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*.	)

AMICUS CURIAE SUBMISSIONS

OF FRIENDS OF THE EARTH CANADA and FRIENDS OF THE EARTH UNITED STATES

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I. INTRODUCTION

1. Friends of the Earth Canada ("FOE Canada") and Friends of the Earth United States ("FOE US") (collectively the "Applicants") make these submissions to the Tribunal in the present NAFTA Chapter 11 arbitration between Glamis Gold Ltd. and the United States of America.

2. This *amicus* submission provides factual information and legal analysis to assist the Tribunal in resolving the issue of whether Glamis Gold Ltd. enjoys sufficient "diversity of nationality" from the United States to sustain its Chapter 11 claim. In the event the Tribunal reaches the substance of the Glamis claim, this submission also includes arguments on:

- the implications of Glamis Gold Ltd.'s tenuous Canadian ties for the Tribunal's analysis of Articles 1105 and 1110; and,
- the significance of the environmental and cultural preservation objectives underlying the actions of the United States and California for the Tribunal's analysis of the Article 1105 claim.

II. STATEMENT OF THE FACTS

A. The Claimant Is Incorporated In Canada But Its Head Office Is In Reno, Nevada

3. In its Notice of Arbitration ("Notice"), Glamis Gold Ltd. ("Claimant") identifies itself as a "publicly held Canadian corporation incorporated in 1972 under the laws of the Province of British Columbia." (Notice at 4.)

4. The Claimant is the sole parent of Glamis Gold, Inc. ("Glamis Gold US"), which is incorporated pursuant to the laws of the State of Nevada. Glamis Gold US is the sole parent of Glamis Imperial Corporation ("Glamis Imperial"), which is also a Nevada-incorporated corporation. The mining claims at issue in this arbitration (the "mining claims") were acquired in 1987 by Glamis Imperial under the federal General Mining Law, 30 U.S.C. § 22 *et seq*. (Notice at 4.)

5. In its Notice, the Claimant lists as its address a Vancouver, British Columbia suite. (Notice at 3.) In fact, this location is the address of the Vancouver office of the law firm of Lang Michener LLP.[1] Lang Michener LLP is the Claimant's Canadian legal counsel.[2]

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[1] See online: Lang Michener website, <http://www.langmichener.ca/index.cfm?fuseaction=contactUs.form>.

[2] Glamis Gold Ltd., *2004 Annual Report* at 53. Online: Glamis Gold Ltd., <http://www.glamis.com/financial/annuals/2004/04ar.pdf>.

6. In 1998, Claimant restructured its business and moved its operations to Nevada.[3] In its most recent filings with Canadian securities regulators, Claimant lists its address as located in Reno, Nevada.[4] This Reno address is identical to that provided by the Claimant in its Notice for its subsidiary corporations. This Reno, Nevada address is the Claimant's "Head Office".[5]

B. The Claimant Has Minimal Connections With Canada

7. The majority of the Claimant's directors are Canadian citizens, as required until recently by the corporation laws of British Columbia.[6] However, the only apparent business activities the Claimant conducts in Canada are those functions required by British Columbia's business corporation law; for example, the Claimant holds periodic shareholder meetings in British Columbia.[7] Claimant is traded on a Canadian stock exchange. It is, however, also listed on the New York Stock Exchange.

8. Control of the Claimant and its day-to-day business is exercised from Reno, Nevada. All of the Claimant's officers reside in Nevada.[8] The Claimant's

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[3] Glamis Press Release, *Glamis Responds to Low Gold Price* (January 14, 1998). Online: SEDAR, <http://www.sedar.com/csfsprod/data8/filings/00064155/00000001/g%3A%5Cccn%5Cjan_20%5C0114glg1.pdf>.

[4] See online: SEDAR for Glamis Gold Ltd. <www.sedar.com>. See also online: Glamis Gold Ltd. <http://www.glamis.com/corporate/index.html> and <http://www.glamis.com/contactus/index.html>.

[5] Glamis Gold Ltd., *2004 Annual Report* at 53. Online: Glamis Gold Ltd., <http://www.glamis.com/financial/annuals/2004/04ar.pdf>.

[6] B.C. *Company Act*, R.S.B.C. 1996, c. 62, s.109 (repealed 2002 and replaced by B.C. *Business Corporations Act*, S.B.C. 2002, c. 57).

