has no merit.[106]

(2) SMARA Does Not Constitute A "Background Principle" Justifying Prohibition Of Glamis' Open-Pit Gold Mine

74. Respondent also argues that SMARA's requirements, enacted in 1975, that mined lands be "reclaimed to a usable condition which is readily adaptable for alternative land uses" and that the SMGB adopt a statewide policy that "may require backfilling" operated as a state law background principle at the time Glamis began its development of the Imperial Project.[107] Specifically, Respondent contends that these provisions were existing principles that ensured the future imposition of complete and mandatory backfilling could not come as a surprise to Glamis.[108]

75. However, as Professor Wälde has noted, the relevant inquiry under international law is not simply whether there was a statute in existence at the time Glamis acquired its "bundle of

---

Governor's Office of Planning & Research, *Enrolled Bill Report of SB 22*, at 4 (at AG000669), Claimant Ex. 279.

106 In any event, as Mr. Olson discusses in his opinion, the Act cannot serve as a limiting "background principle," because it is not clear that a state statute could redefine the fundamental nature of a federal law property interest. *See* Olson Report ¶ 51. Moreover, Mr. Olson points out that because SB 22 and the SMGB regulations "contain grandfather clauses that *require* their rules to be applied in a way that is inconsistent with the nature of generally applicable background principles, inconsistent with the nuisance-law paradigm that Professor Sax invokes, and unlike any of the examples cited in the United States' Counter-Memorial," they are unsustainable as specific articulations of the broad standards set forth in the Act. *See id.*

107 *See, e.g.,* Counter-Memorial at 148, 152.

108 *See id.*

rights," but rather whether there was subsequent government action based on that statute that "add[ed] new restrictions and which the investor could not, at the time of the investment, identify or reasonably expect."[109] This analysis is analogous to the *Lucas* inquiry into whether there are "existing rules or understandings" in the law of property and nuisance proscribing what the property holder seeks to accomplish.[110] The record in this case demonstrates that California's enactment of a mandatory full backfilling requirement was indeed a new restriction that Glamis – notwithstanding familiarity with California's reclamation authority under SMARA – could not possibly have identified or reasonably expected.

(a) SMARA's Obligation To Return The Land To A "Usable Condition" Does Not Equate To A Tradition Of Complete And Mandatory Backfilling

76. In the instant case, for more than a quarter-century after its enactment of SMARA, California never once implemented a complete and mandatory backfilling alternative for any mining plan of operations until it did so with respect to the Glamis Imperial Project. Instead, the "existing rule or understanding" was California's long-standing and widespread incorporation of partial- or no-backfilling obligations in state mine reclamation plans. Professor Wälde notes, "[I]nternational law, like the US Supreme Court in the *Lucas* case, identifies in the notion of an undue regulatory surprise to the investor a crucial indicator of an indirect expropriation."[111] It defies reason to assert, as Respondent does here, that California's enactment of a full backfilling mandate based on its SMARA reclamation authority – when it had never once required full backfilling in the past – was not an "undue regulatory surprise."

---

109 Wälde Report at II-29.

110 *See Lucas*, 505 U.S. at 1030.

111 Wälde Report at III-29.

77. Contrary to Respondent's implication, the California Legislative Office ("CLO") report that Respondent identifies provided no inkling that a full backfilling mandate was forthcoming, or that it was a logical extension of SMARA as written and interpreted.[112] As Respondent concedes, the CLO report, in analyzing the 2001-02 budget bill, noted simply that the provisions of SMARA were not being enforced at a number of mines.[113] Nowhere did it suggest that backfilling – complete or partial – was among the compliance issues.[114] As Respondent also concedes, the CLO recommended only that the California legislature direct the Department of Conservation to submit a plan for "monitoring the adequacy of reclamation plans and financial assurances."[115]

78. Accordingly, the 2001-2002 CLO Report confirmed the existing regulatory regime under SMARA and did not put Glamis on notice that mandatory backfilling requirements could or should be expected. To the contrary, this nonpartisan report was entirely consistent with

---

112 Counter-Memorial at 97.

113 Counter-Memorial at 97, citing California Legislative Analyst's Office, Analysis of the 2001-02 Budget Bill, Department of Conservation, *available at* http://www.lao.ca.gov/analysis_2001/resources/res_6_3480.htm, Claimant Ex. 325.

114 Of course, as pointed out in its Memorial, Glamis' Imperial Project reclamation plan involving partial backfilling was modeled after the "groundbreaking reclamation techniques" it implemented at the Picacho Mine, which in 1998 had been awarded commendation as establishing "a legacy for desert mining projects today and in the future." *See* Memorial ¶ 134 and Claimant Ex. 114 (at MV005677); *see also* Leshendok Report ¶ 85.

115 *Id.* Interestingly, the CLO Report did make a finding that the "State has an interest in ensuring that SMARA is enforced fairly and evenly for all mines of the State. . . ." CLO Report at 6, Claimant Ex. 325. Elsewhere, the CLO Report made a number of important recommendations about how the Department of Conservation could improve administration of SMARA. For example, the CLO Report found that the Department of Conservation "has not been able to provide reliable information on the status of mine compliance with SMARA." CLO Report at 4, Claimant Ex. 325. Accordingly, the CLO Report recommended improved inspection, monitoring and review of existing regulated mines. To this extent, the CLO Report recommendations on the 2001-2002 budget bill were consistent with the 1999 recommendations of the federal NAS/NRC which informed the U.S. Congress and the U.S. Interior Department that "[i]mprovements of the implementation of existing regulations present the greatest opportunity for improving environmental protection and the efficiency of the regulatory process." HARDROCK MINING ON FEDERAL LANDS 6 (National Academy Press, 1999), Claimant Ex. 169.

Glamis' experience operating two open-pit gold mines, which did not employ complete backfilling, in the California Desert in the 1980s and 1990s.

(b) "Public Health And Safety" Principles Did Not Limit Glamis' Property Interest In Any Relevant Respects

79. According to Respondent, SMARA reflects the "broad principle" that "mining rights are subject to environmental and public health and safety limitations" tracing "back well over 100 years. . . ."[116] Curiously, though, Respondent's support for this proposition is based on cases relating to "nuisance" activities, notwithstanding that no allegation of "nuisance" has ever been raised in connection with Glamis' Plan of Operations for the Imperial Project. Respondent invokes, for example, the "hydraulic mining" cases litigated in the 1880s, in which California courts held that hydraulic mining was a statutory and common law nuisance, and thus an injunction from such mining could not effect a taking.[117]

80. In prohibiting damage to another's property, these cases are entirely consistent with both the U.S. and customary international law standards for "background principles" – in the hydraulic mining cases, there was a specific, identifiable, legally binding prohibition on the conduct of common law and statutory nuisance activities. Given that pre-existing restriction, the mining companies could not sustain the argument that the subsequent "specification" of this prohibition of nuisance activities could constitute a Fifth Amendment taking. In essence, these cases are no different from, for instance, the *Thunderbird* situation, in which an investor was unable to sustain an expropriation claim for the deprivation of his business where that business

---

116 Counter-Memorial at 155.

117 *See id.* at 150, citing *Woodruff v. North Bloomfield Gravel Mining Co.,* 18 F. 753, 770 (C.C.D. Cal. 1884) and *People v. Gold Run Ditch & Mining Co.*, 4 P. 1152, 1155 (Cal. 1884). As Respondent concedes, hydraulic mining involved "blasting the land with high-pressure water sprays" and often resulted in "large (continued…)

was determined to be illegal under pre-existing law.[118] However, as we have repeatedly noted, Respondent is unable to point to any pre-existing prohibition of any aspect of Glamis' mining activity that SB 22 can be said to have "specified," and it certainly cannot refute that no court or legislature has ever found that open-pit gold mining is itself a common law or statutory nuisance.[119] It is therefore unsurprising that the California Legislature never claimed at any point during the consideration or passage of SB 22 that the state needed to (or could) invoke its public nuisance laws to halt alleged dangers at the Imperial mine.

81. Respondent's U.S. takings expert, Professor Sax, offers the non-controversial statement that an owner is "deemed to know that his . . . property may be subject to restriction on nuisance grounds" and that it is of no consequence that a "determination of whether particular conduct constitutes a nuisance . . . has to await . . . *specification in legislative form*."[120] He also

---

quantities of debris" being "washed into the surrounding waterways, which resulted in water contamination, blocked waterways, and severe downstream flooding." Counter-Memorial at 149-150.

118 *Int'l Thunderbird* Award ¶ 208.

119 Indeed, according to California law defining actionable nuisance enacted in 1872 and still in force, a public nuisance does not include anything "which is done or maintained under the express authority of a statute." CAL. CIV. CODE § 3482. The mining law is such a statute, as it expressly authorizes mining claims "for gold, silver . . . or other valuable deposits." 30 U.S.C. § 23. *See Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co.*, 171 U.S. 55, 66 (1892) ("It is undoubtedly true that the primary thought of the [1872 Mining] statute is the disposal of the mines and minerals, and in the interpretation of the statute this primary purpose must be recognized and given effect."); *Steel v. St. Louis Smelting & Refining,* 106 U.S. 447, 449 (1882) ("It is the policy of the country to encourage the development of its mineral resources. . . . This [1866] declaration of freedom of mining lands to exploration and occupation was repeated in the act of Congress of May 10, 1872. . . ."); *see also United States v. Coleman,* 390 U.S. 599, 602 (1968) (intent of Congress, in making public lands available to people for purpose of mining valuable mineral deposits was to reward and encourage discovery of minerals that are valuable in an economic sense); *McKinley v. Wheeler,* 130 U.S. 630, 632-33 (1889) ("Many branches of mining, and those which yield the largest returns, can be carried on only by deep excavations in the earth and the use of powerful machinery, requiring expenditures far beyond the means of single individuals. . . . The object of the act of May 10, 1872, 17 Stat. 91 . . . § 1 . . . , was 'to promote the development of the mining resources of the United States'."); *United States v. Iron Silver Mining Co.*, 128 U.S. 673, 675 (1888) ("The statutes providing for the disposition of the mineral lands of the United States are framed in a most liberal spirit, and those lands are open to the acquisition of every citizen upon conditions which can be readily complied with. It is the policy of the government to favor the development of mines of gold and silver and other metals, and every facility is afforded for that purpose. . . .").

120 Sax Report ¶ 24.

acknowledges that California has expressed a "preference . . . for *specification of violation* and of remedy to be articulated by the legislature in a statute, rather than left to common law adjudication."

82. What both Respondent and Professor Sax neglect to mention, however, is that in Glamis' case, the Legislature never *specified* that Glamis' proposed Imperial Project or indeed any comparable mine violated any common law ("background") nuisance principles. In fact, according to Respondent, the *only* rationale put forward by the Legislature for SB 22 was the indeterminate statement – hardly a specific background principle – that the law is "necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution."[121] This type of rationale is precisely what the U.S. Supreme Court held in *Lucas* could not be used to justify an uncompensated regulatory taking: "the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that a total regulatory taking must be compensated."[122]

C. Glamis' Valuable Property Right Was Entirely Devalued, And Compensation Therefore Is Required

83. In his expert opinion, Professor Wälde notes that "[his] own reading of relevant case law and authoritative commentary is that full deprivation leads to a *per se* finding of

---

121 Counter-Memorial at 137 n. 649 (citation omitted).

122 *Lucas*, 505 U.S. at 1026 (emphasis added); *see also id.* at 1031 ("to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*"). Nor does Respondent's later suggestion that open pits like those planned at the Imperial Project site, "can become an *attractive nuisance* for outdoor enthusiasts (such as hikers and rock climbers) and off-road vehicles" change the calculus. Counter-Memorial at 155 (*citing* Parish Declaration ¶ 10) (emphasis added). First, "attractive nuisance" is an inapplicable tort law concept relating to the potential liability of landowners toward licensees and invitees. Moreover, this same attractive nuisance concern would apply to the vast number (over 1,000) of nonmetallic mineral pits which exist across California and are wholly exempt from the mandatory and complete backfilling regime imposed on Glamis.

expropriation, while substantial (but less than full) deprivation leads to a balancing test."[123] In that regard, the *Tecmed* tribunal noted that to establish whether a measure is "equivalent to" an expropriation, the first step is to determine whether the claimant was "radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto – such as the income or benefits related to the [property] or its exploitation – had ceased to exist."[124] The tribunal went on to note that the extent to which assets have lost their "value or economic use for their holder" is important

> because it is one of the main elements to distinguish, from the point of view of an international tribunal, between a regulatory measure, which is an ordinary expression of the exercise of the state's police power that entails a decrease in assets or rights, and a de facto expropriation that deprives those assets and rights of any real substance.[125]

84. The *Tecmed* tribunal thus based the distinction between a regulation and an expropriation largely on the severity of the economic effect. A number of commentators have concurred, noting, for example, that in evaluating whether a measure constitutes an indirect expropriation, "[I]t is particularly important to examine the effect that such taking may have had on the investor's rights. Where the effect is similar to what might have occurred under an outright expropriation, the investor could in all likelihood be covered under most BIT provisions."[126]

---

123 Wälde Report at III-25.

124 *Tecmed* Award ¶115.

125 *Id.*

126 R. DOLZER & M. STEVENS, BILATERAL INVESTMENT TREATIES 100 (1995). For a similar analysis under U.S. takings law, see *Lingle v. Chevron*, 544 U.S. 528, 538 (2005) ("Our precedents stake out two categories of regulatory action that generally will be deemed per se takings for Fifth Amendment purposes. . . . A second categorical rule applies to regulations that completely deprive an owner of "all economically beneficial use" of her property.").

85. In this case, Glamis' own records and the Behre Dolbear valuation demonstrate that, whether evaluated separately or in tandem, the federal and state measures effected a full deprivation of the value of Glamis' property interests.

1. Glamis' Own Records Demonstrate The Complete Devaluation Of Its Mining Claims

86. In his expert opinion, Professor Wälde explains the importance of "objective measures of value" in assessing economic impact, noting that to the extent they exist, they "should be preferred" over, for example, valuations performed in the litigation/arbitration context.[127] Specifically, Professor Wälde indicates that a complete accounting write-off, given stringent U.S. accounting standards, would be "a most significant indicator of economic impact," and given such an indicator "[T]he U.S. would have to adduce very persuasive evidence to suggest that the accounting write-off . . . does not reflect economic realities."[128] In this regard, Glamis' records show that its mining claims currently carry no asset value, as the company completely wrote off their value in 2001, shortly after Interior Secretary Babbitt's denial of the Imperial Project Plan of Operations.[129]

87. Continuing the discussion of objective indicators of value, Professor Wälde explains,

> Similarly, market reactions – ideally over time to present a picture less influenced by volatile perceptions of the moment – will provide one of the best indicators of true economic impact. In the Glamis dispute, I would therefore wish to ascertain how the market, *i.e.,* other companies in proposals for acquisitions, have valued the Glamis' mining rights following the impact of the U.S. (federal and state) conduct.[130]

---

127 Wälde Report at III-31.

128 *Id.*

129 *See* Memorial ¶ 512.

130 Wälde Report at III-31.

88. Although Respondent fancifully suggests that even with the complete backfilling mandate Glamis' mineral rights are worth over $159 million,[131] the fact is that Glamis has not received even a single offer to purchase the mining claims.[132]

89. Yet in spite of Glamis' 100% write-off of the value of the Imperial assets, and in spite of the total absence of any market interest in those assets, Respondent points to internal "valuations" undertaken by Glamis in April 2002 and January 2003, asserting that these "valuations" demonstrate that the mining claims retained value in spite of the enactment of the emergency regulations.[133] Respondent's reliance is misplaced; as Glamis CEO Kevin McArthur previously has noted, the January 2003 valuation memorandum reflected a "back of the envelope" calculation undertaken for the purpose of a "preliminary evaluation" of the economic impact of the measures.[134] Mr. McArthur has also indicated, "that analysis was most certainly not a definitive appraisal of the Imperial Project. It was merely a rough confirmation that the favorable economics of the Imperial Project essentially had been destroyed by the State of California as intended."[135] Nowhere does Respondent explain why this rough confirmation would be more reliable than BLM's own determination in September 2002 that complete backfilling of the Imperial Project "was not economically feasible,"[136] nor does it attempt to explain why Glamis would have abandoned a project purportedly worth $19 million.

---

131 Counter-Memorial at 164.

132 *See* Second Statement of K. McArthur ¶ 6 (Dec. 8, 2006) (noting that despite heightened interest in the gold mining sector, "since 2002, Glamis has not received a single offer or expression of interest from anyone regarding a prospective purchase of the Glamis Imperial Project properties").

133 Counter-Memorial at 165-166.

134 First Statement of K. McArthur ¶ 24.

135 Second Statement of K. McArthur ¶ 3.

136 *See* Memorial ¶ 395, citing BLM, *Mineral Report*, at 3 (Sept. 27, 2002) (at MV023933), Claimant Ex. 255.

90. In sum, the objective measures recommended by Professor Wälde point to a total deprivation of the value of Glamis' property, and Respondent's effort to elevate Glamis' internal valuations above the level of raw, unrefined data fails in the face of Glamis' conduct in the wake of the measures.

2. Behre Dolbear's Conclusion That Glamis' Mining Claims Have Been Totally Devalued By California's Mandatory Backfilling Regulation Is Technically Sound And Fully Supported By The Record

91. In its April 2006 expert report, Behre Dolbear concluded that Glamis' Imperial Project mining claims were totally devalued upon the adoption of the emergency mandatory backfill regulations by the State of California, plummeting from a net present value of $49.1 million to zero.[137] Respondent labors for nearly 20 pages in its Counter-Memorial to undermine and discredit Behre Dolbear's expert findings, relying principally on reports developed by Norwest Corporation and Navigant Consulting for this arbitration.[138] Norwest and Navigant criticize several of the key technical findings and methodologies in Behre Dolbear's report and offer their own opinion as to where Behre Dolbear could have improved its analysis of the Glamis Imperial Project. Norwest and Navigant then recreate what they consider to be the actual capital, operating, maintenance and reclamation costs for the Imperial mine, and speculate that Glamis' mining claims retained substantial value after the passage of the December 12, 2002 emergency backfill regulations, which are now worth more than $159 million.[139]

---

137 Behre Dolbear, *Valuation of Glamis Gold Ltd.'s Imperial Gold Project, Imperial County, California*, at 4 (Apr. 2006) ("Behre Dolbear Report").

138 *See* Counter-Memorial at 163, introducing Expert Report of Norwest Corporation (Sept. 19, 2006) ("Norwest Report") and Expert Report of Navigant Consulting, Inc. (Sept. 19, 2006) ("Navigant Report").

139 *Id.* at 164.

92. Behre Dolbear has prepared a supplemental report addressing the key criticisms of its original valuation contained in the Norwest and Navigant reports.[140] As demonstrated in that supplemental report and briefly summarized below, the Norwest and Navigant reports are riddled with illogical assumptions and unjustifiable methodologies that highlight their apparent lack of experience valuing metallic mining properties. These mistakes undermine their ultimate conclusions, and by extension, Respondent's reliance on those conclusions. After further analyzing the technical record, Behre Dolbear stands by its initial conclusion that the unprecedented mandatory backfill requirements adopted by the State of California rendered the Imperial Project valueless, a conclusion that is based on decades of experience valuing similar projects for major mining companies and international governments each year.[141]

a. Behre Dolbear's Valuation Methods Are Fully Consistent With Industry Standards

93. As a threshold matter, Respondent – relying on the Navigant report – argues that Behre Dolbear's valuation is flawed because it relied on a mixed valuation method; that is, it valued the gold to be extracted from the East and West pits at the Imperial Project using a discounted cash-flow analysis and then used a comparable sales valuation method for the exploration potential of the Singer pit.[142] Navigant asserts that one approach should be used for all three pits, arguing that a complete discounted cash flow analysis would yield a total mine value of $35.3 million and a complete comparable sales approach would yield between $28.5 and

---

140 Behre Dolbear, *Response of Behre Dolbear & Company* (Dec. 2006) ("Behre Dolbear's Response").

141 *Id.* at 1-2 & n.1. In fact, the great majority of the criticisms offered by Norwest and Navigant cannot withstand scrutiny, save one. Behre Dolbear has determined that it did inadvertently double-count $4.77 million in mining costs as described in paragraph 24 of the Navigant Report. Taking this into account, the post-backfill value of the Imperial Project is still nil, but is now negative (-) $8.9 million instead of negative (-) $11.56 million. *Id.* at 8, 19-20.

142 Counter-Memorial at 167.

$36.6 million.[143] Navigant also claims that Behre Dolbear ignored other applicable valuation methods, such as a prior transaction analysis involving the same mining claims.[144]

94. In making these arguments, Navigant demonstrates its lack of familiarity with mineral property valuations. The mixed valuation approach used by Behre Dolbear is consistent with the two leading mineral valuation codes adopted by the international mining industry, and incorporates the same methods used by Behre Dolbear for the 30-plus mineral valuations it performs each year for majoring mining companies and international governments, including the United States Government.[145]

95. One fundamental problem with the Navigant approach is that it fails to understand the difference between gold "reserves" and gold "resources," one of the more basic concepts in precious metal valuations.[146] A reserve is a proven and probable mineral deposit of known character based on detailed sampling, analysis and modeling. A resource is a lesser known deposit with exploration potential, but lacks certainty of extraction.[147] Reserves are appropriately valued using the discounted cash flow method. Resources should be valued using comparable sales.[148] As of 2002, the East and West pits contained proven and probable reserves. The Singer pit contained mostly unproven resources, albeit with significant exploration potential. Thus, Behre Dolbear accurately valued the Imperial Project reserves and resources using a mixed valuation approach, in accordance with well-accepted industry mining codes and standards.

---

143 *Id.* at 167-68.

144 *Id.* at 168-69.

145 Behre Dolbear's Response at 6, 9 -11.

146 *Id.* at 10-11.

147 *Id.*

148 *Id.* at 6-7, 10-11.

96. Compounding this error, Navigant's alternate valuation method using prior transactional sales for the same property is similarly unsound. At the time Glamis acquired its final 35% interest in the Imperial Project mining claims (in 1994), there were no reserves yet identified for the Imperial Project, thus the value of the transaction was based on exploration potential (*i.e.*, resources).[149] Gold reserves sell at a transactional premium. In contrast, gold resources sell at a discount. Thus, to calculate the value of the mine in 2002, after Glamis invested millions of dollars ascertaining the proven and probable reserves associated with its mining claims, based on the discounted price Glamis paid for some of those mining claims in 1994 absent those proven and probable reserves is simply nonsensical and suggests Navigant's inexperience valuing metallic mineral properties.[150]

97. Despite these errors, Respondent attempts to buttress Navigant's analysis by comparing Navigant's weighted average valuation of $32.6 million for the Imperial Project against an April 2002 "internal valuation" prepared by Glamis.[151] Respondent claims that Glamis purportedly valued the Imperial Project at $26.0 million at that time, which represented the value of the East and West pits only. Taking into account Behre Dolbear's estimate of $6.4 million for the Singer pit exploration potential, Respondent claims that Glamis' internal valuation in April 2002 equates to $32.4 million, or nearly exactly what Navigant concluded.[152] What Respondent fails to point out, however, is that the $26.0 million figure from Glamis' April 2002 analysis was just one of sixteen different net present values calculated by Glamis in that

---

149 *Id.* at 16.

150 *See id.*

151 Counter-Memorial at 165-66.

152 *Id.* at 166.

memorandum.[153] More importantly, Respondent neglects to inform the Tribunal that in that **very same** memorandum, Glamis specifically concluded that "*the Imperial Project should be valued somewhere around $50 million,*" and that an appropriate value for the property on a transactional basis would be more than $70 million.[154] Thus, Behre Dolbear's $49.1 million value is actually more conservative than Glamis' internal valuation in April 2002.

b. Behre Dolbear Accurately Calculated The Post-Backfilling Value Of The Imperial Project

98. Respondent, relying on the Norwest report, also attempts to discredit Behre Dolbear's valuation of the Imperial Project after adoption of the mandatory backfill regulation, arguing that Behre Dolbear made several technical mistakes in its analysis.[155] As with the Navigant report, Norwest's analysis is seriously flawed and undermines the credibility of Respondent's arguments.

99. Behre Dolbear did not – as Respondent contends – overestimate the swell factor that would apply to material taken from the pits and subsequently moved during the mining operations. Behre Dolbear derived its 35% swell factor from Glamis' 1996 Final Feasibility Study for the Imperial Project, the definitive source of technical information for the Project.[156] At the time that study was drafted – a full six years before adoption of the mandatory backfilling requirements – Glamis would have had no reason to overestimate the amount of material it needed to handle during mining and post-mining activities; in fact, it had every incentive to project accurately all mining costs to secure and retain investor confidence in its mining projects

---

153 Behre Dolbear's Response at 18.

154 *Id.* at 17-18; *see also* Second Statement of K. McArthur ¶ 5.

155 See discussion beginning at page 167 of Respondent's Counter-Memorial.

156 Behre Dolbear's Response at 27.

and capabilities.[157] The 23% swell factor used by Norwest incorrectly assumes that the bulk of the Imperial Project material would be unconsolidated alluvium and gravel. In reality, the bulk of the material is a cemented gravel or conglomerate, which has a higher propensity to swell when mined.[158] Even the State of California acknowledged, when adopting the mandatory backfill regulations, that material excavated from metallic mines in the state typically swell 30-40% when mined, right in line with Glamis' estimates.[159]

100. Norwest also incorrectly asserts that Behre Dolbear over-estimated the cost of backfilling. For example, Norwest claims that it is cheaper to run loaded trucks downhill, as would be required to take material off of the waste rock piles and heap leach pads before transporting that material to the pits for backfilling.[160] Norwest also claims that the haul distances in Behre Dolbear's analysis are overstated, because backfilling can be accomplished simply by dumping the material over the edge of the pit.[161] What Norwest fails to understand is that running loaded trucks downhill is essentially as expensive as running them uphill and causes equal wear-and-tear on the vehicles.[162] Mining safety mandates that trucks on downhill grades apply sophisticated breaking systems and run at controlled speeds to avoid catastrophic accidents.[163] These safety requirements greatly increase the costs associated with downhill hauls. Nor does backfilling simply involve dumping waste material over the edge of a cliff; California's reclamation standards require that backfilled pits be engineered to avoid long-term settlement

---

157 *Id.*

158 *Id.* at 28-29.

159 *See* Final Statement of Reasons for 14 CCR § 3704.1, at 2 (at CON002955), Claimant Ex. 304.

160 Counter-Memorial at 173.

161 *Id.*

162 Behre Dolbear's Response at 34.

163 *Id.*

and surface water ponding, among other requirements.[164] The only way to avoid future subsidence in a backfilled pit is to engineer the pit from the ground up, compacting each layer as one would a municipal waste dump or any other landfill feature.[165] Thus, the reclamation shortcuts assumed by Norwest significantly understate the true backfilling costs and fail to comply with California's mandatory backfilling regulation, even though the sole purpose of its report was to support its calculation of how much it would cost to comply with that regulation.

101. Respondent also claims that Behre Dolbear's "most significant single error" was its assumption that Glamis would have to post a cash bond equal to the estimated reclamation costs at the beginning of the operating life of the Imperial Project to comply with SMARA's financial assurances requirement.[166] Norwest claims that Glamis could have simply obtained a surety bond or letter of credit from a financial institution at a fraction of the cost, something that was "a common practice among mining companies and would have been available to Glamis. . . ."[167] Actually, surety bonds were not readily available to mining companies at that time, including to Glamis, a fact presented in testimony before the U.S. Congress in July 2002.[168] Given the risk involved in the industry during that period, cash equivalent financial assurances were virtually the only option available to a company like Glamis.[169]

102. Beyond the numerous errors in the Norwest and Navigant reports, Respondent tries yet another tactic to further undermine Behre Dolbear's post-backfill valuation of the Imperial

---

164 *Id.* at 32-33.

165 *See id.* at 32-34.

166 Counter-Memorial at 177.

167 *Id.*

168 *See* Second Statement of C. Jeannes ¶ 3; Behre Dolbear's Response at 18-19.

169 *Id.*.

Project. Respondent compares Behre Dolbear's post-backfill valuation to a January 2003 internal Glamis analysis, arguing that Glamis determined at that time that the mine would still produce a $9.1 million profit notwithstanding the mandatory backfill regulation.[170] According to Mr. Kevin McArthur, CEO of Glamis at that time, Glamis *did not conclude* that the Project "would still be quite profitable" as the government asserts; quite the contrary, Glamis concluded that based on this preliminary internal valuation, the Project was no longer a viable investment.[171] In fact, simply adding the financial assurances requirement into this "back of the envelope" analysis would obliterate the entire $9.1 million net present value the Respondent claims would be "quite profitable" to Glamis.[172]

103. Respondent fails to appreciate that a project may have a minor theoretical net present value, but still might not be economically viable; mining projects must return a substantial return on the investment to justify the large capital outlays, decades-long operating and reclamation life, and the substantial use of human and non-human resources to secure an appropriate profit. A company will not move forward with a 15-year project that involves

---

[170] Counter-Memorial at 166-67. In fact, Respondent asserts that "Glamis neglect[ed] to inform the Tribunal that it conducted an internal valuation shortly after the emergency regulations were adopted. Glamis concluded that the Imperial Project would still be quite profitable, and thus retain substantial value, despite California's reclamation requirements." *Id.* at 162. What Respondent fails to point out is that Glamis did address this issue in the April 2006 Statement of Kevin McArthur, attached to Glamis' Memorial:

> Our valuable mining claims and mill sites, which were confirmed to be valid under U.S. law by the U.S. Interior Department's *Mineral Report* on September 27, 2002, were rendered worthless as of December 12, 2002, when California adopted the mandatory complete backfilling and recontouring measures. *By January 2003, Glamis carried out some very preliminary evaluations of the economic impacts of the backfilling and site recontouring requirements adopted on an emergency basis. These "back of the envelope" calculations were enough for us to know that the Glamis Imperial Project was killed from a business standpoint, even though we had not fully accounted for the massive total costs of backfilling and recontouring and had not included the substantial costs of posting enormous financial assurances for the greatly increased reclamation costs.* . . .

First Statement of K. McArthur ¶ 24 (emphasis added).

[171] *Id.*; *see also* Second Statement of K. McArthur ¶¶ 2-3.

[172] Behre Dolbear's Response at 21.

moving hundreds of millions of tons of material simply to turn an infinitesimal profit; it must turn an economically strategic profit, and Glamis' back of the envelope analysis in January 2003 confirmed that such a result was not possible given the new mandatory backfilling regulation. If the anticipated profit is insufficient to attract a reasonable mining company to proceed with extraction, then the property – the mineral rights – have no value.

c. Respondent Grossly Miscalculates The Current Value Of The Imperial Project

104. Finally, Respondent makes the unbelievable assertion that the Imperial Project is currently worth $159, or more.[173] Respondent would have this Tribunal believe that before California imposed the unprecedented complete and mandatory backfilling requirements, the Imperial Project was worth $32.6 million.[174] Now, only four years later and after the imposition of the draconian backfilling regulation, the Project is worth five times more simply because the price of gold has doubled. Moreover, Respondent claims that Behre Dolbear's conclusion that the Project is now actually worth less than it was immediately following California's adoption of the backfilling regulation "defies accepted economic theory" and "all theories of market valuation" because Behre Dolbear used a 10-year rolling average to value the mine instead of looking to futures markets.[175]

105. Behre Dolbear was tasked to perform a fair market valuation in accordance with Article 1110(2), not develop market theory. In reality, Behre Dolbear uses a 10-year rolling average to value mineral properties because that is the industry-accepted standard approach, an approach that is has used for over 15 years, including in valuations performed for the U.S.

---

173 Counter-Memorial at 179.

174 *Id.* at 171, tbl. 1.

175 *Id.* at 179.

Government.[176] This approach is the most rational way to value metallic mineral properties, particularly in a market subject to significant and unpredictable fluctuation.[177] Furthermore, what Respondent fails to realize is that mine operating costs have risen nearly in lock-step with the gold price, increasing 85% since 2002.[178] Where the principal driver of costs in the post-California measures environment is reclamation, and that reclamation requires a mine operator to relocate hundreds of millions of tons of material, consuming millions of gallons of fuel and other resources in the process, the rise in gold price has not created a boon for California mining projects faced with the new California reclamation standards. If Respondent's assertion were true, one would expect Glamis to have received multiple offers for its Imperial Project claims, particularly in the exuberant gold market that Respondent describes. In reality, Glamis has not received a single expression of interest for its mining claims because those claims are completely valueless.[179]

106. In sum, Respondent's litigation position regarding the economics of backfilling is not just at odds with Glamis and Behre Dolbear, but it runs counter to the views of the National Academy of Sciences; the Bureau of Land Management; the Bureau of Mines; the State of California (and several of its counties); and the mining industry.[180] In fact, the State of

---

176 Behre Dolbear's Response at 24.

177 *See id.* at 23-24.

178 *Id.* at 22.

179 *See* Second Statement of K. McArthur ¶ 6. This NAFTA proceeding, in which Glamis has been seeking damages in the range of $50 million for the expropriation of its investment, is an extremely public and open forum. If the Imperial Project possessed a value of $159 million as Respondent claims, a third party investor could offer approximately $50 million to Glamis to acquire the Imperial Project mining claims and expect an immediate profit of over $100 million. Needless to say, no such offers have materialized.

