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NAFTA, the Mining Law of 1872, and Environmental Protection

ABSTRACT

After spending \$15 million to mine gold on Bureau of Land Management (BLM) lands in California and then failing to secure federal approval, a Canadian mining company claimed \$50 million in damages for a regulatory taking under the North American Free Trade Agreement (NAFTA). The mining company, Glamis Gold, Ltd., argued that under the U.S. Mining Law of 1872, BLM's delay in approving its mining plan violated NAFTA by unfairly targeting the company. Glamis also argued that California's retroactive environmental regulations destroyed the economic viability of its project, rendering the mining property worthless and subject to compensation under NAFTA. This article explores this dispute, the first environmental takings challenge of its kind under NAFTA. While the NAFTA tribunal concluded no regulatory taking had occurred, considerable uncertainty remains as to what environmental regulations constitute a taking under this international agreement, even though, in this case, NAFTA did not become a "sword" to cut through U.S. environmental protections.

INTRODUCTION

On December 10, 2003, the Canadian precious metals company, Glamis Gold, Ltd., (Glamis) filed a \$50 million takings claim under the North American Free Trade Agreement¹ (NAFTA). The company alleged that, by enforcing environmental regulations, the United States and the State of California "destroyed" the value of its gold-mining investment; therefore the U.S. government owed it compensation under Chapter Eleven of NAFTA.² Following Glamis's claim, many expressed concern that a NAFTA decision favoring the mining company would limit the ability of Canada, the United States, and Mexico to uphold their environmental protection laws.³ For example, one legal scholar noted:

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1. Complaint and Demand for Arbitration, *Glamis Gold, Ltd. v. United States*, In the Arbitration Under Chapter Eleven of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, Dec. 9, 2003, available at <http://www.state.gov/documents/organization/27320.pdf>.

2. *Id.* at 7.

3. See Alison A. Ochs, Note, *Glamis Gold Ltd.—A Foreign United States Citizen? NAFTA and Its Potential Effect on Environmental Regulations and the Mining Law of 1872*, 16 *COLO. J.*

The potential for large awards by the arbitration committee against the United States, because of a state's regulation, may make environmental and social legislation more costly, thus hindering regulation of environmental damages. There is a danger, then, that investors like Glamis will use NAFTA "as a sword against regulation, rather than a shield against discriminatory expropriation."⁴

This article examines the Glamis dispute as the first regulatory takings claim under NAFTA in regard to mining, environmental protection, and the protection of Native American cultural sites. Part I of the article provides background on the three main federal laws at issue in this dispute: NAFTA, the U.S. Mining Law of 1872⁵, and the California Desert Protection Act of 1994⁶ (CDPA). Part II provides background on Glamis and the development of the company's mining claims. Part III examines the arguments put forth in the Glamis legal dispute. Part IV analyzes the resulting NAFTA tribunal decision. The article concludes with a discussion of the implications of the NAFTA decision for mine development and environmental protection in North America.

I. NAFTA, THE MINING LAW, AND THE CDPA

A. NAFTA

NAFTA was created in the early 1990s to establish a level playing field for economic investment across North America.⁷ To achieve this goal, NAFTA protects foreign investors from discriminatory treatment by the government hosting their investment.⁸ Specifically, Article 1101(1) of Chapter Eleven in NAFTA defines the scope of this protection as it applies to "measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party; and (c) with respect to Articles 1106 and 1114, all investments in the territory of the party."⁹ Article 1105(1) of Chapter Eleven specifies the type of protection to which investors are

INT'L ENVTL. L. & POL'Y 495, 517 (2005); Judith Wallace, *Corporate Nationality, Investment Protection Agreements and Challenges to Domestic Natural Resource Law: The Implications of Glamis Gold's NAFTA Chapter 11 Claim*, 17 GEO. INT'L ENVTL. L. REV. (2004).

4. Ochs, *supra* note 3.

5. General Mining Act of 1872, 30 U.S.C. §§ 22-47 (2006).

6. California Desert Protection Act of 1994, Pub. L 103-433, 108 Stat 4471 (codified in scattered sections of 16 U.S.C. and 43 U.S.C.).

7. See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 & 32 I.L.M. 605 (1993) [hereinafter NAFTA].

8. See *id.* at 297, 639.

9. See *id.* at 639.

entitled, stipulating that “each party shall accord to investments of investors of another party . . . fair and equitable treatment and full protection and security.”¹⁰

Chapter Eleven also provides foreign investors (including mining companies) with the right to seek compensation for a taking from any of the national governments adopting NAFTA, including the United States. The specific compensatory language in Article 1110 provides 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 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 upon payment of compensation
- d) On payment of compensation in accordance with paragraphs 2 through 6.¹¹

Furthermore, Article 1110(1) of NAFTA requires a host government to pay “compensation” for “any measure that expropriates or is tantamount to expropriation of an investment of an investor of another signatory state.”¹² Under Article 201(1), NAFTA broadly defines “measure” to include “any law, regulation, procedure, requirement or practice.”¹³ Pursuant to a 2002 NAFTA tribunal decision, the term “investment,” as defined by Article 1139, includes “almost every type of financial interest.”¹⁴ This encompasses “real estate or other property (tangible and intangible) acquired in the expectation or used for the purpose of economic benefit or other business purpose.”¹⁵

Under these broad provisions, a foreign investor can claim compensation when any local, state/provincial, or national government law or regulation constitutes a taking. Should a foreign investor want to pursue a takings claim under NAFTA, Articles 1115–1122 establish the proper mechanisms, including submitting those claims to arbitration.¹⁶ This protocol gives foreign investors broad substantive rights to pursue regulatory takings claims before an international tribunal.

10. *Id.*

11. *Id.* at 643.

12. *Id.*

13. NAFTA, *supra* note 7, at 298.

14. Feldman v. Mexico, ICSID Case No. ARB (AF)/99/1, 33 (Dec. 16, 2002), http://ita.law.uvic.ca/documents/feldman_mexico-award-english.pdf.

15. NAFTA, *supra* note 7, at 647.

16. *See id.* at 642–44.

Several issues have been raised despite the apparent clarity of these NAFTA provisions on regulatory takings and compensation. In 2002, law professor Thomas Merrill¹⁷ alluded to the uncertainty surrounding the issue of compensation for regulatory takings under NAFTA, stating that “the notion, reflected in Chapter 11 of NAFTA, that states may be required to pay compensation to foreign investors for what are, in effect, regulatory takings, is barely in its infancy.”¹⁸ Similarly, international law scholar Matthew Porterfield notes that “because NAFTA’s definition of ‘investment’ encompasses more property rights than are protected under the Fifth Amendment to the U.S. Constitution (the Takings Clause), foreign investors have broader rights than domestic investors in making claims against the government.”¹⁹ These issues come into play in the Glamis dispute as the first NAFTA case to consider a regulatory taking in the context of mine development and environmental regulation.