[7] See online: SEDAR for Glamis Gold Ltd. <www.sedar.com>. B.C. law generally requires annual general meetings to be held in British Columbia, subject to certain exceptions. B.C. *Business Corporations Act*, S.B.C. 2002, c. 57, s. 166.

[8] Glamis Gold, *Annual Information Form* for the year ended December 31, 2004 (March 11, 2005), at 42, available at <http://www.sedar.com/csfsprod/data55/filings/00768273/00000001/w%3A%5C3w_out%5C30968%5Caif.pdf>.

corporate communications, in the form of press releases, proxies and information circulars, are all issued from the headquarters in Reno, Nevada.[9]

9. Neither the Claimant nor its subsidiaries own any mining claims in Canada. The Claimant owns – directly or indirectly – mining claims in the United States (Nevada and California), Mexico, Guatemala and Honduras.[10] The Claimant has attempted and, in some instances, has been successful in acquiring Canadian mining corporations. However, the Canadian mining corporations that it has acquired do not carry out mining operations in Canada.[11]

III. CLAIMANT IS A DUAL NATIONAL OF CANADA AND THE UNITED STATES AND IS THEREFORE NOT ENTITLED TO ANY NAFTA REMEDY

A. A Claim Can Be Made Under Section B Of NAFTA Chapter 11 Only By A National Of One Party Against Another Party

10. The Claimant alleges a violation by the United States of the standards of treatment guaranteed by Articles 1105 and 1110 of the NAFTA. Such a claim can only be brought by the national of one NAFTA Party against another NAFTA Party. NAFTA Article 1101(1) provides: "[t]his Chapter [11] applies to measures adopted or maintained by a Party relating to: …(a) investors of <u>another</u> Party; … (b) investments of investors of <u>another</u> Party in the territory of the Party …" (emphasis added).

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[9] Every accessible "News Release" by Glamis Gold Ltd. since July 16, 2002 has been reported from Reno, Nevada. Online: Glamis Gold Ltd. <http://www.glamis.com/whatsnew/index.html>.

[10] Online: Glamis Gold Ltd. <http://www.glamis.com/properties/index.html>.

[11] *See*, *e.g.*, Glamis Press Release, *Glamis Gold and Francisco Gold to Merge Creating the Premier Intermediate Gold Company* (March 6, 2002). Online: Glamis Gold Ltd. < http://www.glamis.com/pressreleases/2002/mar06-02.pdf>.

11. An "investment of an investor of a Party" is "an investment owned or controlled directly or indirectly by an investor of such Party". An "investor of a Party" includes "an enterprise of such Party, that seeks to make, is making or has made an investment". An "enterprise of a Party" is an "enterprise constituted or organized under the law of a Party". An "enterprise" includes any corporation organized under applicable laws. (NAFTA, Arts. 201 and 1139.)

12. Read together, these rules require a "diversity of nationality" as between the Claimant and the NAFTA Party against whom the claim is brought.

13. This principle was affirmed by the Tribunal in *Loewen v. United States*:

> The format of NAFTA is clearly intended to protect the investors of one Contracting Party against unfair practices occurring in one of the other Contracting Parties. <u>It was not intended to and could not affect the rights of American investors in relation to practices of the United States that adversely affect such American investors</u>. Claims of that nature can only be pursued under domestic law …

Loewen, Case No. ARB(AF)/98/3, Award (June 26, 2003) at ¶ 223 (emphasis added).

B. NAFTA's Express Provisions Are Supplemented By Customary International Law

14. The NAFTA's express diversity of nationality requirements are not the only source of law to be applied by Tribunals constituted under NAFTA Chapter 11. Tribunals must "decide the issues in dispute in accordance with [the NAFTA] Agreement and <u>applicable rules of international law</u>". NAFTA, Art. 1131(1) (emphasis added). Moreover, in interpreting NAFTA as a treaty, a Tribunal must follow the principles of international law for the interpretation of treaties, in particular Article 31 of the *Vienna Convention on the Law of Treaties*. *See, e.g.,*

Methanex v. United States, Final Award of the Tribunal (August 3, 2005) at ¶ 29. Article 31(3)(c) of the Vienna Convention provides that treaties are to be interpreted in light of "any relevant rules of international law applicable in the relations between the parties".

15. These "applicable" or "relevant" rules of international law include customary international law. International tribunals interpreting trade and investment agreements have frequently resorted to principles of customary international law as guidance in the interpretation of treaties. For instance, the WTO Appellate Body has said that the WTO agreements are not to be interpreted "in clinical isolation from public international law". *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R at 15.