180 *See, e.g., Final EIR/EIS for the VCR Mining Project*, at 3-30 (Oct. 28, 1987), Claimant Ex. 19 ("In the opinion of most mining experts, the cost of backfilling with all of the overburden would render a large open pit mining operation economically infeasible."); Letter from Richard Grabowski, Chief, Western Field Operations Center, Bureau of Mines, to Ed Hastey, BLM State Director, re Backfilling of Open Pit Mines (June 11, 1990) (at CON003622), Claimant Ex. 29 (noting that backfilling "could make an otherwise (continued…)

California and BLM both concluded that complete backfilling would render the Imperial Project uneconomic, contemporaneous conclusions that Respondent would have this Tribunal ignore in light of its current litigation position.[181]

D. The Federal And California Measures Disappointed Glamis' Reasonable Investment-Backed Expectations

107. As Professor Wälde explains in his expert opinion,

> The economic impact/deprivation test … does not operate on its own – except in the most egregious cases of "total deprivation" – but operates in conjunction with other elements of the test, notably the "disappointment of legitimate, investment-backed expectations."[182]

In the instant case, given the valuation discussion above, Glamis submits that the facts demonstrate a full deprivation of the value of its investment; accordingly, no further inquiry is required. Still, should the Tribunal nevertheless proceed to employ a balancing test and consider Glamis' expectations of being able to mine at the Imperial Project, the record demonstrates that – contrary to Respondent's efforts to rewrite history – those expectations were reasonable and they were entirely frustrated by the Respondent's expropriatory conduct.

---

profitable mine uneconomic"); *Record of Decision, Castle Mountain Project*, at 8 (Oct. 31, 1990) (at MV036495), Claimant Ex. 32 (backfilling would render the Castle Mountain Project uneconomic); Letter from Rand Mining Company to Buzz Todd, BLM, at 4 (Aug. 17, 1994) (at GLA004538), Claimant Ex. 53 ("the cost of any backfilling option will greatly exceed the value that will be added to the land"); NAS/NRC, HARDROCK MINING ON FEDERAL LANDS 5, 82 (1999), Claimant Ex. 169 (agreeing with earlier NAS/NRC study that backfilling of non-coal mineral mines is economically unsound and recommending that complete backfilling only be considered on a mine-by-mine basis); BLM, *Mineral Report of the Glamis Imperial Project*, at 3 (Sept. 27, 2002) (at MV023933), Claimant Ex. 255 (concluding that complete backfilling of the Imperial Project "was not economically feasible"); California Office of the Governor, *Press Release* (Apr. 7, 2003) (at AG001319), Claimant Ex. 284 ("The reclamation and backfilling requirements of this legislation [SB 22] would make operating the Glamis Gold Mine cost prohibitive."); *Non-Disputing Party Submission of the National Mining Association*, Glamis Gold Ltd. v. USA, at 13-16 (Oct. 13, 2006).

181 *See* California Office of the Governor, *Press Release* (Apr. 7, 2003) (at AG001319), Claimant Ex. 284; BLM, *Mineral Report of the Glamis Imperial Project*, at 3 (Sept. 27, 2002) (at MV023933), Claimant Ex. 255.

182 Wälde Report at III-25.

1. Glamis Reasonably Expected Approval Given What Was Known And Knowable About Native American Cultural Resources At The Imperial Project Site

108. In its Counter-Memorial, Respondent essentially seeks to portray Glamis as either blind or foolish in undertaking to invest in the Imperial Project in the face of strong and obvious evidence that the Imperial Project would disturb a property that was "central to the spirituality and cultural continuity of the Quechan."[183] Ignoring the actual facts, Respondent would like the Tribunal to believe that Glamis should have known that the Imperial Project area had much greater significance than virtually any place in the southern California desert, thus presenting a completely different circumstance from the numerous ground-disturbing projects approved for development both before and after the denial of the Imperial Project.[184] The Tribunal should not be misled.

109. To construct its fanciful version of what was known or knowable to Glamis, the United States has made four basic errors. *First*, it has grossly exaggerated the condition of the Imperial Project site and ignored that, of the many documented modern uses of the site, *none* involved Native American ceremonial or religious practices. *Second*, it has overstated – and at times completely mis-cited – the findings of the initial cultural-resource surveyors in its effort to suggest early awareness of some religiously and spiritually significance of the site. *Third*, even though the record is unclear about whether there is something called the "Trail of Dreams," whether it is part of a trail network tied to the Quechan creation story, and whether any remaining segment of it even lies within the Project area, Respondent faults Glamis for not

---

183 Counter-Memorial at 41.

184 Counter-Memorial at 213 ("None of the other mines . . . [were] located on a site that had not previously been mined, or presented such a grave threat to Native American sacred sites of such importance.") (citations omitted).

knowing that its Project was uniquely situated along a major spiritual "corridor" of the Quechan.[185] *Finally,* Respondent cannot explain how Glamis could have known earlier about the late 1997 "discovery" of a Trail of Dreams or, in any event, how the Imperial Project's impact on this short extant trail segment within the Project site distinguishes it from approved projects such that it would undermine the reasonableness of Glamis' expectations when it made its most significant investments between 1988 and mid-1997. We address each of these defects in Respondent's position below.

a. The Imperial Project Site Is Not Pristine And Had Not Been Used By The Quechan In Recent Decades

110. Respondent first asserts – without citation – that Glamis' Imperial Project would be located in a "pristine area within the California Desert Conservation Area."[186] Yet all evidence indicates that the area was anything but pristine. It had been used regularly at least since World War II. The archaeological surveys noted the large presence and diversity of "historic" features at the site as early as 1988:

> Historic features are everywhere through the Indian Pass road sector. Evidence includes Boy Scout camp signs and tent areas, numerous large rock fire rings, varied trash, military supply tins, and shell casings, vehicle tracks, mine claims, prospects, and automotive tires and parts.[187]

In fact, all of the relevant cultural resource studies have described use of the land encompassing the Project area as a tank and artillery training ground during World War II.[188] More recent

---

185 Counter-Memorial at 41.

186 *Id.* at 2.

187 Jay von Werlhof, IVCDM, *Archaeological Investigations of Gold Fields Indian Pass Project Area* (Mar. 1, 1988) at 68 (at MV026598), Claimant Ex. 316.

188 *See, e.g.,* Jerry Schaefer & Drew Pallette, *Cultural Resource Survey and Assessment of the BEMA Indian Rose Project Area* (June 1991) at 12, Claimant Ex. 317; Jerry Schaefer & Carol Schultze, *Cultural Resources of Indian Pass: An Inventory and Evaluation for the Imperial Mine Project, Imperial County, California* (Sept. 1995) at 11, 31 (at GLA035771, GLA035791), Claimant Ex. 318 ("Remains of modern and historic activities are abundant in the project area. Of particular interest are those rock foundations, (continued…)

studies confirm that General Patton trained his troops in the area for the World War II North Africa Campaigns.[189] Remnants of these desert training activities include "ordinance shells, tank tracks, bivouac areas, foxholes, rock walls, and tent foundations."[190] One of the archaeological sites within the proposed mine area, that Respondent suggests should have signaled to Glamis the cultural significance of the Project area,[191] was actually described in 1991 as a "modern campsite with rock alignments," and as including such features as tin cans.[192]

111. Surveyors of the Project area have also noted evidence of activity since the World War II era. Rockhounding in the region is believed to have resulted in the considerable mixing of recent flaking debris with prehistoric artifacts.[193] The Project area shows remnants of use by Boy Scouts and other recreational camping groups.[194] Respondent's attempt to distinguish Glamis' property from other area mines, by coining the term "green fill" site and affixing it to

---

alignments and circles which may relate to the World War II training exercises or other historic activities. . . . Several suspicious rock features were seen in the project area.
This may have been a tent foundation or other structural support. . . . .
. . . This area has been cleared of desert pavement. Interlocking seam tin cans and possible shoe polish tins were among the historic debris noted. . . .

. . . Some shrapnel was also found along the ridgeline.")

189 Schaefer and Schultze (1995), at 11 (at GLA035771), Claimant Ex. 318; *see also* Jerry Schaefer & Carol Schultze, *Cultural Resources of Indian Pass: An Inventory and Evaluation for the Imperial Project, Imperial County, California* (June 1996), at 25 (at GLA035216), Claimant Ex. 319 ("Also documented at four separately defined sites were the rock features and trash scatters from a World War II period encampment associated with the Desert Training Center/California-Arizona Maneuver Area.")

190 Schaefer and Schultze (1995), at 11 (at GLA035771), Claimant Ex. 318.

191 Counter-Memorial at 59.

192 *See* Schaefer and Pallette (1991), at 18, 28, Claimant Ex. 317 (noting that the features of the site, including well constructed rock alignments and a buried tin can, "generally denote historic origin"); *see also* Schaefer and Pallette (1991), at 26, Claimant Ex. 317 ("
. . . These features may be related to WW II training activities, or modern camping.")

193 Quillen (1982), at 4 (at GLA032505), Claimant Ex. 314.

194 *Id.* at 6 (at GLA032507).

the Imperial Project area, is also unavailing.[195] Although it is not clear exactly what Respondent means by this, if it is suggesting that the area is unscarred by prior use, that is contradicted by evidence that the area has been marked by off-track vehicle traffic, in addition to the artillery vehicles and camping-related activity, resulting in the destruction of pre-historic trails in the area,.[196] If it means that the area lacks any previous mining-related activity, this is also untrue, as it is clear from the archaeological record that there had been prior mineral development activities in the past,[197] and that previous prospectors had staked mining claims there.[198]

112. Not only was the Imperial Project area not "pristine," but also none of the Project studies found evidence that the area was currently used by Quechan Tribe.[199] In 1997, BLM's

---

195 Counter-Memorial at 36.

196 *See* Schaefer and Schultze (1996), at 28 (at GLA035219), Claimant Ex. 319 (noting that a trail segment in the Project area is "obliterated on the south end by off-road vehicles"); Schaefer and Schultze (1995), at 23 (at GLA035783), Claimant Ex. 318 (discussing a trail segment, , which has been "impacted by off-road vehicles"); *see* KEA Environmental, *Where Trails Cross: Cultural Resources Inventory and Evaluation for the Imperial Project* (Dec. 1997), at 192 (at AG002947), Claimant Ex. 322 (discussing tank tracks and tire marks '); Schaefer and Schultze (1996), at 12 (at GLA035203), Claimant Ex. 319 (discussing marks left by military activity) (citation omitted); Schaefer and Schultze (1996), at 30 (at GLA035221), Claimant Ex. 319 (noting rock piles could be attributed to mining claims and campers).

197 Schaefer and Schultze (1996), at 12 (at GLA035203), Claimant Ex. 319 ("[M]ining and some military maneuvers left a mark on the cultural landscape of the project area.") (citation omitted); *see also* Schaefer and Schultze (1996), at 28 (at GLA035219), Claimant Ex. 318 (discussing a trail segment which has been "obliterated" by "a modern drill pad").

198 *See* Claimant Ex. 96 ("Notes from Government to Government Meeting: State Director Ed Hastey and Fort Mohave Quechan Religious Belief and Glamis Imperial Project) (Dec. 16, 1997) (at D-00376-079-002 through -003) (stating that the Sierra Club had "reviewed BLM records and found 95 pages of mining claims in the Indian Pass area").

199 *See, e.g.,* Schaefer and Schultze (1996), at 1 (at GLA035192), Claimant Ex. 319 (noting only that sites in the Project area, including trail segments, are elements of a "prehistoric Native American travel and trade network"); *see also* Quillen (1982), Claimant Ex. 314; von Werlhof (1988), Claimant Ex. 316; Schaefer and Pallette (1991), Claimant Ex. 317; Schaefer and Schultze (1995), Claimant Ex. 318. In fact, when the BLM designated the area as warranting special management considerations, it noted that "[t]here is no evidence that the area is used today by contemporary Native Americans." *See* Sebastian Report, at 23 (Apr. 2006) (citation omitted).

survey consultants acknowledged that the Tribe had not used the site or nearby area since the early 1940s, when the Running Man geoglyph was likely laid on the desert floor.[200]

113. In the end, even after the much more intensive inventory of the site,[201] while the numbers of sites recorded within and around the Imperial Project increased, the conclusion did not change that the bulk of the prehistoric features identified – lithic scatters, sherds, chipping stations, and pot drops – were similar to those found elsewhere in the desert, sometimes in better condition and often in greater numbers.[202] The largest portion of sites recorded within the Imperial Project area consists of lithic reduction areas or chipping stations.[203] Similar lithic scatter features exist at the Mesquite mine.[204] Indeed, some have noted that the density of chipping stations is "much lower" and the intervening low density lithic scatters "much more ephemeral" in the Imperial Project area than that recorded for the Mesquite Mine or other places

---

200 KEA Environmental (1997), at 123 (at AG002878), Claimant Ex. 322 ("Although they have not used the [project] area since their father's generation, they want to use it in the future."). The geoglyph is located outside of the proposed mine and process area and would not be directly affected by the Project. Schaefer and Schultze (1996), at 75 (at GLA035266), Claimant Ex. 319; *see also id.* at 78 (at GLA035269), Claimant Ex. 319.

201 As Dr. Sebastian has explained, "The field work for the [1997] resurvey was performed using 5 meter spacing, an intensive level of scrutiny not normally used for large block surveys. . . . BLM subsequently approved 20 meter intervals for the 2001 archaeological survey of the Baja North Pipeline project area. . . ." Sebastian Report at 30.

202 *See, e.g.*, von Werlhof (1988), at 68 (at MV026598), Claimant Ex. 316 ("Trails and lithic stations are the features typical of the Indian Pass Project area. . .

.."); *see also* Schaefer and Pallette (1991), at 29, Claimant Ex. 317 (noting that "pot drops, cleared circles, rock art, and chipping stations" frequent trails that are part of "transportation corridors").

203 *See* Schaefer and Schultze (1996), at 14 (at GLA035205), Claimant Ex. 319 ("Cultural resources consist of lithic procurement sites such as lithic scatters and chipping stations.")

204 Schaefer and Schultze (1995), at 33-34 (at GLA035793-94), Claimant Ex. 318.

closer to the Colorado River.[205] And unlike material found in the Chocolate Mountains, the material at the Project site lacked diagnostic elements that would increase their significance.[206]

114. In sum, the conditions of the area in and around the Project site could not have signaled to Glamis its potential religious significance – indeed, all indicators revealed that before Glamis took an interest in the property, it had been put to an array of diverse uses: by campers, miners, and the military.

b. Prior To The KEA Study In Late 1997, There Was No Ethnographic Or Anthropological Evidence That Could Have Put Glamis On Notice That The Imperial Project Site Had Any Significant Religious Or Ceremonial Value To The Quechan

115. Respondent attempts to give the impression that Glamis was long on notice that features within the Project area were of "sacred significance" to Native Americans.[207] Yet, only by distorting the actual record can it draw connections between archaeological features located within and outside of the Project site – associations that no previous anthropologist, were willing to make.

(1) None Of The Early Regional Studies Tied Significant Cultural Features To The Project Area

116. Although Respondent correctly notes that early regional studies identified two important trail segments

, none of the early studies made a connection between the Imperial Project area and the Quechan Creation

---

205 Schaefer and Pallette (1991), at 29, Claimant Ex. 317.

206 *Id.*; see *also* Sebastian Supplemental Report at 27 (noting that the sites reported in the vicinity of the Project area were mostly lithic scatters plus a few trail segments, rock rings and cleared circles, and that neither these types of sites nor their density at the Project area is uncommon).

207 Counter-Memorial at 58.

myth. Respondent attempts unsuccessfully to find support in some very old texts for the notion that a physical trail, called the *Xam Kwatcan* Trail, has religious significance because it is tied to the Quechan Creation story. Although it cites to a 1997 study referencing these old texts, as Dr. Sebastian has pointed out, most of the old literature (4 out of 6 sources) fails to even mention the term "xam kwatcan," and almost all (5 out of 6) do not mention a trail or trails.[208] Although one mentions a trail, it does not describe it at a physical location.[209]

117. Indeed, at the time Glamis made its investments in the Imperial Project, the only existing information on the physical whereabouts of a trail called the *Xam Kwatcan* places its path well outside the Imperial Mine area, by at least 5 or 6 miles to the West (*see* figure below).[210] Glamis could not have interpreted this information to mean that the Imperial Project area would in any way adversely affect the *Xam Kwatcan* Trail.

---

208 Sebastian Supplemental Report at 16-18 (discussing at length the works of Trippel (1889), Harrington (1908), Kroeber (1925), Forde (1931), Spier (1933), and Forbes (1965)).

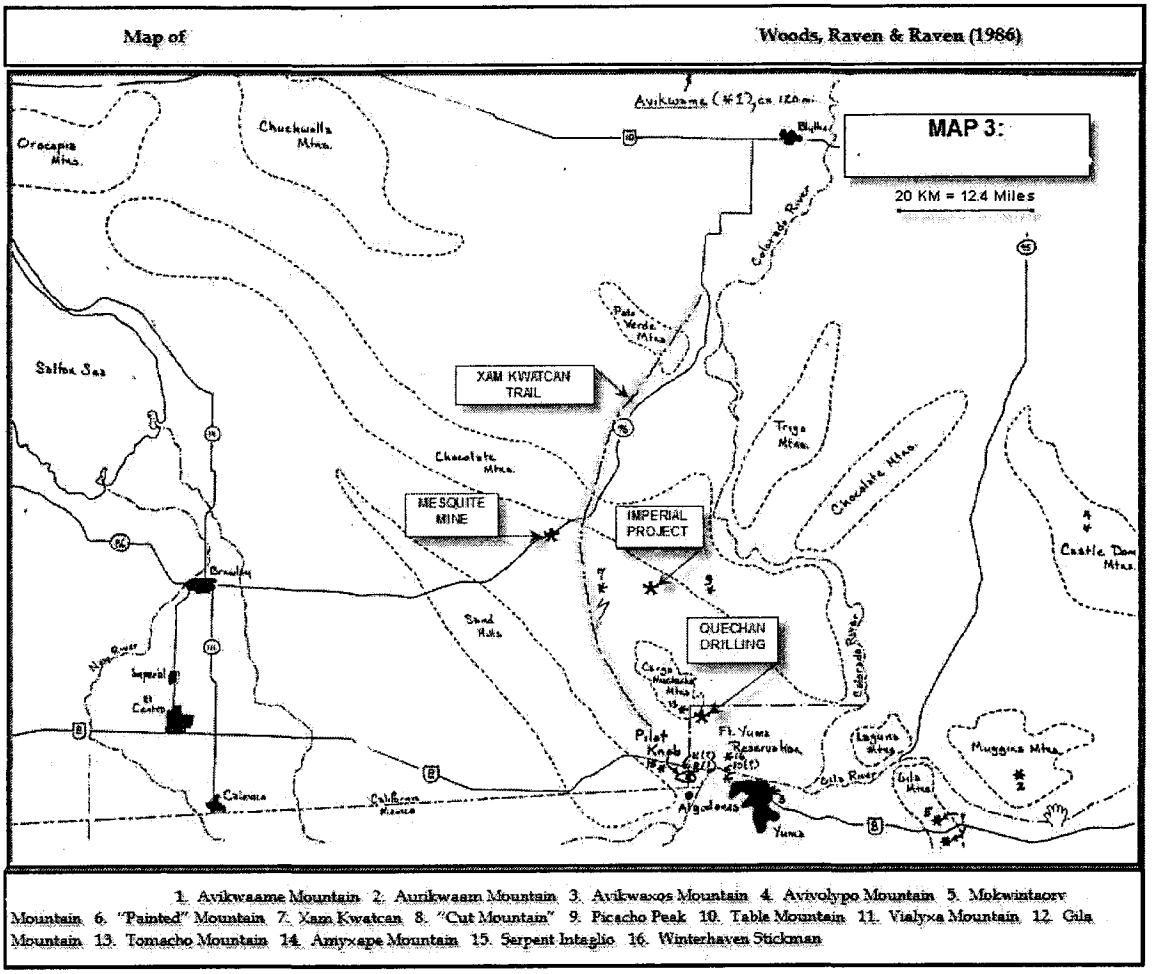
209 Sebastian Supplemental Report at 17.

210 This map is taken from the 1986 study by Woods *et al.* prepared for BLM. This study is approvingly cited in the Counter-Memorial (at 53). It was based on a comprehensive review of all available ethnographic studies of the Quechan, and nearly 50 recorded interviews of Native America elders, including 18 Quechan members. *See* Clyde M. Woods, et al., *The Archaeology of Creation: Native American Ethnology and the Cultural Resource of Pilot Knob*, Table 1 (Mar. 1986), Claimant Ex. 315. Not only does the 1986 Woods study fail to map any religious or cultural sites in the Project area, it also fails to mention any religious or cultural traditions associated specifically with the Indian Pass area, further supporting Glamis' reasonable expectations that the area was ripe for development. The report gives some detail on the known information about the Keruk ceremony of the Yuman Tribes, which involved a four-day commemorative ceremony along the separate Keruk Trail. According to the Woods report, the

> None of these listed locations are closer than seven miles from the Imperial Project area. In fact, *Avikwaame* is well over 120 miles north of the Imperial Project area. The Woods Report also describes
>
> Travel along

these points would not have intersected the Imperial Project, and would have bypassed it by several miles.

Figure 1[211]



118. Moreover, the same study prepared by Woods in 1986, which mapped

None of these sites are found in, or run through, the Project area. Some of the sites identified in Woods' study include *Avikwaame* (Locale No. 1), well over **120 miles** north of the Imperial Project area; Picacho Peak (Locale No. 9), over **seven miles** from the Imperial Project area (near the Glamis Picacho Mine); and the

---

211 *See* Second Statement of Dan Purvance at Attachment 1.

southern portion of the Cargo Muchacho Mountains (Locale No. 13), within **two miles** of where the Quechan Tribe carried out drilling for bulk mineable gold deposits with funding by Interior's Bureau of Indian Affairs ("BIA") in the early 1990s.[212]

(2) None Of The More Recent Studies, Including Those Of The Project Area, Make Connections Between The Cultural Sites Outside Of The Project Area And Sites Within The Project Area

119. Not only did early regional studies and written ethnographic accounts fail to connect any areas of Native American cultural significance to the Project area, but site-specific studies were also unwilling to do so.[213] Respondent nonetheless fosters the false perception that these prior site-specific studies found associations between the unexceptional features inside the Project area and sites outside of the Project,

.[214] Indeed, Respondent cites only to a 1988 study by Dr. von Werlhof to support its allegation that the area surrounding the Project site "contained a braided pre-historic trail and that considerable archaeological evidence existed to support the conclusion that the trail was used by Native Americans for ceremonial purposes."[215]

120. Dr. von Werlhof's study makes no such claim, but rather supports Glamis' reasonable belief that the Project area presented no exceptional Native American cultural features that would distinguish it from the cultural heritage associated with other mining sites in the southern California Desert. First, the 1988 study did not identify the Imperial Project area as

---

212 *See* Memorial at 74-78.

213 *See, e.g.,* von Werlhof (1988), at 13 (at MV026543), Claimant Ex. 316 (finding evidence of "little, if anything, in the project area that would be culturally centered there").

214 Notwithstanding Respondent's suggestion (at 51-52 and 70), there is no evidence that these were the most heavily incised trails in "the entire CDCA." *See* Sebastian Supplemental Report at 14.

215 Counter-Memorial at 70 (citing von Werlhof).

intersecting any segment of the *Xam Kwatcan* Trail.[216] Indeed, it never even mentioned the *Xam Kwatcan* Trail (or any "Trail of Dreams"), let alone that it was at or near the Imperial Project site. Dr. von Werlhof did, however, make the following observations regarding the low level of cultural significance attributable to the Imperial Project site:

- "Firstly, the area is small, has inadequate food-getting potential, contains **no evidence** that more than a few had ever camped within its bounds, and does have several trails that pass through it rather than just lead into it."[217]
- "There is **little, if anything**, in the project area that would be culturally centered there. Everything observed points elsewhere for meanings."[218]
- "The extrinsic areas at least include the river, Indian Pass itself, Pilot Knob Mesa, ancient lakes to the west, the mesa east of the Cargo Muchacho Mountains, Mesquite project area, Black Mountain and its eastern watershed, and Imperial Gables, and possibly – or probably – far beyond."[219]
- "In other words, the importance of the Indian Pass project area is archaeologically related to other areas and the native group they served. The Project Area itself was **minor in use and purpose**, serving as one of the outreach areas for a group probably inhabiting a stretch of the Colorado River east of Indian Pass. . . ."[220]

121. Perhaps the most egregious distortion made by Respondent is its characterization of a story Tribal Historian Lorey Cachora relayed to the 1991 archaeological surveyors. Here, it is worth examining Respondent's own words:

> Lorey Cachora described the trail as significant to the Quechan because of its association with the Running Man legend. . . . By recounting this tale in association with the identification of Lorey Cachora clearly signaled the spiritual significance of to the surveyors and to anyone familiar with Quechan ethnography, he

---

216 *See generally* von Werlhof (1988), Claimant Ex. 316.

217 von Werlhof (1988), at 13, Claimant Ex. 316.

218 *Id.*

219 *Id.*

220 *Id.* (emphasis added).

> identified a portion of the Quechan's sacred Xam Kwatcan trail network.[221]

122. Not surprisingly, Respondent does not offer a citation to anything that even remotely alludes to a "Running Man legend" – quite simply because there is none.[222] Not only is Respondent's claim untraceable to any ethnographic literature, but it also contradicts unrebutted evidence showing that at the time Mr. Cachora told his story, he did not even know where the Running Man geoglyph was located.[223] Indeed, as Dr. Sebastian points out in her supplemental expert report:

> By labeling this story "the Running Man legend," the Respondent implies that it is somehow connected to the historical period Running Man geoglyph
> But there is no such connection, and neither Cachora nor anyone ever implied that there is. The 1991 story of the famous runner and the ant-people has nothing to do with the Running Man figure, and there is no Running Man "legend."[224]

Neither Mr. Cachora nor any of the numerous Imperial Project studies prior to 1997 tied the site containing the Running Man geoglyph,

---

221 Counter-Memorial at 59.

222 In reality, the 1991 study to which Respondent cites simply discusses Mr. Cachora's recounting of an allegory about ants, stating as follows: "Lori Cachora retells an old story of a famous runner who, while traveling west on the trail, fell asleep under a mesquite tree. He dreamt that he was transported to the underworld inhabited by the ant-people. Their leader informed him that he was known for killing ants and he was never to step on ants again for they are people too. They had the power to kill him but they would spare his life if he would spread this message to the Yuman peoples. He woke to see an ant walking off his body. When he returned home he told his people to avoid stepping on ants." Schaefer and Pallette (1991), at 25, Claimant Ex. 317 (emphasis added). Nothing in this statement can be construed to reveal an association between site and the site or between and the *Xam Kwatcan* Trail, which was mapped by Woods in 1986. *See also* discussion in Sebastian Supplemental Report at 6-7.

223 First Statement of Dan Purvance ¶ 11.

224 Sebastian Supplemental Report at 8.

to specific features within the Imperial Project area, nor had they even ascribed any cultural, ceremonial, or religious significance to those trail segments.[225]

123. Perhaps recognizing the difficulty that reality now poses to Respondent's efforts to backdate an awareness of some special significance to the Project area, Dr. King, in his expert report submitted with the Quechan Non-Party submission, offers several purely speculative and conflicting explanations for Mr. Cachora's silence:

- "Mr. Cachora may not have known at the time of Schaefer and Schultz's survey that the trail segment in question was part of the Trail of Dreams."[226]

- "Mr. Cachora may have been disinclined to trust Schaefer and Schultz with sensitive information – because of its sensitivity, because he perceived them to be part of the external power structure that threatened his spiritual places...."[227]

- "[Mr. Cachora's] story about the runner and the ant people may have been a parable designed to initiate a discussion, that fell flat. It may have had metaphorical meanings in a Quechan context that did not register with the archeologists...."[228]

124. The fact that Dr. King, speaking on behalf of the Quechan Tribe, has offered these conflicting explanations at this stage in the controversy only serves to confirm that Glamis was in no position – then or now – to know that the Imperial Project area had greater significance

---

225 Respondent's claim is also premised on an overgeneralization of ethnographic literature describing the importance of dreaming in Quechan culture. The standard ethnographic work on the Quechan recognizes several types of Quechan dreaming, each with varying degrees of importance. *See* Sebastian Supplemental Report at 11 ("The standard and most detailed ethnography of the Quechan is Forde (1931). In this work, Forde makes a clear distinction between the power bestowing dream, or dream vision, and the less significant dream of everyday life.") (citation omitted).

226 Dr. King Report at 12.

227 *Id.* at 12. In assessing this speculation, it should be recalled that Mr. Cachora was voluntarily working with Dr. Schaefer as a paid member of the cultural resource assessment team.

228 *Id.* at 11.

than other areas of the California Desert open to development. Certainly, Dr. King's statements are an admission that the 1991 and 1996 reports by Dr. Schaefer conveyed no clear signal about the spiritual significance of the trail features, notwithstanding Mr. Cachora's active participation in the field work for each study.

(3) The 1996 Study Was The First Hint Of Any Quechan Significance Associated With Features Near The Imperial Project, And This Concerned One Of The Trail Crossings Outside Of The Project Area

125. Site-specific cultural resource studies carried out at BLM's direction in 1995 and 1996 were the first to suggest the special cultural significance of any feature located in the vicinity of the Project site. The authors of the 1996 Imperial Project study made this determination at the site , which had been identified many years earlier by Malcolm Rogers.[229] Indeed, part of the reason BLM asked the 1995 cultural resource team to follow up its 1995 study a year later was to more fully investigate the importance of the Running Man site.[230] The 1996 report noted that was associated with at least 15 features, aside from the Running Man geoglyph, and stated that it was culturally important to the Quechan.[231]

126. Even in light of the 1996 cultural resources report, however, Glamis would not have been on notice that the Imperial Project might itself disturb a location of great Quechan significance. The record shows that the Running Man site, in addition to the trails at is located well over of the main project area and

---

229 Schaefer and Schultze (1996), at 41-54 (at GLA0335232 to -245), Claimant Ex. 319.

230 *See* Michael Baksh, *Native American Consultation for the Glamis Imperial Project* (Sept. 22, 1997), Appendix A, at 1 (at MV002761), Claimant Ex. 320.

231 Schaefer and Schultze (1996), at 44 (at GLA035235), Claimant Ex. 319.

would not be impacted by the proposed Imperial Project.[232] Moreover, as explained above, this site had never been linked to feature in the Imperial Project area, notwithstanding Respondent's characterization of Mr. Cachora's 1991 statements.

c. There Remains Significant Doubt As To Where The "Trail of Dreams" Lies And Whether It Even Traverses The Project Area

127. Respondent has placed considerable weight on its notion that the Imperial Project was treated differently from other projects only because it was differently situated; in short, that the site contained the kinds of cultural resources that distinguish it from other development sites in the area.[233] The ACHP's recommendations to the Department of the Interior are rooted in the claim that one of the special resources that would be destroyed by the Imperial Project is the "Trail of Dreams,

."[234] Secretary Babbitt likewise rested his final denial of the Project in large part on the assertion that the Project would "impair the ability to travel, both physically and spiritually" along the "Trail of Dreams."[235] Yet, Respondent ignores the considerable uncertainty surrounding the location and manifestation of this trail, in order blindly to insist that all available sources indicated to Glamis that the area was both sacred and could not be disturbed.[236]

---

232 Schaefer and Schultze (1996), at 75 (at GLA035266), Claimant Ex. 319; *see also id.* at 78 (at GLA035269) ("Site is sufficiently distant to avoid any direct impacts from any possible modification of Indian Pass Road and installation of a parallel pipeline.").

233 Indeed, Respondent admits that "the Quechan posited their claim regarding the site's extreme importance in part on the fact that '

."' Counter-Memorial at 68.

234 Letter from Cathryn Buford Slater to Secretary Bruce Babbitt, at 2 (Oct. 19, 1999) (at D-00409-0048-0043), Claimant Ex. 201.

235 *Record of Decision for the Imperial Project Gold Mine Proposal*, at 10 (Jan. 17, 2001) (at D-00138-0001-0010), Claimant Ex. 212.

236 Counter-Memorial at 2.

(1) The Term "Trail of Dreams" And Its Association With The Project Area Does Not Appear In Any Ethnohistoric Or Ethnographic Literature Until Late 1997

128. In its Counter-Memorial, Respondent maintains that the Trail of Dreams, which it suggests is associated with the sacred *Xam Kwatcan* Trail network, runs through the proposed Mine area and would be damaged by the Project.[237] Yet Respondent does not, and cannot, dispute that the term "Trail of Dreams" does not appear in *any* regional or site-specific ethnographic literature until 1997, when yet another cultural resource study of the Imperial Project site was performed at BLM's request.[238] Furthermore, there is no basis to conclude that any portion of the *Xam Kwatcan* Trail network is located within (or near) the Imperial Project area, given that the only known geographic description of the *Xam Kwatcan* places it outside of Indian Pass area altogether. Indeed, a 2001 study states that the Trail of Dreams is a non-physical pathway above the *Xam Kwatcan* Trail.[239]

129. Despite the assortment of possible justifications offered by Dr. King for the Tribe's silence on the Trail of Dreams prior to 1997, Claimant does not dispute that the Tribe may have had good reasons for not trusting BLM and its consultants. Yet, the fact remains that Glamis acted reasonably based on all information that could possibly have been known to it.[240] Glamis

---

237 *Id.* at 147.

238 In more recent literature, both the Trail of Dreams and the *Xam Kwatcan* Trail are reputed to link with In 1986, Woods depicted the *Xam Kwatcan* Trail as linking to . *See* Woods (1986), at Map 3 and Table 3, Claimant Ex. 315. In 1997, Baksh likewise described the Trail of Dreams as linking to Baksh (1997), at 21 (at MV002744), Claimant Ex. 320.

239 Boma Johnson, *Cultural Resources Overview of the North Baja Pipeline Project* (Aug. 27, 2001), at 36 (at MV-035111); Claimant Memorial 326.