B. The Mining Law

In 1872, the U.S. Congress adopted the General Mining Act (Mining Law) to encourage the discovery of ore deposits and mining development on federal lands, particularly in the western United States.²⁰ The implications of the historic Mining Law have been much discussed in terms of environmental protection and the management of public lands, with the Mining Law interpreted to “trump all other potential uses of public lands.”²¹

17. Merrill is a Chris Evans Hughes Professor of Law at Columbia University, http://www.law.columbia.edu/fac/Thomas_Merrill.

18. Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 110 (2002).

19. See Matthew C. Porterfield, *International Expropriation Rules and Federalism*, 23 STAN. ENVTL. L.J. 3, 6 (2004).

20. See Ochs, *supra* note 3, at 761.

21. *1872 Mining Law*, EARTHWORKS, <http://www.earthworksaction.org/1872.cfm> (last visited Apr. 24, 2010). See also Steven G. Barringer, Brian R. Hanson & Kenneth D. Hubbard, *Environmental Balance*, in *THE MINING LAW OF 1872: A LEGAL AND HISTORICAL ANALYSIS* 127 (Nat'l Legal Ctr. for the Pub. Interest, 1989); Roger Flynn, *1872 Mining Law as an Impediment to Mineral Development on the Public Lands: A 19th Century Law Meets the Realities of Modern Mining*, 34 LAND & WATER L. REV. 301 (1999); Jerry L. Haggard, *Public Land-Use Planning and the Mining Law System*, in *THE MINING LAW OF 1872: A LEGAL AND HISTORICAL ANALYSIS* at 99; Sam Kalen, *1872 Mining Law for the New Millennium*, 71 U. COLO. L. REV. 343 (2000); John C. Lacy, *Historical Overview of the Mining Law: The Miner's Law Becomes Law*, in *THE MINING LAW OF 1872: A LEGAL AND HISTORICAL ANALYSIS* at 13; Michael McCloskey, *Mining Law of 1872*, in *THE MINING LAW OF 1872: A LEGAL AND HISTORICAL ANALYSIS* at 1; Clayton J. Parr, *Self-Initiation Under the Federal Mining Law*, in *THE MINING LAW OF 1872: A LEGAL AND HISTORICAL ANALYSIS* at 49; Donald E. Smith, *Mining Law of 1872, the Independent*

The Mining Law's system of free access is very different from the leasing or auction systems in place in most other countries of the world, which provide host governments with more discretion and control over mining and multiple land use processes. However, long-term security is a critical issue for mining companies, given the significant amount of capital necessary to facilitate mine development and the painful memories of past expropriations by host governments. As legal scholars Morriss et al. note:

Mining's capital intensity and fixed location renders it vulnerable to expropriation; once a mine is developed it cannot be moved. This vulnerability made possible the wave of nationalizations and controlling legislation adopted in developing countries in the 1960s and 1970s. Highlighting the importance of strong property rights when such vulnerabilities exist, these expropriations led mining companies to withdraw from those countries and concentrate their efforts on the United States and other countries with more secure property rights.²²

Calls for reform of the Mining Law have resounded for decades. The criticisms of the historic legislation include first that, under the U.S. free-entry system, "[t]hose who discover mineral resources on federal land are entitled to receive title to the resources (and the surface estate if they so choose) for no more than a *de minimus* payment to the government,"²³ and that "by vesting the resource locator with the full title to the minerals and, at the resource holders' option, with fee simple title to the surface estate as well, the government increases the value of the reputational constraint on its activities."²⁴

A second criticism is that the Mining Law does not address reclamation efforts. In the nineteenth century, when the Mining Law was passed, the U.S. government "wasn't concerned with environmental protection," and therefore the law did not address the need to reclaim mining sites.²⁵

A third criticism is that the Mining Law provides too much latitude to mining operations. The N.M. Environmental Law Center has argued that "the Forest Service and Bureau of Land Management also have

Miner's Viewpoint: An Overview, in *THE MINING LAW OF 1872: A LEGAL AND HISTORICAL ANALYSIS* at 45; Mark Squillace, *The Enduring Vitality of the General Mining Law of 1872*, 18 ENVTL. L. REP. 10261 (1988).

22. Andrew Morriss, Roger Meiners & Andrew Dorchak, *Homesteading Rock: A Defense of Free Access Under the General Mining Law of 1872*, 34 ENVTL. L. 745, 752-53 (2004).

23. *Id.* at 758.

24. *Id.* at 768.

25. See *EARTHWORKS*, *supra* note 21.

to contend with the federal Mining Law, which has been interpreted as an absolute right to mine on public lands anywhere an ore body is found regardless of potential environmental damage.”²⁶ In 1997, economics professor David Gerard noted:

The 1872 Mining Law . . . is the subject of continuing and sometimes rancorous controversy. Led by environmental activists who are antagonistic to the Mining Law, critics are trying to change the present system. Mining companies are resisting. The result is a bitter battle that has gone on for years, with no end in sight.²⁷

The environmental group Earthworks argues that “[r]eform of the 1872 Mining Law should include clear operational standards for hardrock mining, to prevent future . . . contamination.”²⁸ Earthworks has proposed standards that include “[t]he ability to deny mining operations that would cause undue degradation to human health, water resources, wildlife habitat and other natural resources” and “explicit reclamation standards” for the “restoration of the surface and revegetation.”²⁹

Despite the continued criticism, no general consensus exists as to how to reform the Mining Law to address environmental concerns. Some see other laws accomplishing what the Mining Law cannot, in that “changing . . . laws, such as the Superfund law and the Clean Water Act, would accomplish more than changing the Mining Law. ‘Current environmental laws often provide wrong incentives to ensure accountability and encourage reclamation’”³⁰

Others have found little need for reform. For example, in 1999, at the request of Congress, the National Research Council formed a committee to evaluate “the adequacy of the regulatory framework for hardrock mining on federal lands.”³¹ The resulting report notes that a variety of state and federal regulations provide environmental protection when

26. *Issues—Mining in New Mexico*, N.M. ENVIRONMENTAL LAW CENTER, <http://nmenvirolaw.org/index.php/site/issues-mining/> (last visited Apr. 24, 2010).

27. David Gerard, *The Mining Law of 1872: Digging a Little Deeper*, PROPERTY & ENVIRONMENT RESEARCH CENTER (Dec. 1997), <http://www.perc.org/articles/article646.php>.

28. *Modern Mining Needs a Modern Mining Law*, EARTHWORKS, 4, <http://www.earthworksaction.org/pubs/ModernMiningFINAL.pdf> (last visited May 19, 2010).

29. *Id.*

30. Summary of David Gerard, *The Mining Law of 1872: Digging a Little Deeper*, PROPERTY & ENVIRONMENT RESEARCH CENTER (Dec. 1997), <http://www.perc.org/articles/article196.php>.