C. The Content Of The NAFTA "Diversity of Nationality" Requirement Is Supplemented By Customary International Law

16. Customary international law doctrines relating to diversity of nationality are applicable to a treaty-based, investor-state dispute system (such as NAFTA Chapter 11), where they are not expressly excluded by a treaty term. *Loewen,* ¶¶ 229-230. In *Loewen*, the Chapter 11 Tribunal pointed to customary international law in holding that diversity of nationality must be continuous – *i.e.*, exist at the time Chapter 11 standards were putatively infringed by the Party through to the time the claim is resolved in front of a Tribunal. *Loewen*, ¶¶ 225-226.

17. Critically, customary international law requires more than the "continuous nationality" discussed by the *Loewen* Tribunal. The latter principle is merely part of the broader rules of customary international rules concerning diversity of nationality and "diplomatic protection" of aliens. MALCOLM SHAW,

INTERNATIONAL LAW (5th Ed., 2003) at 726. Diplomatic protection is an "action taken by a State against another State in respect of an injury to the person or property of a national … attributable to the latter State." J. DUGARD, FIRST REPORT ON DIPLOMATIC PROTECTION, International Law Commission, Fifty-second Session A/CN.4/506 (2000) at 11. NAFTA Chapter 11 is simply a variant on classic rules of diplomatic protection, one that allows investors themselves standing to espouse claims in an international arbitration. *Loewen*, ¶¶ 222 *et seq.*; *Council of Canadians v. Canada (Attorney General)*, [2005] O.J. No. 3422 at paras. 39-40 (Ontario S.C.J. 2005).

18. A pre-condition to diplomatic protection in customary international law is a sufficient link of nationality between the injured person and the state extending diplomatic protection ("espousing state"). See *Panevezys-Saldutiskis Railway Case* (1939), P.C.I.J. (ser.A/B), No. 76, at 16 ("[i]n the absence of special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection").

19. The customary rules of diplomatic protection are particularly material to a claim brought under Article 1105. Article 1105(1) obliges each Party to confer "treatment <u>in accordance with international law</u>, including fair and equitable treatment and full protection and security" (emphasis added) to investments made by the investors of another Party. The Free Trade Commission issued an interpretation of Article 1105(1) in July 2001:

> Article 1105(1) prescribes the <u>customary international law minimum standard of treatment of aliens</u> as the minimum standard of treatment to be afforded to investments of investors of another Party.

(emphasis added). This interpretation is binding on Tribunals constituted under Chapter 11. (NAFTA, Art. 1131(2).)

20. Diplomatic protection is intimately connected to this customary international law minimum standard of treatment of aliens guaranteed by Article 1105(1). *See* Art. 1 Draft Articles of Diplomatic Protection, ILC, *Report of the International Law Commission – 56th Session (2004),* Supplement No. 10 (A/59/10) ("[d]iplomatic protection consists of resort to [*e.g.*] …means of peaceful settlement by a state adopting in its own right the case of its national in respect to an injury to that national arising from an internationally wrong act of another state") (emphasis added).

D. Customary International Law Includes Rules For Determining The Nationality Of A Corporation

21. Because of the importance of nationality in the law of minimum treatment and diplomatic protection, international law establishes rules for ascertaining the nationality of corporations:

> According to international law and practice, there are different possible criteria to determine a juridical person's nationality. The most widely used is the place of incorporation or registered office. Alternatively, the place of the central administration or effective seat may also be taken into consideration.

Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/00/5), Decision on Jurisdiction (September 27, 2001) at ¶ 107. *See* also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (1990) at 422 ("the nationality must be derived either from the fact of incorporation …or

from various links including the centre of administration (*siege social*) and the national basis of ownership and control").

22. It follows that where the state of incorporation and the state of the effective seat are *different*, a corporation has the nationality of *both* states; *i.e.*, is a dual national.

E. Customary International Law Requires A Dominant Connection To The Espousing State Where A Claim Is Brought By A Dual National

23. In the customary law of diplomatic protection and minimum treatment of aliens, special diversity of nationality rules exist where the injured person is a national of *both* the injuring state and the espousing state. In this circumstance, customary international law applies a "non-responsibility" rule.