240 Despite the crude speculation offered by Dr. King in his report as part of the Quechan Tribe's Non-Party Submission, Glamis is only left to wonder why – if conventional mineral exploration and gold mining activity conducted near areas such as Indian Pass was so inherently offensive to the traditionally held (continued...)

had no way of gauging the extent of incompleteness in the cultural record before late 1997, particularly given that prior researchers were able to identify the location of several significant Native American cultural sites in the Southern California Desert – in part from the words of 18 Quechan Tribal members themselves.[241]

(2) The Evidence Indicates That The Trail Of Dreams Is Outside Of The Project Area And Is Running Direction Away From The Proposed Mine

130. Given that the Trail of Dreams (whether part of the *Xam Kwatcan* or not) has been described as a trail, Respondent fails to reconcile how a portion of the Trail of Dreams might be located within the Imperial Project site, which according to most of the ethnographic accounts, was known to contain portions of a trail system (sometimes referred to as the "Indian Pass trail system").[242]

.[243] In fact, the Indian Pass trail system is believed to be the same general system that was found running through the Mesquite mine.[244]

---

religious beliefs of the Quechan – the Tribe failed to object (to BLM, BIA or Glamis) while Glamis openly proceeded with its drilling activities and investments from 1988 through 1996.

241 *See* Woods (1986), Table 1, Table 3, and Map 3, Claimant Ex. 315.

242 Schaefer and Schultze (1995), at 12 (at GLA035772), Claimant Ex. 318 (referring to the "Indian Pass trail system").

243 *See, e.g.,* Schaefer and Shultze (1995), at 35 (at GLA035795), Claimant Ex. 318 ("The trails in the project area are part of one of the more important networks that remains only partially known from ethnohistoric sources. . . ."); *see also* Schaefer and Schultze (1995), at 29, Claimant Ex. 318 ("[T]he Indian Pass trail system was a major corridor from .."). The artifacts present along this trail system are all consistent with the use of the region by travelers along this route. *See* von Werlhof (1988), at 68 (at MV26598), Claimant Ex. 316.

244 Schaefer and Schultze (1995), at 34 (at GLA035794), Claimant Ex. 318 (explaining that the Indian Pass trail system is linked to the "trail found running through the Mesquite Mine area").

131. Moreover, Respondent's arguments ignore that prior studies have documented a well-known trail near, the Project area,

[245]

."[246] This is entirely consistent with a description of the Trail of Dreams offered by the Quechan, who have explained that there are two main branches of the *Xam Kwatcan* Trail: one is the Trail of Dreams and the other is the Medicine Trail

[247]

[248]

According to the Quechan, the junction of the two trails is marked by

[249]

---

245 No portion has been identified or thought to exist within the Imperial Mine area. *See* Jackson Underwood & James H. Cleland, *Trails of the Indian Pass Area, Imperial County, California* (July 1998), at 33 (at MV00907), Claimant Ex. 323 ("The other major trail at this [Running Man] geoglyph . Rogers called this the 'Mohave Trail' or 'Mohave War Trail'. . This trail does not head toward the Project mine and process area and, consequently, it was not investigated during the course of the present trails reconnaissance.

.").

246 Schaefer and Shultze (1996), at 41 (at GLA035232), Claimant Ex. 319.

247 KEA Environmental, *Where Trails Cross: Cultural Resource Inventory and Evaluation for the Imperial Project* (Draft, Oct. 1997) at 295 (at GLA034138), Claimant Ex. 321; KEA Environmental, *Where Trails Cross: Cultural Resources Inventory and Evaluation for the Imperial Project* (Dec. 1997) at 292 (at AG003046), Claimant Ex. 322.

248 Draft October 1997 KEA Report, at 292 (at AG003046), Claimant Ex. 321.

249 *Id.* It is also consistent with Boma Johnson's finding in 2001 . *See* Johnson (2001), at 40 (at MV035115), Claimant Ex. 326.

132. In contrast to descriptions of each of the two main branches of the *Xam Kwatcan* Trail offered by the Quechan, the trail segments found within the Project site are repeatedly identified in the literature

.[250] Because these segments are thought to be part of the Indian Pass trail system,

they do not meet the Quechan's description

.[251]

133. Studies published since 1997 have drawn just this conclusion. A 2001 study assumed that the trail segment at the Running Man site – but not in the Imperial Project mine area – is part of the *Xam Kwatcan* Trail network.[252] That study, completed by Boma Johnson as part of the North Baja Pipeline Project, places the branch of the *Xam Kwatcan* along the same route

as that mapped by Woods *et al.* (1986).[253]

---

250 *See, e.g.*, Schaefer and Schultze (1995), at 35 (at GLA035795), Claimant Ex. 318 ("The trails in the project area are part of one of more important networks . . . that contains substantial archaeological confirmation as a major transportation route."); Schaefer and Pallette (1991), at 25, Claimant Ex. 317 ("

. . . The Indian Pass trail system was an important, will [sic] recognized, route for the Quechan of the Colorado River.").

251 Even viewing the 1997 cultural resources in isolation, it is at best ambiguous about where the Trail of Dreams runs. A reasonable reading of that study is that the trail at the Running Man site (sometimes referred to as the Mohave War Trail), is a branch of the *Xam Kwatcan* trail. *See* Schaefer and Schultze (1995), at 23 (at GLA035783), Claimant Ex. 318 (referring to the "Mojave War Trail"). In a declaration attached to the Counter-Memorial, Dr. Cleland claims that all references in the report to the Trail of Dreams were editing errors. Now he states that the trail segment, at the Running Man site is the Trail of Dreams, and it is that trail segment that continues through the Project site.

252 Johnson (2001), at 40 (at MV035115), Claimant Ex. 326.

253 *See* Sebastian Supplemental Report at 24.

(3) There Remains Substantial Doubt That Any Additional Physical Impacts To A Trail In The Project Area Would Interfere With Quechan Religious Practices

134. Respondent claims that the Quechan expressed concern that the Imperial Project would destroy the Tribe's ability to travel along the Trail of Dreams both physically and spiritually.[254] This fails to account for other documented disturbances of the trail in the Imperial Project vicinity, and it fails to explain why the Imperial Project would have this effect when other development projects have adversely impacted portions of what has been identified as the important *Xam Kwatcan* Trail.[255] Indeed, the North Baja Pipeline, approved by Interior and California in 2002, was routed so as

;[256] and, as the figure below shows (figure 2),

which explains why Quechan Tribal members urged that it be located elsewhere.[257]

---

254 Counter-Memorial at 69. And, as explained, Secretary Babbitt's denial of the Imperial Project was premised in large part on the claim that the Project would "impair the ability to travel, both physically and spiritually" along the "Trail of Dreams." *Record of Decision for the Imperial Project Gold Mine Proposal*, at 10 (Jan. 17, 2001) (at D-00168-0001-0010), Claimant Ex. 212.

255 *See* Schaefer and Schultze (1995), at 23 (at GLA035783) , Claimant Ex. 318 (noting that a segment of trail has been "impacted by off road-vehicles" and partially "obliterated by natural erosion"); *see also* KEA Environmental (1997), Site Records attached as Appendix F (at GLA034774, GLA034781), Claimant Ex. 322 (noting that both trails have been impacted). As Dr. Sebastian has pointed out, the North Baja Pipeline was expected to impact at least two trail segments that measure 1,700 meters or longer. *See* Sebastian Report at 40. By contrast, the largest trail segment recorded in the Imperial Mine area was 1,000 meters. *See* Schaefer and Schultze (1995), at 23-24 (at GLA035783-84), Claimant Ex. 318. The site that is now claimed to be a part of the Trail of Dreams is reported as measuring approximately 675 meters in length. KEA Environmental (1997), at 188 (at AG002943), Claimant Ex. 322. *See also* Sebastian Report at 42 ("The trails at Indian Pass are not extraordinary in their length, orientation, or physical condition . . . .").

256 Sebastian Report at 40.

257 Johnson (2001), at 22 (at MV035098), Claimant Ex. 326. Despite the obvious Native American cultural resource concerns associated with the location of that pipeline and the government's acknowledgement of those concerns at that time, the government has recently approved an expansion of the pipeline that would require another 70-mile swath of the desert to be trenched in support of yet another pipeline adjacent to the original line. *See Draft EIS/EIR for the North Baja Pipeline Expansion Project* (Sept. 2006), *available at* http://www.ferc.gov/industries/gas/enviro/eis/09-22-06.asp.

Figure 2[258]

135. Moreover, despite Respondent's intimation that Glamis should have known that physical trails in the Project site are linked to Quechan dreams, as Dr. Sebastian has previously explained, nothing in the available ethnohistoric literature ties the Quechan Tribe's ability to

---

258 *See* Second Statement of Dan Purvance at Attachment 2.

experience religious dreams to a tangible path through the desert.[259] This includes any association between the dreaming process and either the *Xam Kwatcan* or the Trail of Dreams.[260] And, it cannot be overlooked that, even today, there is considerable uncertainty about where the Trail of Dreams or *Xam Kwatcan* lies, or if they are, indeed, physical trails. Boma Johnson, for example, concluded in 2001 that the Trail of Dreams was a non-physical trail.[261]

d. In Any Event, Glamis Could Not Have Known Any Of This When It Began Investing And Made Its Most Significant Investments Between 1994 And Mid-1997

136. Given that the Project area itself would not have signaled to Glamis that the property was any different from other areas in the southern California desert open to mineral exploration, and that neither the *Xam Kwatcan* nor the Trail of Dreams was expressly or impliedly associated with the Imperial Project area before 1997, there is no basis to conclude that Glamis acted unreasonably in its significant investments prior to that time. As explained in Claimant's Memorial, the types of features present in and around the Project site, and the level of significance assigned to those feature, could never have indicated to Glamis that the Project area would later be singled out for different treatment, let alone that the proposed Imperial Project would eventually be denied on cultural resources grounds or that economically infeasible backfilling requirements would be imposed to protect such resources.

---

259 Sebastian Report at 31 ("We examined the standard ethnographic sources on the Quechan. . . . None of them, however, ties successful dreaming or dream travel to important sacred places to physical trails, and none of them specifically mentions a "Trail of Dreams.").

260 *Id.* at 31.

261 Johnson (2001), at 36 (at MV035111), Claimant Ex. 326 (describing a non-physical route leading to Spirit Mountain known as the "Dream Trail").

137. Respondent's bean-counter suggestion that Glamis' case is somehow exceptional because of the numbers of resources recorded in the Project area is likewise without merit.[262] As Dr. Leshendok and Dr. Sebastian first showed in Claimant's Memorial, these resources – whether or not eligible for the National Register – are no more significant than those identified at other approved mine sites within the CDCA.[263] In fact, surveyors identified no less than 77 archaeological sites (including trails) at the Mesquite Mine, the closest operation to the proposed Imperial Mine.[264] When that Project was approved, only half of these sites could be avoided through project redesign.[265] Likewise, the Castle Mountain Mine, the Soledad Mountain Project, the American Girl Mine, and the Briggs Mine were all found to have adverse effects on prehistoric archaeological sites, yet all were approved after they adopted plans for mitigation measures as part of Section 106 compliance.[266] The Picacho Mine was also approved even though is resulted in the "destruction of a portion of the Medicine Trail."[267] This is the same Trail that was described in 1997 as a route followed by Quechan ancestors from Pilot Knob to *Avikwaame*.[268]

138. Moreover, despite the pages Respondent devotes to describing the United Nations' World Heritage Convention,[269] to this day, none of the sites identified in the Imperial Project

---

262 *See* Counter-Memorial at 71-73.

263 *See* Sebastian Report at 36-41 (discussing the identification of features and sites at other nearby projects, including Mesquite Mine and North Baja Pipeline); Leshendok Report at 37-38.

264 Sebastian Supplemental Report at 27.

265 *Id.* at 27 (noting also that 13 of these affected sites were National Register eligible or likely to be). Similarly, the Briggs Mine was approved over concerns by Native Americans that it would disturb the "sacred" Panamint Range. *See id.*

266 *Id.*

267 *Final EIS/EIR for Imperial Project*, at 5-19 (Sept. 2000), Claimant Ex. 324.

268 Baksh (1997), at 21 (at MV002744), Claimant Ex. 320.

269 Counter-Memorial at 33-35.

area have been designated for inclusion on the World Heritage List.[270] Indeed, no sites in Imperial County or the greater California Desert Conservation Area, for that matter, have even been identified for potential nomination by the U.S. Interior Department for inclusion on the World Heritage List[271] even though the United States has nominated other Native American sites for inclusion.

139. And as Glamis' Memorial detailed,[272] the Quechan Tribe itself had aggressively drilled for "bulk mineable gold" on the southern flank of the Cargo Muchacho Mountains, within two miles of Tomacho Mountain – an area of identified cultural importance to the Quechan Creation Myth in the 1986 Woods study.[273] Contrary to Respondent's unfounded assertions,[274] the area chosen by the Quechan had not been extensively mined: it was largely undisturbed and the closest mine (the American Girl Mine) was over three miles away.[275] The fact remains that this government-funded exploratory effort by the Quechan Tribe in an area at least as culturally significant as what was known about the Imperial Project site is wholly inconsistent with the claims today that Glamis could not reasonably have expected its Plan of Operations to be approved or that Glamis should have known that complete backfilling would be required.

140. Finally, the Quechan Tribe's own statements in opposition to the Imperial Project belie Respondent's argument that the Project area contains the kinds of unique cultural features on which the United States could base its denial. They reveal simply that by the time the

---

270 *See* List of World Heritage Sites, http://www.cr.nps.gov/worldheritage/list.htm.

271 *See* 47 Fed. Reg. 19648, as amended in part by 55 Fed. Reg. 33781; National Park Service website, *Potential U.S. Nominations from the Tentative List,* http://www.cr.nps.gov/worldheritage/list1.htm.

272 Memorial at 73-78.

273 Woods (1986), at Map 3, Claimant Ex. 315.

274 Counter-Memorial at 238, n. 1035.

275 Second Statement of Dan Purvance at 3-4.

Imperial Project was poised for approval, the Tribe was no longer willing to accept the same types of disturbances that had occurred at other sites. According to the Quechan Tribal Historian Mr. Cachora, who testified against the Imperial Project at a hearing in February 1997:

> We accepted the three mining companies that are there [Mesquite Mine, Picacho Gold Mine, and Tumco]. We thought this would suffice everything. We even let some of our materials that were important to us be destroyed. These are numerous rock alignments in the Mesquite Mine facility at that time. . . . But at the time I said, go ahead and do that, because we have others that we can use in time. But evidently the three wasn't enough. . . . At this time I think I am not going to sit down and say yes, go ahead and do it, anymore.[276]

Thus, Glamis could not have known that that the Imperial Project would become the Tribe's last stand, and that a sympathetic government apparatus would ultimately prevent the Project from going forward.

2. Respondent's Arguments Regarding "Specific Assurances" Ignore The Facts And Misstate The Law

141. Under NAFTA and international law, the investor's receipt of "specific assurances" and the state's later abrogation of those assurances are not independent, stand-alone prerequisites for a *prima facie* showing of indirect expropriation. Rather, the presence (or absence) of such assurances is just one of the factors to be considered in evaluating the overall reasonableness of an investor's expectations. As Professor Wälde notes,

> [Reasonable] expectations may be triggered by specific assurances, but can also be formed by a reasonable view of the general legal system applicable; such a reasonable view – the investor's "legitimate expectations horizon" will generally be based on the legal system as it is

---

[276] Lorey Cachora's Testimony, attached as Appendix B to Baksh (1997) (Feb. 13, 1997), at 23-25 (at MV002812-14), Claimant Ex. 320; *see also* Notes from Government to Government Meeting: State Director Ed Hastey and Fort Mojave Quechan Tribe (Dec. 16, 1997) (at D-00376-0079-0002), Claimant Ex. 96 (recounting Mr. Cachora's remarks that he "knew one day it would come to this and it's sad it came through Chemgold's operation" and that "the tribe met and finally said no").

> generally and professionally understood, including established standard administrative practices and the dominant interpretation of the law.[277]

142. International arbitral precedent on this issue confirms the role of specific assurances as contributing to an investor's reasonable expectations. In *Feldman*, for example, the tribunal pointed out the absence of specific commitments made to the claimant – however, this was significant only in the context of the claimant's business activity which, as discussed *infra*, fell afoul of a specific, pre-existing legal requirement.[278] Much of the claimant's case in *Feldman* was predicated on its argument that the Mexican government had waived this requirement, but the tribunal found insufficient evidence to support this assertion.[279] The *Feldman* panel did not dismiss the claim because of the absence of specific assurances *per se* (though this is Respondent's characterization of the decision),[280] but rather found that in the context of this requirement, the claimant could not demonstrate that its pursuit of the venture was *reasonable* absent some indication from the government that an exception to the pre-existing law would be permitted. Thus, the tribunal noted,

> [A] *reasonable person*, given the complex and exacting nature of tax laws and regulations, and the ambiguity of statements by and correspondence with [government] officials, should have sought expert tax counsel if it was not already available to him. Had this occurred, the Tribunal doubts that any competent tax attorney would have confirmed the Claimant's right to rebates in the absence of proper invoices showing the tax amounts separately … *given the text of Article 4 of the IEPS law and the lack of apparent legal authority on part of [government] officials to waive this requirement*.[281]

---

277 Wälde Report at III-49.

278 *Feldman* Award ¶ 119.

279 *Id*. ¶¶ 125-128.

280 Counter-Memorial at 184.

281 *Feldman* Award ¶ 132 (emphasis supplied).

In other words, it was *unreasonable* for the claimant to proceed under the assumption that a specific legal requirement would be waived absent some indication that such a waiver was forthcoming and within the authority of the relevant officials.

143. Although customary international law does not require a showing of "specific assurances" and state abrogation of those assurances, Respondent nevertheless reads in such difficult requirements, noting that "Glamis has not cited a single international law authority in which a bona fide regulation in the public interest, such as California's reclamation measures, has been deemed expropriatory in the absence of specific assurances to the investor that were abrogated by later regulation."[282] This statement is problematic on multiple levels: first, the contention that the full backfilling mandate was a "bona fide regulation in the public interest" is unsustainable, as discussed below. Second, the statement incorrectly implies that the absence of "specific assurances" precludes the possibility of a regulatory taking rather than just being a consideration in the tribunal's evaluation of Glamis' reasonableness.

144. In the instant case, as discussed *infra* and in its Memorial, Glamis' expectation that it would be able to mine at the Imperial site was reasonable based on its understanding as to the Quechan Tribe's position on the Imperial Project area, its understanding of the applicable standards governing BLM permitting of mining plans of operations, and its understanding of applicable state reclamation and mitigation requirements. Respondent states that Glamis "received no specific assurances that measures protecting Native American sacred sites, or implementing SMARA's reclamation requirements, would not be applied to its proposed Imperial Project."[283] This, of course, turns the analysis on its head – the pertinent question is not

---

282 Counter-Memorial at 181.

283 *Id.*

whether Glamis received a specific indication that no such measures would be enacted, but rather whether Glamis was reasonable in its view, informed by the applicable law and regulations, that such measures would not result in the full devaluation of its property rights.

145. Similarly, Respondent's argument that "Glamis had no reason to conclude from the fact that Congress had not specifically withdrawn the land on which the Imperial Project was located that the lands would be free from regulation in perpetuity" entirely misses the point.[284] The issue is not whether the non-withdrawal of the lands rendered them "free from regulation in perpetuity," but rather whether the facts that (1) the Imperial Project area remained subject to mineral exploration and operations under the CDPA; and (2) the CDPA included a "no buffer zone" provision contributed to Glamis' reasonable expectation of being able to mine at the Imperial site.[285] As discussed at length above, in Glamis' Memorial, and the submissions of its Dr. Sebastian and Mr. Leshendok, Glamis' view in that regard was entirely reasonable. In this regard, Respondent's reliance on the *Reeves v. United States* decision is misplaced, as that case featured a denial of a mining plan of operations in an area that had been designated a "Wilderness Study Area" (and therefore subject to a statutory non-impairment standard) *prior* to plaintiff's acquisition of its mining claims.[286] Thus, at the time of their acquisition of the mining claims, the plaintiffs in *Reeves* had a reasonable basis on which to conclude that mining in the relevant area might well be prohibited – Respondent can identify no such basis in this case.

---

284 *Id.* at 187-188.

285 A more detailed discussion of the import of the "no buffer zone" appears below.

286 *See* Memorial ¶ 475, citing *Reeves v. United States*, 54 Fed. Cl. 652, 669 (2002) (noting that "status of the land as a WSA continues to this date, and Congress has not made a final determination regarding the . . . WSA's suitability for wilderness protection. Therefore, the area in which plaintiffs' mining claims are located remains subject to the nonimpairment standard.").

3. The Fact That The Mining Industry Is Highly Regulated Does Not Excuse The Government From Responsibility For The Expropriation Of Glamis' Property Interests

146. As detailed in Glamis' Memorial, the mandatory complete backfilling requirement that California implemented is unprecedented. Behre Dolbear's report highlights the novelty of the California regulations, noting that

> At the time the California regulation was adopted, Behre Dolbear is not aware of any other similar law for base and precious metal mines in the United States, Canada, Mexico, or the rest of the world. Behre Dolbear's conclusion in this regard is supported by over 30 years of experience valuing hundreds of open pit base and precious metal mining projects throughout the world.[287]

147. Respondent is unable to rebut this assertion, and in fact it does not attempt to do so. Instead, it engages in analytical sleight of hand, asserting, for example, "As early as 1996 . . . the California Department of Conservation specifically notified Glamis that it would consider requiring Glamis to backfill all three pits in the Imperial Projects."[288] Once again, Respondent has played loose with the facts – both of the exhibits it cites to support this statement are intra-agency correspondence, and neither indicates that it was shared with Glamis. Even if they had been, the reference to backfilling is in the context of evaluating safety and end use. In both exhibits, the reference is to considering backfilling without any suggestion that it should be mandatory or that other mitigation measures could not resolve the identified concerns. In short, nothing from these internal California documents would have alerted Glamis to the possibility of a legislated seismic shift to require complete backfilling without any scientific study of the need for, or feasibility of, that new approach.

---

[287] Behre Dolbear's Response at 2, n.1.

[288] Counter-Memorial at 192, n. 856 (citing two exhibits: 7 FA tab 11 and 7 FA tab 15).

148. Respondent contends that because the mining industry is highly regulated, a "reasonable investor would have anticipated the possibility of regulatory changes."[289] In support of this proposition, Respondent again points to the reclamation requirements embodied in SMARA, noting that "Glamis could not have had any reasonable expectations that California would not regulate to ensure compliance with SMARA's reclamation standard."[290] First, this statement implies a congruence between SMARA's reclamation standard and California's mandatory complete backfilling requirement which, as discussed above, does not exist. More to the point, as in its discussion of specific assurances, Respondent has misstated the issue, which is whether Glamis should reasonably have expected that compliance with SMARA at the Imperial Project would involve mandatory complete backfilling.

149. Respondent also refers to California as being "at the forefront of environmental and health and safety regulation," arguing that California's predisposition toward such legislation could have informed any prudent investor that mandatory and complete backfilling would be imposed. The difficulty is, putting that *post hoc* justification aside, SB 22 was not conceived as either an "environmental" or a "health and safety" regulation. Indeed it could not possibly be either, since there was never any technical analysis – formal or informal – of the environmental or health and safety impact of mandatory complete backfilling for metallic mines alone. If there is an environmental or a health and safety threat of leaving an open pit, it is equally applicable to all types of open pits, including the significant borate open pit in Kern County (in the CDCA).[291] In this regard, Professor Wälde notes that

---

289 *Id.* at 190.

290 *Id.*

291 *See* Memorial ¶ 138.

> the statements by the governor, the statements accompanying the "emergency regulations", and the final regulations indicate that the key motivation was not to improve the environmental quality of the mine development given that the measures were not based on a professional environmental assessment of the mine development plan, of the prior repeated studies on cultural heritage, of the environmental impact assessment, or of de-commissioning plans.[292]

150. Still, while Respondent would have the Tribunal ignore the express purpose of SB 22 – Respondent itself leaves little doubt as to what was motivating the legislature, noting in its Counter-Memorial that the regulations were enacted to "accommodate Native Americans' religious freedoms" and to "preserve sites of historic and cultural significance. . . ."[293] In short, SB 22 was unrelated to environmental or health and safety concerns, and instead was designed solely to protect (alleged) significant cultural resources. Yet, as Glamis has repeatedly established and as Dr. Sebastian's reports confirm, based on the information available, there was no way for even the most prudent of investors to recognize that so-called cultural-resource protection would yield an expropriation of Glamis' Imperial mining claims.

151. As with its discussion of "specific assurances," Respondent's characterization of the mining industry (particularly in California) as "highly regulated" is an effort to create an exception to its NAFTA obligations not contemplated by either international law or NAFTA itself. Respondent does not provide any precedential support for its implicit conclusion that expropriations are somehow excusable where an industry is regulated. Nor does Respondent's contention that the high degree of regulation compromised Glamis' reasonable expectations withstand even minimal scrutiny. First, Glamis is a seasoned mining operator whose familiarity with the mining law and regulations was bred by many years of experience, including two

---

[292] Wälde Report at III-83.

[293] Counter-Memorial at 202.

decades of mining in the California desert. Its experience with precisely the regulations Respondent identifies were a substantial component of the basis for its expectations; the fact that Glamis could not foresee the enactment of a *de facto* prohibition of its mining activity at the Imperial site cannot possibly render Glamis' expectations unreasonable. Respondent's argument in essence requires Glamis to have recognized that even though it met the robust regulatory protections for health, safety, environmental, and cultural resource interests already in place -- and even though those robust regulatory protections were applied both before and after the Imperial Project to approve the Baja Pipeline as well as the American Girl, Mesquite, and other area mines -- the Government may freely, and at any time, rely on its authority in any one of those regulatory areas to expropriate Glamis' property. No reasonably prudent investor could be expected to infer that possibility. In sum, the fact that the mining industry is highly regulated did not and could not have caused Glamis to reasonably believe that a mandatory full backfilling requirement would be forthcoming, or that it would not be able to realize the value of its Imperial mining claims.

4. Glamis' Reasonable Expectation Of Mine Approval Without Complete Backfilling Was Supported By Federal And State Administration Of Relevant Mine Reclamation Requirements Which Were Consistent With The 1979 And 1999 Findings Of The National Academy Of Sciences/National Research Council

152. Respondent contends that the California complete backfilling regulatory requirements "were a reasonably foreseeable development in the context of California's regulation of mining."[294] Yet in evaluating Glamis' reasonable-investment backed expectations, it bears re-emphasizing that the pertinent federal and state laws, as administered by the applicable agencies, provided the company with the reasonable understanding that its Imperial

[294] *Id.* at 191.

Project would be approved without complete backfilling. To that end, a select few of those well-developed regulatory programs (described more fully in the Memorial[295]) are discussed here.

153. First, Respondent's Counter-Memorial does not address BLM's governing CDCA Plan, promulgated in 1980 pursuant to FLPMA, which specifically provided that mitigation requirements for any project on Class L lands (such as the Imperial Project and Picacho Mine) would be "*subject to technical and economic feasibility*."[296] Under this standard, as discussed *infra*, not one of the many open-pit mines operating either inside or outside of the California Desert had ever been subjected to complete mandatory backfilling prior to December 2002.[297] Section 601(d) of FLPMA specifically mandated that Interior "*prepare and implement*" the CDCA Plan.[298]

154. The CDCA Plan was one only one important piece of the regulatory framework bearing on Glamis' reasonable expectations at the time it began investing in the Imperial Project. As explained in the Memorial, BLM's 43 C.F.R. Subpart 3809 regulations, which were first promulgated in 1980, interpreted FLPMA's "unnecessary or undue degradation" standard to mean that the Interior Secretary "is authorized and required to take some steps to prevent or minimize those environmental impacts due to mining activity which are avoidable. However, it does not go so far as to authorize him to take steps to prevent any and all impacts."[299] Thus,

---

295 Memorial at 18-44.

296 BLM, *The California Desert Conservation Area Plan,* at 18 (1980), Claimant Ex. 12. *See generally* Leshendok Expert Report.

297 The California Desert Conservation Area has been the site of numerous open-pit mines producing gold and other minerals for decades. Indeed, Imperial County itself is one of five counties in the State of California with the largest number of mines regulated by SMARA. *See generally* 2002 Cal. Legis. Office Report, Claimant Ex. 325.

298 43 U.S.C. § 1781(d) (emphasis added).

299 BLM, Final EIS, *Surface Management of Public Lands Under the U.S. Mining Laws*, at 8-5 (Aug. 1980), Claimant Ex. 13; Memorial at 35; *see also* 1980 EIS at 5-1 ("even well regulated, carefully conducted (continued…)

Glamis had no reason to suspect that any cultural resources identified in or near the Project site and vicinity, *regardless* of their alleged uniqueness, could or would eventually form the linchpin of a federal effort to prevent approval of the Project. The preamble to those BLM regulations specifically stated that: "*If, upon compliance with the National Historic Preservation Act, the cultural resources cannot be salvaged or damage to them mitigated, the [mining] plan must be approved*."[300] The CDCA Plan was in full accord with this statement, which in turn was fully in accord with the National Historic Preservation Act, 16 U.S.C. § 470. That Act provides only a *consultation procedure* to review and identify options to protect historic and cultural resources, *but does not impose substantive restrictions upon federal agencies*.[301]

155. Glamis' expectations were reinforced by the relatively recent Interior Department's rulemaking action on October 30, 2001 (66 Fed. Reg. 54,834), rescinding the newly created discretionary authority to deny mine proposals on the basis of "substantial irreparable harm" ("SIH") to "significant scientific, cultural, or environmental resource values of the public lands that cannot be mitigated . . . ."[302] The rescission was justified on the grounds of "basic fairness," and because "it would be very difficult to implement the standard fairly as it relates to significant cultural resource values. . . ."[303]

156. Glamis submitted its Plan of Operations to BLM immediately after, and in accordance with, the landmark actions of the U.S. Congress in the 1994 California Desert

---

mining activities will result in some degree of conflict and unavoidable adverse impacts to resources other than mineral, such as range land, recreation, wildlife, etc.") and 9-33 ("applicable laws do not authorize denial of mining activities because of unavoidable impacts.").

300 45 Fed. Reg. 78,902, 78,905 (Nov. 26, 1980) (emphasis added).

301 Memorial ¶¶ 55-61, 102.

302 *See id.* ¶ 76.

303 *Id.*

Protection Act which, following BLM's recommendations, designated the Indian Pass Wilderness and the Picacho Peak Wilderness as important to be permanently preserved for Native American cultural values and environmental preservation values, while guaranteeing Native Americans access to those pristine wilderness areas for religious purposes, *but expressly confirming that lands outside those areas like the Imperial Project area were to be open for multiple use activities, including mining, "without protective perimeters or buffer zones*."[304] Congress clearly expressed its intent that "the fact that a mining operation can be seen or heard from a point within a wilderness area is not sufficient to impose restrictions on that mining operation that are not the result of applicable law."[305]

157. Respondent mischaracterizes Glamis' position when it asserts that the "'no buffer zone' language provided it with reasonable expectations that *the Imperial Project would not be subject to any future regulatory requirements*."[306] Glamis has never made such a contention. The significance of the 1994 California Desert Protection Act is that it was the culmination of a nearly two-decade federal land use planning process through which BLM and the U.S. Congress, in consultation with Native Americans, determined which lands in the California Desert were to be designated and set aside for permanent wilderness preservation and which lands were to remain available for multiple use development including mining.[307] It is undisputed that the Imperial Project lands were never recommended by BLM to be placed in a Wilderness Study Area ("WSA") – where it would be subject to FLPMA's most stringent "*non-impairment*"

---

304 *See id.* ¶ 114.

305 California Desert Protection Act of 1994, PL 103-433, 108 Stat. at 4471, 4478 (Oct. 31, 1994); H.R. Rep. 103-498 at 55 (May 10, 1994), as reprinted in 1994 U.S.C.C.A.N. 3598; Memorial ¶ 115.

306 Counter-Memorial at 186.

307 Memorial ¶¶ 111-116.

standard as in the *Reeves v. United States* litigation where a mining plan of operations was denied on that specific and limited basis. [308]

158. The landmark passage of the largest federal public land legislation in decades (second only to the 1980 Alaska National Interest Lands Conservation Act), with the "no buffer zone" language, was intended by the Congress to settle the question over which lands were available for multiple use development and which lands were to be permanently preserved as wilderness. Moreover, that "other law[s]"[309] might regulate how a mining operation would be conducted did not provide license to use such regulation – as California did here – as a subterfuge to extend and expand the protected area. Glamis could – and did – reasonably rely on the exclusion of the Imperial Project site from the designated wilderness area in making its sound exploration and mineral development investments in the CDCA.[310]

---

308 *Reeves v. United States*, 54 Fed. Cl. 652 (2002). In sharp contrast to *Reeves*, the Glamis Imperial Project was never in a WSA, and Congress confirmed the multiple use status of the Imperial Project lands when it designated other lands in the region such as the Indian Pass Wilderness and the Picacho Peak Wilderness as warranting permanent preservation as Wilderness, because of the paramount value of those other lands for environmental and scenic resources, and Native American cultural resources.

309 *See* Counter-Memorial at 186.