31. NAT’L RESEARCH COUNCIL, COMMITTEE ON HARDROCK MINING ON FEDERAL LANDS, *HARDROCK MINING ON FEDERAL LANDS 1* (1999), available at www.mining-law-reform.info/NRCReport.htm.

mining federal lands.³² This report adopted the position previously taken by the National Research Council's Committee on Surface Mining and Reclamation in 1979 and concluded that reclamation efforts such as back-filling "should be considered on a case-by-case basis."³³

Others see it differently. The Public Lands Foundation has noted that as long as "the Mining Law of 1872 remains in effect . . . [and although] the U.S. Bureau of Land Management and U.S. Forest Service . . . have developed surface management regulations that help curtail unnecessary surface disturbance, the Mining Law still gives priority to mineral development over other public uses and environmental concerns on these public lands."³⁴

The gold mine proposed by Glamis involved the use of the controversial cyanide heap-leach and open-pit reclamation process, raising environmental concerns including potential water impacts, health and safety issues, and possible cyanide spills.³⁵

C. CDPA

Although to a much lesser extent than NAFTA and the Mining Law, the California Desert Protection Act (CDPA) is also at issue in this dispute. In 1994, concerns about protecting California's unique desert ecosystems prompted the U.S. government to adopt the CDPA, "which formally withdrew millions of acres of federal land from any development."³⁶ Congress created the CDPA on the basis that

- (1) the California desert contains historical, scenic, archeological, environmental, biological, cultural, scientific, educational, recreational, and economic resources that are uniquely adjacent to an area of large population;
- (2) the California desert environment is a total ecosystem that is extremely fragile, easily scarred, and slowly healed;
- (3) the California desert environment and its resources, including certain rare and endangered species of wildlife, plants, and fishes, and numerous archeological and historic sites, are seri-

32. *See id.* at 4.

33. *Id.* at 5.

34. *Id.*

35. *Cyanide Incidences*, THE RAINFOREST INFORMATION CENTER, <http://www.rainforest.info.org.au/gold/spills.htm> (last visited May 19, 2010).

36. Transcript of the Hearing on the Merits, Day 1, at 54, *Glamis Gold, Ltd. v. United States*, In the Arbitration Under Chapter Eleven of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules (Aug. 12, 2007), available at <http://www.state.gov/s/1/c10986.htm> [hereinafter *Gourley*].

ously threatened by air pollution, inadequate Federal management authority, and pressures of increased use.³⁷

The CDPA designated certain lands in the California desert as wilderness and created Death Valley National Park, Joshua Tree National Park, and the Mojave National Preserve.³⁸ The CDPA also withdrew particular areas within 25 million acres previously designated as the California Desert Conservation Area,³⁹ subject to any valid existing rights, from

all forms of entry, appropriation, or disposal under the public land laws; from location, entry, and patent under the United States mining laws; and from disposition under all laws pertaining to mineral and geothermal leasing, and mineral materials, and all amendments thereto.⁴⁰

Importantly, this withdrawal contained a “no buffer zone” clause.⁴¹ In essence, this lack of a buffer zone provision ensures environmental protection only up to the border of the withdrawn area, but not beyond. Specifically, mining is not precluded on a territory adjacent to a CDPA area solely because mining activities may be seen or heard from a wilderness area.⁴²

The proposed Glamis mine was located in one of the California Desert Conservation Areas but not one withdrawn under the CDPA.⁴³ Because of the lack of a buffer zone, gold mining at Glamis could proceed directly adjacent to an area protected by the CDPA. Furthermore, Glamis argued that “Congress warned against even the slightest expansion of those [withdrawn] areas.”⁴⁴ The company also claimed the no buffer zone language was “a specific assurance leading to its reasonable

37. California Desert Protection Act, 43 U.S.C. § 1781(a)(1)–(3).

38. California Desert Protection Act, Pub. L. 103-433, § 104(5), 108 Stat 4471, 4473 (1994); *id.* at § 402, 108 Stat at 4488; *id.* at § 502, 108 Stat at 4490.

39. This designation was given by the U.S. Congress in 1976 under the Federal Land Policy and Management Act (FLPMA), Pub. L. No. 94-579, § 601, 90 Stat 2743 (1976).

40. Pub. L. 103-433, § 104(7)(c), 108 Stat. at 4473.

41. *Id.* at § 103(d).

42. *Id.*

43. Memorial of Glamis Gold, at 46, *Glamis Gold, Ltd. v. United States*, In the Arbitration Under Chapter Eleven of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules (Dec. 15, 2006), *available* at <http://www.state.gov/documents/organization/78762.pdf> [hereinafter *Glamis Memorial*].

44. *Id.* at 58.

expectation of the ability to mine the Imperial Project.”⁴⁵ These arguments are examined further in Part III.

II. GLAMIS: THE COMPANY

Glamis Imperial, a U.S. subsidiary of the Canadian precious-metals mining company Glamis Gold, Ltd., began acquiring mineral interests in Imperial County, California, in 1987.⁴⁶ Between 1987 and 1994, with the approval of the U.S. Bureau of Land Management (BLM), Glamis conducted “an extensive exploration drilling program in the Imperial Project area . . . to locate, if any, valuable mineral deposits such as gold and silver.”⁴⁷ After locating a potentially significant deposit, Glamis applied for permits to mine this gold on federal lands.

At the end of 1994, Glamis submitted the “Imperial Project Plan of Operations and Reclamation Plan” (Imperial Project) to the state of California’s Imperial County Planning and Building Department, the “appropriate lead agency.”⁴⁸ BLM also participated in the review of Glamis’s proposed project, including the environmental assessment review.⁴⁹ Both levels of project review are examined below.

A. Federal Response to the Glamis Project

In 1996 and 1997 respectively, BLM released an initial and a second revised draft environmental impact statement (EIS); both drafts selected the proposed Imperial Project as the preferred alternative.⁵⁰ However, the second draft EIS noted that the project would negatively affect Native American cultural sites, specifically the sacred sites of the Quechan tribe, including the tribe’s “trail of dreams.”⁵¹

Subsequently, at a 1997 meeting between the Quechan and BLM, a Quechan tribal historian discussed the significance of this area, describing it as similar to “Jerusalem or Mecca.”⁵² However, at this meeting, BLM State Director for California Ed Hastey informed the Quechan representatives that because of the Mining Law, BLM was “kind of ham-

45. Decision, at 271, *Glamis Gold, Ltd. v. United States*, In the Arbitration Under Chapter Eleven of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules (July 8, 2009), available at <http://www.state.gov/documents/organization/125798.pdf> [hereinafter *Glamis Decision*].

46. *Id.* at 13.

47. *Id.* at 24.

48. *Id.* at 45.

49. *Id.* at 41.

50. See *Glamis Decision*, *supra* note 45, at 46–55.

51. *Id.* at 54 (quoting Draft EIS/EIR for Glamis Imperial Project (Nov. 1997)).