24. The traditional, strict non-responsibility rule is articulated in Article 4 of the 1930 *Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws*: "[a] State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses." League of Nations, Treaty Series, vol. 179, p. 89. Only a handful of countries have ratified the Hague Convention. However, Article 4 has been regarded as customary international law. *United States of America ex. Rel. Florence S. Mergé v. Italian Republic*, 14 R.I.A.A. 236 (Italian-United States Conciliation Commission, 1955) at 243 ("The Hague Convention, although not ratified by all the Nations, expresses a *communis opinion juris*, by reason of the near-unanimity with which the principles referring to dual nationality were accepted"); *Salem Case* (Egypt v. U.S.) (1932), 2 R.I.A.A. 1161 ("…the practice of several governments, for instance the German, is that if two powers are both entitled by international law to treat a person as their

national, neither of these powers can raise a claim against the other in the name of such a person"). E. M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS (1915) at 588 ("[t]he principle generally followed has been that a person having dual nationality cannot make one of the countries to which he owes allegiance a defendant before an international tribunal"); LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW 347-348 (Vol.1, 1955) (*locus standi* depends on the person "(a) having the nationality of the State by whom it is put forward, and (b) not having the nationality of the State against whom it is put forward"); INSTITUTE OF INTERNATIONAL LAW, SESSION AT WARSAW – THE NATIONAL CHARACTER OF AN INTERNATIONAL CLAIM PRESENTED BY A STATE FOR INJURY SUFFERED BY AN INDIVIDUAL (Article 4(a) "An international claim presented by a State for injury suffered by an individual who possesses at the same time the nationalities of both claimant and respondent States may be rejected by the latter and is inadmissible before the court (*jurisdiction*) seised of the claim").

25. The strict, Hague Convention non-responsibility doctrine has now been tempered by a "dominant nationality" approach: diversity of nationality is satisfied where the injured person has a *closer* connection to the espousing state. In *Islamic Republic of Iran v. United States of America*, Case No. A-18, 23 I.L.M. 489 (1984), the Tribunal's attention was drawn to the expression "nationals" in the U.S.-Iran Claims Agreement, the treaty giving the tribunal jurisdiction over citizens of the two states. Iran argued that this word was to be accorded a meaning consistent with the customary international law of diplomatic protection.

The latter law, it argued, precluded one state from espousing the claims of a dual national against a state whose nationality the complainant also possessed. The Claims Commission disagreed, holding that the Hague Convention non-responsibility rules had been supplanted by a more modern approach: "…the relevant rule of international law which the Tribunal may take into account for purposes of interpretation . . . is the rule … of real and effective nationality, and the search for 'stronger factual ties between the person concerned and one of the States whose nationality is involved.'" The Tribunal then held that it would assess effective nationality by "consider[ing] all relevant factors, including habitual residence, center of interests, family ties, participation in public life and other evidence of attachment." *See* also *Bavanati and The Government of the Islamic Republic of Iran*, Case No. 296, Chamber Two, Award No. 564-296-2, as cited in 10-6 MEALEY'S INTL. ARB. REP. 8 (1995) (dismissing a compensation case brought by an Iranian-U.S. dual national where the claimant could not establish a dominant and effective United States nationality); *Joan Ward Malekzadeh, Sonya Malekzadeh, Alireza Malekzadeh and the Islamic Republic of Iran*, Case No. 356, Chamber One, Award No. 543-356-1, as cited in 9-9 MEALEY'S INTL. ARB. REP. 17 (1994) (same); *Ninni Ladjevardi [formerly Burgel] and the Government of the Islamic Republic of Iran*, Case No. 118, Chamber One, Award No. 553-118-1, as cited in 8-12 MEALEY'S INTL. ARB. REP. 6 (1993) (same).

26. In 2000, the International Law Commission's rapporteur on diplomatic protection described the dominant nationality approach as the prevailing view in customary law:

> The weight of authority supports the dominant nationality principle in matters involving dual nationals. Moreover, both judicial decisions and scholarly writings have provided clarity on the factors to be considered in making such a determination. The principle contained in article 6 [of the rapporteur's draft articles applying a dominant nationality approach] therefore reflects the current position in customary international law...

J. DUGARD, FIRST REPORT ON DIPLOMATIC PROTECTION, International Law Commission, Fifty-second Session A/CN.4/506 (2000) at 54.

27. The rapporteur's position proved persuasive to the full International Law Commission, which adopted the following principle in its draft articles on diplomatic protection: "A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national *unless the nationality of the former State is predominant*, both at the time of the injury and at the date of the official presentation of the claim." Article 7, ILC, *Report of the International Law Commission – 56th Session (2004)*, Supplement No. 10 (A/59/10) at 19.