310 Respondent points out that in one other single case in 1990, Interior denied a mining plan of operations in the California Desert, in part, on "undue impairment" grounds. Counter-Memorial at 252 (citing *Eric L. Price*, 116 IBLA 210, 220 (1990)). However, that aberrational case is readily distinguishable from the Glamis Imperial Project, because the "proposed [Eric Price] project is located within lands identified as Class C (Controlled Use) on the CDCA Plan Map and recommended as suitable as wilderness." 116 IBLA at 213. Under the CDCA Plan, Class C lands were classified as "Wilderness" and were unavailable for multiple use mining in sharp contrast to the Class L multiple use lands at the Glamis area. Accordingly, BLM's CDCA Plan standard for mining on Class L lands of setting mitigation conditions "subject to economic and technical feasibility," was not applicable to the *Eric L. Price* lands, though it plainly was applicable to the Glamis lands, which BLM always has designated as Class L, and which BLM never recommended for wilderness designation. In *Eric L. Price,* BLM found that the proposed mine would "impair the wilderness suitability" of the Class C lands "[b]y creating impacts substantially noticeable from within WSA 355 . . . and by impairing wilderness suitability within a portion of the Class C . . . boundary (which defines the boundary of optimum wilderness manageability). . . ." 116 IBLA at 219-220. Although the IBLA (but not BLM) referred to FLPMA's "undue impairment" standard in the course of upholding BLM's decision, the case result was dictated by the governing CDCA Plan provisions. Moreover, the case was decided against the pending backdrop of the active congressional consideration of the BLM's wilderness recommendations, as resolved in the 1994 California Desert Protection Act, with permanent Wilderness designations and "no buffer" language ensuring that multiple use development was authorized outside designated Wilderness areas, regardless of whether impacts could be seen from Wilderness areas.
(continued…)

159. Other regulations bearing on Glamis' reasonable investment-backed expectations included California's SMARA, which itself recognized that mineral extraction is "essential" to the economic health "of the state and to the needs of society."[311] Even though the law states that reclamation "may require backfilling, grading, revegetation, soil compaction, stabilization, or other measures . . . ,"[312] the fact remains that before December 2002, California had never promulgated rules requiring complete backfilling nor imposed complete backfilling requirements on an open-pit mine.[313] Indeed, California counties acting as the lead agencies in partnerships with BLM have repeatedly disfavored complete backfilling in site-specific EIS/EIR analyses in the California Desert and elsewhere.[314]

160. Not only did the statutory and regulatory framework provide Glamis with the reasonable expectation that it could invest in the Imperial Project without factoring in the costs of complete backfilling of its mine, but scientific studies sponsored by the federal government itself made Glamis' investments reasonable from an industry and regulatory viewpoint. In 1979 and 1999, the National Academy of Sciences and its National Research Council ("NAS/NRC") prepared two reports at the request of the U.S. Congress, both of which strongly advised against mandatory complete backfilling as a reclamation standard for metallic mines. They concluded

---

Additionally, the IBLA case was effectively overruled by the October 23, 2001 Myers Solicitor Opinion, approved by Interior Secretary Norton, directing that the "undue impairment" standard shall not be a basis for mine denial, absent new implementing regulations.

311 CAL. PUB. RES. CODE § 2711(a).

312 *Id.* § 2733.

313 Leshendok Report ¶¶ 101-103, 165.

314 *Id*. In the case of Glamis' own Rand Mine in Kern County, California, in 1995, full backfilling was specifically rejected because "the potential loss of natural resources and economic disadvantages of maximum pit backfilling appears to be substantially greater than the potential environmental advantages" of that option. As BLM and Kern County explained: "Backfilling essentially doubles the costs of loading and hauling material, potentially making an otherwise profitable mine operation uneconomical to develop and operate." Record of Decision, Rand Project, at 6 (June 9, 1995), Claimant Ex. 67; *see also* Memorial ¶ 137.

that the restoration of lands to approximate original contour through backfilling, "is generally not technically feasible, or has limited value because it is impractical, inappropriate or unsound."[315]

161. Respondent mischaracterizes these reports when it claims that these findings only concerned "the potential application of reclamation requirements to *existing* mines."[316] In fact, the 1999 NAS/NRC responded to "a request by Congress that the National Research Council assess the adequacy of the regulatory framework for hardrock mining on federal lands. The regulatory framework applies to hardrock (locatable) minerals – such as gold, silver, copper and uranium – on over 350 million acres of federal lands in the western United States." The study was not confined to assessing existing mines. The NAS/NRC committee was asked to identify "federal and state regulations applicable to environmental protection of federal lands in connection with mining activities . . . ," and to assess the "adequacy of statutes and regulations to prevent unnecessary or undue degradation of the federal lands."[317] The study covered the entire mining process including "exploration, mine development, mining (extraction), mineral processing (beneficiation), and reclamation (including post-closure)."[318]

162. The findings of the NAS/NRC in 1999, prepared at the request of the U.S. Congress, found also that the "*overall structure of federal and state laws and regulations that provide mining-related environmental protection is complicated but generally effective* . . . ."[319] Indeed, the NAS/NRC was concerned not only with the negative environmental impacts that backfilling may cause as the result of "delayed reclamation and habitat development," but it was also

---

315 SURFACE MINING OF NON-COAL MATERIALS (NRC, 1979) (quoted in HARDROCK MINING ON FEDERAL LANDS 82 (National Academy Press, 1999)), Claimant Ex. 169; *see also* Memorial ¶ 74.

316 Counter-Memorial at 241.

317 HARDROCK MINING ON FEDERAL LANDS 1 (National Academy Press, 1999).

318 *Id*. at 3.

319 *Id*. at 5.

concerned with the potentially degrading effect that backfilling can have on groundwater.[320] Accordingly, the NAS/NRC recommended that the feasibility of potential backfilling should always be assessed on a site-specific basis. These findings influenced the administration of federal and state reclamation laws, and they were well known within the mining industry, thereby supporting Glamis' reasonable expectations of Project approval. In fact, the Interior Department's BLM specifically relied on the 1999 NAS/NRC report in rejecting a proposed rebuttable "presumption" in favor of backfilling in a final rulemaking action in November 2000.[321]

163. Further, and of particular importance, the reasonableness of Glamis' expectations was confirmed strongly by the BLM *Mineral Report* issued by Interior on September 27, 2002: "We conclude that Glamis has found minerals within the boundaries of the 187 lode mining claims and the evidence is of such character that *a person of ordinary prudence would be justified in the further expenditure of labor and means, with a reasonable prospect of success, in developing a valuable mine*. The requirements of the mining laws of the United States have been satisfied . . . ."[322] This federal government finding was attested to by no fewer than 11 BLM minerals specialists and supervisory officials. The BLM *Mineral Report* found that complete backfilling was not economically feasible, further confirming that such a requirement would not be imposed.[323] The *Mineral Report* also found that Glamis would be justified in further expenditures with a reasonable prospect of success in developing a valuable mine at the Imperial

---

320 *Id*. at 83.

321 65 Fed. Reg. 69,998, 70,047, 70,051 (Nov. 21 2000); Memorial ¶ 73.

322 *BLM Mineral Validity Examination of the Glamis Imperial Project*, at 3 (Sept. 27, 2002), Claimant Ex. 255 (emphasis added).

323 Memorial ¶ 34.

Project, notwithstanding an express reference in the *Mineral Report* itself to the ACHP's October 19, 1999, letter to the Interior Secretary recommending denial of the Imperial Project.

164. Thus, quite apart from having a reasonable basis to believe that its Project could not go forward without complete backfilling or that cultural resources should give it any special cause for concern, the complex regulatory landscape – with which Glamis was very familiar – was nothing but positive for a company that had conformed to the requirements as they existed at the time.

E. The Character Of The Measures Further Demonstrates Their Expropriatory Nature

165. Professor Wälde establishes that "if one adopts the view of the US (including California) conduct as effecting a 'total deprivation' of Glamis property rights, then no balancing between the worthy purposes of a regulation and the intensity of the measures taken is necessary."[324] As noted above, Glamis submits that the Behre Dolbear report coupled with the "objective indicators" of value on the record here, demonstrate that the state and federal measures effected a full deprivation; as such no further inquiry is required. However, should the tribunal nevertheless conclude that evaluation of what Professor Wälde refers to as the "justifiability of a substantial economic deprivation"[325] is appropriate, that evaluation confirms that the state and federal measures are compensable expropriations.

166. Professor Wälde's opinion suggests that, as a prerequisite for the balancing process, both Glamis and Respondent must be able to demonstrate baseline factual predicates.[326] The

---

324 Wälde Report at III-66.

325 *Id.* at I-23.

326 *Id.* at I-23-24.

starting point for Glamis involves demonstrating the severity of the impact;[327] as discussed above, in the instant case the impact of the measures is maximally severe, as it fully devalued Glamis' property interests. Respondent then must show that "the public welfare purpose advanced for justifying the government measures" is legitimate.[328] In this regard, Professor Wälde notes,

> That is not only a matter of a generalizing nomination of the "sacred sites" or of asserting that the mining area would cause essential and irreparable damage to "sacred sites" vital to actual and significant Quechan religious practices, but of proving it specifically and in detail that there are "sacred sites" beyond their average distribution in the arid desert area, that these are actually used for significant religious practices and the mining area poses a specific challenge to them . . . which is substantially above disruptions already caused by other facilities.[329]

167. In fact, as shown above, there was no evidence of any specific Native American religious practices being conducted at the site and no evaluation of how destruction of one additional trail segment[330] inside the Project site (next to the West Pit, which would have been completely backfilled under Glamis' original plan) would irreparably harm the "heavily incised" segment outside of the Project site.

168. Assuming *arguendo* that Respondent could demonstrate that the policy goal is legitimate, it would also have to show a link between that policy and the measures.[331] Here, Professor Wälde observes that this link would have to explain "how the complete back-filling of the "East Pit" can avoid or minimize disruptions."[332] He explains

---

327 *Id.* at I-23.

328 *Id.* at I-24.

329 *Id.*

330 It is undisputed that much of the trail Cleland began to refer to as the Trail of Dreams was obliterated by the Indian Pass Road and off-track vehicle traffic.

331 Wälde Report at I-24.

332 *Id.*

> If the "view" from certain locations around the prospective waste rock mound to the summit of Picacho Peak (or Indian Pass) is the only tangible improvement brought by the back-filling requirements, then the Respondent has to prove that this aspect is truly central to the precisely specified religious practices.[333]

Again, Respondent cites nothing, and there is nothing, in the cultural-resource record to cite from that could carry this burden.

169. Assuming *arguendo* that Respondent could make these baseline showings, the tribunal would then undertake a balancing test that would evaluate the measure's proportionality (including "least restrictiveness" and "suitability")[334] and also consider any "discriminatory elements."[335] Finally, if the measures could be fully justified under these tests, Respondent would have to show that the measures have not resulted in a disproportionate burden being placed upon Glamis. As noted above, Respondent has not demonstrated the basic factual predicates that trigger the balancing test; putting this aside, whether the tribunal focuses on the balancing test elements of proportionality and non-discrimination or on the disproportionate burden concept, the California measures are unjustified and compensation for their expropriatory effects is due.

1. The California Measures are Discriminatory

170. Even under regulatory expropriation formulations that except "police power" regulations from the usual compensation requirements, that exception is not absolute.[336] Respondent concedes (and its cited authority confirms) that under the "non-compensable police power" construction, expropriatory laws and regulations must be "non-discriminatory" to

---

333 *Id.*

334 *Id.*

335 *Id*. at I-28.

suspend the usual obligation to provide compensation for expropriated property.[337] In the instant case, even assuming that regulatory activity merits presumptive non-compensability (a proposition which is very much in doubt, as discussed below), Respondent has failed to meet the most basic requirements for that presumption to attach, as the California measures were irrefutably discriminatory.

171. Respondent, not surprisingly, expresses its preference that there be a presumption of permissible, non-compensable regulatory activity, and that the presumption should be difficult to rebut. For example, it cites a comment from 1975 noting the allegedly "necessary presumption that States are 'regulating' when they say they are 'regulating'" and another from 1962 to the effect that where the reasons set forth for an allegedly expropriatory measure are "plausible, search for the unexpressed 'real' reasons is chimerical."[338] These comments aside, Respondent has not provided any support for the proposition that *discriminatory* regulations under international law are excepted from the usual compensation requirements. Moreover, as to the California measures, the underlying "real reason" can hardly be said to be "unexpressed." To the contrary, as noted in Glamis' Memorial, Governor Davis was quite explicit as to the discriminatory import of the emergency regulations and SB 22 when he noted that he was

---

336 *Saluka Investments BV v. The Czech Republic*, UNCITRAL ¶ 258 (Partial Award) (March 17, 2006) (noting that "the so-called police power exception is not absolute").

337 *See* Counter-Memorial at 195-202.

338 *Id.* at 202 and n. 893. While we take no position on whether the comments by Messrs. Weston and Christie represented authoritative statements as to the state of customary international law in 1975 and 1962 (respectively), given the proliferation of BITs, the enactment of NAFTA, and the arbitral jurisprudence relied upon in this case by both parties (virtually all of which was decided post-1962), we do question the extent to which they are authoritative as to the current state of the law in this area.

"directing the Secretary of Resources to pursue all possible legal and administrative remedies that will assist in stopping the development of the Glamis gold mine."[339]

172. In its Memorial, Glamis identified a number of ways in which the California measures were discriminatory, including

- As in the *Whitney Benefits* case and a number of other U.S. takings cases that found discrimination, the measures here were "enacted, at least in part, specifically to prevent the only economically viable use of the property;"[340]

- Glamis' Imperial Project was identified as the sole basis for the "emergency" used to justify the issuance of the emergency backfilling regulations;[341]

- Glamis' Imperial Project was the only metallic mine in California affected by the regulations that had completed the cost and lengthy EIS/EIR process and was awaiting approval;[342]

173. In its Counter-Memorial, although Respondent refers to the California legislation and regulations as "non-discriminatory, of general applicability, and . . . enacted for the public welfare,"[343] it does not rebut, or even attempt to rebut, a single one of these factual showings. Instead, Respondent raises tepid challenges to the conclusions that Glamis draws from these facts. For instance, Respondent makes the puzzling argument that the Governor's acknowledgment that the legislation and regulations were targeted at the Imperial mine do not justify the "inference" that the regulation was not of general applicability.[344] Citing the injury from the Imperial Project "and other projects like it" (none of which were ever identified), Respondent asserts that merely

---

339 Memorial ¶ 366 (citing Governor Gray Davis, *Signature Message for SB 483* (Sept. 30, 2002) (at AG000587), Claimant Ex. 257.

340 Memorial ¶ 503 (citing *Whitney Benefits*, 18 Cl.Ct. at 407).

341 *Id.*

342 *Id.*

343 Counter-Memorial at 202.

344 *Id.* at 203.

because "Glamis's proposed Imperial Project might have been the mining project most immediately affected by SB 22 does not make the bill discriminatory. . . ."[345] This, however, misses the point – the law and regulations were not discriminatory only because Glamis' property was the only one affected (although that is significant); more importantly, they were discriminatory because Glamis' property was the only one *targeted*.[346]

174. Respondent attempts to distinguish *Metalclad* and *Whitney Benefits* on the ground that the measures at issue in those cases applied only to a "specific parcel of land" and a "particular type of property," respectively.[347] In light of the undisputed targeting of the Imperial project and the law and regulations' exclusive application thereto in this case, that distinction is simply not meaningful.

175. The majority of Respondent's discussion about the character of the California measures is devoted to demonstrating that *bona fide*, non-discriminatory regulations are not subject to Article 1110's compensation requirements. As a legal matter, that analysis is incorrect

---

345 *Id.* Respondent simply ignores Glamis' explanation of how the legislation was narrowly drafted to ensure that it affected only the Glamis Imperial Project. *See* Memorial ¶¶ 371-376.

346 Respondent points out the recent application of the full backfilling requirements to the Golden Queen Mining Company's Soledad Mountain mine as indicative of the regulations' general applicability. Counter-Memorial at 101-103, 206. This point is unavailing – the statute and regulations were specifically designed to affect, and did uniquely affect, the property of a single party. That they also had some effect on others well after the fact is irrelevant to the question of whether they were discriminatory as enacted. In any event, Respondent fails to point out that the Golden Queen Mining Company recently filed a petition to amend the mandatory complete backfilling and site recontouring regulations to exempt the Soledad Mountain mine. *See* Letter from James Good to the California State Mining and Geology Board (Sept. 7, 2006), Claimant Ex. 337. In addition, Respondent's assertion that Golden Queen was unconcerned about the costs associated with complete backfilling is disingenuous; in the very hearing that Respondent cites, Golden Queen's counsel specifically stated that he was "not [there] to talk about whether backfilling is a good idea, or what the policy should be with respect to backfilling by the state, or any of those issues." *See* Statement of James Good, SMGB Meeting (July 13, 2006), Claimant Ex. 336.

347 Counter-Memorial at 200-201.

as discussed below, but even if it were correct, it would avail Respondent of nothing given that the unrebutted facts demonstrate that the law and regulations were discriminatory.[348]

2. The California Measures Disproportionately Burden Glamis

176. Both Professor Wälde (in the international law context) and Mr. Olson (in the U.S. takings law context) note the requirement that an otherwise permissible regulation not disproportionately burden individuals such that they be required "to bear public burdens which, in all fairness and justice, must be borne by the public as a whole."[349] Professor Wälde concisely summarizes the concept as

> cases where an investor/owner is made to bear a "disproportionate burden" or make a "special sacrifice" for the interests of the community at large. It relates to an individual owner/investor – or a group of owner/investors – who are required to give up their property so that a more important public interest can be achieved.[350]

177. Professor Wälde's opinion cites *SPP v. Egypt* as an example.[351] In that case, the Egyptian government withdrew the approval of a (hotel) construction project near Cairo, following the discovery of antiquities at the construction site, and it subsequently rezoned the site from a commercial tourism use to a public land use.[352] In laying out the framework for its legal analysis, the tribunal noted,

> Clearly, as a matter of international law, the Respondent was entitled to cancel a tourist development project situated on its own territory for the

---

348 *See* Wälde Report at III-98 concluding that "there are pertinent indicators which point towards the presence of discriminatory elements in the treatment of Glamis, a company squeezed in the most economically disadvantageous position, exposed to regulatory surprise and targeted – as is now acknowledged – because of its "proximity to the Quechan sites").

349 Wälde Report at I-26 and Olson Report ¶ 39 (both citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

350 Wälde Report at III-76.

351 *Id.* at III-78 (citing *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt* ("*SPP v. Egypt"*) (May 20, 1992) (reprinted in 32 I.L.M. 933 (1993)).

352 *SPP* Award, 32 I.L.M. at 948.

> purpose of protecting antiquities. This prerogative is an unquestionable attribute of sovereignty. The decision to cancel the project constituted a lawful exercise of the right of eminent domain. The right was exercised for a public purpose, namely, the preservation and protection of antiquities in the area. Nor have the Claimants challenged the Respondent's right to cancel the project. Rather, they claim that the cancellation amounted to an expropriation of their investment for which they are entitled to compensation under both Egyptian law and international law.[353]

178. The tribunal then concluded that the cancellation of the project did indeed effect an expropriation.[354] As Professor Wälde points out, that determination is instructive here – not unlike the Egyptian government's effort to protect antiquities, the state of California opted to "accommodate Native Americans' religious freedoms" and to "preserve sites of historic and cultural significance . . . ."[355] The point is that California may be well within its rights to do this, as Egypt was, but that does not absolve it of its obligation to provide compensation, as the *SPP* tribunal concluded.

3. That Actions Are "Regulatory" Does Not Mean That They Are Not Expropriatory

179. Respondent's primary defense of the justifiability and character of the California measures is that they were non-discriminatory regulations and therefore not subject to expropriation compensation requirements. Respondent thus asserts, "[U]nder international law, where the action is a non-discriminatory regulation, it will not be deemed expropriatory under ordinary circumstances."[356] As noted above, however, the record of this case clearly shows discrimination against Glamis and its Imperial project. Because there are no non-discriminatory

---

353 *Id.* at 967.

354 *Id.* at 968-69.

355 Counter-Memorial at 202.

356 *Id.* at 197.

regulations at issue, the Tribunal need not reach the question of whether such regulations are compensable where they effect an expropriation.

180. Still, even if the tribunal were to characterize the law and regulations as non-discriminatory, as a matter of international law, there is substantial doubt as to whether such regulations are immunized from the normal presumption that states must pay just compensation where they expropriate investors' property.[357] The majority of investment treaties, including NAFTA, the Energy Charter, and most bilateral investment treaties, contain no language about or exception for non-compensable regulations.[358] After all,

> Is not the State in both cases (that is, either by a taking for a public purpose, or by regulating) purporting to act in the common good? And in each case has the owner of the property not suffered loss? Under international law standards, a regulation that amounted (by virtue of its scope and effect) to a taking, would need to be "for a public purpose" (in the sense of in the general, rather than for a private, interest). And just compensation would be due.[359]

181. Contemplating the role of "public" regulation, the *Pope & Talbot* tribunal pointed out that "much creeping expropriation could be conducted by regulation, and a blanket exception for regulatory measures would create a gaping loophole in international protections against

---

357 We note that Respondent cites five "respected commentators" who allegedly share the view that "measures taken in the pursuit of a State's 'political, social or economic ends' do not constitute a compensable expropriation." Counter-Memorial at 198 (citation omitted). In regard to these commentators' views (listed in footnote 878 of Respondent's Counter-Memorial), we would note that the first three were written between 1953 and 1962, *i.e.*, over thirty years prior to the enactment of NAFTA, not to mention virtually every international expropriation decision cited by either party. As such, their continuing authority is in some doubt. The fourth reference is limited to circumstances in which a measure affects a property interest "considerably" but does not address the complete deprivation effected by California's measures here. Finally, the fifth reference, which argues that environmental protection is definitively non-compensable, is off-point, because (1) the legislation at issue here was not "environmental" in nature as discussed *infra*; and (2) the comment was written in 1994, prior to any interpretation of NAFTA's Article 1110. Moreover, both academic commentators and tribunals have rejected this view in the context of both international law generally, and NAFTA in particular, as discussed below.

358 OECD, *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, OECD Working Papers on International Investment, 2004/3), at 6-7.

expropriation."[360] Similarly, the Iran-US Claims Tribunal in *Phelps Dodge* noted that "The Tribunal understands the economic and social concerns that inspired the law pursuant to which [the respondent] acted, but those reasons and concerns cannot relieve the Respondent of the obligation to compensate [the investor] for its loss."[361]

182. In the recently decided *ADC v. Hungary* case, the tribunal squarely addressed the issue of what role the state's "right to regulate" plays in the context of investment protection, noting,

> It is the Tribunal's understanding of the basic international law principles that while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. As rightly pointed out by the Claimants, the rule of law, which includes treaty obligations, provides such boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment-protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate.[362]

183. In the instant case, the U.S. was bound by the investment protections afforded by Article 1110 of NAFTA, which states at part (1) that

> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis;
>
> (c) in accordance with due process of law and Article 1105(1); and

---

359 Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 R.C.A.D.I. 259, 331 (1982).

360 *Pope & Talbot Inc. v. Canada*, NAFTA/UNCITRAL, ¶ 99 (Interim Award) (June 26, 2000).

361 *Phelps Dodge Corp. v. Iran,* Award No. 217-99-2, 10 Iran-U.S. C.T.R. 121, 130 (Mar. 19, 1986).

362 *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, ¶ 423 (Award) (Oct. 2, 2006) (emphasis supplied).

(d) on payment of compensation in accordance with paragraphs 2 through 6.[363]

184. To argue, as Respondent does, that regulations that are non-discriminatory and enacted for a public purpose are not subject to the compensation requirement effectively renders the language of sub-sections (a) and (b) meaningless.[364]

185. As noted above, the absence of any technical support – much less support for a distinction between a metallic mine pit and an open pit for industrial minerals or even gravel – belies Respondent's contention that the California measures were "environmental" regulations.[365] Yet, even if the measures could be characterized in that fashion, they would remain subject to Article 1110's compensation requirement. In that regard, a number of commentators have indicated that "public" (including environmental) regulations are subject to the compensation requirement where they effect a deprivation of property, noting for example that "the plain language of Chapter 11 undercuts the argument that regulations are non-compensable . . . NAFTA stresses the importance of environmental regulation, but not at the expense of the investor. Extending police power status to environmental legislation causes the exception to swallow the rule, and almost any regulation would be justifiable as a police power

---

363 NAFTA art. 1110(1).

364 Although the *Methanex* tribunal rejected this plain meaning view in *dicta*, that tribunal's interpretation of the provision has been roundly criticized; Professor Wälde notes that it "probably misrepresents the current state of customary international law." *See* Wälde Report at I-20, III-83.

365 As noted elsewhere, this is a key distinction between the instant facts and those at issue in *Methanex*. As Professor Wälde points out, the Methanex award upholding the regulation at stake is based on a very extensive review by the tribunal of the credibility, independence, solidity, methodology and procedural quality of the very extensive study carried out by the University of California providing a foundation for California's pro-ethanol and anti-methanol regulation. Wälde Report at III-68.

and therefore non-compensable."[366] In evaluating the appropriate measure of compensation for expropriated real property, the *Santa Elena* tribunal reasoned,

> Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.[367]

In making this finding, the tribunal echoed commentators who have noted,

> The premise that the States cannot avoid liability for expropriation by couching measures in a regulatory mode seems to *cover even those cases where the measure in question is non-discriminatory and pursued for a public purpose*... [There is] no general exception from the obligation to compensate for environmental regulation.[368]

186. The *Tecmed* tribunal explicitly rejected the idea that administrative regulations enjoy immunity from the obligation to provide compensation for expropriation.[369] The tribunal was particularly troubled by regulations that effect a full deprivation of the value of the property interest, noting that

> we find no principle stating that regulatory administrative actions are per se excluded from the scope of the [investment] Agreement, even if they are beneficial to society as a whole – such as environmental protection – particularly if the negative economic impact of such actions on the financial position of the investor *is* sufficient to neutralize in full the value,

---

366 Jeffrey Turk, *Compensation for "Measures Tantamount to Expropriation" under NAFTA: What It Means and Why It Matters*, 1 INT'L L. & MGMT. REV. 41, 69 (2005) (emphasis supplied); *see also* Ian A. Laird, *NAFTA Chapter 11 meets Chicken Little*, 2 CHI. J. INT'L L. 223, 226 (2001) (noting that a plain reading of NAFTA Article 1110 (1) supports the position that it is in fact a no-fault provision).

367 *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, ¶ 72 (Award) (Feb. 17, 2000).

368 Jack Coe, Jr. & Noah Rubins, *Regulatory Expropriation and the Tecmed Case: Context and Contributions*, INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 597 at 634, 637 (Todd Weiler, ed., 2005).

369 *Tecmed* Award ¶ 121.

> or economic or commercial use of its investment without receiving any compensation whatsoever.[370]

187. Consistent with this construction, the *Metalclad* panel specifically laid out the meaning of expropriation under NAFTA, finding that in addition to "open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title," it also includes "covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property. . . ."[371] The tribunal then applied this standard to a municipal governor's decree creating an ecological preserve that included the project area, finding that because it "had the effect of barring forever the operation of the landfill" effected an expropriation.[372] The tribunal declined to even consider whether the decree was for a public purpose or non-discriminatory, noting that "The Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree."[373]

188. Respondent attempts to distinguish that finding on the basis that the decree applied to "a specific parcel of land" and did not affect "an entire industry."[374] Respondent does not, however, provide any indication of why this is relevant to the question of whether the measures

---

370 *Id.* ¶ 121 (emphasis supplied).

371 *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, ¶ 103 (Award) (Aug. 30, 2000). Respondent's attempt to undercut this portion of the *Metalclad's* decision based on a subsequent *vacatur* by the Supreme Court of British Columbia is ill-considered. Its name notwithstanding, the Supreme Court of British Columbia is a trial-level court; the highest provincial court is the British Columbia Court of Appeal. In any event, the *Metalclad* decision reflected the views of a distinguished international arbitral panel as to its understanding of expropriation and the application of that understanding to the facts of the case. Respondent does not attempt to provide any analytical justification for the implicit assertion that the panel's views are "trumped" by those of a domestic Canadian trial court applying Canadian law.

372 *Metalclad* Award ¶ 109. As Respondent concedes, this portion of the *Metalclad* decision survived the B.C. trial court's *vacatur*. *See* Counter-Memorial at 200, n. 883 (citing *United Mexican States v. Metalclad Corp.*, 5 ICSID Rep. 236, ¶ 133 (Sup. Ct. B.C. May 2, 2001)).

373 *Metalclad* Award ¶ 111.

374 Counter-Memorial at 200.

had "the effect of depriving [Glamis], in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of [its] property,"[375] nor does it supply any precedent supporting that position.

189. Respondent makes a further attempt to distinguish both *Metalclad* and *Whitney Benefits* by arguing that unlike the measures at issue in those cases, the measures here "do not affect Glamis's mining claims."[376] Given California's express intent in passing the measures coupled with the record evidence of their full deprivatory impact, this claim is nonsensical. As the U.S. Supreme Court noted with regard to mineral rights in the coal context, "[F]or practical purposes, the right to coal consists in the right to mine it. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."[377]

190. In sum, even if Respondent could demonstrate that the regulations at issue were not discriminatory, its contention that such regulations are immune from compensation requirements where they effect an expropriation is untenable. As the *ADC* tribunal established,

> The related point made by the Respondent that by investing in a host State, the investor assumes the "risk" associated with the State's regulatory regime is equally unacceptable to the Tribunal. It is one thing to say that an investor shall conduct its business in compliance with the host State's domestic laws and regulations. It is quite another to imply that the investor must also be ready to accept whatever the host State decides to do to it.[378]

---

375 *Metalclad* Award ¶ 103.

376 Counter-Memorial at 201.

377 *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922).

378 *ADC* Award ¶ 424.

191. Likewise, it is one thing to say as Respondent does that "a reasonable investor in Glamis's position would have had no reasonable, investment-backed expectations that California's reclamation requirements would remain static,"[379] but it is quite another to imply that Glamis had to be ready to accept whatever novel, discriminatory and expropriatory requirement California might concoct.

192. In spite of Governor Davis' and the California Legislature's unambiguous statements in opposition to the Glamis Project, Respondent refers to the notion that the legislation was targeted at Glamis as a "straw man," noting that it was intended to stop the project "and others like it from going forward *in the manner in which they were proposed*" and that "future mines" (presumably not including Glamis') "would be reclaimed in compliance with the requirements of SMARA."[380] The actual record, however, flatly contradicts Respondent's characterization of California's intent. Respondent offers no response to or discussion of the language in the legislative history of SB 483, which SB 22 expressly incorporated and which, as Glamis' Memorial points out, stated that "SB 483 contains narrowly-crafted language intended to prevent approval of a specific mining project proposed for an Imperial Valley location by Glamis Gold, Inc. The provisions . . . are intended to affect *only this particular project*."[381] This language flatly refutes Respondent's claims that (1) the legislation was designed only to stop the mine "in the manner it was proposed" as opposed to precluding it altogether; (2) that the legislation contemplated other "future" mines; or (3) that the legislation was enacted to ensure SMARA compliance.

---

379 Counter-Memorial at 195.

380 *Id.* at 205 (emphasis in original).

381 Memorial ¶ 363.

193. Finally, Respondent alleges that the "SMGB enacted the regulations because of the damage projects such as the Imperial Project would cause to the environment absent the regulations, and not for any reason particular to Glamis."[382] This argument is belied by the legislative history language above as well as the total absence of any technical or scientific analysis of the environmental impact of or justification for the regulations. Indeed, the state board noted that "*no technical, theoretical, empirical studies, reports, or documents were prepared or relied upon by the SMGB in its consideration of this rulemaking*."[383] Moreover, the existing research on this subject indicates that mandatory complete backfilling is not environmentally justifiable.[384] In short, the record clearly establishes a discriminatory intent toward Glamis and its Imperial Project, further confirming the expropriatory nature of the California measures at issue in this proceeding.

F. The Federal Government's Denial Of Glamis' Mining Plan of Operations And Continued Refusal To Issue A Decision Have Effected An Indirect Expropriation Of Glamis' Investment

194. In his discussion of Economic Impact and Denial of Permitting, Professor Wälde provides a summary of the jurisprudence of the Iran-US Claims Tribunal, which has been instrumental in shaping international law on the issue. He notes that the tribunal has adopted

> an economically realistic approach to the issue of withholding normally expected permitting: If permits are required and the investor could have

---

382 Counter-Memorial at 206.

383 Final Statement of Reasons for 14 CCR § 3704.1, at 4 (at CON002957), Claimant Ex. 304 (emphasis added). Given these facts, Respondent's attempt to shift the burden of proof to Glamis to show "why California would want solely to stop the Imperial Project" is puzzling. The record indicates that this was precisely California's intent; if the record does not accurately reflect the facts, in our view the burden of proof is squarely with Respondent to explain the dissonance.

384 HARDROCK MINING ON FEDERAL LANDS 82 (National Academy Press, 1999) (quoting SURFACE MINING OF NON-COAL MATERIALS xxviii (NRC, 1979)), Claimant Ex. 169. Also note Professor Wälde's observation in this regard that "[t]here is some authority in international law that a regulation based on one regulatory power (here: environment and reclamation) should not be used for a quite distinct different reason (here: sacred site/religious practice protection) – the issue of the "false pretense." Wälde Report at I-25.

> expected, in the normal course of operations that the permits would be issued, then the unreasonable withholding of such licenses and permits will ripen rapidly into an expropriation. The Tribunal in essence applies a good-faith/legitimate expectations approach to governmental conduct: While government has numerous permitting powers which exist for legitimate reasons, it can not exercise such powers in bad faith and against the legitimate expectations of the investor without incurring responsibility to pay compensation for expropriation.[385]

195. There is no dispute in the instant case that federal approval of Glamis' mining Plan of Operations is "required" – indeed, even if California's prohibitive backfilling mandate were revoked, Glamis is legally barred from commencing mining without such approval. The question, therefore, is whether Glamis could have expected, in the normal course of operations, that the approval would be issued, such that its withholding is "unreasonable." Given the legal framework in place before Secretary Babbitt's denial of the Project and after its rescission, coupled with the undisputed fact that Glamis' mining plan complied with applicable regulations, the record shows that Glamis had every reasonable expectation that approval would be forthcoming. Yet as of mid-December 2006, more than twelve years after Glamis filed its Imperial Project Plan of Operations and more than five years after the denial of that plan was rescinded, Interior still has not acted on Glamis' plan and there is no indication that it will do so.

196. The initial Babbitt denial coupled with the continued refusal to process the plan together demonstrate what Glamis has asserted all along; namely, that Interior used all of the powers available to it to ensure Glamis' Imperial Project would never go forward. Initially, that was manifested in the multi-year effort to fabricate a novel denial authority that in turn was used as the basis to deny the plan. Later, with that authority no longer available, Interior consigned the plan to bureaucratic limbo. This targeted abuse of the permitting process represents precisely

---

[385] Wälde Report at III-38.

the sort of bad faith that concerned the Iran-US Claims Tribunal.[386] Because the economic effect of that bad faith is to deprive Glamis of any ability to realize the value of its mining claims, the federal government measures have effected an expropriation and, under Article 1110, compensation is due.