52. *Id.* at 55 (quoting Notes from Government to Government Meeting (Dec. 16, 1997)).

strung” in its ability to stop the Imperial Project.⁵³ Hasteley also noted that, under the Mining Law, mining rights would usually prevail over religious interests.⁵⁴

After the meeting, Hasteley asked the U.S. Department of the Interior’s (DOI) Regional Solicitor John Leshy to prepare an opinion letter analyzing the Quechan’s religious concerns and how they conflicted with Glamis’s plans.⁵⁵ Additionally, in 1998, BLM requested the federal Advisory Committee on Historic Properties (ACHP) to review the proposed Imperial Project.⁵⁶ ACHP concluded that the area was very important to the Quechan’s religious practices and that the proposed Imperial Project would “unduly degrade” this important area.⁵⁷ ACHP then issued a recommendation that “Interior take whatever legal means available to deny the project.”⁵⁸

As noted above, Hasteley’s (BLM) request to DOI’s Regional Solicitor Leshy addressed any First Amendment concerns regarding the Quechan’s exercise of religion. Rather than focusing on these constitutional religious issues, Leshy issued an “M-Opinion” that examined BLM’s responsibility to prevent “unnecessary or undue degradation” of the area under FLPMA.⁵⁹ In 1999, at the time of the M-Opinion, FLPMA’s unnecessary degradation standard was defined with reference to the “prudent operator” standard under which a disturbance was not generally allowed when it was greater than the disturbance that would normally result from a prudent operator.⁶⁰ The M-Opinion noted that the “standard does not by itself give the BLM authority to prohibit mining altogether on public lands.”⁶¹ Moving on from the FLPMA standard, Leshy then examined the “undue impairment” standard contained in the CDPA⁶² and noted that this standard was separate and more powerful than FLPMA’s “prudent operator standard.”⁶³ Leshy stated:

[T]he “undue impairment” standard would permit BLM to impose reasonable mitigation measures on a proposed plan of operations that threatens “undue” harm to cultural, historic or

53. *Id.* at 56.

54. *Id.* at 56.

55. *See id.* at 56.

56. *See* Glamis Decision, *supra* note 45, at 59.

57. *See id.* at 127.

58. *See id.* at 63 (quoting letter from Cathryn Buford Slater, ACHP, to Bruce Babbitt, Secretary of the Interior (Oct. 19, 1999)).

59. *See id.* at 67–70.

60. *Id.* at 70–71 (quoting M-Opinion).

61. *Id.* at 71 (quoting M-Opinion).

62. California Desert Protection Act, 16 U.S.C. §§ 410aaa–410aaa-83 (2006).

63. *See* Glamis Decision, *supra* note 45, at 71 (quoting M-Opinion).

other important resources of the CDCA. Moreover, the reasonableness of those mitigation measures ought not to be judged by whether they make the particular operation uneconomic at current market prices . . . the “undue impairment” standard might also permit denial of a plan of operations if the impairment of other resources is particularly “undue” and no reasonable means are available to mitigate the harm.⁶⁴

After issuance of the M-Opinion, in 2000, BLM released its Final Environmental Impact Statement, which selected the “No Action” option in contrast to the two earlier draft EISs.⁶⁵ BLM’s stated grounds for rejecting the Imperial Project were based on the use of cyanide and that the project was subject to the agency’s statutory duty to “take any action necessary to prevent unnecessary or undue degradation of public lands.”⁶⁶

During this time, BLM also entertained the possibility of “withdrawing the affected land from future mineral entry.”⁶⁷ Just before President Clinton left office in 2000, BLM withdrew some federal lands in California from mineral development in order to preserve existing indigenous cultural and religious sites.⁶⁸ Glamis’s mineral rights were in an area subject to withdrawal and the company was concerned by this possibility.⁶⁹ As a result, in 1998, Glamis’s chief executive officer consulted BLM regarding possible withdrawal, reporting that BLM assured Glamis it: (1) should have every reasonable expectation and assurance that under the applicable U.S. mining law and regulations, the project would be approved;⁷⁰ and (2) would have “defacto [sic] valid existing rights (VER) as of the date of the withdrawal pending the outcome of a formal valid existing rights” determination.⁷¹ This meant that the company should have had a perfected right to its mineral discovery regardless of a

64. *Id.* at 72 (quoting M-Opinion).

65. *See id.* at 74 (quoting 2000 Final Environmental Impact Statement).

66. 43 U.S.C. § 1732(b) (2000); Imperial Project Gold Mine Proposal, BLM Case No. CA 670-41027, 12 (Dep’t of the Interior, Jan. 17, 2001) (Record of Decision), available at http://www.blm.gov/ca/pdfs/elcentro_pdfs/Glamis_ROD_final_1-01.pdf [hereinafter Record of Decision].

67. *See* Glamis Decision, *supra* note 45, at 63 (quoting M-Opinion).

68. *See* Public Land Order No. 7469, Withdrawal of Public Land for the Indian Pass Area, California, 65 Fed. Reg. 64,456 (Oct. 27, 2000), in compliance with U.S. Executive Order 13007, to preserve sacred Indian sites.

69. *See* Glamis Decision, *supra* note 45, at 63–64.

70. *Id.* at 64.

71. *Id.* (quoting BLM Notes of July 17, 1998, Meeting with Glamis, at 1 [Ex. 131]).

future withdrawal.⁷² However, BLM had postponed the VER determination until ACHP's memo on religious concerns was completed.⁷³

Regardless of these assurances, in 2001, Secretary of the Interior Bruce Babbitt issued a Record of Decision (ROD) formally denying Glamis's Imperial Project plan.⁷⁴ The ROD adopted Leshy's M-Opinion, including its interpretation of the "undue impairment" standard under CDPA.⁷⁵ However, that same year, President George W. Bush's newly appointed DOI Solicitor, William Myers III, took action to rescind the agency's M-Opinion denying development.⁷⁶ In addition, DOI rescinded the ROD; thus, Glamis's Imperial Project was once again headed for approval.⁷⁷

In 2002, BLM issued its VER determination, with the agency finding that Glamis's Imperial County mining claims were in fact valid existing rights.⁷⁸ BLM concluded that the mining company satisfied the Mining Law and that the gold could be extracted at a profit.⁷⁹ However, BLM excluded backfilling mine waste into a third pit as uneconomical.⁸⁰ By taking this stance, BLM in essence ignored former DOI Solicitor Leshy's comments regarding the more stringent "undue impairment" standard available under the CDPA. Regardless, BLM continued to review Glamis's Imperial Project until the company submitted its takings claim for arbitration under NAFTA the following year.⁸¹

72. A valid existing right is created when a mining company perfects a discovery prior to the enactment of legislation affecting its rights to exploit that discovery. Post-perfection legislation typically includes language protecting these preexisting rights in order to ensure compliance with the Takings Clause. See Jan Laitos, *Nature and Consequences of Valid Existing Rights Status in Public Land Law*, 5 J. MIN. L. & POL'Y 399, 406 (1989).

73. See Glamis Decision, *supra* note 45, at 66–67.

74. Record of Decision, *supra* note 66; See also Glamis Decision, *supra* note 45, at 76.

75. See Record of Decision, *supra* note 66, at 4; see also Glamis Decision, *supra* note 45, at 76–77.

76. See Glamis Decision, *supra* note 45, at 77.

77. See *id.* at 78.

78. Glamis Reply Memorial, at 79, Glamis Gold, Ltd. v. United States, In the Arbitration Under Chapter Eleven of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules (Dec. 15, 2006), available at <http://www.state.gov/documents/organization/78762.pdf> [hereinafter Reply Memorial] (citing BLM, Mineral Validity Examination of the Glamis Imperial Project 3 (Sept. 27, 2002)).

79. See Glamis Decision, *supra* note 45, at 79 (citing BLM, Mineral Validity Examination of the Glamis Imperial Project 3 (Sept. 27, 2002)).