28. In sum, there is no diversity of nationality in customary international law unless a person having the nationality of both the injuring and the espousing state is more closely connected to the latter at the time of injury and at the date the claim is presented.

F. As A Dual National, Claimant In This Arbitration Does Not Satisfy The Diversity Of Nationality Standard And Is Not Entitled To Make A Claim Under Chapter 11

29. Claimant in this arbitration is incorporated in Canada, but has its head office, central administration and effective seat in the United States. As a matter of customary international law, both the United States and Canada are entitled to

treat the Claimant as a national – the United States, as the location of the corporation's *siege social*, and Canada, as the jurisdiction of incorporation. Claimant is, in other words, a dual national.

30. The NAFTA is silent on the implications of dual nationality for a claim brought pursuant to Chapter 11 that alleges infringements of Article 1105 and 1110. In these circumstances, the relevant rules of customary international law are of direct application. NAFTA, Art. 1131(1); *Loewen*, ¶¶ 229-230 (refusing to relax a customary rule of diplomatic protection on diversity of nationality where no specific provision of NAFTA does so).

31. Thus, a Claimant must have the dominant nationality of one of the non-injuring NAFTA Parties, in this case Canada, at the time of injury and at the date the claim is presented.

32. However, for the reasons set out in the Statement of Facts of this submission, the dominant nationality of the Claimant in this Arbitration is that of the United States. The most material indicators of dominant nationality are these:

- Claimant's central administration and seat of operation (including the residence of all its officers and the place of issuance of its corporate communications, including press releases, proxies and information circulars) are in United States;
- Claimant's head office is in the United States, and its only registered Canadian office is merely that of its law firm;
- Claimant's business operations are all in the United States (and Latin America), and not in Canada.

33. As Claimant is a dual national of Canada and the United States and does not have dominant Canadian nationality based on the test prescribed by customary international law and incorporated in NAFTA by Article 1131(1), it is barred from bringing a claim or receiving a Chapter 11 remedy against the United States.

G. NAFTA Chapter 11's Purposes And Objects Support This Conclusion

34. As suggested above, NAFTA was never intended to allow claims by a Party's own nationals against a decision of that Party. See, *e.g.*, *Lowen* at ¶ 223 ("it is inconceivable that sovereign nations would negotiate treaties to supplement or modify domestic law as it applies to their own residents" by allowing claims concerning the practices of the Claimant's own state of nationality. "Such a collateral effect on the domestic laws of the NAFTA Parties was clearly not within their contemplation when the treaty was negotiated"). The "object of NAFTA is to protect outsiders who do not have access to the political or other avenues by which to seek relief from nefarious practices of governmental units", not to extend new privileges to a state's own nationals. *Lowen* at ¶ 224.

35. Yet, a restructuring that converts one Party's nationals into the nominal investors of another Party may be accomplished through the simple expedient of a corporate "inversion" – a transaction in which a domestic corporation becomes the subsidiary of a nominal foreign corporation. Inversions by U.S. companies are now employed regularly as a means of minimizing tax liability. U.S. Dep't of the Treas., Office of Tax Pol'y, *Corporate Inversion Transactions: Tax Policy Implications* (May 2002).

36. To discourage abusive inversions of this sort in the NAFTA context and to preserve the clear object and purpose of the treaty, Tribunals should adopt the customary international law approach outlined above and decline access to Chapter 11 remedies where the corporation's only true contact with a Party is a simple incorporation. Any other approach would open the door to "flags of convenience" claims under NAFTA Chapter 11. Prospective claimants could attain standing to bring Chapter 11 claims against their own governments through the simple act of incorporating, followed by an "inversion" in the jurisdiction of another Party.

IV. If The Tribunal Reaches The Merits, It Should Extend To The Claimant Rights No Greater Than Those Available As Local Remedies

37. If, despite the foregoing arguments, the Tribunal decides to consider the substance of Claimant's claim, it should interpret the applicable substantive standards of law, including Articles 1110 and 1105, with an eye to the tenuousness of Claimant's connection to another Party. Specifically, as Claimant is only incidentally an investor of Canada and is instead (for all practical purposes) an investor of (and within) the United States, the Tribunal should be wary of interpreting Chapter 11 in a manner that gives Claimant broader rights than would exist if it were to pursue local remedies. To do otherwise would encourage prospective claimants to pursue corporate inversions designed to obtain nominal status as an investor of another Party.