197. Respondent employs several creative techniques to cope with the awkward factual record.[387] It first splits the denial and the subsequent refusal to act into two separate claims to be evaluated *seriatim*. Thus, noting that the record of decision for Interior's denial was in effect for ten months prior to its rescission, Respondent states that "[S]uch a short deprivation is merely ephemeral, and does not give rise to an expropriation."[388] This, however, implies that the rescission of the Babbitt denial somehow cured the violation – it did not. It is the timely *approval* of a plan that is required for commencement of mining operations, not merely the absence of a denial.

198. The rescission of Secretary Babbitt's denial in 2001 left Glamis no better off than it had been during the 10 months that the denial was effective, nor has Glamis' burden been eased in the interim. This is why Glamis' 1105 claim is based on the combined effect of the denial of the plan and the subsequent refusal to act, which together have left Glamis with no plan approval

---

386 Wälde Report at III-35.

387 Respondent's very first argument is that "if, as Glamis alleges, California's reclamation requirements had the effect of expropriating its mining claims, then the federal government's actions . . . cannot have expropriated that same property." Counter-Memorial at 208. Respondent evidently ignores the *Metalclad* decision, in which the tribunal held that a denial of a construction permit necessary for the *Metalclad's* landfill and a subsequent ecological decree barring such construction *each* constituted an expropriation of Metalclad's investment. *Metalclad* Award ¶¶ 104-109. The same analysis applies here, where the California measures and the federal measures each independently have a fully deprivatory effect on Glamis' investment. Moreover, Respondent cannot have it both ways: if the California measures did *not* effect an expropriation, then Respondent is obliged to respond to the allegation of federal government expropriation. Respondent cannot deny expropriation by the California measures when discussing those measures and then defend the federal government's behavior by arguing that the property already had been taken.

388 Counter-Memorial at 210.

– despite compliance with all applicable regulations – twelve years after its filing. The record indicates that as far back as mid-1998, Interior (via Solicitor Leshy) was delaying processing of Glamis' mining plan in order to craft a new denial authority – this was the first instance of the "bad faith withholding of permits" that Professor Wälde suggests yields expropriation; accordingly, the "period" is not the ten months during which the Record of Decision was in effect but rather the 8 years – and counting – during which Interior manipulated the approval process to ensure the Imperial Project would not go forward.

199. To explain away a twelve-year permit process, Respondent faults Glamis for not recognizing that its plan would be "subject to close and potentially lengthy scrutiny" rather than being "rubber-stamped,"[389] further noting that Glamis was different from other mines that were processed far more quickly in that (1) it was located on a site not previously mined; and (2) it posed a "grave threat to Native American sacred sites of . . . [great] importance."[390] These excuses are entirely unsatisfactory – that the pristine nature of the site caused delays is absurd given the 18-year history of exploration in the area, and in any event there is not a shred of evidence in the record that this had any impact on the time required to process the plan. Furthermore, given the proximity of other mines it is difficult to conceive how it could. As to the second, as discussed previously, Dr. Sebastian's report clearly demonstrates that there was nothing special or unique about the Project site, from an archaeological and ethnohistoric standpoint. The site contained features no more significant than those existing at other mine sites in California and in the greater CDCA. The only thing that did distinguish the Imperial Project was that the Quechan Tribe had finally decided to take a stand against further encroachment of

---

389 *Id.* at 213.

390 *Id.*

its traditional territory.[391] Thus, given that the site contained the same types of features as other sites in the Tribe's traditional territory, Glamis could not reasonably have known that those sites would suddenly be assigned a much greater level of significance.

200. Moreover, none of these factors explains why Interior has failed to approve the plan in the wake of the rescission of the denial in 2001. Respondent indicates that both before the denial and after the rescission, Interior was "either drafting the EIS/EIR, responding to comments, conducting the validity examination, or resolving legal questions arising from the mine's impact on cultural resources and Native American sacred sites."[392] Yet the lion's share of that work had been completed *prior* to the denial (the main exception being the validity examination that Solicitor Leshy directed be delayed). Given that Glamis met all applicable regulatory requirements, and given that the Leshy Opinion was the only basis for the Babbitt denial of Glamis' plan, there is no basis for Interior to do anything with the plan but approve it. Respondent implies that Glamis' filing of this case is somehow to blame for the delay, stating that "Interior was continuing to process Glamis's Plan of Operations at the time Glamis provided notice of its intent to commence these proceedings." Why that notice would have impeded the processing, however, is not explained.

201. Finally, Respondent finds fault with Glamis' failure to seek domestic relief.[393] Respondent does not, however, provide any insight into precisely what domestic avenues Glamis could even pursue to remedy Interior's refusal to act on the Imperial Project Plan of Operations. In this regard, the cases that Respondent cites all involved specific, identifiable procedures that

---

391 Baksh (1997), at 23 (at MV-002737), Claimant Ex. 320 ("[Quechan Cultural] Committee members also emphasized that the tribe is now prepared to take a stand to stop all further encroachment on their traditional territory, and want to take back land for the tribe between Yuma and Blythe.").

392 Counter-Memorial at 212.

the claimants failed to invoke (the seeking of a license in *Feldman*, the failure to challenge the denial of VAT refunds in court in *EnCana v. Ecuador*, etc.). Respondent has not identified any such procedural alternatives here, and Glamis is not aware of any. More to the point, NAFTA not only deviates from the customary international law requirement of pursuing local remedies, but also requires the Claimant to waive any local claims for loss or damage.[394]

202. In short, Respondent's failure to act promptly to approve the Glamis Plan of Operations is unexcused by the withdrawal of Secretary Babbitt's Record of Decision and is a measure tantamount to expropriation of Glamis' property.

II. Article 1105 Protects Foreign Investors Such As Glamis From Loss Of Their Investments Resulting From The United States And California's Arbitrary Measures And Failure To Provide A Transparent And Predictable Framework

203. The measures taken by the United States and California with respect to Glamis' Imperial Project demonstrate a clear violation of the standard of treatment afforded to foreign investors under Article 1105 of the NAFTA. In order to deny Glamis' environmentally and technically sound mining plan of operations, Respondent blatantly manipulated the law and the administrative process to favor a political constituency at the expense of an individual foreign investor – in contravention to Article 1105.

204. Article 1105 provides that:

> 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.

393 *Id.* at 214-215.

394 NAFTA article 1121.1(b).

While Glamis and Respondent agree that the standard of treatment for foreign investors under Article 1105(1) is defined by customary international law,[395] Respondent attacks Glamis' claims first, by advancing such a constrictive interpretation of Article 1105 as to make virtually meaningless its express embodiment of the now well-recognized principle of fair and equitable treatment. Second, Respondent argues that in any event, and under any interpretation of 1105, the measures taken to delay and stop the Imperial Project do not constitute violations of the protections afforded by Article 1105. Neither of Respondent's contentions withstand scrutiny, as the following sections demonstrate.

A. Respondent's Framework For Interpreting Article 1105 Is Unsupported By Customary International Law

205. The international standard of treatment for foreign investors codified in Article 1105 embodies a number of protections that a host state must provide to its foreign investors, as even Respondent has acknowledged:

> The "international minimum standard" embraced by Article 1105(1) is . . . "an umbrella concept incorporating a set of rules" which "have crystallized into customary international law in specific concepts."[396]

Of the potentially numerous protections embodied in Article 1105, two are expressly declared: "fair and equitable treatment" and "full protection and security."

206. In its effort to constrain the reach of the "fair and equitable treatment" standard applicable here, however, Respondent advances a framework for interpreting Article 1105 that if applied, would require the Tribunal to accept three principles fundamentally at odds with international law: *first*, that the content of Article 1105 is *sui generis* and thus, divorced from the

---

395 *See* Memorial ¶ 517; Counter-Memorial at 219.

396 *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, ¶ 110 (Award) (Jan. 9, 2003), (citing Post-Hearing Submission of Respondent United States of America on Article 1105(1) and *Pope & Talbot*, Respondent's Post-Hearing Submission, at 2 (June 27, 2002)).

substantive protections recognized by arbitral tribunals as comprising the international standard of treatment for foreign investors under customary international law; *second*, that Article 1105 need not be interpreted in an evolutionary fashion; and *third*, that reference to the "minimum standard" somehow means that the most arbitrary and capricious of state actors sets the bar for how any state may treat foreign investors. Such a framework is unsupported by international law, and contradictory even to positions Respondent has advanced in the past. Accordingly, this Tribunal should reject Respondent's attempts to evade its obligations under the international standard of treatment owed to foreign investors through these methods of (mis)interpreting Article 1105.

1. The International Standard Of Treatment Under Article 1105 Cannot Be Divorced From The International Standard Of Treatment Under Customary International Law As Informed By Thousands Of Investment Treaties

207. As summarized by Professor Wälde, the substantive content of the international standard of treatment afforded foreign investors under Article 1105 is to be developed by considering " arbitral and judicial jurisprudence relating to Article 1105 and similar language in other investment treaties" as well as "pertinent modern normative state practice . . . currently best expressed by investment treaty practice and the way such treaties are applied by arbitral tribunals . . . ."[397] Notwithstanding its acknowledgement that Article 1105(1) embodies the customary international law minimum standard of treatment, Respondent would have the Tribunal interpret its obligation as *sui generis* – essentially divorced from the relevant body of arbitral case law interpreting the international standard of treatment afforded foreign investors. Respondent argues that BIT jurisprudence lacks the requisite elements of customary international

[397] Wälde Report at IV-10.

law and that the NAFTA standard of treatment is somehow unique from the many BITs that also require fair and equitable treatment. In these ways, Respondent seeks to distinguish any non-NAFTA jurisprudence, such as the numerous cases on which Glamis relies, including *Maffezini*, *Tecmed*, *CMS*, and *ELSI*.[398] Respondent's contentions are wrong.

208. Indeed, the *Mondev* tribunal confronted and rejected the very same argument that Respondent presents here, finding that BIT jurisprudence demonstrates both elements of customary international law, state practice and *opinio juris*, and thus, informs the international standard of treatment owed to foreign investors under customary international law.[399] With respect to the issue of whether BITs represent state practice, the *Mondev* tribunal stated that "the vast number of bilateral and regional investment treaties (more than 2000) almost uniformly provide for fair and equitable treatment of foreign investments, and largely provide for full security and protection of investments. . . . On a remarkably widespread basis, States have repeatedly obliged themselves to accord foreign investment such treatment."[400] If *over* 2000 investment treaties do not represent state practice in ensuring the international minimum standard of treatment to foreign investors, it is not clear what would. Furthermore, the tribunal confirmed that "such a body of concordant practice will necessarily have influenced the content of rules

---

398 Counter-Memorial at 227 (arguing that Glamis' reliance on *Maffezini v. Kingdom of Spain* is "unavailing" because that tribunal's decision was made in the context of the fair and equitable treatment standard under the Spain-Argentina BIT, which "is not expressly tied to customary international law"), at 228 (arguing *ELSI* "does not shed light on the interpretation of NAFTA Article 1105(1) or on the content of the minimum standard of customary international law" because the arguments in that case were based on a treaty between Italy and the United States), at 231 (arguing reliance on *Tecmed* is misplaced because the "tribunal interpreted the Spain-Mexico bilateral investment treaty, not Article 1105(1) of the NAFTA"), and at 232 (arguing reliance on *CMS* is misplaced because the tribunal relied on the preamble to the U.S.-Argentina bilateral investment treaty in interpreting the fair and equitable treatment standard at issue).

399 *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, ¶¶ 110-125 (Award) (Oct. 11, 2002).

400 *Mondev* Award ¶ 117.

governing the treatment of foreign investment in current international law."[401] In short, the *Mondev* tribunal demonstrated that there is an overwhelming body of treaty law establishing states' practice of providing fair and equitable treatment to foreign investors.[402]

209. With respect to *opinio juris*, the *Mondev* tribunal put to rest Respondent's concern about BIT practice lacking this element of customary international law:

> These States [the NAFTA Parties] appear to question whether the parties to the very large numbers of bilateral investment treaties have acted out of a sense of legal obligation when they include provisions in those treaties such as that for "fair and equitable" treatment of foreign investment.
>
> The question is entirely legitimate. It is often difficult in international practice to establish at what point obligations accepted in treaties, multilateral or bilateral, come to condition the content of a rule of customary international law binding on States not party to those treaties. *Yet the United States itself provides an answer to this question, in contending that, when adopting provisions for fair and equitable treatment and full protection and security in NAFTA (as well as in other BITs), the intention was to incorporate principles of customary international law.* Whether or not explanations given by a signatory government to its own legislature in the course of ratification or implementation of a treaty can constitute part of the *travaux préparatoires* of the treaty for the purposes of its interpretation, they can certainly shed light on the purposes and approaches taken to the treaty, and thus can evidence *opinio juris*. For example the Canadian Statement on Implementation of NAFTA states that Article 1105(1) "provides for a minimum absolute standard of treatment, based on longstanding principles of customary international law". The numerous transmittal statements by the United States of BITs containing language similar to that of NAFTA show the same general approach. . . .
>
> Thus the question is not that of a failure to show *opinio juris* or to amass sufficient evidence demonstrating it. The question rather is: what is the content of customary international law providing for fair and equitable treatment and full protection and security in investment treaties?[403]

---

401 *Id*.

402 *Id*.; *see also* Wälde Report at IV-7.

403 *Mondev* Award ¶¶ 110-113 (emphasis added).

210. To answer this question, the *Mondev* tribunal engaged in a lengthy discussion about the evolutionary nature of the minimum standard of treatment under customary international law and the significance of the FTC's interpretation of Article 1105.[404] The tribunal finally concluded that the content of customary international law is shaped by thousands of relevant treaties:

> In holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce.[405]

211. The *Mondev* tribunal's view accords with that of other tribunals and major experts in the international investment arena. For example, the tribunals in *Pope & Talbot v. Canada* and *Loewen Group, Inc. v. United States* also recognized arbitral case law (including cases pertaining to non-NAFTA treaties) as a source of law guiding the evolution of the minimum standard of treatment under customary international law.[406] Judge Stephen Schwebel, an esteemed international jurist and scholar, has similarly stated that "when BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood

---

404 *Id*. ¶¶ 114-125.

405 *Id.* ¶ 125.

406 *Pope & Talbot Inc. v. Canada*, NAFTA/UNCITRAL, ¶ 62 (Award in Respect of Damages) (May 31, 2002). ("Canada's views on the appropriate standard of customary international law for today were perhaps shaped by its erroneous belief that only some 70 bilateral investment treaties have been negotiated; however, the true number, now acknowledged by Canada, is in excess of 1800. Therefore, applying the ordinary rules for determining the content of custom in international law, one must conclude that the practice of states is now represented by those treaties."); *Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, ¶ 131 (Award) (June 26, 2003) (referencing *Pope & Talbot* Award in Respect of Damages and holding that "the content of custom in international law is now represented by more than 1800 bilateral investment treaties which have been negotiated.").

to mean the standard of international law embodied in the terms of some two thousand concordant BITs."[407]

212. By seeking to discount the relevance of non-NAFTA case law, Respondent is advancing the position that NAFTA is somehow fundamentally unique from, and less protective than, the thousands of other investment treaties in the world that seek to protect similar rights. This litigation position is contradicted by the United States' assurances provided in transmittal statements corresponding to various U.S. BITs. Again, noted in *Mondev*, when adopting provisions for fair and equitable treatment and full protection and security in NAFTA and other BITs, the intention of the United States was to incorporate principles of customary international law.[408]

> For example, the transmittal statement with respect to the United States-Ecuador BIT of 1993 states that the guarantee of fair and equitable treatment "sets out a minimum standard of treatment based on customary international law". . . .
>
> More recent transmittal statements are even more explicit. For example the transmittal statement for the United States-Albania BIT of 1995 states in relevant part: "Paragraph 3 sets out a minimum standard of treatment based on standards found in customary international law. The obligations to accord 'fair and equitable treatment' and 'full protection and security' are explicitly cited, as is the Parties' obligation not to impair through unreasonable and discriminatory means, the management, conduct, operation, and sale or other disposition of covered investments."[409]

---

407 Matthew C. Porterfield, *An International Common Law of Investor Rights?*, 27 U. PA. J. INT'L ECON. L. 79, 85-86 (2006) (citing Stephen M. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, 98 AM. SOC'Y INT'L L. PROC. 27, 29-30 (2004)).

408 *Mondev* Award ¶ 111.

409 *Id.* ¶¶ 111, 112.

Thus, the statements above indicate that the fair and equitable treatment standards in U.S. BITs are generally intended to incorporate principles of customary international law, as is NAFTA's Article 1105.[410]

213. In short, BITs are reflective of the customary international law standard of treatment owed to foreign investors, as demonstrated by tribunals' decisions and Respondent's own acknowledgments in the context of transmittal statements. The *sui generis* interpretation of Article 1105, as advanced by Respondent, would require the Tribunal to exclude from its consideration the majority of customary international law – in breach of the plain language of Article 1105 (which states that treatment shall be in "accordance with international law") and the Free Trade Commission's statement reaffirming 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."[411] Such an approach cannot be accepted. Thus, Glamis correctly relied on BIT case law (in addition to other sources of law), including *Tecmed*, *CMS Gas*, and *Maffezini,* to demonstrate that an obligation exists under the fair and equitable treatment standard to provide a transparent and predictable framework, and on

---

410 The transmittal statements corresponding to several other US BITs further demonstrate that the "fair and equitable treatment" provisions in the treaties set out a "minimum standard of treatment based on customary international law." *See e.g.*, US-Estonia BIT: Treaty Between the Government of the United States of America and the Government of the Republic of Estonia Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Estonia, April 19, 1994; US-Jamaica BIT: Treaty Between the United States of America and Jamaica Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Jamaica, Feb. 4, 1994; US-Kazakhstan BIT: The Treaty Between the United States of America and the Republic of Kazakhstan Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Kazakhstan, May 19, 1992; US-Kyrgyzstan BIT: The Treaty Between the United States of America and the Republic of Kyrgyzstan Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Kyrgyzstan, Jan. 19, 1993; US-Latvia BIT: The Treaty Between the Government of the United States of America and the Government of the Republic of Latvia Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Latvia, Jan. 13, 1995; US-Moldova BIT: The Treaty Between the United States of America and the Republic of Moldova Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Moldova, Apr. 21, 1993; *available at* http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp.

411 Memorial ¶ 517.

ELSI to establish the existence of an obligation under Article 1105 for host states to protect foreign investors from arbitrary measures. Given that cases arising under BITs comprise a significant portion of the body of law shaping the content of the customary international law standard of treatment owed to foreign investors, the non-NAFTA case law relied upon by Glamis in its Memorial (as well as in this Reply Memorial) must be duly considered by the Tribunal in assessing Glamis' claim.

2. Interpretation Of Article 1105 In Accordance With Established Principles Demonstrates The Minimum Standard Of Treatment Afforded Foreign Investors Has Evolved Well Beyond That Which Is "Notoriously Unjust" Or "Egregious"

214. Next, putting aside Respondent's constrained view of the body of customary international law informing Article 1105, Respondent also challenges Glamis' effort to avail itself of the 1105 protections by arguing that the substantive protections under 1105 are limited to the types of substantive protections afforded foreign investors in the 1920s. Despite Article 1105's grounding in and reference to customary international law, Respondent seeks to constrain the reach of Article 1105 by applying a historically frozen interpretation of the protections afforded by it. Respondent argues that "broad State practice and *opinio juris* have thus far coincided to establish minimum standards of State conduct in only a few areas."[412] Thus, Respondent, would, in effect, limit Article 1105 solely to:

> 1) assuring investors a "minimum level of internal security and law and order" under the "full protection and security" strand of the international minimum standard of treatment;
>
> 2) protection from an egregious or notoriously unjust "denial of justice"; and

---

412 Counter-Memorial at 221.

> 3) protection from expropriation without compensation (a protection that is dealt with by Article 1110).[413]

Since the requirement to provide a "minimum level of internal security and law and order" falls under the "full protection and security" strand of the international minimum standard of treatment, and protection from expropriation is dealt with by Article 1110, Respondent limits the substantive protection under the "fair and equitable treatment" strand of the international standard of treatment to claims of "notoriously unjust" or "egregious" denials of justice by a state's judiciary.[414] As detailed below, the protection under the "fair and equitable treatment" standard cannot be limited in this fashion to protection from extreme forms of behavior not only because it has been explicitly rejected by other tribunals, but also because such an interpretation necessarily ignores the evolutionary content of Article 1105.

215. Modern tribunals have explicitly rejected any threshold limitation that conduct be "egregious," "outrageous," "shocking," or otherwise extraordinary (as was required in the *Neer v. Mexico* case of the 1920s) in order to be prohibited under the international standard of treatment of foreign investors.[415] Thus, Respondent cannot limit denials of justice that are protected under Article 1105 to those that are "notoriously unjust" or "egregious."

216. Furthermore, it is well established that the meaning of the international standard of treatment is evolutionary – not fixed – and must be evaluated in light of current standards:

> [B]oth the substantive and procedural rights of the individual in international law have undergone considerable development. In the light

---

413 *Id*.

414 *Id*.

415 Memorial ¶ 526 (referencing *Pope & Talbot Inc. v. Canada,* UNCITRAL (Award on the Merits of Phase 2) (Apr. 10, 2001)). Although Respondent does not like the *Pope & Talbot* decision or believe it relevant to the interpretation of Article 1105, it cannot deny that the tribunal accurately stated customary international law. *See Mondev* Award ¶ 105 (citing *Pope & Talbot Inc. v. Canada*, Award in Respect of Damages ¶ 59) ("Article 1105 incorporated an evolutionary standard, which allowed subsequent practice, including treaty practice, to be taken into account.").

> 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.[416]

Respondent itself has recognized and accepted (in principle, at least) that "Article 1105(1) is intended to provide a real measure of protection of investments" and that the standard is an evolutionary one.[417] Given the ever-increasing body of arbitral case law that populates and establishes the content of the minimum standard under customary international law, Respondent's argument that Glamis' claim under Article 1105(1) must fail because it did not allege "a failure to provide adequate police protection for its investment," or that it had "been denied fundamental rights of due process in a judicial or quasi-judicial proceeding" must be rejected.[418] Contrary to Respondent's interpretation, Article 1105 does not prohibit only the most extreme forms of host state behavior. "To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious."[419]

217. In light of the rejection of the requirement that host states' measures be egregious or notorious and the evolutionary nature of Article 1105, the fair and equitable treatment standard must be seen as expressing "modern standards of good governance in the principal legal systems where respect for the rule of law is high and materially effective," as articulated by Professor Wälde.[420] Moreover, "[w]hat is a breach [of the fair and equitable treatment standard] is uniformly . . . related to the principle of good faith, transparency, legal certainty, consistency and

---

416 *Mondev* Award ¶ 116.

417 *Id*. ¶ 116.

418 Counter-Memorial at 223.

419 *Mondev* Award ¶ 116.

420 Wälde Report at I-28.

the predictability required to make long-term investment commitments."[421] Consistent with these principles, the international standard of treatment afforded to foreign investors includes a variety of protections, the most pertinent to the present case being "'*arbitrariness*' of governmental conduct and the breach of reasonable '*legitimate expectations*' in the stability of the business environment and consistency in application of the rules."[422]

3. The Minimum Standard Of Treatment Under Article 1105 Does Not Mean That The Most Arbitrary And Capricious State Actors Set The Bar For Treatment Owed To Foreign Investors

218. Finally, in its effort to constrict the protection afforded by the international minimum standard of treatment embodied in Article 1105, Respondent places an unnatural and undue emphasis on the word "minimum."[423] As Professor Wälde points out, this does little to illuminate the content of Article 1105 – "any legal standard is [of course] a 'minimum standard.'"[424] To advance its position that customary international law requires treatment of only the lowest commonly accepted sort, Respondent cites to the OECD Working Paper for the proposition that the "fair and equitable treatment" standard is "an 'absolute', 'non-contingent' standard of treatment."[425] Respondent seizes on these words and takes them out of context in an effort to minimize the protections afforded under Article 1105. The OECD's statement,

---

421 Wälde Report at I-29-30.

422 Wälde Report at IV-13; *see also* Memorial ¶¶ 523-539.

423 Counter-Memorial at 220 ("Rather, the minimum standard sets an absolute minimum *floor* of treatment, ensuring that States' treatment of aliens does not "fall[] below a civilized standard.").

424 Wälde Report at I-28. ("But this minimalist view finds little support in treaty language, arbitral jurisprudence, state practice or authoritative commentary. . . . To breach the FET standard as in any legal standard, the 'minimum' threshold has to be reached. What is more, there is in international arbitral jurisprudence – NAFTA, BITs, or Energy Charter Treaty – no distinction between what is 'fair and equitable' and the customary international law standard for treatment of foreign investors.").

425 Counter-Memorial at 220 n. 964.

however, is quite clear and provides guidance on how the fair and equitable treatment standard is to be applied:

> It is an "absolute", "non-contingent" standard of treatment, i.e. a standard that states the treatment to be accorded in terms whose exact meaning has to be determined, *by reference to specific circumstances of application*, as opposed to the "relative" standards embodied in "national treatment" and "most favoured nation" principles which define the required treatment by reference to the treatment accorded to other investment.[426]

219. Thus, the "fair and equitable treatment" standard is an absolute standard in that the substance of the standard does not vary based on a host state's treatment of another country's nationals (as with the "most favored nation" standard) or based on a host state's treatment of its own nationals (as with the "national treatment" standard). While a state is free, for example, under the national treatment standard to provide as much or as little protection under its laws to its own nationals (subject to international human rights treaties and other such obligations), it does not have that luxury under the fair and equitable treatment standard.[427]

220. Although the fair and equitable treatment is a non-contingent standard, its exact meaning is to be determined "by reference to specific circumstances of application."[428] The

---

426 OECD, *Fair and Equitable Treatment Standard in International Investment Law* (OECD Working Papers on International Investment, 2004/3), at 2 (emphasis added).

427 "The international minimum standard is a norm of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which States, *regardless of their domestic legislation and practices*, must respect when dealing with foreign nationals and their property." *Id*. at 8 n. 32 (emphasis added). Thus, contrary to Respondent's assertion, it is entirely conceivable that the minimum standard of treatment required by international law would proscribe action acceptable under national law. *See* Counter-Memorial at 234. While it may be the case that United States law does not compensate plaintiffs *solely* upon a showing that regulations interfered with their expectations, it does not preclude protection of a foreign investor's reliance on the host state's legal and business framework under international law. Moreover, the *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) case cited by Respondent is a takings case. *Id*. at 234. There is no dispute that in takings (and expropriation) cases, an investor's settled expectations are not the sole consideration in determining if there has been a taking (although they are certainly an important factor). Wälde Report at I-20-23, 31-33 (discussing the concept of "legitimate expectation" as used in the Article 1110 "indirect expropriation" test and in the Article 1105 "fair and equitable treatment" test).

428 OECD, *Fair and Equitable Treatment Standard in International Investment Law*, at 2.

specific circumstances of application necessarily involves a consideration of the host state's level of development. As explained by Professor Wälde:

> A respondent NAFTA country such as the U.S., with an unbroken record of prosperity, strength and a powerful history of respect for the rule of law for more than two centuries cannot, therefore, use as evidence of a low threshold test for the minimum standard examples from past centuries, which were marked by low levels of civilization and governance, or examples of governments with serious difficulties with the "rule of law," such as the Soviet Union or current Russia.[429]

221. Like the *X v. Central European Republic* and *Generation Ukraine* tribunals referenced in the Memorial, this Tribunal too, should assess Respondent's level of development, particularly with respect to its rule of law, in determining whether Claimant has suffered a breach of the fair and equitable treatment standard given the specific circumstances of this dispute.[430]

B. The "Fair And Equitable Treatment" Owed To Foreign Investors Includes An Obligation To Provide A Transparent And Predictable Framework For Investment And Protection From Arbitrary Measures

222. Respondent's reasons for trying to read the "fair and equitable treatment" standard out of Article 1105 are clear. As pointed out in Claimant's Memorial[431] and reaffirmed by Professor Wälde's expert opinion,[432] numerous tribunals – interpreting BITs and other instruments around the world – have concluded that measures which lack transparency, fail to provide predictability or are otherwise arbitrary violate the customary international law obligation to provide fair and equitable treatment. And, as discussed below, the number of such

---

429 Wälde Report at IV-9.

430 Memorial ¶ 519; Wälde Report at IV-8-10; *see also Saluka Investments BV v. Czech Republic*, UNCITRAL, ¶¶ 359-360 (Partial Award) (Mar. 17, 2006) (considering the legal shortcomings in Czech law in failing to find a violation of the fair and equitable treatment standard by its failure to improve the legal framework within a timescale of help to Nomura, where the legal shortcomings must have been known to Nomura when it made its investment).

431 Memorial ¶¶ 532-39.

432 Wälde Report at IV-13-67.

decisions continues to increase and they demonstrate that the very same sort of lack of "transparency and candour in the administrative process" and "arbitrary" or "idiosyncratic" treatment[433] that Glamis suffered in pursuing its Plan of Operations for the Imperial Project have resulted in awards, at least for the restitution interest.

223. In this section, without burdening the Tribunal by repeating everything that is in the Memorial, Glamis demonstrates why – Respondent's protests notwithstanding – transparency, predictability and protection against arbitrary treatment are very much a part of the current minimum standard of treatment of foreign investors under customary international law.

1. The "Fair And Equitable Treatment" Standard Includes An Obligation To Protect Legitimate Expectations Through Establishment Of A Transparent And Predictable Framework

224. Relying on *Metalclad*, *Tecmed*, *Maffezini, CMS Gas* and other authorities, Glamis demonstrated in its Memorial that transparency and predictability are indeed recognized strands comfortably within the protection afforded by the promise of fair and equitable treatment under customary international law. Nonetheless, Respondent persists that "Glamis has not demonstrated the existence of any customary international law rule requiring States to regulate in such a manner – or refrain from regulating – so as to avoid upsetting foreign investors' settled expectations with respect to their investments."[434] As Professor Wälde notes,

---

433 *See Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, ¶ 98 (Award) (Apr. 30, 2004).

434 Counter-Memorial at 230. Respondent also argues that Glamis has not demonstrated that there is a customary international law rule "governing the substantive reclamation that may be imposed on open-pit mines." *Id.* at 224. Glamis does not seek to argue that there is such a rule under the fair and equitable treatment standard under Article 1105. Rather, Glamis points to the wide-spread acceptance of open-pit mining as a factor contributing to its reasonable and legitimate expectation that its plan of operations would be approved. Memorial ¶¶ 468-472. It is not Glamis' position that states cannot ban open-bit mining. The United States has long designated certain areas as off-limits for mining, including Yellowstone National Park (since 1872), and specific designated Wilderness Areas in the California Desert (since 1994). While protecting property from mining is a legitimate government objective, if the manner in which it is effected – as was done by the United States and California measures in this case – injures the legitimate expectations of the foreign investor, compensation is due.

> It is not easy to follow the U.S. argument that 'legitimate expectation' is not part of international state practice . . . when the U.S. itself, in its domestic takings law and also in other areas, recognizes both the specific denomination of 'legitimate expectation' (most prominently in its takings' jurisprudence), but also, under this title and other equivalent names (detrimental reliance, estoppel) the concept itself.[435]

And the *Mondev* tribunal's decision, discussed above, thoroughly answers Respondent's claim that this Tribunal should simply ignore the numerous decisions acknowledging transparency and predictability as obligations under the "fair and equitable treatment" element of customary international law. Indeed, "[m]odern state practice, particularly that of developed market economies including the U.S., contributes to the current content of customary international law as reflected in investment treaty practice, and in general principles of international and comparative public and administrative law of the major legal systems."[436] Moreover, Respondent's specific challenges to the cited decisions do not fare any better, and recent decisions continue to reaffirm the principles of transparency and predictability as components of the obligation to provide "fair and equitable treatment" as part of the minimum protection afforded foreign investors.

a. All Of The Decisions On Which Glamis Originally Relied Involve NAFTA Or BITs With Similar Promises Of "Fair And Equitable Treatment"

225. Respondent offers a series of grounds for trying to distinguish the cases on which Glamis relies, none of which are availing.[437] First, it attempts to distinguish *Tecmed* on grounds that the tribunal interpreted "fair and equitable" as an "autonomous" standard under the Spain-

---

435 Wälde Report at I-29.

436 Wälde Report at IV-4.

437 Counter-Memorial at 227, 230-34.

Mexico BIT at issue.[438] Again, Respondent seizes the word but ignores the context. While the tribunal provided an "autonomous interpretation," it expressly did so by giving effect to "*international law and the good faith principle,* on the basis of which the scope of the obligation assumed under the Agreement and the actions related to compliance therewith are to be assessed."[439] As the tribunal further noted, if the intended scope of the fair and equitable treatment provision in the Spain-Mexico BIT was not to incorporate international law standards, "Article 4(1) of the Agreement would be deprived of any semantic content or practical utility of its own."[440] Thus, the *Tecmed* tribunal, even while giving Article 4(1) an autonomous reading, grounded its interpretation in customary international law and the minimum obligation that any host state owes its foreign investors. Accordingly, the tribunal's conclusion that "[c]ontracting Parties [are required to] . . . provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment," is equally applicable to foreign investors protected by NAFTA Article 1105.[441]

226. Similarly, Respondent seeks to diminish the force of the *CMS Gas* tribunal's unequivocal conclusion that "a stable legal and business environment is an essential element of

---

438 *Id.* at 231.

439 *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, Case No. ARB(AF)/00/2, ¶ 155 (Award) (May 29, 2003).

440 *Tecmed* Award ¶ 156.