80. See *id.* at 79 (citing BLM, Mineral Validity Examination of the Glamis Imperial Project 3 (Sept. 27, 2002)).

81. See *id.* at 81.

B. The State of California's Response to the Glamis Project

As the federal government changed tracks regarding the Glamis mine, the State of California took action to prevent the company from mining the gold deposit within its borders. As early as 2001, a bill targeting the Imperial Project was introduced in the California Senate.⁸² In fact, the California Governor's Office of Planning and Research explicitly stated that this bill "contain[ed] narrowly crafted language intended to prevent approval of a specific mining project proposed for an Imperial Valley location by Glamis Gold, Inc."⁸³ Additionally, in February 2002, another bill was introduced in the California Legislature stating that it was the State's policy to ensure protection of Native American religious practices, including access to sacred areas.⁸⁴ Soon after, amendments were introduced instructing California agencies to deny permit applications if the proposed plans negatively affected certified Native American sacred sites.⁸⁵ Finally, in August 2002, amendments were introduced into Senate Bill 483 to protect Native American sacred sites and specifically "to require the complete backfilling and re-contouring of all surface hard-rock mining operations."⁸⁶ However, all of these bills were either vetoed or rendered inoperative by then-Governor Davis.⁸⁷ Regardless, in a "Signature Message," Davis expressed that he "strongly oppose[d] the Glamis gold mine because it would irreparably damage sites sacred to the Quechan Indian Tribe."⁸⁸ To carry out that opposition, the governor directed his administration "to pursue all possible legal and administrative remedies that will assist in stopping the development of the Glamis gold mine."⁸⁹

In April 2003, the California Legislature achieved those goals by passing Senate Bill 22 (SB 22), a resurrection of an earlier effort requiring state agencies to deny reclamation plans for certain surface mining developments "located on, or within one mile of any Native American sacred site and [which are] located in an area of special concern."⁹⁰ Under this new law, mine development could proceed only if all mining pits

82. *See id.* at 82.

83. *Id.* at 82 (quoting GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, ENROLLED BILL REPORT OF SB 483).

84. *See* Glamis Decision, *supra* note 45, at 82-83.

85. *See id.* at 83.

86. *See id.* at 166.

87. *See id.* at 84-85.

88. *Id.* at 85 (quoting Governor Gray Davis's Statement on Signing SB 483 (Sept. 30, 2002)).

89. *Id.*

90. CAL. PUB. RES. CODE § 2773.3 (West 2003); *see also* Glamis Decision, *supra* note 45, at 85.

were backfilled and contoured to conform roughly to the original landscape.⁹¹ In addition, the law required applicants to provide adequate financial guarantees for backfilling.⁹² SB 22's authors stated that the bill

need[ed] to be made operative immediately because of provisions that establish new reclamation requirements for strip mining operations for gold, silver and other precious metals that affect Native American sacred sites in portions of the Southern California desert. These changes to statute are urgently needed to stop the Glamis Imperial mining project in Imperial County proposed by Glamis Gold, Ltd.⁹³

In a further show of support, the Governor's Office of Planning and Research noted that the new law would "permanently prevent the approval of the Glamis Gold Mine project," which the office acknowledged would otherwise have been approved.⁹⁴ Also during this time, the State took additional efforts to thwart Glamis, starting on December 12, 2002, when the California Surface Mining and Geology Board adopted backfilling regulations specifically designed to stop the Imperial Project.⁹⁵

Following these developments at both the state and federal level, Glamis submitted its claim for arbitration under NAFTA in 2003 for discriminatory treatment resulting in a regulatory taking.⁹⁶

III. THE GLAMIS LEGAL CLAIMS

In 2003, Glamis filed an expropriation claim as a foreign investor under Chapter Eleven of NAFTA.⁹⁷ In essence, the company argued that actions by BLM and the State of California, for which the U.S. government is responsible, "defeated Glamis' reasonable investment-backed expectations" under NAFTA and "unfairly subjected Glamis' Imperial Project to a new regulatory regime" applied *after* it had incurred \$15 million in exploration and development expenses.⁹⁸ As such, Glamis argued that its California mining claim, valued at \$49.1 million in 2002, had lost

91. Glamis Decision, *supra* note 45, at 172.

92. *Id.* at 85.

93. *See id.* at 86 (quoting CAL. STATE NATURAL RES. WILDLIFE COMM'N, SUMMARY OF SB 22, CA B. An., S.B. 22 Sen. (2003)).

94. *See id.* at 86 (quoting GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, ENROLLED BILL REPORT OF SB 22). All of these steps were completed before Governor Schwarzenegger took office on November 13, 2003.

95. *See id.* at 87-90.

96. *See* Glamis Decision, *supra* note 45, at 90.

97. *See id.* at 91.

98. Glamis Reply Memorial, *supra* note 78, at 6.

all of its value.⁹⁹ The company attributed this loss to three regulatory actions: (1) the U.S. government's decision in 2001 denying approval of its plan of operations;¹⁰⁰ (2) the U.S. government's failure to promptly correct an unlawful act;¹⁰¹ and (3) California legislation and emergency regulation that imposed backfilling and site re-contouring reclamation.¹⁰²

Glamis's Notice of Arbitration was made pursuant to Article 1120 of NAFTA, under which a disputing investor may submit a claim to arbitration, provided that at least six months have elapsed since the events giving rise to the claim.¹⁰³ Once Glamis had duly served notice on the Respondent, the United States of America, both parties then agreed that the arbitration would take place in Washington, D.C., and further agreed that the International Centre for Settlement of Investment Disputes (ICSID) would administer it.¹⁰⁴ In accordance with NAFTA Article 1123, a three-member panel was established; Glamis and the United States each selected one arbitrator while the third member of the panel, who would act as the presiding arbitrator, was appointed by agreement.¹⁰⁵ After completion of numerous procedural steps, the hearing on the merits took place August 12–19, 2007, at the offices of the World Bank in Washington, D.C.¹⁰⁶

A. Glamis's Position

Glamis based its claims on the premise that the failure of the state and U.S. governments to approve its Imperial Project violated its reasonable investment-backed expectations and had affected the value of its investment in the United States. First, the company noted that after it had learned about the proposed land withdrawals under the CDPA, in 1998, its representatives questioned BLM about whether such proposals would negatively impact its mining project and had received assurance that no such effect would occur.¹⁰⁷ Despite this assurance, BLM issued a final EIS recommending denial of the project. As noted above, while this decision was ostensibly final, the BLM later reconsidered the Glamis

99. *Id.* at 1.

100. Glamis Decision, *supra* note 45, at 143.

101. *Id.* at 144.

102. *Id.* at 145.

103. NAFTA, *supra* note 7, at 644.

104. Glamis Decision, *supra* note 45, at 91.

105. NAFTA, *supra* note 7, at 644.

106. Detailed information regarding each of these steps is available at U.S. DEP'T. OF STATE, <http://www.state.gov/s/1/c10986.htm> (last visited Feb. 6, 2011).