38. United States law contains local remedies for expropriation. Claimant alleges that at least some of the government measures it impugns "completely destroy the economic value of Glamis Imperial's significant investment in the mineral rights

established". (Notice ¶ 23.) In relation to an alleged "regulatory taking" (as opposed to a physical seizure of property), government regulations that completely deprive the Claimant of all economically beneficial use of its property may constitute an expropriation under U.S. law. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (U.S. 1992). There is no expropriation, however, "if background principles of nuisance and property law independently restrict the owner's intended use of the property". *Lingle v. Chevron U.S.A., Inc*., 161 L. Ed. 2d 876, 888 (U.S. 2005) (emphasis added); *Lucas*, 505 U.S. at 1026-1032. There is no expropriation, in other words, if the "property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers". *Ibid* at 1027.

39. In the present Arbitration, even if the impugned governmental acts do deprive Claimant of its investment's economic value, Claimant itself acknowledges that its property entitlement to the mining claims has never been absolute and is subject to "other laws and BLM regulations". Notice, ¶ 4. *See* also 30 USC § 26 ("The locators of all mining locations …, so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment") (emphasis added; U.S. Statement of Defense (April 8, 2005) in this Arbitration at ¶ 4 *et seq.* Under these circumstances, there is no expropriation where new constraints on Claimant's investment are imposed as part of this independent, existing property law regime, one whose existence is anticipated when the investment is made.

V. If The Tribunal Reaches The Merits And Considers the Application of The International Standard Of Minimum Treatment, It Should Show Special Sensitivity To The Environmental and Cultural Context Of The Claim

40. Claimant contests the outcome of multiple government acts and decisions intended to reconcile Glamis Imperial's rights to mineral properties with environmental protection and cultural preservation objectives. (Notice ¶ 11 *et seq.*) However, it is not the function of a NAFTA tribunal to weigh the range of facts and considerations that contribute to government environmental and cultural preservation decision-making. *See, e.g. S.D. Myers v. Canada*, Partial Award of November 13, 2000 at ¶ 261 ("When interpreting and applying the 'minimum standard', a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making"); *GAMI Investments, Inc. v. The Government of the United Mexican States*, Award of 15 November 2004 at ¶ 93 (same).

41. Thus, the Tribunal should not engage in a *de novo* review of the merits or necessity of the environmental and cultural preservation objectives pursued by the United States and California. Instead, its sole focus should on be whether Claimant has been accorded fair and equitable treatment *given* these environmental and cultural preservation objectives.

42. An approach to Article 1105 that ignored the degree to which environmental and cultural preservation objectives may reasonably affect the treatment of an investor would impair the legitimate exercise of a Party's police powers in pursuit of a broader public interest. Such an approach would also do violence to the express intentions of the Parties, as articulated in Chapter 11 itself. *See* Art. 1114(1) ("[n]othing in this Chapter shall be construed to prevent a Party from adopting,

maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns").

VI. CONCLUSION

43. In sum, Applicants submit:

a. As Claimant is a dual national of Canada and the United States, but its dominant nationality is not Canadian, it is barred from bringing a claim or receiving a Chapter 11 remedy against the United States based on the test prescribed by customary international law and incorporated into the NAFTA by Article 1131(1);

b. In the event the Tribunal decides to consider the merits of Claimant's legal claims, the tenuousness of Claimant's Canadian ties should prompt it to interpret Chapter 11 in a manner that gives Claimant rights no broader than would exist if it were to pursue local remedies. The U.S. local remedy for expropriation provides that, even if the investor is deprived of the complete value of the investment as a consequence of changes to a regulatory regime, there is no expropriation where new constraints on Claimant's investment are imposed as part of an independent, existing property law regime and the property owner necessarily expected the uses of its property to be restricted, from time to time, by various measures newly enacted by the state in the legitimate exercise of its police powers (*e.g.*, where the investment is explicitly subject to environmental and cultural preservation regulation).

c. In the event the Tribunal considers the application of the minimum treatment standard in Article 1105, the Tribunal should not engage in a *de novo* review of the merits of the environmental and cultural preservation objectives pursued by the United States and California and instead should consider whether Claimant has been accorded fair and equitable treatment *given* these environmental and cultural preservation objectives.

All of which is respectfully submitted by Friends of the Earth Canada and Friends of the Earth United States, this 30th day of September, 2005, by counsel for Friends of the Earth:

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