441 *Id.* ¶ 154. Nothing in the language of the treaty at issue in *Tecmed* nor in the tribunal's interpretation of it suggests that Mexico offered more to Spain than it obtained for its investors in the United States under Article 1105 of NAFTA. The language of the fair and equitable treatment provision in the Spain-Mexico BIT is nearly identical to the language in Article 1105(1). The Spain-Mexico BIT guarantees "in its territory fair and equitable treatment, according to International Law, for the investments made by investors of the other Contracting Party." *Id*. ¶ 152. NAFTA's Article 1105 guarantees "treatment in accordance with international law, including fair and equitable treatment and full protection and security."

fair and equitable treatment,"[442] by suggesting that it is not grounded in customary international law.[443] It is difficult to fathom how that can be true where the tribunal expressly stated:

> In addition to the specific terms of the Treaty, the significant number of treaties, both bilateral and multilateral, that have dealt with this standard also unequivocally shows that fair and equitable treatment is inseparable from stability and predictability. Many arbitral decisions and scholarly writings point in the same direction.[444]
>
> * * *
>
> [T]he Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.[445]

It is thus Respondent's argument, and not the *CMS Gas* tribunal's statement, that lacks support.

227. Finally, Respondent seeks to eliminate the *Metalclad* decision from consideration[446] because a single Provincial court[447] judge disagreed with part of the decision made by a tribunal of acknowledged international law experts. As explained by the noted NAFTA commentator, Todd Weiler, "[t]he [*Metalclad*] decision should not be of much concern for investors arguing their case before international tribunals, because it is 'municipal law' and has virtually no value in the international context."[448] Other commentators have likewise criticized the Provincial

---

442 Memorial ¶ 534 (citing *CMS Gas* Award ¶ 274).

443 Counter-Memorial at 232.

444 *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, ¶ 276 (Award) (May 12, 2005).

445 *CMS Gas* Award ¶ 284.

446 Counter-Memorial at 227.

447 The British Columbia Supreme Court is the superior trial court for the province and hears both civil and criminal cases, as well as some appeals from the Provincial Court. It is not even the highest court in the province, which is the British Columbia Court of Appeal. *See* http://www.courts.gov.bc.ca/.

448 Todd Weiler, *Canadian Court's Review of Decision by NAFTA Panel Against Mexico Raises More Questions than Answers: An Interview with NAFTA Legal Expert Todd Weiler*, 9 (5) LATIN AM. L. & BUS. REP. 18, 19 (May 31, 2001) (also noting that "[i]nternational lawyers argue 'international law' before (continued…)

lower court for exceeding its authority[449] and no NAFTA tribunal (or other reviewing court) has relied upon the Provincial lower court's decision as an authoritative ruling on the meaning of Article 1105. Accordingly, the *Metalclad* tribunal's holding remains a significant contribution to the meaning of fair and equitable treatment under customary international law both in the context of NAFTA and BITs:

> the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters.[450]

228. In short, it is a well established principle that host states promising fair and equitable treatment must provide transparency of process and a predictable framework for the planning, approval and operation of the foreign investments they invite within their borders.

b. Recent Authorities Reaffirm That Transparency And Predictability Are Elements Of "Fair And Equitable Treatment"

229. Nor are those prior decisions the only ones establishing transparency and predictability as elements of fair and equitable treatment under customary international law.

---

expert international arbitrators. The report of what a local judge thinks 'international law' might mean is simply not very relevant to most international lawyers or arbitrators.")*; see also* Carl-Sebastian Zoellner, *Note: Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law*, 27 MICH. J. INT'L L. 579, 617 (Winter 2006) ("In contrast to the tribunal's interpretation, the judgment by the British Columbia Supreme Court is flawed for several reasons and consequently should have minimal impact. Moreover, because national courts cannot bind international tribunals and their conclusions on matters of law are therefore of limited value, the reasoning of the appeal should not function as a powerful precedent outside of British Columbia."); Courtney N. Seymour, *The NAFTA Metalclad Appeal - Subsequent Impact or Inconsequential Error? . . . Only Time Will Tell*, 34 U. MIAMI INTER-AM. L.REV. 189, 199-200 (Winter 2002) ("It is important to note that the individuals chosen to lead NAFTA arbitration panels are world-renowned and respected international legal scholars, and experts in the field of international law. In contrast, Justice Tysoe's expertise is most likely vested in judicial analysis of matters under Canadian law, particularly that of British Columbia.").

449 *See* Charles H. Brower II, *Beware the Jabberwock: A Reply to Mr. Thomas*, 40 COLUM. J. TRANSNAT'L L. 465, 482 (2001-2002).

450 *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, ¶ 76 (Award) (Aug. 30, 2000).

Indeed, the United Nations Conference on Trade and Development (UNCTAD) reported as early as 1999:

> The concept of transparency overlaps with fair and equitable treatment in at least two significant ways. First, transparency may be required, as a matter of course, by the concept of fair and equitable treatment. *If laws, administrative decisions and other binding decisions are to be imposed upon a foreign investor by a host State, then fairness requires that the investor is informed about such decisions before they are imposed.* This interpretation suggests that where an investment treaty does not expressly provide for transparency, but does for fair and equitable treatment, then transparency is implicitly included in the treaty. Secondly, where a foreign investor wishes to establish whether or not a particular State action is fair and equitable, as a practical matter, the investor will need to ascertain the pertinent rules concerning the State action; the degree of transparency in the regulatory environment will therefore affect the ability of the investor to assess whether or not fair and equitable treatment has been made available in any given case.[451]

230. Recent decisions reinforce this conclusion. In *Azurix v. Argentina*, for example, the tribunal analyzed decisions under NAFTA (including *Mondev*, *Loewen*, and *Waste Management*), as well as additional decisions such as *Tecmed* and *Genin*, and found a common element to be the "frustration of expectations that the investor may have legitimately taken into account when it made the investment."[452] The tribunal's statement with regards to this element are just as applicable with respect to NAFTA as they were with the Argentina–U.S. BIT at issue in *Azurix*:[453]

> The standards of conduct agreed by the parties to a BIT presuppose a favorable disposition towards foreign investment, in fact, a pro-active

---

451 UNCTAD, *Fair and Equitable Treatment* 51 (UNCTAD Series on issues in international investment agreements, 1999) (emphasis added) (internal reference omitted).

452 *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, ¶ 372 (Award) (July 14, 2006).

453 It is also noteworthy that while the tribunal decided a breach of the fair and equitable treatment standard under the Argentina – U.S. BIT (The Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Argentina, Nov. 14, 1991), it explained that the content under of the standard under the BIT "is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law." *Azurix* Award ¶ 361.

> behavior of the State to encourage and protect it. To encourage and protect investment is the purpose of the BIT. It would be incoherent with such purpose and the expectations created by such a document to consider that a party to the BIT has breached the obligation of fair and equitable treatment only when it has acted in bad faith or its conduct can be qualified as outrageous or egregious.[454]

Thus, the Azurix tribunal interpreted the obligation not to frustrate the legitimate expectations of an investor as a "pro-active" requirement by the State to positively encourage and protect foreign investment. Applying this interpretation and considering the actions together, the tribunal found a breach of the standard of fair and equitable treatment where it was clear that the tariff regime was politicized and there were repeated calls by government officials for non-payment of bills by customers, verging on bad faith. Far from encouraging and protecting Glamis' foreign investment, the United States and California governments' actions sought to stall and eventually, kill the Imperial Project. Respondent's measures demonstrate that the processing of Glamis' plan of operations was deeply political – as Respondent invented ways to protect Native American interests at the expense of its foreign investor, Glamis.

231. The recent *ADC v. Hungary* decision also supports the existence of a requirement to provide a transparent and predictable framework under international law.[455] In *ADC*, the claimant argued that Hungary failed to provide "fair and equitable treatment" since Hungary's actions destroyed its basic expectation to have their contractual rights honored and were imposed on the Claimants to their total surprise.[456] Hungary argued, much like Respondent does here,[457]

---

454 *Id.* ¶ 372.

455 *ADC Affiliate & ADC & AMDC Mgmt. Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16 (Award) (Oct. 2, 2006).

456 *ADC* Award ¶ 379.

457 Counter-Memorial at 233 ("Indeed, most, if not all, regulatory action is bound to upset the expectations of a portion of the populace. If States were prohibited from regulating in any manner that frustrated expectations – or had to compensate everyone who suffered any diminution in profit because of a regulation – States would lose the power to regulate.").

that the actions taken by it were merely an exercise of its rights under international law to regulate its domestic economic and legal affairs and that "by investing in a host State, the investor assumes the 'risk' associated with the State's regulatory regime."[458] The *ADC v. Hungary* tribunal rejected both of these arguments in turn, stating:

> It is the Tribunal's understanding of the basic international law principles that while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. . . . [T]he rule of law, which includes treaty obligations, provides such boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment-protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate.[459]
>
> It is one thing to say that an investor shall conduct its business in compliance with the host State's domestic laws and regulations. It is quite another to imply that the investor must also be ready to accept whatever the host State decides to do to it. In the present case, had the Claimants ever envisaged the risk of any possible depriving measures, the Tribunal believes that they took that risk with the legitimate and reasonable expectation that they would receive fair treatment and just compensation and not otherwise.[460]

Applying these principles to the facts, the *ADC* tribunal concluded that the obligations under Article 3 (including "*fair and equitable treatment*", "*unreasonable or discriminatory measures*" and "*full security and protection*") were breached by Hungary.[461] For the same reasons, the Tribunal should reject Respondent's arguments here that the United States and California had an unfettered right to regulate and Glamis assumed that risk in investing $15 million of its Canadian shareholders' money into development of the Imperial Project in reliance on a quarter-century of experience and practice in mining in the Southern California desert.

---

458 *ADC* Award ¶ 423-24.

459 *Id.* ¶ 423.

460 *Id.* ¶ 424.

232. In *Saluka Investments BV (the Netherlands) v. Czech Republic*, the tribunal recently recognized that "[a]n investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable."[462] "The standard of 'fair and equitable' is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard."[463] The *Saluka* tribunal further stated that "[b]y virtue of the 'fair and equitable treatment' standard . . . the [host state] must therefore be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations."[464]

233. Finally, the tribunal in *Champion Trading Company v. Egypt* recognized the requirement of transparency as a part of the minimum international law standard of treatment.[465] As described by the tribunal, the claimants in *Champion Trading Company* developed the transparency principle by reference to the WTO Appellate Body's decision in the *U.S.* –

---

461 *Id*. ¶ 445.

462 *Saluka* Partial Award ¶ 301.

463 *Id*. ¶ 302. Although the *Saluka* case concerned the "fair and equitable treatment" standard under the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, the tribunal noted that "the difference between the Treaty standard laid down in Article 3.1 and the customary minimum standard, when applied to the specific facts of a case, may well be more apparent than real." *Id*. ¶ 291.

464 *Id*. ¶ 302. Based on the facts of *Saluka*, the tribunal did not find that the fair and equitable treatment had been breached. While the tribunal acknowledged that there were legal shortcomings in Czech law, it held that the legal shortcomings must have been known to the investor when it made its investment. Thus, the host state's failure to improve its legal framework within a timescale that would help the investor did not constitute a breach of the "fair and equitable treatment" standard. *Id*. ¶¶ 359-360. Unlike the investor in *Saluka*, Glamis does not base its claim that the fair and equitable treatment standard has been breached on a failure by Respondent to improve its legal framework. Rather, Glamis' complaint is that Respondent arbitrarily and without transparency changed the rules of the game *after* Glamis had taken the extraordinary mineral exploration risk and discovered – what BLM belatedly acknowledged – was a valuable gold deposit.

465 *Champion Trading Co. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9 (Award) (Oct. 27, 2006).

Underwear case and the ICSID *Tecmed* case.[466] While on its facts, *Champion Trading Company* did not find that Egypt had violated the "fair and equitable treatment" standard,[467] the decision nonetheless confirms that the principle of transparency is firmly established as an obligation under the standard of treatment owed to foreign investors under customary international law.

234. In short, Glamis has more than met its burden of demonstrating that it is well established that "[t]ransparency and the protection of legitimate expectations are firmly rooted in arbitral practice."[468] Indeed, "[t]he stability of the legal and business framework is . . . an essential element fair and equitable treatment"[469] under customary international law. The Tribunal should reject Respondent's efforts to obtain for itself a lesser obligation than what has been imposed on its NAFTA partners[470] and other countries throughout the world community.[471]

2. The "Fair And Equitable Treatment" Standard Includes Protection From Arbitrary Measures

235. As established in Glamis' Memorial, government actions are arbitrary, in violation of the fair and equitable treatment standard, when the conduct is "grossly unfair," "unjust," "clearly improper and discreditable" (though it need not be "egregious," "outrageous,"

---

466 *Champion Trading* Award ¶¶ 161-162. "The essential implication is that Members and other persons affected, or likely to be affected, by Governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and, accordingly, to protect and adjust their activities, or alternatively to seek modification of such measures." *Id*. ¶ 161 (referencing United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear, (WT/DS24/AB/R), February 10, 1997, at 21).

467 Since "the Claimants were in a position to know beforehand all rules and regulations that would govern their investments for the respective season to come" and did not produce any evidence that Egypt violated this principle, the tribunal denied the lack of transparency claim based on the facts. *Champion Trading* Award ¶ 164.

468 Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, J. WORLD INV. & TRADE 357, 375 (2005).

469 *Occidental Exploration and Production Company (OEPC) v. Ecuador*, UNCITRAL, ¶ 183 (Final Award) (July 1, 2004).

470 *See e.g.*, *Metalclad* Award.

471 *See e.g.*, *Tecmed* Award; *CMS Gas* Award; *ADC* Award; *Azurix* Award.

"shocking" or "otherwise extraordinary"), such that it raises concerns about the judicial propriety of the outcome.[472] In spite of the substantial support provided by Glamis, Respondent seeks to avoid its obligation to refrain from arbitrary measures affecting foreign investors by arguing, as it did with the transparency principle, that there is no such obligation under the customary international law minimum standard of treatment.[473] Respondent supports its position by seeking to diminish the relevance of the principal cases relied on by Glamis, arguing that *ELSI* is not applicable because it involved a treaty other than NAFTA and that the remaining cases relied upon by Glamis should be limited to their particular facts. As detailed below, Respondent's arguments do not survive scrutiny and are further contradicted by recent case law establishing the protection from arbitrary measures as part of a host state's obligation under international law.

236. According to Respondent's own statements in the *ELSI* case, "the prohibition of 'arbitrary' measures commits 'the respective governments not to injure the investments and related interests of foreign investors by the unreasonable or unfair exercise of government authority.'"[474] Arbitrary actions are "those which are *not based on fair and adequate reasons* (including sufficient legal justification), but rather arise from the unreasonable or capricious exercise of authority."[475] Despite its previous statements on the standard of arbitrariness, Respondent here argues that there is no such obligation under international law to refrain from arbitrary measures. Respondent should not be able to evade the standards pertaining to arbitrariness that it articulated over 15 years ago now, when the standard no longer suits its

---

472 Memorial ¶¶ 523-31; Wälde Report at IV-13-22.

473 Counter-Memorial at 227.

474 Memorial ¶ 524 (citing Sean D. Murphy, *The ELSI Case: An Investment Dispute at the International Court of Justice*, YALE J. INT'L L. 391(Summer 1991)).

475 Memorial ¶¶ 524-25; *see also* Wälde Report at IV-23.

position.[476] It is no defense that the *ELSI* decision involved an interpretation of the Treaty of Friendship, Commerce and Navigation between Italy and the United States instead of the NAFTA,[477] as it is well established that the content of customary international law is "shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce."[478]

237. Respondent's attempts to distinguish the remaining cases based on their facts also fail. While the *Mondev* and *Loewen* cases factually involved judicial proceedings, there is no reason why the principles underlying the tribunals' decisions do not apply in other contexts. In fact, the *Waste Management* tribunal considered these cases along with other NAFTA decisions to synthesize the standard of treatment required under Article 1105.[479] Furthermore, these

---

476 *See* Wälde Report at IV-22-23.

477 Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT'L L. 809, 848 (2005) ("While the U.S.-Italy FCN treaty does not mention the international minimum standard per se, its prohibition against arbitrary acts has generally been treated as synonymous with that standard.").

478 *Mondev* Award ¶ 125.

479 Memorial ¶ 520, citing *Waste Management*. Moreover, Respondent's argument that *Waste Management* "does not assist Glamis" is entirely inconsistent. Counter-Memorial at 228 n. 990. Respondent states "[t]he tribunal in that case stated that behavior must be 'grossly' unfair or unjust . . . and mentioned 'arbitrary' conduct only in dictum . . . ." *Id*. In *Waste Management*, however, the tribunal stated that the behavior breaches the minimum standard of fair and equitable treatment if "the conduct is arbitrary, grossly unfair, unjust or idiosyncratic . . . ." "Arbitrary," "grossly unfair" and "unjust" are all used in the same sentence. Thus, Respondent's argument that the tribunal's statement that arbitrary action constitutes a violation of Article 1105 was made only in dictum makes no sense – particularly when Respondent accepts that behavior that is "'grossly' unfair or unjust" violates the same standard. To contend that one part of the sentence is dictum, but the remaining part is reliable, is nonsensical. Respondent's further argument that *Waste Management's* summary of past decisions ignored whether those tribunals grounded their decisions in customary international law must also be rejected. In summarizing the standard under Article 1105, the *Waste Management* tribunal focused on prior NAFTA decisions. If Respondent is now arguing that even NAFTA decisions do not constitute the body of law that should guide the interpretation of Article 1105, it remains unclear what does. Furthermore, the synthesis from *Waste Management* has been endorsed and applied in recent decisions, such as *Saluka* Partial Award ¶ 289. Finally, Glamis does not dispute *Waste Management's* statement that in applying the fair and equitable treatment 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," but disagrees with Respondent's position that such representations were not present in this case. Counter-Memorial at 228 fn. 990. As discussed in Professor Wälde's Expert Report, "[t]he legitimate expectation can arise both from specific representations by competent officials, but also from established regulatory and administrative practice properly understood by the investor." Wälde Report at IV-40.

decisions have been discussed in the context of other arbitral decisions involving administrative proceedings, such as in *Tecmed*.[480] In *Tecmed*, the tribunal found that the fair and equitable treatment standard not only included an obligation "to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment,"[481] but also an obligation to refrain from arbitrary measures:

> The foreign investor also expects the host State to act consistently, *i.e.* without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.[482]

238. Respondent's use of legal instruments governing Glamis' investment failed to conform to their usual function. It was, thus, arbitrary for Respondent to use environmental regulatory powers for the protection of cultural resources, particularly where its intention was clearly not to establish superior reclamation practices but merely to thwart Glamis' Imperial Project.

239. Furthermore, the *S.D. Myers* and *International Thunderbird* cases also support that arbitrariness is prohibited under Article 1105 (and by arbitrariness, Glamis does not mean

---

480 *Tecmed* Award ¶ 153, referencing *Mondev* in its discussion of the fair and equitable treatment standard. Moreover, one decision, *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award (January 26, 2006), does not support Respondent's assertion that *under customary international law*, administrative due process can somehow be less than judicial process. Counter-Memorial, at 229-30. The absence of an official at a hearing (as in *Thunderbird*) cannot be compared with the adoption of unlawful changes in longstanding regulations (as in Glamis' case). *Thunderbird* ¶ 200.

481 *See* Memorial ¶ 533 (discussing the fair and equitable treatment's obligation to protect legitimate expectations of an investor by providing a transparent and predictable framework).

482 *Tecmed* Award ¶ 154.

"mere" arbitrariness, as suggested by Respondent).[483] The *S.D. Myers* tribunal stated that "a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective."[484] *International Thunderbird* stated that "manifest arbitrariness falling below international standards" is prohibited under Article 1105. That the tribunal did not find a violation of this standard based on the particular facts does not negate the existence of such an obligation under the minimum standard of treatment.[485] Thus, as demonstrated by Glamis' Memorial and reinforced again here, the obligation under Article 1105(1) to provide "fair and equitable treatment" includes a prohibition against arbitrary treatment.[486]

240. Finally, the recent *Azurix v. Argentina* case further demonstrates that international law requires protection from arbitrary measures.[487] Considering the ordinary meaning of the terms used in the treaty at issue and the findings of other tribunals (particularly that of the ICJ),[488] the tribunal found that Argentina acted arbitrarily when, as explained by Professor Wälde, "for political reasons, [it] responded to and incited political agitation in order to undermine the economic functioning of the concession rights, without due regard to contractual commitment, proper procedures, or any rational study of the matter."[489] Respondent in this case

---

483 Counter-Memorial at 229; *see also* Wälde Report at IV-13-14 ("[T]here has to be a certain materiality of the breach before it can become actionable.").

484 S.D. Myers Inc. v. Canada, NAFTA/UNCITRAL, ¶ 263 (Partial Award) (Nov. 13, 2000).

485 *Thunderbird* Award ¶ 194; *Id*. (Wälde, T., Separate Opinion) ¶¶ 1, 21; Wälde Report at IV-40, n. 530.

486 Charles H. Brower II, *NAFTA's Investment Chapter: Initial Thoughts About Second-Generation Rights*, 36 VAND. J. TRANSNAT'L L. 1533 n. 78 (2003) ("Also known as the 'minimum standard,' the obligation under Article 1105(1) to provide 'fair and equitable treatment' essentially constitutes a prohibition against arbitrary treatment.").

487 *Azurix* Award.

488 *Id*. ¶ 391.

489 Wälde Report at IV-19.

similarly acted in response to political pressure in imposing measures (emergency backfilling regulations) without supporting studies (and in fact, in the face of studies advising against a full re-contouring and backfilling requirement).[490]

241. In short, it is well-established by the body of customary international law that host states may not arbitrarily deprive a foreign investor of its investment backed expectation. That is what both the federal and California measures did here.

C. The Federal And California Measures At Issue Demonstrate Respondent's Breach Of Article 1105's "Fair and Equitable Treatment" Standard Which Obliges It To Provide Glamis, A Foreign Investor, With A Transparent And Predictable Framework And Protection From Arbitrary Measures

242. In addition to challenging the legal content of the protections provided under the fair and equitable treatment standard of Article 1105, Respondent also claims that the measures at issue did not violate that standard. Respondent's extraordinary and capricious treatment of Glamis' investment in the Imperial Project illustrates exactly why there is a need for treaties such as NAFTA to protect foreign investments. If a host state is allowed to alter radically the rules of the game in favor of a domestic interest after the foreign investor has successfully undertaken its high-risk exploration, then a foreign investor is left with little incentive to take on such an investment. It is not an issue of requiring host states to freeze their laws indefinitely, as Respondent tries to frame it, but rather an issue of requiring states to apply their laws and administer their procedures in a normalized manner that provides predictability and stability and refrains from arbitrariness. As detailed in Glamis' Memorial and further explained below, the arbitrary actions taken by the federal government and the state of California significantly altered

---

[490] Memorial ¶ 554.

the legal environment under which Glamis' investment was made and evaluated, and accordingly, breached Respondent's obligations under the Article 1105 minimum standard of treatment.[491]

1. The Federal Measures Lack Transparency And Are Arbitrary

243. The federal government's actions and inactions, with respect to denying Glamis' technically and environmentally sound plan of operations based on an illegal unanticipated standard, and subsequently failing to act on the plan once the initial denial was rescinded, violate Article 1105 in that they were arbitrary and lacked transparency. Glamis had every expectation of approval of the Imperial Project under the settled laws and procedures that it understood well from its actual experience developing and operating two open pit gold mines in the California Desert. It could never have anticipated how Interior's political operatives would hijack, manipulate, and radically change the applicable processes with the sole purpose of killing the Glamis Imperial Project that under all prior practice and precedent would have been approved.

a. Interior's January 17, 2001 Record Of Decision Denying The Glamis Imperial Project – A Government Of Men, Not Laws

244. Secretary Babbitt's January 17, 2001 Record of Decision denying Glamis' Plan of Operations clearly demonstrates that Respondent failed to provide Glamis "fair and equitable treatment" in that it was "not founded on reason or fact nor on the law"[492] and was totally at

---

491 The amicus brief of the Sierra Club and Earthworks, dated October 16, 2006, surprisingly asserts (at 8) that "any argument that Glamis was unfairly treated by the federal and state governments as a foreign entity is groundless because, by definition, only United States citizens can hold mining claims." This clearly erroneous suggestion is refuted by a century of Interior Department practice which allows foreign corporations such as Glamis to form wholly owned U.S. corporate subsidiaries to hold mining claims to support mining investments. *See Helit v. Gold Fields Mining Corp.,* 97 I.D. 10; 113 IBLA 299, 318 (1990) ("It is indisputable that the Department's construction of the [Mining Law regulatory] provision allows aliens, as well as foreign corporations, to locate and hold mining claims by forming a corporation under the laws of a state or territory. *See* 1 *American Law of Mining* § 31.04[3] (2d ed. 1984). Appellant has 'failed to show why this consistent interpretation, stretching over nearly a century of adjudication, should be abandoned at this late date.'").

492 Memorial ¶ 523 (citing *Lauder v. Czech Republic*, UNCITRAL, ¶ 232 (Final Award) (Sept. 3, 2002)).

odds with the settled and predictable framework by which large ground disturbing projects have been evaluated both before and after. Respondent cannot really dispute that Glamis had a reasonable and legitimate expectation that its plan for the Imperial Project would be approved under the existing laws and regulations in place at the time that its plan was submitted. BLM and Imperial County found Glamis' plan to be the "preferred alternative," most consistent with applicable laws and land use plans, in their first and second drafts of the EIS/EIR in 1996 and 1997.[493] Moreover, BLM recognized in May 1998 that Glamis' "mining proposal appears to have merit under the 1872 mining law, the mining claims are properly recorded, [and] a practical [plan of operations] was submitted consistent with 3809 regulations."[494] Given such favorable findings with respect to the Imperial Project and Glamis' previous experience with planning and operating two other open-pit gold mines in Imperial County and the California Desert Conservation Area, Glamis had a reasonable expectation that its plan for the Imperial Project would be processed under the existing legal regime – and would be approved within the typical 2-3 year time frame.[495]

245. Moreover, as demonstrated in Mr. Leshendok's Expert Report, Glamis' amended Plan of Operations met the standards for approval as they existed prior to Respondent's novel

---

493 Memorial ¶¶ 185, 194.

494 *Id.* ¶ 545 (quoting BLM, Draft Option Paper, Imperial Project (Chemgold) – Glamis Corp (May 7, 1998) (at MV004193), Claimant Ex. 112).

495 Memorial ¶¶ 21, 134, 136-37, 397-98; Leshendok Report ¶ 95, tbl. 1. The Respondent's assertion that 5-10 years is a typical time frame for BLM to prepare a mineral exam report in connection with a *mineral patent* application is highly misleading. *See* Counter-Memorial at 259, note 1132. There is no evidence whatsoever that the cited BLM mineral exam reports were connected to pending proposed operations. More relevant is Interior's June 30, 2005 report to Congress showing average BLM time frames to process plans of operations since 1999 was typically less than two to three years. *See* Department of Interior Report to Congress, encl. 2 (June 30, 2005), Claimant Ex. 335. It is also critically relevant that in this case we have actual evidence of Interior Solicitor Leshy directing a "delay" of the Glamis mineral exam and EIS process on October 30, 1998, and admitted unlawful denial of the Glamis Imperial Project by Secretary Babbitt on January 17, 2001. *See* Memorandum from John Leshy to Ed Hastey (Oct. 30, 1998) (at (continued…)

(and now rescinded) standard of approval. As Mr. Leshendok, a senior former BLM minerals administrator with over two decades of supervisory experience, concluded:

- The Glamis Imperial Project was submitted by Glamis Gold Ltd. in 1994 with an expectation of commencing mining "as early as 1995." The proposed plan of operations that was analyzed for the 1996 Draft EIS/EIR indicated that Glamis Gold Ltd. expected that the plan of operations would be approved in 1997. The proposed plan of operations that was analyzed for the 1997 Draft EIS/EIR indicated that there was an expectation of plan approval in 1998. Department of Interior correspondence indicated that the Final EIS/EIR would be completed and the ROD would be issued in 1998. The summary in the [2000] Final Glamis Imperial Project EIS/EIR noted that the operations would "commence operations in 1998, after the acquisition of all required approvals."

- Glamis Gold Ltd. had followed a sequence of access, exploration, and predevelopment activities which was consistent with other open pit gold mining projects within Class L lands of the California Desert Conservation Area. There was a sequence of approvals of exploration and predevelopment activities by BLM which stated there was no unnecessary or undue degradation of the public lands in the CDCA. These approvals by BLM and the County of Imperial addressed and mitigated impacts to biological, cultural and environmental resources and were consistent with Federal and State laws.

- The Glamis Imperial Project was located within the CDCA which had twelve (12) open pit gold mining projects as referred to in the Draft and Final Glamis Imperial EIS/EIRs. There were six (6) active open pit gold mining projects in the CDCA in 1997-1998: Picacho, Briggs and Castle Mountain on Class L lands and Rand, Mesquite and American Girl on Class M lands. The Glamis Imperial Project was located within ten (10) miles of three major, approved open pit mining projects on public lands in the CDCA (Picacho, Mesquite and American Girl), with sixteen (16) individual open pits. The project is within the Basin and Range Geological Province which had about forty-nine (49) major, active gold and copper open pit mining projects and the state of California which had about 955 active nonfuel (hardrock and industrial mineral) mines in 1997-1998.

- Glamis Gold Ltd. practices in the proposed plan of operations were consistent with and similar to with other open pit gold mining operations. The proposed operation was based on standard and similar engineering and environmental principles used for gold mining operations in California, CDCA, and the Basin and Range Geologic Province. An adjoining open pit gold mining

MV022293), Claimant Ex. 152 and *Record of Decision for the Imperial Project Gold Mine Proposal* (Jan. 17, 2001) (at D-00168-0001-0001), Claimant Ex. 212.

> operation, Picacho, which was managed by the same technical and management team was operating at the same time as the submission in accordance with county, State and Federal requirements. In 1995, BLM stated that the Picacho operations and management set a good example as cooperating partners and stewards and in reclamation of desert lands; several successful Picacho mining practices were used in developing the proposed Glamis Imperial plan of operations. Glamis Gold Ltd. made similar efforts for environmental, hydrological, biological, cultural, Native American, engineering, and other studies in support of the proposed operation. Glamis Gold Ltd. operated other open pit gold mining operations in California and other States (Rand in California and Marigold, Daisy and Dee in Nevada).

However, despite its compliance with all applicable standards in place at the time of investment between 1998 and 2001, political operatives at the Interior Department indisputably changed the legal standards in reliance on which Glamis had invested considerable sums to move the reserves and identify resources and adopted a new discretionary denial authority to stop Glamis Imperial Project – without following legally required notice and comment rulemaking procedures.

246. Contrary to Respondent's arguments, the Imperial Project approval process has been far from transparent and fair. What the Respondent would like to depict as a thoughtful process dealing with complex issues was in reality anything but. That Solicitor Leshy met with Glamis on one occasion does not make the multi-year process through which he manipulated and intentionally delayed the project schedule transparent.[496] In fact, one of the very reasons why his legal opinion was eventually overturned by Solicitor Myers and Secretary Norton is because the new interpretation of the "undue impairment" standard of FLPMA established in his Opinion was adopted in blatant violation of the Administrative Procedure Act, the fundamental federal law that requires administrative agencies like BLM to adopt new rules and regulations having the

---

[496] *See* Counter-Memorial at 249. Moreover, the Leshy Solicitor's Opinion was summarily issued by Interior on January 14, 2000, with no prior notice of what the Solicitor was proposing to do. *Any comments submitted were shots in the dark without knowledge of what the Solicitor was contemplating.*

force and effect of law through a fair and transparent rulemaking process.[497] As explained by Interior Solicitor Myers:

> In addition, the Department should not apply the "undue impairment" provision in section 601(f) of FLPMA to deny a plan of operations unless and until it completes rulemaking to establish standards for the meaning of "undue impairment." *Because the Department has not promulgated regulations to define "undue impairment" under section 601 of FLPMA, I advise the rescission and reconsideration of any decisions made by the Department to deny a plan of operations based on the application of the "undue impairment" provision, including the Glamis proposal*.[498]

247. Respondent claims that Solicitor Myers' opinion is merely form over substance, and that *if* BLM promulgated a meaningful definition for "undue impairment," it *could* apply that provision to deny a future mining plan of operations for the Glamis Imperial Project.[499] But this argument suffers from two defects. First, it ignores Interior's long-standing recognition of the vested rights of mineral claim holders in not applying new regulations to pending plans of operation.[500] Second, it is pure speculation how such rulemaking would have come out on the issue of "undue impairment."[501] It is far more likely that if BLM did undertake such a rulemaking, it would clarify its longstanding understanding that the "unnecessary or undue degradation" standard is controlling, such an outcome would be consistent with Interior's latest relevant rulemaking action on October 30, 2001, in which it rescinded the short-lived and wholly subjective "substantial irreparable harm" mine denial authority created by Solicitor Leshy and

---

497 Solicitor's Opinion, M-37007, at 20 (Oct. 23, 2001), Claimant Ex. 216; *see also* Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq*.

498 Solicitor's Opinion, M-37007, at 20 (Oct. 23, 2001), Claimant Ex. 216.

499 Counter-Memorial at 252.

500 For example, even the Babbitt-Leshy Interior Department did not seek to make the new 3809 regulations that they proposed fully applicable to Glamis' Imperial Project.

501 As one senior BLM official noted in 2001 shortly after the Leshy Opinion was rescinded, "[w]e purposely did not define undue impairment in 1980 [the year the original 3809 regulations were promulgated] because (continued…)

Secretary Babbitt[502] in part on the grounds of "basic fairness" and because "it would be very difficult to implement the standard fairly as it relates to significant cultural resource values. . . ." The Respondent lacks credibility for advocating views contrary to this recent extant regulatory action of the Interior Department.[503]

248. As Glamis explained in the Memorial, BLM had already set the relevant standards for mining plans of operation in the California Desert Conservation Area Plan – through a public notice and comment process. The still-governing standards provided that mitigation conditions for mining, including on Class L lands, would be "*subject to technical and economic feasibility*. . . .[504] Contrary to Respondent's suggestion,[505] the 2003 *Mineral Policy Center*[506] district court opinion did not address at all the "undue impairment" standard applicable to the CDCA, nor the CDCA Plan standards for mining. Moreover, the district court upheld Interior's 2001 *deletion* of the new "substantial irreparable harm" regulatory standard which was based on the 1999 Leshy Solicitor's Opinion. The district court approvingly credited Interior's rationale that retention of the new wholly subjective "substantial irreparable harm" mine denial authority was projected by Interior and the western states to result in "a substantial decrease in mining

---

we all concluded it meant the same as undue degradation." E-mail from Bob Anderson to Karen Hawbecker (Oct. 26, 2001) (at D-000389-0136-0001), Claimant Ex. 217.