107. *See* Glamis Decision, *supra* note 45, at 64.

plan but the review was suspended when Glamis filed its Notice to Submit to Arbitration under Chapter Eleven of NAFTA.¹⁰⁸

Second, Glamis claimed discrimination, arguing that its proposed mine was subject to California backfilling and contouring reclamation requirements not imposed on other operators. These requirements retroactively had the effect of destroying the total value of the mineral extraction project, therefore warranting compensation.¹⁰⁹ Glamis put forth December 12, 2002, as the date when the State's backfilling regulations were adopted, which destroyed any profitable extraction of its Imperial gold deposit.¹¹⁰

1. Federal Claims

To support its claim of a vested property right, Glamis first argued that consistent with longstanding decisions of the U.S. Supreme Court,¹¹¹ under the Mining Law, its mining claims were a "unique form of property" and that this type of mineral interest was "property in the fullest sense of that term,"¹¹² conferring upon the owner "the exclusive right of possession and enjoyment of all the surface land and the minerals thereunder."¹¹³ Theodore Olson, a constitutional law scholar and for-

108. *Id.* at 81.

109. Reply Memorial, *supra* note 78, at 2.

110. Glamis Decision, *supra* note 45, at 139.

111. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1961); *accord United States v. Locke*, 471 U.S. 84, 104 (1985); *see also Shell Oil Co. v. Andrus*, 591 F.2d 597, 603 (10th Cir. 1979), *aff'd*, 446 U.S. 657 (1980) ("a locator or owner of an unpatented [mining] claim, properly located, has a vested property interest therein. This has been universally recognized by the courts."). *See also Skaw v. United States*, 13 Cl. Ct. 7, 29 (1987); *Freese v. United States*, 226 Cl. Ct. 252, 256, 639 F.2d 754, 757 (1981) ("It is a matter beyond dispute that federal mining claims are 'private property' enjoying the protection of the fifth amendment Had plaintiff suffered an uncompensated divestment of his federal mining claims, we would have a clear constitutional violation.").

112. *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306, 316 (1930); *Skaw v. United States*, 13 Cl. Ct. 7, 29 (1987) ("Once there has been a valid discovery and a proper location, an unpatented mining claim is real property in the highest sense."); *Collord v. United States Dep't of Interior*, 154 F.3d 933, 934-35 (9th Cir. 1998) (noting that a "mining claim confers the right to exclusive possession of the claim, including the right to extract all minerals from the claim An unpatented mining claim is a 'fully recognized possessory interest.'" (citation omitted)).

113. *Cook v. United States*, 37 Fed. Cl. 435, 437 (1997); *see also United States v. Shumway*, 199 F. 3d 1093, 1099-110 (9th Cir. 1999) ("The phrase 'mining claim' represents a federally recognized right in real property. The Supreme Court has established that a mining 'claim' is not a claim in the ordinary sense of the word—a mere assertion of a right—but rather is a property interest, which is itself real property in every sense, and not merely an assertion of a right to property.").

mer U.S. Solicitor General retained by the company as an expert, concurred, stating that

Glamis does have a property interest in being able to extract minerals from the area of its mining claims . . . I believe California has affected 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.¹¹⁴

Olson also argued that under U.S. takings law, any preexisting restrictions would be insufficient to avoid just compensation pursuant to the Fifth Amendment of the U.S. Constitution.¹¹⁵

Second, Glamis argued that the historical land use priority afforded under the Mining Law “embodies 130 years’ statutory promise that prospectors may enter Federal lands, locate valuable mineral deposits . . . and in return the Government grants them a vested property interest in those mineral deposits”¹¹⁶ This argument arose from the claim that the objective of the Mining Law was to encourage mineral exploration and development. Glamis argued that, having received such encouragement, “neither the United States nor its subgovernmental agencies/entities can suddenly change in a discriminatory and targeted manner the preexisting legal regime,”¹¹⁷ especially as this undermined Glamis’s rights as a foreign investor under NAFTA. Glamis asserted that both it and the U.S. government understood that under the Mining Law “there was no lawful basis to deny the plan of operations” for the Imperial Project¹¹⁸ and that DOI’s M-Opinion “clearly and unlawfully imposed a new legal standard for mines on federal land.”¹¹⁹

Third, Glamis argued that “the Record of Decision not only willfully disregarded the applicable law by relying on [the M-Opinion’s] manufactured grounds for denial but it also violated expressly the very promise based on the CDPA on which Glamis had relied in making its significant investment.”¹²⁰

Because of the primacy of the Mining Law and longstanding interpretation of federal land use regulation, Glamis argued that its “invest-

114. Reply Memorial, *supra* note 78, at 9.

115. *Id.* at 22.

116. Gourley, *supra* note 36, at 50.

117. *Id.* at 52.

118. *Id.* at 64.

119. Transcript of the Hearing on the Merits, Day 7, at 1612, *Glamis Gold, Ltd. v. United States*, In the Arbitration Under Chapter Eleven of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules (Aug. 12, 2007), available at <http://www.state.gov/documents/organization/93408.pdf>.

120. *Id.* at 1613.

ment-backed expectations for project approval were reasonable;" that a reasonable investor would conclude that "the identified cultural resources in the project area were not sufficiently distinct to justify prohibiting" the project; and that a "reasonable investor would conclude that its plan of operations . . . , consistent with comparable operations, would have been approved."¹²¹

2. State Claims

In addition to its federal claims, Glamis argued that, once it appeared that the federal government under President Bush was again trying to win approval for the Imperial Project, the State of California took matters into its own hands and "simply changed the law in an unprecedented manner to prohibit any cost-effective operation of the Glamis mining claims."¹²² Glamis argued that California's actions were "clearly discriminatory and targeted at this mine,"¹²³ citing statements from the Governor's Office of Planning and Research that legislation would "permanently prevent the approval of the Glamis Gold Mine project."¹²⁴ Glamis submitted that the mine backfilling requirements to protect the environment made the project uneconomical: "[t]he author believes the back-filling requirements established [by the bill] make the Glamis Imperial project infeasible."¹²⁵

Glamis also claimed that the California measures were arbitrary in the sense that no "technical or environmental justification" existed for the stringent backfilling measures, which were "a radical departure from conventional approaches to backfilling at other metallic mining operations in the United States and around the world."¹²⁶

In terms of both federal and state actions, Glamis did not challenge the regulation of mining for the protection of the environment or to preserve cultural sites. Glamis also conceded that the U.S. government had never *actually* approved its proposed mine. However, Glamis did claim that California's backfilling and reclamation requirements were discriminatory and, when combined with unreasonable delay by the federal government to approve its reasonable mine plan, amounted to an

121. Glamis Memorial, *supra* note 43, at 119.

122. *Id.* at 308.

123. Gourley, *supra* note 36, at 82–83.

124. Glamis Decision, *supra* note 45, at 86 (quoting GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, ENROLLED BILL REPORT OF SB 22).

125. Glamis Decision, *supra* note 45, at 86 (quoting CAL. STATE NATURAL RESOURCES WILDLIFE COMMISSION, SUMMARY OF SB 22, CA B. An., S.B. 22 Sen. (2003)).

