

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

GLAMIS GOLD, LTD.,

Claimants/Investors,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

REJOINDER OF
RESPONDENT UNITED STATES OF AMERICA

CONFIDENTIAL
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**REJOINDER OF
RESPONDENT UNITED STATES OF AMERICA**

In accordance with the Tribunal's Procedural Order No. 10, dated February 22, 2007, respondent United States of America respectfully submits this Rejoinder to the claims of Glamis Gold Ltd., which it submitted on behalf of its enterprises, Glamis Gold, Inc. and Glamis Imperial Corporation (collectively, "Glamis").*

PRELIMINARY STATEMENT

In its Counter-Memorial, the United States demonstrated that Glamis's claims were dependent upon a distorted view of the facts and non-existent legal principles. Glamis's Reply utterly fails to rehabilitate its claims in these respects and, indeed, confirms their deficiencies.

* On November 4, 2006, Goldcorp, Inc. announced its acquisition of Glamis Gold Ltd. For purposes of this arbitration, the United States will continue to refer to the claimant as "Glamis."

Glamis's Imperial Project, as it was proposed, would have involved mining for gold by digging pits hundreds of feet deep, leaving a gaping, mile-wide hole, and piling the excavated land into stockpiles measuring approximately 300 feet high. This would have been done in the environmentally sensitive California Desert Conservation Area ("CDCA") on federally-owned land that was sacred to the neighboring Quechan Tribe. At the conclusion of its mining operations, Glamis proposed to simply leave this massive scar and these enormous piles, permanently damaging the environment and preventing the Quechan – or any member of the public – from ever using the area again.

That the federal and state governments took action to address concerns generated by Glamis's plan is hardly surprising. Indeed, in light of the history of increasing environmental regulation and the known harms stemming from unreclaimed open-pit mines in California, it would have been surprising if the government *had not* acted to prevent even more mining companies from leaving publicly-owned lands in a state of devastation after they had extracted the desired minerals from them.

Yet Glamis suggests that it was invidious for the government to respond to the environmental and cultural threats posed by open-pit gold mining. It argues that the federal government lacked discretion to do anything but approve its proposed plan, regardless of the environmental damage that it would cause. And it turns well-established principles of federalism on their head by contending that California lacked the authority to enact reclamation requirements to require mining companies like Glamis to undo the otherwise permanent damage they would cause. Glamis's claim that the federal and California governments' careful, informed, and measured actions violated international law is baseless.

Glamis's claim is ultimately dependent upon persuading this Tribunal to review *de novo* each and every government action that had any effect on its mining claims and then hoping that this Tribunal will reach factual conclusions and make policy choices different from those made by the respective federal and state governments. Thus, it asks this Tribunal to find that:

- determinations of professional archaeologists that a portion of the Quechan's sacred trail system traversed the project area were not supported by a preponderance of the evidence;
- the DOI violated the Administrative Procedure Act by issuing an opinion interpreting an undefined term in the agency's statute without having conducted a formal rulemaking; and
- the California State Mining and Geology Board was obligated to review scientific studies before determining that massive open pits accompanied by large piles of waste rock leave the land in a condition unsuitable for alternate use post-mining.

But NAFTA Chapter Eleven is neither a mechanism for reviewing domestic administrative procedure nor an international insurance policy for foreign investors. Treaties containing investment provisions, like the NAFTA, are intended to provide a measure of protection to foreign investors, particularly when the domestic legal system of the host country does not offer such protections. The investor-State arbitral mechanism provides a neutral forum for resolving investment disputes, which is especially important where the host country's courts are insufficiently independent or where there exist linguistic, cultural, or legal impediments to resorting to local courts. But, as confirmed by its Senior Vice President and General Counsel in testimony before the U.S. House of Representatives, Glamis faces no such impediments:

Opponents of mining often talk of Glamis and others in our industry as "foreign companies," Nothing could be further from the truth. Glamis' head office and all of its executive and administrative functions are located in Reno, all of our operations are located in the U.S. or Latin

America, the great majority of our shares are traded on the New York Stock Exchange and the majority of our shareholders are U.S. citizens. Accordingly, our problems are U.S. problems[.]**

In spite of its predominantly American profile, Glamis has resorted to international arbitration. It is clear why it has done so, as its claims would not pass muster in a U.S. court. Thus, Glamis's challenge lies in persuading this Tribunal that the customary international law of expropriation and the minimum standard of treatment somehow provide protections far exceeding those provided under the constitutional and administrative law of the United States, whose protection of property and due process rights is unsurpassed among the municipal legal systems of the world.

In an attempt to meet its challenge, Glamis relies primarily on Professor Thomas Wälde – who has submitted a 250-page, single-spaced opinion which is more akin to a memorial than an expert's report – for the discredited and unsupported propositions that NAFTA Article 1110 expands expropriation protection beyond that available under customary international law, and that NAFTA Article 1105 grants investor-State tribunals unfettered authority to second-guess government decision-making. These erroneous assumptions underlie Professor Wälde's analysis and are compounded by his evident bias, as well as his willingness both to opine on matters indisputably beyond his purported areas of expertise and to inappropriately weigh evidence and arrive at factual conclusions. The report is objectionable in its entirety.

Glamis's claims have no basis in customary international law. Years before Glamis made any investment, the federal government enacted legislation requiring the

** Statement of Chuck Jeannes, Senior Vice President and General Counsel, Glamis Gold, Ltd., U.S. House of Representatives, Committee on Resources, Oversight Field Hearing, Effect of Federal Mining Policy Fees and Mining Policy Changes on State and Local Revenues and the Mining Industry (Apr. 20, 2001), at 35.