502 66 *Fed Reg.* 54,834 (Oct. 30, 2001); *see also* Memorial ¶¶ 77-79. Even the BLM during Secretary Babbitt's tenure in 2000 concluded that the "substantial irreparable harm" would be highly subjective because "most of the Native American religions are based on the concept that each individual determines what is significant for himself/herself." Memorial ¶ 77 (quoting BLM EIS/EIR). BLM added, "[b]ecause of these concerns, we assume that this provision as it relates to sacred and religious values will be extensively applied." *Id.*

503 *See United States v. Nixon,* 418 U.S. 683, 696 (1974) ("So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States . . . is bound to respect and to enforce it.").

504 Memorial ¶¶ 99-100 (emphasis added).

505 Counter-Memorial at 253.

506 *Mineral Policy Center v. Norton,* 292 F. Supp. 2d 30 (D.D.C. 2003). Although the district court's opinion contains dicta agreeing with certain aspects of the Leshy Solicitor's Opinion, the October 23, 2001 (continued…)

activity, causing serious economic consequences."[507] Thus, setting aside Respondent's speculation as to what BLM might do in the future with respect to the "undue impairment" provision, in reality, BLM still has never promulgated a regulatory definition for that provision. Secretary Babbitt's denial of the Imperial Project was unquestionably premised on this unlawfully promulgated new rule as Interior Solicitor Meyers and Secretary Norton so found in 2001.

249. In a vain – if not surprising – effort to rehabilitate Leshy's opinion and propose that the process through which the Interior Department denied Glamis' Plan of Operations was transparent and non-arbitrary, Respondent asserts the legal opinion was issued in response to a request for legal guidance from BLM.[508] Respondent suggests that the process that followed was then simply one of a lawyer providing the requested advice to its client. What Respondent fails to mention, however, is that Solicitor Leshy went far beyond what was asked of him, undoubtedly influenced by his longstanding animosity toward the federal Mining Law. The specific questions that BLM State Director Hastey asked the Regional Solicitor in January 1998 were:

> What are our responsibilities to ensure that we do not violate the First Amendment? What are our responsibilities to the mining claimant to ensure that his proprietary rights are protected?[509]

250. The Interior Regional Solicitor's Office promptly answered this question by May 1998, as stated in the following e-mail from Regional Solicitor John Payne: "in light of the *Lyng*

Solicitor's Opinion by William Meyers and Secretary Norton remains the official position of the U.S. Interior Department today regarding these laws.

507 *Mineral Policy Center,* 292 F. Supp. 2d at 30, 46 n. 18.

508 Counter-Memorial at 248.

509 Memorandum from State Director to Solicitor re Request for Opinion Regarding Conflict Between Quechan Religious Beliefs and the Glamis Imperial Project, at 3 (Jan. 5, 1998) (at MV002602), Claimant Ex. 98.

case, a first amendment religious challenge to a decision approving the Plan of Operations [is] an almost certain loser."[510] With this conclusion, the Regional Solicitor's Office had also addressed the concerns raised by BLM in a May 7, 1998 internal options paper that framed the legal issue as follows:

> Approval of the POO would likely trigger legal action by Native Americans or environmental groups. . . . It is unclear whether the religious aspects of the case would take precedent over the mining law. We have been working with the Regional Solicitor for clarification of the legal issues. . . . *The mining proposal appears to have merit under the 1872 mining law, the mining claims are properly recorded, a practical POO was submitted consistent with 3809 regulations. Thus, denial of the POO could constitute a taking of rights granted to a claimant under the Mining Law.*[511]

Thus, if BLM denied Glamis' Plan of Operations, "reasonable compensation can be expected to be substantial,"[512] and no First Amendment challenge could stand in the way of that result.

251. Notwithstanding these legal conclusions that were strongly supportive of Glamis' mining property rights, Solicitor Leshy did not allow the Regional Solicitor to issue a limited First Amendment opinion and instead began scrutinizing the economics of the Imperial Project, seeking a copy of BLM's "internal mineral feasibility report in late May 1998,[513] and directing his legal staff a few weeks later to explore "what if anything we can do with the preliminary assessment of the economic viability of the mine . . . ."[514] The plain fact is that from 1998

---

510 E-mail from John Payne to David Nawi, at 2 (June 1, 1998) (at D-00376-0010-0002), Claimant Ex. 121, referencing *Lyng v. Northwest Indian Cemetery Protection Ass'n*, 485 U.S. 439 (1988); *see also* E-mail from John Payne to Joel Yudson & Janie Sheppard (May 18, 1998) (at D-00376-0049-0001), Claimant Ex. 115.

511 BLM, Draft Option Paper, Imperial Project (Chemgold) – Glamis Corp, at 3 (May 7, 1998) (at MV004195), Claimant Ex. 112 (emphasis added).

512 *Id.*

513 E-mail from John Leshy to Joel Yudson, et al. (May 25, 1998) (at D-00377-0008-0007), Claimant Ex. 119.

514 E-mail from Karen Hawbecker to Lisa Hemmer (June 15, 1998) (at D-00040-0001-0001), Claimant Ex. 124 (forwarding e-mail from John Leshy to staff (June 14, 1998)).

through January 2001, Interior's full effort under Solicitor Leshy's direction was not to process the Glamis Imperial Plan of Operations, but to kill it, and they succeeded.[515]

252. From this point forward, as explained in detail in Claimant's Memorial, BLM's internal deadline for issuing the "Record of Decision" and "Conditions of Approval" for the Imperial Project Plan of Operations by October 18, 1998 was blown out of the water.[516] Instead, BLM was purposefully directed by Solicitor Leshy on October 30, 1998 to "*delay completion of the [Glamis mining claim] validity examination and the final EIS*"[517] – which it did – while Solicitor Leshy prepared his novel (and now rescinded) legal opinion. That opinion would not be issued until (after dozens of secret drafts were produced and modified) December 27, 1999, or released until concurrence by Secretary Babbitt on January 14, 2000 - a full two years after BLM State Director Hastey first asked for advice.[518] All of these events were part of Solicitor Leshy's orchestrated process designed to create a veneer of legality to hide the unlawful failure to approve Glamis' Plan of Operations.

253. When the Opinion, and later the Record of Decision itself, was issued, Glamis could never have anticipated the extent to which the asserted cultural and religious significance of the

---

515 Although mine approval decisions are normally made at the BLM state or district office level, by early July 1998 Solicitor Leshy had decided that Washington, D.C., would take the lead on drafting the legal opinion for BLM State Director Hastey, that the Division of Indian Affairs could draft the section of his legal opinion dealing with First Amendment issues, and that the Division of Mineral Resources could take "the lead on issues relating to BLM's authority to mitigate impacts and when that would lead to a takings." E-mail from John Payne to James Hamilton (July 9, 1998) (at MV015981), Claimant Ex. 128 (referring to a telephone conference with Solicitor Leshy). Nowhere in BLM State Director Hastey's initial request for legal advice did he ask where or under what circumstances would BLM's authority under the Mining Law to mitigate impacts implicate Fifth Amendment takings liability. Clearly, Solicitor Leshy was now working well beyond the scope of his client's request.

516 Memorial ¶ 263, citing Imperial Project EIS Schedule (July 27, 1998) (at D-00039-0002-0001), Claimant Ex. 135.

517 Memorial ¶ 291, citing Memorandum from John Leshy to Ed Hastey (Oct. 30, 1998) (at MV022293), Claimant Ex. 152.

518 *See* Solicitor John Leshy, *Regulation of Hardrock Mining* (Dec. 27, 1999) (at MV005585), Claimant Ex. 205.

Imperial Project area would be a basis for the denial. First, BLM's governing 3809 regulations and the CDCA Plan itself had provided that the projected impact of a mine on cultural resources would not provide a basis for project denial.[519] Second, as discussed extensively above and contrary to Respondent's claims,[520] Glamis had no reason to anticipate that the ubiquitous Native American artifacts and trail segments would suddenly assume such premier cultural significance as to differentiate the Imperial Project from the numerous other mines and ground disturbing projects in the California Desert.

254. Further, Glamis could never have anticipated the biased nature of the ACHP process. The Tribe's expert before this Tribunal, Dr. King, is the same individual who communicated on September 15, 1998 with Mr. Alan Stanfill, a chief staff person at the ACHP, and Mr. Ray Soon, a member of the ACHP and one of three members of the individual review team assigned to review the Imperial Project, prior to the ACHP actually being referred the case by BLM.[521] Dr. King advised the ACHP on how it should go about recommending denial of the Imperial Project, highlighted the "problems" presented by the "long-obsolete Mining Act of 1872" and noted that a "case like the Imperial Project, if highlighted by Council action, could contribute importantly to encouraging Congress to *take appropriate action on the Mining Law*."[522] He further stated: "I hope that the Council would speak eloquently to the need both to deny the

---

519 *See* Memorial ¶¶ 47-117.

520 Respondent asserts that that survey in particular provided sufficient evidence that the area immediately surrounding the Imperial Project had a higher density of archaeological resources than the broader area. Counter-Memorial, at 254-56. What Respondent fails to mention is that the area's archaeological resources (lithic scatters, shards, chipping stations, and pot drops) were no different in kind and significance than other areas of the desert, as discussed above. Respondent's argument on this point merely underscores the key point Dr. Sebastian raised in her initial expert report: the more you look, the more you find. *See* Sebastian Report at 9-10.

521 Memorial ¶ 313 & n. 620.

522 Letter from Tom King to Ray Soon (Sept. 15, 1998) (at AG002726), Claimant Ex. 144.

project the use of Federal land and to *change the 1872 Mining Act* to give agencies like BLM more control over destructive uses of the lands with whose management they are entrusted. . . . It would place the Council dramatically on record in support of the Administration's efforts to *change the Mining Law*. . . ."[523] This letter, acknowledging that the steps being urged would change the legal framework (in violation of the fair and equitable treatment standard) under which Glamis planned its investment, encouraged Mr. Soon to "*use [his] position on the Council to insist that the Council promptly terminate consultation on this project and convene an on-site public meeting of the full membership to consider it and formulate comments to the Secretary*."[524]

255. In line with Dr. King's recommendation, the ACHP then held public hearings and field visits that members of the ACHP and BLM themselves found to be "unusual" and outside the normal rules of the Section 106 process.[525] Much like their "unusual" field hearing, the ACHP's sham site visit to the Project Area was similarly designed to support the ACHP's eventual (and pre-decided) recommendation to deny the Imperial Project. Notably, the ACHP's site visit team failed to visit the actual proposed mine site on the 1600-acre Project Area.[526] Not surprisingly, the ACHP's Executive Director met with Solicitor Leshy in Leshy's office in early October 1999 to coordinate the timing of the ACHP's letter to Secretary Babbitt.[527] The ACHP's decision to terminate consultation – in line with Dr. King's early urging – is itself contrary to the normal NHPA Section 106 process.[528]

---

523 *Id.*

524 *Id.* (emphasis added).

525 Memorial ¶ 315, n 623.

526 *Id.* ¶ 315.

527 *Id.* ¶ 323 (citing to E-mail from John Fowler to Don Klima (Oct. 15, 1999) (at ACHP01373), Claimant Ex. 200)).

528 *See* Sebastian Supplemental Report at 25-26.

256. Finally, Respondent speciously argues that Glamis cannot assert a claim under Article 1105 with respect to the Interior Secretary Babbitt's January 2001 Record of Decision, unlawfully denying the Glamis Imperial Project, since that decision was later rescinded.[529] The simple answer is the damage was already done and Secretary Norton's action – while conclusively demonstrating the violation of Article 1105 – did not cure it. As discussed extensively above in the context of the breach of Article 1110, the plan of operations remains unapproved. Indeed, Respondent has consigned it to suspended animation. Merely reversing the decision has not undone the damage Glamis suffered in the total loss of its $15 million investment.

b. Interior's Inaction/Failure To Process Glamis' Plan Of Operations

257. Respondent takes a piecemeal approach to arguing that its particular actions and inactions did not alone constitute a breach of customary international law. Respondent vaguely argues, for instance, that Interior's failure to take final action on Glamis' plan once Interior rescinded the Babbitt denial in November 2001 does not constitute an "extreme delay in the administration of justice by the courts" such that "can give rise to State responsibility under customary international law."[530] A tribunal must look at *all of the conditions*, however, in evaluating whether there has been a breach of international law. In *Metalclad*, the tribunal looked at the *totality of the circumstances* and found that they "demonstrate[d] a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA."[531] Looking at all of the

---

529 Counter-Memorial at 247.

530 Counter-Memorial at 258.

531 *Metalclad* Award ¶ 99.

circumstances in this case, this Tribunal should also find that Interior's failure to act on Glamis' Plan of Operations demonstrates a violation of its obligations under NAFTA.

258. In *Metalclad*, it took the municipality thirteen months after the submission of Metalclad's application to deny its construction permit in December 1995; Metalclad initiated its NAFTA case in January 1997.[532] Glamis submitted its Plan of Operations in 1994. To this day, the plan has not been approved or denied, despite the fact that the United States has never shown that Glamis' Plan of Operations was deficient. By any calculation, and particularly by BLM's own projection, it should not have taken over 11 years to decide on Glamis' plan.[533] But for the extraordinary irregularities surrounding the Imperial Project's administrative process, Glamis' plan should have been approved in the usual time range of 2-3 years,[534] and at least by January 2001 – and Glamis should have been mining and selling gold and silver from the Imperial Project in today's booming commodities market – without a complete mine backfilling obligation.

259. Moreover, Respondent's attempts to blame the delays plaguing the approval of Glamis' Imperial Project on Glamis itself are baseless. Glamis has never authorized Interior to stop processing its Plan of Operations. Although Glamis made a specific request for temporary suspension in processing on December 9, 2002 (just three days before California's adoption of the "emergency" complete backfilling regulations),[535] Interior refused unless Glamis provided a

---

532 *Id*. ¶ 90.

533 *See, e.g.,* Imperial Project EIS Schedule (July 27, 1998) (at D-00039-0002-0001), Claimant Ex. 135 (projecting that the Record of Decision and Conditions of Approval would be ready by October 1998).

534 *See* Leshendok Report ¶ 95, tbl. 1; Department of Interior Report to Congress, encl. 2 (June 30, 2005), Claimant Ex. 335.

535 *See* Letter from Kevin McArthur, Glamis Gold, to Mike Pool, BLM California State Director (Dec. 9, 2002) (at AG001140), Claimant Ex. 265.

release of liability – which Glamis refused to do.[536] In short, no suspension in processing occurred as a result of this request.[537]

260. Moreover, again as discussed above, nothing in the NAFTA Claim Notice of Intent in July of 2003 reflected a suggestion that Interior stop processing the Plan of Operations. If anything, the Notice should have galvanized Interior to address its failures to treat the Imperial Project Plan of Operations fairly and equitably. Sadly, it did not.[538]

---

536 *See* Letter from Charles Jeannes, Glamis Gold, to Mike Pool, BLM California State Director (Mar. 31, 2003) (at CON003376), Claimant Ex. 280.

537 In any event, the request was a good faith effort by Glamis to see if a dispute could be avoided. *See* Letter from Kevin McArthur, Glamis Gold, to Mike Pool, BLM California State Director (Dec. 9, 2002) (at AG001140), Claimant Ex. 265. The impetus for Glamis' request for suspension of processing was Glamis' knowledge that California – being aware that the federal government no longer sought to kill the Imperial Project – was about to enact sweeping new confiscatory regulations of its own expressly designed to stop the Imperial Project. The potential acquisition of the Glamis Imperial Project property interests had been strongly supported on November 22, 2002, by the bi-partisan U.S. congressional delegation from Nevada, and later even by the ACHP. *See* Memorial ¶¶ 354-355; *see also* Letter from Senators Ensign and Reid and Representative Gibbons to Interior Secretary Norton at 1 (Nov. 22, 2002) (at D-00384-0048-0002), Claimant Ex. 262. The bi-partisan congressional delegation urged that the Interior "Department explore whether the property interests of the Glamis Imperial Corporation in the Project could be acquired by the government and end this contentious dispute to the mutual satisfaction of the corporation and the Quechan Tribe." They stated further: "We ask that you promptly initiate a fair-market value appraisal of the property interests held by the Glamis Imperial Corporation and . . . that you then enter into discussions with the company to see if an agreement could be reached on acquisition of those property interests . . . ."; *see also* Letter from ACHP Chairman Nau to BLM Director Clarke (Mar. 17, 2003) (misdated 2002) (at D-00365-0015-0002), Claimant Ex. 226 ("Acquisition of the company's interests could finally resolve the conflict between the proposed mining activity and these unique resources. We encourage the Bureau to actively pursue further investigation of this option in cooperation with the mining company . . . ."). On January 8, 2003, in a letter to Congressman Gibbons, Interior Assistant Secretary Watson agreed that, while such an "acquisition would end this contentious dispute, our concern is where the funds would come from for such an acquisition . . . ," and she added that Interior's budget did not enable it to carry out an appraisal or fund the acquisition. *See* Letter from Interior Assistant Secretary Watson to Representative Gibbons (Jan. 8, 2003) (at D-00384-0048-0005), Claimant Ex. 272. At essentially the same time, BLM notified Glamis that it would ***not*** temporarily suspend processing of the plan of operations unless Glamis agreed first to release Interior from "any legal liability. . . ." Letter from Mike Pool, BLM California State Director, to Kevin McArthur, Glamis Gold (Jan. 7, 2003) (at AG001141), Claimant Ex. 271. By January 2003, of course, the emergency backfill regulations were in place and the Glamis Imperial Project was once again in regulatory limbo and halted by the targeted and unprecedented action of the State of California – acting pursuant to Governor Gray Davis' September 30, 2002 directive to use "all possible" remedies to "assist in stopping the development of that mine." Governor Gray Davis, *Veto Message for SB 1828*, at 2 (Sept. 30, 2002) (at CON001964), Claimant Ex. 256.

538 In this regard, we note that Respondent also breached its obligation under Article 1118 to "first attempt to settle a claim through consultation or negotiation." While Glamis presented its Notice both written and orally, Respondent refused to provide any response or engage on the merits while the claim was filed and the panel selected.

2. The California Measures Lack Transparency And Are Arbitrary

261. Additionally, the California measures both denied Glamis a transparent and predictable framework and arbitrarily imposed on Glamis – after it had made its significant investment – the cost of protecting Native American cultural resources. Respondent waffles about the precise justification for the California measures but seems to suggest that that SB 22 and the SMGB's mandatory backfilling regulations were legitimate measures passed to address environmental hazards associated with open-pit metallic mining, reasonably and legitimately accommodated the free exercise of religion, and were adopted in accordance with due process. Respondent claims that no studies were required in support of the new standards because they were merely an extension of pre-existing legal requirements and were passed to provide clarity to the regulated community. Respondent's arguments, however, fail to explain why emergency powers had to be used for such legitimate purposes, why the Imperial Project was identified as the sole "emergency condition" justifying the emergency regulation, and why the then-Governor of California directed his various agencies to stop the development of the Imperial Project just before SB 22 and the mandatory backfilling regulations were adopted.

a. California's Sudden Enactment Of Complete And Mandatory Backfilling Requirements For Open-Pit Metallic Mines Was Not Consistent With Existing Legal Principles And Could Not Have Been Predicted By Glamis

262. As is clear under customary international law, investors are entitled to rely on the laws in place at the time of their investment. Host states are entitled to make changes to their laws, but they must make them prospectively or compensate the investor who relied on the host

state's laws as they existed at the time of the investment.[539] As Professor Wälde explains, "legitimately enacted legislation and regulations" must be adopted to have a prospective effect only, as retroactive application is prohibited in international and domestic law.[540] The California measures at issue here had the effect of applying retroactively to Glamis in that they completely changed the legal and business framework governing the Imperial Project, after Glamis had invested over $15 million to ensure profitable operation under the law as it existed prior to December 2002.

263. Respondent would have this Tribunal believe that the complete backfilling and re-contouring requirements adopted by California in late 2002 and early 2003 were simply logical extensions of pre-existing background principles embodied in the Sacred Shrines Act and SMARA, provided clarification on the existing reclamation requirements of SMARA, and were adopted through an open and transparent democratic process, during which Glamis was an active participant.[541] Respondent would also have this Tribunal believe that the new backfilling requirements were adopted in response to a California Legislative Office study calling for better enforcement of the SMARA reclamation standards, or in the alternative, that no studies were required to support the new standards because they simply were an extension of pre-existing standards.[542]

264. Whatever the real rationale, the government cannot overcome one simple fact – before December 2002, complete backfilling and re-contouring of open-pit metallic mines was

---

539 The fair and equitable treatment standard requires "[c]ontracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment." *Tecmed* Award ¶ 154.

540 Wälde Report at IV-56, fn 592.

541 Counter-Memorial at 242-46.

542 *Id.* at 96-97, 241.

not required in California and in fact had never been required at any major mine in the state. After December 2002, all open-pit metallic mines must be backfilling and re-contoured to pre-existing grade. Before December 2002, the counties – as lead regulatory agencies under SMARA – had the discretion to modify the applicable reclamation standards for a particular mine based on the approved end use of the land in question.[543] After December 2002, the counties expressly could not exempt a mining project from the complete backfilling requirements of SB 22 or the mandatory backfilling regulations; those requirements have to be applied without exception.[544] Thus, December 2002 marked a fundamental shift in the legal framework surrounding open pit metallic mining in the State of California and marked a departure from the existing legal and scientific framework that Glamis was expert in navigating.

265. As detailed in Glamis' Memorial and in the unchallenged expert report of Mr. Thomas V. Leshendok, Glamis had developed a Plan of Operations for the Imperial Project that was fully consistent with federal and state requirements prior to December 2002, including all applicable reclamation standards.[545] Glamis had operated two other open-pit metallic mines in the California desert, and in fact was critical in pioneering advanced reclamation techniques for desert mining at its Picacho Mine, located less than 10 miles from the Imperial Project area.[546] As recognized by the California Mining Association and heralded in the California Legislature in 1998, Glamis received an "Excellence in Reclamation Award" for its innovative land-sculpting and re-contouring techniques that mimicked the desert environment and surrounding landforms,

---

543 *See* Cal. Admin. Code tit. 14, § 3700(b).

544 *See id.* § 3704.1.

545 *See* Leshendok Report ¶¶ 150-161; Memorial ¶ 194.

546 *See* Memorial ¶¶ 133-137 (describing Glamis' operations at the Picacho and Rand mines within the California Desert Conservation Area).

and for its sequential backfilling techniques that significantly minimized the footprint of the mine in the post-operational environment.[547] Glamis had also earned a reputation within BLM as being a "good steward[]" of the land because it shared with BLM the "responsibilities for proper use, development and planned reclamation of desert lands . . . ."[548] Glamis relied on this expertise and experience in acquiring, exploring, planning, and engineering the Imperial Project between 1987 and 2002, during which time it invested nearly $15 million to develop a technically and scientifically appropriate mining plan of operations.[549]

266. What Glamis could not know or reasonably predict, however, that before it would ever get to implement that Plan of Operations, the State of California would totally revamp its open-pit metallic mine reclamation standards without advance warning, serious debate, scientific study, or legitimate rationale. Glamis could not have predicted that the state regulatory agencies would suddenly and radically change the existing and well-established legal framework for mining reclamation because they were instructed to do so by senior political figures in the state, including then-Governor Gray Davis and members of the State Legislature.[550]

267. Surprisingly, Respondent asserts that Glamis has not provided any basis to infer that the Governor or other political operatives in the state would target the Glamis Imperial Project, arguing that Glamis cannot prove that those politicians held any animus towards the company.[551] Actually, as the Memorial makes clear, Governor Davis made the point repeatedly and clearly on the day he signed SB 22 into law: "I'm proud that today, California is sending a message to the

---

547 *See, e.g.,* Congressman Battin, California Legislature Assembly Resolution No. 1138 (May 13, 1998) (at MV005677), Claimant Ex. 114.

548 BLM, *Gold Mines in El Centro Resources Area* (Jan. 10, 1995) (at B00177), Claimant Ex. 60.

549 *See* First Statement of K. McArthur ¶ 6.

550 *See* Memorial ¶¶ 356-377.

551 Counter-Memorial at 242.

federal government that our sacred sites are more precious than gold."[552] As Glamis explained in its Memorial, California wanted to establish a new land use policy for the state and used the Glamis Imperial Project as the vehicle for making that happen.[553]

268. Contrary to Respondents assertions, there is substantial information in the record to conclusively demonstrate that SB 22 and the mandatory backfilling regulations were specifically targeted at Glamis. For example, shortly after Governor Davis instructed his Secretary of Resources "to pursue all possible legal and administrative remedies that will assist in stopping the development of the Glamis gold mine,"[554] a California Senate staffer and a lawyer for the Governor began communicating about the feasibility of the State Mining Board adopting emergency regulations to shut down the Imperial Project while the State Legislature worked with Department of Conservation lawyers to draft legislative proposals to accomplish the same objective.[555] In fact, just two days after this particular communication, the California Secretary of Resources sent a letter to the Chairman of the State Mining and Geology Board asking that

---

552 Talking Points – SB 22 Bill Signing (Apr. 7, 2003) (at GOV063), Claimant Ex. 285.

553 *See, e.g.,* Memorial ¶ 337. As for providing more explicit detail into the inner workings of California's legislative and regulatory processes and motivations, Respondent's arguments are disingenuous. Respondent specifically withheld hundreds of documents from Claimant during the discovery phase of this arbitration that purport to describe the process of how and why California moved to adopt SB 22 and the mandatory backfilling regulations. Respondent argued at that time that such documents are protected by the attorney-client, work product, deliberate process, and executive office privileges. As Glamis repeatedly stated in its discovery filings, Respondent should not be allowed to stand behind a bevy of privilege claims to protect the inner deliberations of government in support of the so-called democratic process, and then later argue that Claimant cannot prove the substance of those internal deliberations or why California specifically targeted the Imperial Project. *See id.* at n. 739.

554 Governor Gray Davis, *Signature Message for SB 483* (Sept. 30, 2002) (at AG000587), Claimant Ex. 257.

555 E-mail from Jeff Shellito to Rich Thalhammer (Oct. 15, 2002) (at AG000171), Claimant Ex. 258 (expressing concern that this particular e-mail correspondence would end up in court and not be protected by the attorney-client privilege).

Board to consider "adopting state regulations which would *alter* current state reclamation policies" at its next scheduled hearing.[556]

269. State Senators Sher and Burton later wrote to the Board Chairman urging the Board to adopt the proposed regulations on an emergency basis "because the federal government is racing to complete an environmental analysis of the Glamis Imperial Project, and the Secretary of Interior may take action allowing the mine to move forward before the end of the year."[557] In the meantime, those same Senators had introduced SB 22 to the Legislature in which they claimed that mandatory backfilling requirements were "urgently needed to stop the Glamis Imperial mining project in Imperial County proposed by Glamis Gold Ltd., a Canadian-based company . . . ."[558] And when SB 22 was finally signed into law, the California Governor proclaimed that the legislation "will essentially stop the Glamis mine proposal dead in its tracks."[559] Thus, no matter how much Respondent attempts to cloak the development and passage of the emergency backfill regulations and SB 22 under the guise of a legitimate and orderly rulemaking or legislative process to protect public safety, environmental health, and Native American sacred sites,[560] Respondent cannot overcome the evidence in the record that clearly indicates the targeted nature of those measures.[561] Nor can Respondent point to any study

---

556 Letter from Mary Nichols, Secretary of Resources, to Allen M. Jones, Chairman of the State Mining and Geology Board (Oct. 17, 2002) (at AG000449), Claimant Ex. 259 (indicating that such regulations should require complete backfilling of all open-pit metallic mines) (emphasis added).

557 Letter from Senators Burton and Sher to Allen M. Jones, at 1 (Dec. 10, 2002) (at CON003031), Claimant Ex. 266.

558 Cal. S. Natural Res. Wildlife Comm., *Summary of SB 22*, at 4 (Jan. 14, 2003 (sic) Committee Hearing) (at ARC01071), Claimant Ex. 274.

559 Talking Points – SB 22 Bill Signing (Apr. 7, 2003) (at GOV063), Claimant Ex. 285.

560 *See, e.g.,* Counter-Memorial at 92-100.

561 *See* Memorial ¶¶ 356-77. For reasons discussed above, the Tribunal must also dismiss Respondent's argument that the legal principles underlying these measures were in force at the time that Glamis made its investment and thus foreclosed any reasonable expectations by Glamis that California would not legislate (continued…)

or other empirical evidence in the record that specifically identified the need for the development of mandatory complete backfilling requirements for open-pit metallic mines in the state, other than the self-serving statements of need in the legislative and regulatory proposals themselves. Respondent only suggests that the California Legislative Office in 2002 recommended that the state begin to monitor the adequacy of reclamation plans and financial assurances for all mines in the state. As discussed above, that report did not suggest that the state adopt or even explore the possibility of adopting an unprecedented mandatory complete backfilling requirement.

270. Finally, Respondent claims that because Glamis participated in the legislative and rulemaking processes underlying the adoption of the California measures, that it should now acquiesce to the legitimacy of those processes.[562] In the United States, government agencies must follow two overriding principles when developing new rules and regulations. They must provide fair notice and due process to the regulated community about proposed changes in the law, and those proposed changes must bear some rational relationship to a stated and legitimate governmental purpose.[563] Respondent would have this Tribunal believe that because Glamis participated in the legislative and rulemaking process, Glamis should accept the results of that process regardless of the outcome. Simply participating in a democratic process does not necessarily make that process transparent or its results less arbitrary. As explained below, the complete backfilling measures adopted by California were both arbitrary and unnecessary to address any environmental or cultural resource concerns at issue at the Glamis Imperial Project.

---

to accommodate Native American religious practices, to protect sacred sites from irreparable harm, or regulate to ensure compliance with SMARA's reclamation standard. Contrary to Respondent's assertion, the California measures did not merely specify pre-existing statutory standards embodied in the Sacred Sites Act and SMARA. Such broad principles cannot be considered sufficient to provide Glamis, or any other foreign investor, with reasonable notice as to the laws affecting their investment.

562 Counter-Memorial at 243.

b. The California Measures Are Arbitrary And Do Not Fulfill Their Purported Purposes

271. Respondent would have this Tribunal believe that California adopted complete backfilling requirements for open-pit metallic mines because it is so well established that environmental degradation and public safety concerns are associated with every open-pit *metallic* mine in the state, but not necessarily any other kind of open-pit mine. By trying to devise a legitimate reason for California to adopt these measures, it hopes to distract the Tribunal from the undisputed and openly acknowledged reasons – to preserve the Imperil Project site despite Glamis' considerable investment in successful gold exploration. In reality, there is very little evidence to support the notion that complete backfilling makes sense from an economic or environmental perspective. At best, most analysts to have considered this issue believe that backfilling (either sequential, partial or complete) must be considered on a case-by-case basis. Moreover, there is no empirical evidence in the record to suggest that complete backfilling actually preserves Native American archeological resources. That is, unless the true purpose of the complete backfilling requirement is to shut down all mining activities; then complete backfilling fulfills that purpose perfectly.

(1) The Mandatory Backfilling Regulations Were Not Based On Any Scientific Study Or Technical Report And Fail To Achieve Their Stated Goals

272. A close scrutiny of the administrative record for the mandatory backfilling regulations reveals that no technical or empirical data or other scientific study was relied on in the development of those regulations. Of course, this is not surprising as California admitted as

563 *See* 5 U.S.C. § 553 (b), (c) (fair notice); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 42, 48-50, 52 (1983) (rational relationship to a legitimate purpose).

much in the actual administrative record for those regulations.[564] It stretches the bounds of reasoned rulemaking to suggest that a seismic change in reclamation standards with limited environmental or safety benefit but dramatic impacts on an entire industry would be hurriedly adopted without careful analysis and study in order to apply it to a solitary pending mining proposal.

273. California's failure to rely on any scientific or technical report or study in support of the mandatory backfilling regulations resulted in the development of a reclamation standard that cannot withstand objective and careful scrutiny, particularly because that standard applies to only a small fraction of the open-pit mines in the state. For example, Respondent has offered no rational justification for why the mandatory backfilling regulations apply to open-pit metallic mines but not the thousands of other open-pit mineral mines in the state.[565] Respondent claims that backfilling non-metallic mineral mines is infeasible because most of the mined material at those mines is hauled away; to backfill those mines, Respondent argues, would require another hole to be dug just to provide the material.[566] Respondent's sole basis for this argument, however, is a single blanket statement in the administrative record for the mandatory backfilling regulation. That it would be expensive (as is also true for metallic mines) does not address any safety or other environmental concern. In both instances, there is still a large, unfilled pit remaining.

---

564 Final Statement of Reasons for 14 CCR § 3704.1, at 4 (at CON002957), Claimant Ex. 304 ("No technical, theoretical, empirical studies, reports, or documents were prepared or relied upon by the SMGB in its consideration of this rulemaking.").

565 *See* Memorial ¶¶ 138-139, 378 (explaining that the great majority of the 1,100+ open-pit mineral operations in California produce non-metallic minerals).

566 Counter-Memorial at 240-241.

274. Respondent also fails to point out that no scientific analysis or report of non-metallic mining practices was consulted during the rulemaking process. The State Mining Board presented no evidence to demonstrate, for example, whether any waste rock or other material remains after non-metallic open-pit mining and whether it would have been feasible to require backfilling to the maximum extent practical with that material. In fact, such a provision was included in the mandatory backfilling regulation for metallic mines: "The requirement to backfill an open pit excavation to the surface . . . shall not apply if there remains on the mined lands at the conclusion of mining activities . . . an insufficient volume of materials to completely backfill the open pit. . . . In such case, the open pit excavation shall be backfilled . . . to an elevation that utilizes all of the available material remaining . . . ."[567] There is no rational explanation for why this same provision should not apply to both metallic and non-metallic mines alike.