126. Glamis Memorial, *supra* note 43, at 308.

expropriation in contravention of NAFTA Articles 1110 and 1105.¹²⁷ Specifically, Glamis alleged that the U.S. government breached its obligations under Article 1110 of NAFTA by implementing measures “tantamount to expropriation of the claimant’s investment without payment of compensation.”¹²⁸

B. The U.S. Government’s Position

In response to Glamis, the U.S. government argued there had been no contravention of Article 1110 because the company’s mineral rights “did not confer on it any right to limit the California government’s authority to accommodate Native American religious practice, injure Native American sacred sites . . . or threaten public health and safety.”¹²⁹ The U.S. government argued that measures were taken to serve the legitimate public purposes of protecting the environment, Native American cultural sites, and religious freedoms.¹³⁰ As such, the State of California and agencies of the U.S. government had the right to “accommodate Native Americans’ religious freedoms” and to “preserve sites of historic and cultural significance.”¹³¹

IV. THE GLAMIS DECISION

Professor Thomas Wälde,¹³² an international mining law expert retained by Glamis, made no mistake about the significance of this case, stating:

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 a 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

127. Glamis Gold, Ltd. v. United States, Notice of Intent to Submit a Claim to Arbitration (July 21, 2003), available at <http://www.naftaclaims.com/Disputes/USA/Glamis/Glamis-Intent.pdf>.

128. Glamis Memorial, *supra* note 43, at 227.

129. Counter-Memorial of Respondent United States of America, at 107–108, Glamis Gold, Ltd. v. United States (Sept. 19, 2006), available at <http://www.state.gov/documents/organization/73686.pdf> [hereinafter Glamis Counter-Memorial].

130. *Id.*

131. *Id.* at 202.

132. Wälde, now deceased, was known as a scholar, mediator, arbitrator, expert witness, and arbitration and litigation consultant; see *Obituaries*, THE TIMES, Oct. 27, 2008, available at <http://www.timesonline.co.uk/tol/comment/obituaries/article4987338.ece>.

foreign investment in the U.S. by providing investment protection enforceable by a NAFTA Chapter XI tribunal.¹³³

Two years after oral arguments, in 2009, the NAFTA tribunal issued an extensive, written decision on what it characterized as “the particularly thorny issue of what is commonly known as a regulatory taking.”¹³⁴

With regard to the actions of the U.S. government, the tribunal agreed with Glamis that the M-Opinion and the ROD substantially changed existing law, and that, under the long-established Mining Law, “mining operators developed expectations that the discovery of Native American artifacts at a mining site could necessitate mitigation, but would not lead to a denial of the project’s [plan].”¹³⁵ The tribunal also found that the M-Opinion “was a reasoned, complicated legal opinion on an issue of first impression that changed a decades-old rule and century-old regime upon which [Glamis] had based reasonable expectations.”¹³⁶ Yet under the circumstances involving an international agreement, the M-Opinion did not violate the customary international fair treatment standard, as it did not evidence “a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons.”¹³⁷ Therefore, the tribunal held that the M-Opinion was not arbitrary in that BLM had requested it specifically in order to clarify a difficult issue.¹³⁸ Furthermore, in keeping with the requirements of natural justice, the M-Opinion included reasons that justified its conclusions and was actually an opinion of “general applicability” rather than targeted discrimination.¹³⁹ Finally, the tribunal concluded that because the M-Opinion was rescinded within a relatively short time, any due process issues were moot.¹⁴⁰

In terms of Glamis’s claim to a federal property right, the tribunal announced that “a violation of Article 1105 based on the unsettling of reasonable, investment-backed expectations requires as a threshold circumstance, at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment.”¹⁴¹ In light of this contractual requirement, the tribunal held that the U.S. government had made no such commitment.¹⁴²

133. Reply Memorial, *supra* note 78 at 7.

134. Glamis Decision, *supra* note 45, at 155.

135. *Id.* at 329.

136. *Id.* at 330.

137. *Id.*

138. *See id.* at 331.

139. *Id.*

140. *See* Glamis Decision, *supra* note 45, at 333.

141. *Id.* at 331.

142. *See id.* at 331–32.

This is not to suggest that such a test could never be met; indeed, the tribunal noted that this requirement could have been satisfied by an actual guarantee of the approval of the mining project or if Glamis had been offered a benefit in exchange for pursuing its claim “beyond the customary chance to exploit federal land for possible profit.”¹⁴³

In regard to Glamis’s claim that the State of California had not treated its investment fairly and equitably, the tribunal looked to language of SB 22 that:

(1) targets the Imperial Project and was specifically designed to make the Project infeasible; (2) the process by which SB 22 was adopted disturbed a transparent and predictable framework in that it occasioned radical change and undue surprise; and (3) the requirement of mandatory backfilling is arbitrary in that it does not protect cultural resources and may even cause greater environmental degradation.¹⁴⁴

With regard to Glamis’s discrimination claim, the tribunal recognized the difficulty in “ascertaining the legislative intent” of SB 22 and noted that individual statements regarding the Imperial Project may not reflect the beliefs of the entire legislative body.¹⁴⁵ Therefore, the tribunal turned to whether SB 22 was a law of “general application.”¹⁴⁶ In doing so, the tribunal applied the standard that “the likely characteristics of a law of general application would be that it is not strictly limited in time or geographic scope, and it is not crafted so as to exclude from its regulation all, or most, other similarly situated actors.”¹⁴⁷ According to the tribunal, the California law:

[A]ppears to apply to potentially several mines, if not yet at present, then in the future In addition, it applies for the broad goal of preventing “the imminent destruction of important Native American sacred sites threatened by proposed strip mining and . . . ensur[ing] these mining activities are adequately mitigated through implementation of new state reclamation requirements at the earliest opportunity.”¹⁴⁸

The tribunal could not conclude “[w]hether, in reality, this bill will only serve to limit the operation of the Imperial Project,” but pointed out that, although the bill appeared to affect only the Imperial Project, the tribunal

143. *Id.* at 331–32.

144. *Id.*

145. *See id.* at 340–41.

146. Glamis Decision, *supra* note 45, at 341.

147. *Id.*

148. *Id.* at 341–42.

was not prescient enough to determine whether “such a condition will continue for the life of the bill.”¹⁴⁹ Therefore, the tribunal concluded that Glamis failed to prove discrimination.¹⁵⁰

With regard to Glamis’s claim that SB 22 had radically changed a transparent framework in violation of Article 1105, the tribunal required Glamis to show it had invested in California *because* it was “induced by California’s specific assurances.”¹⁵¹ The tribunal rejected Glamis’s argument that the “no buffer zone” language in the CDPA qualified as a specific assurance, noting:

[T]his is not the type of specific inducement necessary to create the duty that is a prerequisite to any breach of Article 1105 by repudiation of investor expectations. The asserted assurances made to [Glamis] are not equivalent to the assurances in *Metalclad*, which were found to be “definitive, unambiguous and repeated” and thus were sufficient to create the threshold State obligation.¹⁵²

In the end, the tribunal concluded that none of the actions by the U.S. government or the State of California, or any combination thereof, had contravened Article 1105.¹⁵³

Notwithstanding that California plainly and obviously did target the Glamis project, the fact that the tribunal found no contravention of NAFTA may be explained by the tribunal placing a high priority on discouraging future takings claims and minimizing investor uncertainty. This ruling creates a high but certain threshold for a mine developer to qualify for takings compensation. Hypothetically, a mining company could proceed to develop a mining property but at a reduced profit to comply with the more onerous backfilling and reclamation requirements.

With respect to the Glamis claim under Article 1110—i.e., the claim that federal and state actions amounted to an expropriation of its investment—the tribunal’s initial inquiry involved a “threshold question,” under which it analyzed “the degree of the interference with the property right” in order to determine whether the government action “is sufficient to potentially constitute a taking at all.”¹⁵⁴ The tribunal characterized this initial inquiry as “a foundational threshold inquiry of whether the property or property right was in fact taken.”¹⁵⁵ In regula-

149. *Id.* at 342.

150. *Id.* at 342.

151. *See id.* at 343.

152. Glamis Decision, *supra* note 45, at 344.

153. *Id.* at 352–53.

154. *See id.* at 156–57.

155. *Id.* at 156.

tory takings cases, this foundational question requires examination of “the degree of the interference with the property right.”¹⁵⁶ The analysis of the degree to which the relevant government action has interfered with the property right is broken down further into two additional components: “the severity of the economic impact and the duration of that impact.”¹⁵⁷ Thus, before the tribunal could address the reasonableness or purpose of the government measures, the tribunal first sought to “determine whether the Claimant’s investment in the Imperial Project has been so radically deprived of its economic value as to potentially constitute an expropriation.”¹⁵⁸

As to Glamis showing it had been “radically deprived of the economical use and enjoyment of its investments,”¹⁵⁹ the tribunal set a high standard and cited a previous NAFTA tribunal decision in *Tecmed*.¹⁶⁰ Moreover, the tribunal required Glamis to prove that its mining rights had become essentially “useless” and not merely restricted.¹⁶¹ Based on the *Tecmed* test and the tribunal’s earlier conclusion that the government’s measures were temporary and limited, the tribunal concluded no expropriation or taking had occurred under NAFTA, as Glamis’s use of its mine was only restricted.¹⁶² Thus, the tribunal did not reach either of the two steps¹⁶³ of an Article 1110 expropriation claim.

The tribunal also considered whether the federal government had “facilitated” an expropriation via the State of California measures.¹⁶⁴ As before, the key issue for the tribunal was whether California’s measures satisfied the threshold requirement of a “radical diminution in value of the Imperial Project.”¹⁶⁵ The tribunal indicated that it would determine this issue by examining what “entitlements and value” would remain after Glamis fulfilled its backfilling duties.¹⁶⁶

156. *See id.*

157. *Id.*

158. Glamis Decision, *supra* note 45, at 157.

159. *Id.*

160. Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case ARB(AF)/00/2, ¶ 115 (May 29, 2003), available at INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, http://icsid.worldbank.org/ICSID/Servlet?requestType=CasesRH&actionVal=showDoc&docId=DC602_En&caseId=C186.

161. Glamis Decision, *supra* note 45, at 157.

162. *See id.* at 158.

163. *Id.* at 156. (“(1) the extent to which the measures interfered with the reasonable and investment-backed expectations of a stable regulatory framework, and (2) the purpose and character of the governmental actions taken”).

164. *Id.* at 158.

165. *Id.* at 159.

166. *Id.*

The parties hotly contested the financial effects of California's backfilling measures. Glamis argued that the regulation decreased the value of the Imperial Project from \$49.1 million to less than zero.¹⁶⁷ Whereas, California contended that the project retained significant positive value.¹⁶⁸ The difference in these appraisals centered on five elements: (1) the backfilling costs; (2) the value and costs related to a possible third open pit; (3) the correct price of gold; (4) financial assurances required by governments; and (5) the correct discount rate.¹⁶⁹

In considering the mine's value, the tribunal noted that it was not determining whether the California measures constituted an expropriation, but rather, the threshold question of whether "there was *not* a significant economic impact."¹⁷⁰ The difference between these two inquiries is significant. At this stage of the analysis, the tribunal only sought to determine if the project had a positive value.¹⁷¹ Determining whether there was an expropriation predicated a complex calculation to determine the precise value of the Imperial Project after the required backfilling measures.

With regard to this threshold question, the tribunal concluded that Glamis's valuation methodology had significant problems, particularly with regard to the company's \$98.5 million estimate of backfilling and reclamation.¹⁷² In the end, the NAFTA tribunal concluded that the value of the Glamis mining property on December 12, 2002, was more than \$20 million.¹⁷³ Nonetheless, the tribunal held rigidly to its threshold question of whether the governments' (United States and the State of California) actions amounted to an expropriation by requiring Glamis to show its investment had been rendered essentially valueless in order to qualify as a taking. Therefore, as Glamis had failed to satisfy even this threshold requirement, its taking claim under Article 1110 failed in its entirety.¹⁷⁴

V. CONCLUSION

In light of the few regulatory takings decisions under NAFTA to date, considerable uncertainty remains as to the test to use to determine a regulatory taking and the basis for calculating compensation. Glamis is

167. Glamis Decision, *supra* note 45, at 159.

168. Glamis Counter-Memorial, *supra* note 129, at 162.

169. Glamis Decision, *supra* note 45, at 159-60.

170. *Id.* at 160-61.

171. *Id.* at 161.

172. *Id.*

173. *Id.* at 230.

174. *Id.* at 230-31.

the first dispute in which a NAFTA tribunal considered these questions in regard to mining and environmental and cultural protection.

Because of the free-access system under the Mining Law, Glamis argued it could not have foreseen that BLM, acting on behalf of the United States, or the State of California would prohibit its project. California's backfilling and reclamation requirements, directed at preventing the project, did not exist when Glamis acquired its mining claims for which it spent \$15 million on development. Notwithstanding almost 150 years of U.S. history, during which mining has been afforded a land use priority under the pro-investment Mining Law, and the sudden, targeted actions of the State of California to prevent the Glamis mine from opening, the NAFTA tribunal concluded no taking occurred—based primarily on the fact that the value of the mining claim had not been reduced to zero. Rather, the tribunal held rigidly to the threshold question of whether a government's actions—both the United States and the State of California—amounted to an expropriation for which Glamis was required to show its investment had been rendered essentially valueless in order for a regulatory taking to occur. Instead, the tribunal concluded that the Glamis mining claim had a value of at least \$20 million at the time of the alleged expropriation—down from the \$50 million Glamis claimed prior to California's restrictions.

In Glamis, the government's rejection of the less-costly mineral extraction method proposed by the mine developer did not prompt the tribunal to decide there was a taking. Ultimately, the tribunal concluded that the unwillingness of BLM to approve a lower-cost mining plan did not compromise Glamis's reasonable, financially backed expectations as a foreign investor under the trade agreement, and therefore, the U.S. government did not breach the protection afforded by NAFTA. Clearly, given the outcome of this first environmental takings claim under NAFTA, the trade agreement was not used as a "sword" to undermine the regulatory powers of the U.S. government or the State of California to protect the environment and Native American cultural sites.