275. Respondent's insistence that complete backfilling provides immense public safety benefits by eliminating the "attractive nuisance" open-pit metallic mines pose to humans also highlights the arbitrariness of the regulation vis-à-vis non-metallic mines.[568] If open-pit metallic mines are dangerous to humans, then so too are non-metallic mines. As Thomas Leshendok points out, the California landscape is dotted with open-pit non-metallic mines.[569] In any event, Respondent fails to point to any conclusive evidence in the record that open pits actually pose an

---

567 Cal. Admin. Code tit. 14, § 3704.1(h).

568 Counter-Memorial at 240-241.

569 Leshendok Report ¶ 114.

attractive nuisance, or are any more dangerous than the surrounding environment in which they are located.[570]

276. Respondent attempts to bolster its argument that metallic mines should be treated differently from non-metallic mines by claiming that metallic mines are inherently more dangerous from a public and environmental health standpoint.[571] Again, this argument lacks merit because no scientific support was provided for this blank assertion in the administrative record. The Mining Board instead merely conjectured that open-pit metallic mines "may" pose a harm to the environment, or otherwise provided anecdotal evidence without any underlying scientific or technical justification. For example, the State Board claims that because waste rock and heap leach material typically remains on the land after the completion of mining, the material "*may* pose a contamination problem when residual cyanide (or any other processing solution) not completely removed by rinsing is exposed to precipitation percolating through the pile and flushing the processing solution into surface waters."[572]

277. When Imperial County questioned the need for the regulation because "there is no scientific analysis to show that cyanide leaching causes significant, adverse environmental impacts to desert washes, its habitat and impacts to wildlife," the Mining Board revealed that the environment was not its real concern, stating that the "regulation does not address cyanide heap leaching as a process and mining."[573] It suggested that the County contact the Mineral Policy

---

570 *Compare* Addendum to Final Statement of Reasons, at 1 (at CON003025), Claimant Ex. 334 (in which Imperial County points out that "mining and reclamation of a gold mining operation will not create any greater danger to the public than that which already exists in the desert").

571 *See* Counter-Memorial at 240 (citing Parrish Declaration, ¶ 13).

572 Final Statement of Reasons for 14 CCR § 3704.1, at 4 (at CON002957), Claimant Ex. 304 (emphasis added).

573 State Mining and Geology Board, Executive Officer's Report, at 17 (Jan. 16, 2003) (at CON003006), Claimant Ex. 332.

Center (the environmental advocacy group now known as Earthworks) for information regarding the "impact to the environment of cyanide heap leach processes."[574] In fact, there are government standards – met by Glamis' proposed Plan of Operations– that specify the level of cyanide that may remain in the waste rock to specifically protect the environment, which the Board failed to address in its rulemaking.[575]

278. It is unclear how the Board can adopt mandatory backfilling requirements to protect the environment by requiring heap leach material to be returned to the excavated pits and yet also claim that the regulation does not address cyanide heap leaching as a process. The Board likely waffled on this issue because if pressed, it could not provide any scientific evidence indicating that mandatory backfilling is in fact better for the environment. For example, the Non-Party submission from the Sierra Club and Earthworks in this arbitration illustrates the utter lack of scientific basis for the complete mandatory backfilling. That submission asserts that "backfilling mine pits after operations are completed" is a "best-practice" component of mine design,[576] yet the *only* technical authority cited for this statement is a U.S. EPA Region 10 guidance document from January 2003.[577] That EPA guidance document itself contains a disclaimer that the EPA document is "general in nature and applicants should not view anything in this guidance as 'mandatory' or prescriptive."[578] Moreover, the only cited discussion of mine backfilling in the EPA guidance document is found in an Appendix F entitled *Solid Waste Management,* and

---

574 State Mining and Geology Board, Executive Officer's Report, at 17 (Jan. 16, 2003) (at CON003006), Claimant Ex. 332.

575 *See, e.g.,* 43 C.F.R. § 3809.420(b)(12).

576 Submission of Non-disputing Parties Sierra Club and Earthworks (Oct. 16, 2006).

577 *EPA and Hardrock Mining: A Sourcebook for Industry in the Northwest and Alaska* (Jan. 2003), Claimant Ex. 330.

578 *Id.* at i.

nothing in the relevant parts of the EPA guidance document advocates *complete mandatory backfilling* as a standard mine reclamation or remediation measure.

279. The EPA discussion begins with a straightforward definitional statement that mine "backfilling is the act of transporting and placing overburden, waste rock, or tailings materials in surface or underground mines."[579] It then states that "*tailings are more often used as backfill than waste rock or overburden*." Tailings are the results of beneficiation of mine ore materials, not the waste rock and overburden which dominated the volume of material to be backfilled at the Glamis Imperial Project. The EPA guidance document does make the statement that the "technique is being used increasingly as a remediation measure (e.g., to minimize the potential for acid generation in mine walls and/or the backfilled material) and to minimize the amount of surface disturbance required to store waste materials."[580] However, it is entirely unclear from this discussion whether the "technique" being referred to is solely the use of *tailings* as a backfilling measure, which is stated to occur "more often" than the backfilling of waste rock or overburden. It is also unclear whether this "technique" refers to backfilling underground mines or open-pit mines, since both types of mines are mentioned in the brief EPA discussion.

280. In any case, the EPA guidance document states: "*If waste rock and overburden are to be used as backfill*, mine applicants should provide information . . . to allow regulatory agencies to conduct full NEPA analyses and make permitting decisions."[581] The desired information includes the physical and chemical characteristics of the backfill materials, predictions regarding the structural stability and leachabilty of backfilled material, and prediction

---

579 *Id.* at F-6.

580 *Id.* at F-6 and F-7.

581 *Id.* at F-7 (emphasis added).

of water quality in the mine, both with and without backfilling.[582] In other words, the EPA guidance document advocates a *site-specific analysis* of the potential pros and cons of potential backfilling, just as the National Academy of Sciences/National Research Council Report of 1999 recommended.[583] Accordingly, the EPA guidance document wholly fails to support the mandatory complete backfilling requirements imposed by California to destroy the economics of the Glamis Imperial Project, and this was the sole technical support offered by the Non-Party submissions of Sierra Club and Earthworks in support of the new California requirements.

281. In contrast, the record in this case clearly demonstrates that complete backfilling may not actually improve environmental protection. For example, in a 1990 EIS/EIR for the Castle Mountain Project, BLM determined that "maximum pit backfilling" actually had a "greater impact" that traditional open-pit reclamation methods on water resources, wildlife, air quality and visual resources.[584] In 1994, the U.S. Bureau of Mines commented to California State Director Ed Hastey that backfilling "could also present problems with groundwater."[585] In 1999, the NAS/NRC study confirmed the findings of an earlier study by the Committee on Surface Mining and Reclamation that "backfilling of a large open pit would be of uncertain environmental and social benefit . . . ."[586] And most importantly, Imperial County (acting as the lead California agency under SMARA and CEQA) specifically rejected a complete backfill

---

582 *Id.*

583 *See* Memorial ¶ 392.

584 Final EIS/EIR for the Castle Mountain Project, at 3-37 to 3-38 (Aug. 17, 1990) (at CON003293 to CON003294), Claimant Ex. 31.

585 Letter from Richard Grabowski, Chief, Western Field Operations Center, Bureau of Mines, to Ed Hastey, BLM State Director, re Backfilling of Open Pit Mines (June 11, 1990) (at CON003623), Claimant Ex. 29.

586 NAS/NRC, HARDROCK MINING ON FEDERAL LANDS 82 (1999) (quoting NAS/NRC, SURFACE MINING OF NON-COAL MINERALS xxviii (1979)), Claimant Ex. 169.

alternative at the Glamis Imperial Project as the "Environmentally Superior Alternative," instead choosing the partial backfill alternative consistent with Glamis' proposed Plan of Operations.[587]

282. In the end, it is obvious that the State Mining Board, at the urging of the Secretary of Resources on behalf of Governor Davis, provided a pre-determined and arbitrary justification for the complete mandatory backfilling regulation without any data or scientific evidence in support.[588] Instead, the Board decided as a matter of state law, that metallic ore open pits could not be designated for open space, wildlands or recreational lakes because those uses were not suitable alternative uses within the meaning of SMARA.[589] In fact, the Board specifically rejected a recommendation that the local counties, as lead agencies under SMARA, might be better suited to determine what is an appropriate end use for reclaimed lands based on an assessment of the "overriding benefits" to that area.[590] Thus, the Board eliminated several

---

587 *Final EIS/EIR for the Glamis Imperial Project*, at 2-70 (Sept. 2000), Claimant Ex. 210; *see also* Memorial ¶ 333.

588 Instead, the determination that leaving open pits and waste piles on mined lands is not consistent with SMARA was essentially a conclusory legal opinion that was originally included in Dr. Parrish's Executive Officer's Report in support of the initial public meeting to discuss the proposed regulations. *See* State Mining and Geology Board, Executive Officer's Report, 1-3 (Nov. 14, 2002) (at CON008622), Claimant Ex. 327. That rationale was then carried forward in the subsequent public hearing to consider adopting the proposed regulations on an emergency basis, with the pending Glamis Imperial Project identified as the stated emergency. *See* State Mining and Geology Board, Executive Officer's Report, at 1-4 (Dec. 12, 2002) (at CON003183), Claimant Ex. 328. The same rationale remains unchanged all the way through to the final adoption of the mandatory backfilling regulation, with each mention offering no more than the following blanket statements: (1) Because SMARA has a general standard that reclaimed land must be returned to a usable condition which is readily adaptable to alternative land uses, (2) lead agencies "often" do not require backfilling of the open pits, and (3) the alternative land use approved by lead agencies is "often" an "undefined 'open space", the argument is made that (4) "it often is difficult to envision how the remaining open pit is readily adaptable for a beneficial alternate use . . . or how the 'open space' itself is usable." *See, e.g.,* State Mining and Geology Board, Executive Officer's Report, at 3 (Jan. 16, 2003) (at CON002978), Claimant Ex. 332; Notice of Proposed Rulemaking, Backfilling, at 10 (at CON002841), Claimant Ex. 329; Final Statement of Reasons for 14 CCR § 3704.1, at 3-4 (at CON002956), Claimant Ex. 304; State Mining and Geology Board, Executive Officer's Report, at 3-4 (Apr. 10, 2003) (at CON002992), Claimant Ex. 333. Nowhere in the administrative record does it demonstrate that this legal opinion was ever supported by actual scientific study or empirical evidence.

589 *See, e.g.,* Final Statement of Reasons for 14 CCR § 3704.1, at 9, 11-12 (at CON002962, CON002964-65), Claimant Ex. 304.

590 *Id.*

alternative land uses for reclaimed lands under SMARA while eliminating a local county's ability to determine the most appropriate reclamation standard based on the individual needs of the county and mineral property at issue.[591] And yet Respondent asserts that the mandatory backfilling regulations were nothing more than a clarification of existing state law.[592] Such an argument underscores the arbitrariness of this entire regulation.

(2) The Mandatory Backfilling Requirements Of SB 22 Do Not Fulfill Their Intended Purpose Of Preserving Native American Cultural Resources Unless Their True Purpose Is To Completely Shut Down Mining Activities

283. Just as the mandatory backfilling regulations are arbitrary and without a sound foundation in science, California's purported purpose for enacting SB 22 – the protection of Native American sacred sites – is also not legitimately furthered by the complete backfilling and site re-contouring requirements of SB 22. As described in Glamis' Memorial, complete backfilling will actually cause greater disturbance to the land intended to be protected due to the swelling of the excavated material.[593]

284. Respondent's principal argument in retort is the same discredited suggestion, discussed above, that the swell factor is not as great as that used by Behre Dolbear (or for that matter, the 30% to 40% figure relied on by the State of California when it adopted the mandatory complete backfilling regulation).[594] As discussed above, Respondent's expert – Norwest Corporation – assumed that the material to be extracted from the Imperial pits was

---

591 *See* Cal. Admin. Code tit. 14, § 3704.1 (stating that lead agencies cannot avail themselves of the mine-specific reclamation standard exemptions provided by Cal. Admin. Code tit. 14, § 3700(b)).

592 Counter-Memorial at 241.

593 Memorial ¶ 495.

594 Counter-Memorial at 237-238.

unconsolidated gravel and alluvium; essentially, loose material.[595] In contrast, and in reality, the earthen material that makes up Glamis' mining claims is a cemented gravel or conglomerate; essentially, hard compacted material.[596] In layman's terms, loose material does not swell as much as compacted material when taken out of the ground. At the Imperial Project, because of the mandatory backfilling requirements and the re-contouring limitation that material must be no more than an arbitrary 25 feet above the original grade, the amount of actual land disturbance by mining and reclamation activities will increase by 17% over the acreage assessments contained in the Final EIS/EIR.[597]

285. The lack of any rational basis between the mandatory backfilling and site re-contouring requirement on one hand and the protection of Native American cultural resources on the other is perhaps best demonstrated by consideration of how it would apply in context of the Imperial Project.

.[598] Glamis already had proposed complete backfilling of the West Pit .[599] artifacts would still need to be moved and catalogued, or ultimately buried when the site was re-contoured. Even if Glamis had totally avoided all mining activities of the Project, however, it would still not have satisfied the Quechan Tribe – their position was

---

595 Behre Dolbear Response at 29.

596 *Id.*

597 *Id.* at 37.

598 *See, e.g.*, KEA Environmental, *Where Trails Cross: Cultural Resource Inventory and Evaluation for the Imperial Project* (Dec. 1997), at 197 (at AG002925), Claimant Ex. 322.

599 *See, e.g., Final EIS/EIR for the Glamis Imperial Project*, at 2-8 to 2-9 (Sept. 2000), Claimant Ex. 210.

simply, "we say not to all of it."[600] In the end, Respondent cannot deny that the only way SB 22 preserves Native American cultural resources is – as Governor Davis correctly concluded – but making hardrock metallic mining cost-prohibitive.

III. The Respondent's Affirmative Defenses Lack Merit

A. Glamis' NAFTA Claims Are Not Time-Barred Under Article 1117(2)

286. In its Counter-Memorial, Respondent identifies three government "measures" as being "time barred under Article 1117(2)"[601] in this adjudication of the Glamis NAFTA claims: (1) the October 19, 1999 federal ACHP recommendation to Interior Secretary Babbitt urging denial of the Glamis Imperial Project; (2) the now-rescinded December 27, 1999 "M-Opinion" issued by former Interior Solicitor Leshy (approved by Secretary Babbitt on January 14, 2000); and (3) BLM's November 17, 2000 Final EIS/EIR identifying the "no action" alternative, (*i.e.,* denial of the Imperial Project Plan), as the preferred alternative. Respondent's view is that because each of these three actions was taken more than three years prior to the filing of Glamis' Notice of Arbitration (on December 9, 2003), an adjudication of claims arising out of these "measures" by this Tribunal is "time-barred under Article 1117(2)." This argument makes no more sense now than when Respondent first raised it in the context of its (subsequently denied) Request to Bifurcate this proceeding.[602] In short, the "measures" that Respondent argues are time-barred are not in and of themselves the measures upon which Glamis' 1105 and 1110 claims are based, and Respondent's invocation of Article 1117's time limitations therefore is entirely misplaced.

---

600 Notes from Government to Government Meeting, at 5 (Dec. 16, 1997) (at D-00376-0079-0005), Claimant Ex. 96 (quoting Lorey Cachora in response to BLM's suggestion that sites could be avoided if mining was restricted to the East Pit).

601 Counter-Memorial at 105.

602 *See* Respondent's Statement of Defense and Request for Bifurcation (Apr. 8, 2005).

287. As Glamis noted in its response to Respondent's bifurcation request, in order to raise a timeliness defense as to the specified events, Respondent must demonstrate that each provides a separate and distinct basis for a claim. Respondent does not even attempt to make that showing, arguing only that "none of them can serve as a basis for finding a violation of NAFTA."[603] Yet Glamis has never maintained that those government actions, by themselves, effected an expropriation under Article 1110 or a violation of the minimum standards of treatment under Article 1105. Instead, Glamis repeatedly has demonstrated that those activities formed the factual predicate of the unlawful and now rescinded January 17, 2001 Secretarial Record of Decision denying the Imperial Project, and are thus the context for the substantial damage flowing from that decision and the failure of the federal and state government authorities to comply with the law and approve Glamis' Plan of Operations on a timely basis.[604] Respondent concedes that "these measures may be taken into account as background facts,"[605] which is precisely the way in which Glamis has introduced them. As a result, Respondent's lengthy discussion of whether they do or do not constitute "measures" within the meaning of NAFTA is neither necessary nor relevant.

288. Respondent's observation that Glamis "has alleged that prior to December 9, 2000, it had incurred loss or damage"[606] reflects nothing more than Glamis' characterization of the series of events that flowed into the federal government's NAFTA violations. That

---

603 Counter-Memorial at 105.

604 *See, e.g.*, Response of Claimant Glamis Gold to Request for Bifurcation of Respondent United States of America, at 5-7 (Apr. 21, 2005). Indeed, the October 19, 1999 ACHP recommendation to Secretary Babbitt, and Solicitor Leshy's December 27, 1999 Legal Opinion are each expressly cited as the basis for, and attached to, Secretary Babbitt's January 17, 2001 Record of Decision denying the Glamis Imperial Project.

605 Counter-Memorial at 105 (emphasis added).

606 *Id.* at 107.

characterization does not implicate Article 1117's time limitations. Likewise, Glamis' allegations (in the context of a separate federal court proceeding in 2000 which were dismissed on ripeness grounds) that action taken by BLM in reliance on the unlawful 1999 Solicitor's M-Opinion would cause it further harm – which it most certainly did – does not somehow convert the Solicitor Leshy's M-Opinion into a discrete measure causing damage distinct from that associated with Secretary Babbitt's unlawful denial and the subsequent conduct that the Tribunal must separately rule upon, nor can Respondent exclude the Leshy Solicitor's M-Opinion, and the facts related to it, from the relevant factual record on that basis. In sum, the "measures" that Respondent seeks to exclude are not the bases for Glamis' claims that the U.S. has violated NAFTA Articles 1105 and 1110. Rather, they are among the factual predicates for those claims.[607] While these earlier predicate acts made the ultimate damage foreseeable, the damage did not become fixed until Secretary Babbitt's denial. As such, Respondent's Article 1117 analysis is inapposite.

B. Glamis' Claims Are Ripe Because Its Property No Longer Has Value, The United States Has Signaled Its Unwillingness To Move On Glamis' Plan of Operations, And Any Further Processing Would Be Futile

289. Respondent also contends that Glamis' expropriation claims are not yet ripe. Respondent makes three principal allegations in this regard; namely that (1) the mere threat of interference with a property right is not expropriatory,[608] (2) no final administrative decision has been reached on Glamis' Plan of Operations,[609] and (3) Glamis' own activities, and specifically a

---

607 *Cf. Tecmed Award* ¶ 68 (Respondent's conduct, acts and omissions, occurring before the treaty was in force, could be considered "a constituting part, concurrent factor or aggravating or mitigating element of conduct or acts or omissions of the Respondent which took place" after the treaty was in force).

608 *See* Counter-Memorial at 109.

609 *See id.* at 115.

December 2002 request (never made effective) to suspend processing of its Plan of Operations on the eve of California's emergency mandatory backfilling regulations taking effect, are somehow to blame for the United States' not having "had occasion" to apply the challenged measures.[610] These arguments ignore the factual record as to the deprivatory effect that the statute and regulations already have had, and they misrepresent the import of Glamis' December 2002 request.

290. First, Glamis does not face a mere threat of interference with its property right, as it has already been deprived of the value of that right by the California measures. Respondent's own valuation analysis explicitly concedes, for example, that the mandatory full backfilling and site recontouring regulations already have adversely affected the value of Glamis' mining claims. The California mandatory complete backfilling regulations took effect on December 12, 2006, first on an emergency basis, and they were made final on April 10, 2003, following the SB 22 legislation enacted on April 7, 2003. The entire novel regulatory scheme was aimed at the Glamis Imperial Project, and there are no exceptions to its requirements. Even under the Navigant/Norwest valuation methodology (whose serious methodological and analytical flaws Glamis already has exposed herein), Respondent concedes that the California regulations "would reduce [the mining claims'] value by . . . seven percent."[611] As noted, Glamis takes serious issue with the valuation methodology adopted by Respondent, but to the extent that Respondent recognizes that the California regulations already have devalued Glamis' mining claims at least to some extent, the debate at this point hinges not around the question of "whether" the regulations adversely affected the mining claim values, but rather "by how much" they do so.

---

610 *See id.*

611 *Id.* at 180 (emphasis added).

Accordingly, Respondent's continued characterization of this property right interference as a "mere threat" is unsustainable.

291. The State of California made it perfectly clear that the mandatory and complete backfilling requirements applied to Glamis to prevent the Imperial Project from proceeding. Indeed, Governor Gray Davis was unambiguous in his April 7, 2003 statement declaring that the purpose of the new requirements was to "stop[] the Glamis Gold Mine proposal in Imperial County."[612] He stated further that the new requirements would be "cost prohibitive."[613] It would therefore be futile for Glamis to participate in further administrative processing of the Imperial Project Plan of Operations.

292. Regarding Glamis' mining Plan of Operations, nearly three years have passed since California's deprivatory regulations were enacted, and over five years have passed since the November 23, 2001 rescission of BLM's denial of Glamis' proposed mining Plan of Operations. Still, no further action has been taken by the State of California or the U.S. Interior Department on the pending Plan of Operations, nor has there been any indication that any such action is forthcoming. This is not surprising, since further processing of a proposed mine that faces insurmountably "cost prohibitive" reclamation requirements would be futile. It would likewise be futile for Glamis to withdraw the pending proposed Plan of Operation and resubmit a plan that it could not financially perform.

293. Respondent now argues that its own (continuing) refusal to act can insulate it from liability for an expropriation. Putting aside the California regulations and their impact on the mining claims, it is uncontested that Glamis cannot proceed with the Imperial Project unless and

---

612 Calif. Office of the Governor, *Press Release* (Apr. 7, 2003) (at AG001319), Claimant Ex. 284.

613 *Id.*

until its mining Plan of Operations has been approved by BLM and California. Notwithstanding that the last federal legal hurdle (the Leshy Opinion) was rescinded over five years ago, final administrative action has not been forthcoming. Glamis thus has been entirely deprived of its right to exploit its valuable mining claims for at least five years and arguably longer.

294. Deprivations of this length (and indeed substantially shorter deprivations) have consistently been found to be more than "merely ephemeral" – and thus compensable – under customary international law.[614] Nevertheless, under Respondent's apparent theory, BLM can enjoy permanent immunity from the requirement to compensate Glamis for that deprivation by simply failing to take final action on the proposed Plan of Operations. This analysis is inconsistent with the transparent and predictable investment environment that NAFTA's investor protection provisions seek to effectuate, and it contravenes the international law precedent requiring that expropriations be "severe" and "more than ephemeral."

295. The main case relied on by Respondent, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* does not advance its position. In *Williamson County*, a private developer challenged the actions of a local planning commission, asserting that the application of various zoning laws to its property effected an uncompensated takings. The Supreme Court ultimately dismissed the claim as not ripe because plaintiff did not seek "variances that would have allowed it to develop the property according to its proposed plat . . . ."[615] According to the Court, a final decision after application for variances was

---

614 *See, e.g., Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4 (Award) (Dec. 8, 2000) (finding a deprivation of access to an investment for one year to be sufficient to have deprived the investor of its enjoyment of the investment in a manner which was more than ephemeral).

615 *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 188 (1985).

necessary to determine whether the "land retained beneficial use or whether respondent's expectation interest had been destroyed."[616]

296. Glamis' expropriation claims are easily distinguished from plaintiff's claim in *Williamson County* because there were (and are) *no variance procedures* for Glamis to pursue. The California mandatory backfilling regulations, first passed in December 2002, applied without exception, as did SB 22, passed in April 2003 in order "to stop the Glamis Imperial mining project . . . proposed by . . . a Canadian-based company."[617] Nor does the Canadian domestic case of *Mariner Real Estate Ltd. v. Nova Scotia* support Respondent's position.[618] In that case, the court relied on the fact that "many of the restricted activities may be authorized by permit," and that there was "no evidence that a permit [had] been sought for any of these kinds of activities, much less refused" in finding that the restrictions did not effect an expropriation.[619] In Glamis' case there is no permit that will allow it to circumvent the California mandatory full backfilling regulations.

297. Third, Glamis' unsuccessful request on December 9, 2002 to the federal government to suspend processing of its Plan of Operations (in the hope of exploring settlement options) is unrelated to the United States' failure to render a final administrative decision on Glamis' Plan of Operations. That request was made just three days before the adoption of the California emergency backfilling requirements which destroyed the economic viability of the Glamis Imperial Project – a drop in the bucket compared to the multi-year delays already experienced by

---

616 *Id.* at 189 n. 11.

617 Cal. S. Natural Res. Wildlife Comm., *Summary of SB 22*, at 4 (Jan. 14 2003 (sic) Committee Hearing) (at ARC01071), Claimant Ex. 273; *see also* S. Rules Comm., *Summary of SB 22*, at 3 (Jan. 28, 2003 Third Reading) (at AG00673), Claimant Ex. 274.

618 *Mariner Real Estate Ltd. v. Nova Scotia* (Attorney General), 90 A.C.W.S. (3d) 589 (Can.) ¶ 54.

619 *Id.* ¶ 90.

Glamis. It would have been futile for Glamis to further pursue a reclamation plan and final Plan of Operations (a necessary prerequisite to mine) to the California authorities at that point. The wasteful expenditure of further resources on a futile permitting process would only have added to Glamis' damages. In making its ripeness argument, the Government utterly has ignored evidence that the emergency regulations, the challenged California statute, and the implementing regulations were adopted with the express goal of killing the Imperial Project. Indeed, the sole basis for the emergency December 12, 2002 regulation was California Governor Davis' direction "to pursue all possible legal and administrative remedies that will assist in stopping the development" of Glamis' Imperial Project.[620]

298. Respondent further implies (at 115) that by filing its Notice of Intent to commence arbitration on July 21, 2003, Glamis somehow was responsible for halting processing of the Plan of Operations, once again. This is wishful thinking; in fact, Glamis never directed the government to stop processing its Imperial Plan when it initiated this NAFTA claim. Nor does Respondent give any reason for why it need stop;[621] its choices remain to either accept or reject the Plan – it has chosen neither.

299. As Glamis has explained to the Tribunal in previous submissions, United States case law fully supports that where a measure prohibits all economical use of a property upon

---

620 Gov. Gray Davis, *Veto Message for SB 1828,* at 2 (Sept. 30, 2002) (at CON001964), Claimant Ex. 256. Likewise, in signing a separate statute on April 7, 2003, Governor Davis candidly acknowledged that its purpose was to "stop[] the Glamis Gold Mine proposal in Imperial County," because "[t]he reclamation and backfilling requirements of this legislation would make operation of the Glamis Gold Mine cost prohibitive." California Office of the Governor, *Press Release* (Apr. 7, 2003) (at AG001319), Claimant Ex. 284.

621 There is certainly no requirement that regulatory activity be suspended during the pendency of NAFTA proceedings. *See, e.g., Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, ¶ 67 (Award) (Aug. 30, 2000) (noting in the context of a NAFTA claim that Article 48 of the ICSID Additional Facility rules permit amendments "to previously submitted claims and consideration of facts and events occurring subsequent to the submission of a Notice of Claim, particularly where the facts and events arise out of and/or are directly related to the original claim").

enactment, a plaintiff need not seek a permit before challenging the action as a taking. In *Whitney Benefits, Inc. v. United States*, the Claims Court (and the Federal Circuit) specifically rejected a nearly identical argument by the United States that plaintiff's property "could not have been taken until their application for a mine permit actually was denied . . . ."[622] According to the Court, further processing of plaintiff's permit would have been "futile" because "when a statute [prohibiting surface coal mining] is enacted, at least in part, specifically *to prevent the only economically viable use of a property, an official determination that the statute applies to the property in question is* ***not*** *necessary to find that a taking has resulted* . . . ."[623] Moreover, in the seminal regulatory takings case of *Lucas v. South Carolina Coastal Council*, there is no evidence that plaintiff had even applied for, much less been denied, a permit to develop his beachfront property before the courts would consider his takings challenge to a South Carolina statute that prohibited the construction of habitable structures in a critical area along the coast.[624]

300. International law similarly does not require Glamis to perform a "futile" act in trying to obtain a further administrative decision on its Plan of Operations in order to perfect and bring its Article 1110 expropriation claim. The Tribunal in *Ethyl Corp. v. Canada* noted as much when it found that under international law, claimant need not perform a "futile" act as a prerequisite to bringing an Article 1118 claim.[625] Accordingly, the Respondent's ripeness defense must be dismissed.

---

622 *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394, 407 (1989), *aff'd*, 926 F.2d 1169 (Fed. Cir. 1991).

623 *Id.* (emphasis added).

624 *See generally, Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991); *see also Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992).

625 *Ethyl Corp v. Canada*, NAFTA/UNCITRAL, ¶ 84 & n.33 (Award on Jurisdiction) (June 24, 1998) (citing *Finnish Ship Arbitration (Finland v. UK)*, Award on May 9, 1934, *reprinted in* 3 R.I.A.A. 1479 (1934)).

IV. Conclusion

301. For all of the reasons stated above and in the Claimant's Memorial, through the extraordinary measures identified above, Respondent has denied Glamis the minimum standard of treatment under international law (including full protection and security and fair and equitable treatment of its investment) guaranteed by Article 1105 of the NAFTA and has expropriated Glamis' valuable mining property interests without providing prompt and effective compensation as guaranteed by Article 1110.

302. Article 1110(2) itself establishes the compensation owing for an expropriation: "the fair market value of the expropriated investment immediately before the expropriation took place." Behre Dolbear followed this rule by calculating the net present value as of midnight on December 12, 2002, which it originally concluded to be $49.1 million and now reaffirms after considering the criticisms – mostly unfounded – of Respondent's experts. December 12, 2002 is the day before the California emergency regulations went into effect, but in cases such as these involving measures tantamount to expropriation, the Tribunal could look to other dates as well, such as April 7, 2003 when the California statute was passed or April 10, 2003 when the permanent regulation went into effect, or even January 16, 2001 the day before Secretary Babbitt's Record of Decision went into effect. As it turns out, either of the 2003 dates would yield a comparable value as the 10-year average for gold price remained close to $320 an ounce. The 10-year average gold price was significantly higher (approximately $340 an ounce) as of January 2001, so the value of the Imperial Project would be correspondingly higher on that date, assuming the cost of mining was comparable.

303. There is no established formula for damages owing under Article 1105, but as Prof. Wälde points out, the trend is to make the Claimant whole, which in this case could arguably be what Glamis would be earning today (in the current exuberant gold market) had Interior

approved the Imperial Project without complete backfilling instead of unlawfully denying it on January 17, 2001. Glamis, however, has not sought the maximum justifiable damages (or even a "windfall" as Respondent suggests). Rather, it seeks only compensation for the property which its investments developed and which were rendered valueless by Respondent's measures. At a minimum, the Tribunal should award restitution damages for Glamis' net out-of-pocket costs as adjusted to net present value.

304. Accordingly, with these factors in mind, Glamis repeats its demands for:

- A sum not less than U.S. $49.1 million in compensation for the net present value of Glamis' valuable mining property at the time of the expropriation, the value of which Respondent destroyed by its violations of Articles 1110 and 1105;
- Such further damages that the Tribunal may deem appropriate for the United States' failure to accord Glamis the minimum standard of treatment, recognizing that Glamis' net investment in the Imperial Project exceeded $14.83 as of December 2002, and that most of that amount ($13.64 million) had been invested by 1998 (and thus must be adjusted to present value from the date of the actual expenditures), which is also the year when the Imperial Project would likely have been approved by the U.S. Interior Department absent the improper actions and inactions by the federal government and the measures adopted by the State of California;
- Pre-award interest, at a rate to be fixed by the Tribunal, on Glamis' invested amounts in the Imperial Project from no later than June 30, 1998 to December 12, 2002;

- Pre-award and post-award interest on the full net present value from December 12, 2002 forward at a rate to be fixed by the Tribunal; and
- Costs associated with these proceedings, including attorneys' fees and expenses, in an amount to be determined at the conclusion of the proceedings.

305. Finally, with respect to the suggestion of the Quechan Tribe in its statement of August 19, 2005, regarding the proposed transfer and extinguishment of the Glamis mining claims and mill sites on BLM-managed lands in the Indian Pass area of Imperial County,[626] Claimant continues to agree with the Quechan Tribe that the formal transfer and extinguishment of these mining claims and mill sites to the United States would be an appropriate condition of this Tribunal's award of fair and just compensation to Glamis for the expropriation of the Imperial Project. By pursuing this claim for compensation against the United States, Glamis does not intend to offend the Quechan Tribe or any of its members. After more than a decade of conflict over this subject matter, the Tribunal's award of full compensation should bring this regrettable controversy to a final and complete conclusion.

---

[626] In that submission in this case of August 19, 2005, the Quechan Tribe's counsel stated: "Of significant concern to the Tribe is whether a decision in favor of the Claimant would directly or indirectly result in the extinguishment of Glamis' claims to mine the area. If it does not, then it is possible that Glamis could both receive a monetary award and then also have the benefit of its allegedly valueless claims, meaning it could then presumably use or sell them." *Glamis Gold Ltd. v. United States*, NAFTA/UNCITRAL, Quechan Indian Nation Amicus Application & Submission, at 14-15 (Aug. 19, 2005).

Respectfully submitted,

/s/

Alan W.H. Gourley
R. Timothy McCrum
Alexander H. Schaefer
David P. Ross
Sobia Haque
Jessica Hall
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2500

Counsel for Claimant/Investor

December 15, 2006