BLM to prevent mining companies from causing “undue impairment” of the environment in the CDCA. Before Glamis made any investment, California had legislation mandating that land be reclaimed to a usable condition and expressly providing for the possibility that this be achieved by backfilling. Before Glamis made any investment, California had legislated to prohibit any person from causing irreparable damage to Native American sacred sites. Glamis cannot now complain that its plan of operations was not simply rubber stamped by the federal government or that California requires backfilling of all open-pit metallic mines. None of the things with which Glamis takes issue constitutes an unpredictable, seismic change in the legal landscape; these were foreseeable and incremental changes that continued a decades-long trend of strengthening environmental protections for mined lands.

Nor has any of the government actions had the devastating effect on Glamis that it would have this Tribunal believe. While Glamis harps on the fact that the federal government denied its plan of operations, Glamis cannot escape the fact that the denial was in place for only a few months and that Glamis itself is the cause of DOI’s having stopped processing its plan. Nor can it avoid the conclusions of its own contemporaneous evidence showing that the Imperial Project would have been impressively profitable, even if Glamis complied with California’s reclamation requirements. Indeed, at today’s gold prices, the project is worth at least \$159 million. In short, none of the measures about which Glamis takes issue gives rise to State responsibility under international law.

Below, the United States addresses Glamis’s expropriation and minimum standard of treatment claims. In each case, the United States first addresses Glamis’s challenge to

the California measures, and then addresses its challenge to the federal government's actions. As shown below, Glamis has failed to demonstrate that the United States expropriated its investment or failed to accord it the minimum standard of treatment required by customary international law. Glamis's claim should thus be dismissed in its entirety.

I. Glamis's Expropriation Claim Should be Denied

The question before this Tribunal is whether the United States breached Article 1110 by expropriating Glamis's investment without paying compensation. It did not. *First*, with respect to the California measures, Glamis has failed to show (i) that its claim against the California measures is ripe; (ii) that the California measures deprived it of a property right it possessed; or (iii) that the California measures indirectly expropriated its investment. *Second*, with respect to the Federal Government's actions in processing Glamis's plan of operations, Glamis has failed to show (i) that its claim of delay is founded in fact or law; (ii) that the DOI expropriated Glamis's investment during its review of Glamis's plan of operations; or (iii) that the DOI's actions following the rescission of the Record of Decision were expropriatory. Accordingly, the Tribunal should deny Glamis's expropriation claim arising from both the California and the Federal actions.

A. The California Measures Did Not Expropriate Glamis's Investment

California adopted two measures that Glamis alleges expropriated its investment. First, the SMGB adopted a regulation that implemented the provisions of SMARA and required that all open-pit metallic mines in California be backfilled and recontoured.

Later, the California Legislature enacted Senate Bill 22 (“SB 22”),¹ which contains backfilling and recontouring requirements similar to those imposed by the SMGB regulation, but which only applies to certain mines near Native American sacred sites. Although Glamis blurs the distinction between the two,² the SMGB’s regulation does not “implement” SB 22. The California measures Glamis challenges are two distinct measures adopted by different branches of government.³ The legislative history and purpose of SB 22 cannot be attributed to the SMGB, which promulgated its regulation pursuant to its pre-existing legislative authority, SMARA. Nor can the administrative record for the SMGB regulation shed light on the California Legislature’s reasons for enacting SB 22.

Whether Glamis is deliberately trying to obfuscate the issues by treating SB 22 and the SMGB’s regulation as one and the same, or whether it is merely confused about the facts is not clear. But what is clear is that the Tribunal should deny Glamis’s

¹ As explained in the Counter-Memorial, Senate Bills 483 and 1828 were “single-joined,” such that SB 483 could not become law unless SB 1828 was also signed into law. Governor Davis signed SB 483, but vetoed SB 1828. In April 2003, the Governor signed SB 22, which decoupled the vetoed SB 1828 from the approved SB 483, thereby allowing SB 483 to become law. *See* Counter-Mem. at 94-95. SB 483 amended SMARA to require backfilling and regrading of *any* open-pit metallic mine “located on, or within one mile of, any Native American sacred site and . . . in an area of special concern.” *Id.* at 95. For ease of reference, we refer herein to the language of SB 483, as well as its codification at CALIFORNIA PUBLIC RESOURCES CODE §§ 2773.3 and 2773.5 as “SB 22.”

² *See, e.g.*, Reply Memorial of Claimant Glamis Gold Ltd. (Dec. 15, 2006) (“Reply”), ¶ 193 (acknowledging the United States’ explanation that the “SMGB enacted the *regulations* because of the damage projects such as the Imperial Project would cause to the environment absent the regulations, and not for any reason particular to Glamis,” but then stating that “[t]his argument is belied by the *legislative history language . . .*”) (emphasis added); *see also* Expert Report of Thomas W. Wälde (Dec. 15, 2006) (“Wälde Rep.”) at III-66, n.281 (expressing confusion as to the “objections” to the Imperial Project, and failing to understand the distinction between the justifications for the reclamation requirements as expressed in SB 22 (protection of Native American sacred sites) and those expressed in the SMGB regulation (*e.g.*, prevention of harm to the environment and health and safety hazards created by open-pit metallic mining)).

³ *Compare* SB 483 (later enacted through SB 22) (amending the Public Resources Code to add § 2773.3, imposing backfilling requirements on metallic mining operations “located on, or within one mile of, any Native American sacred site . . . located in an area of special concern”) *with* the SMGB’s regulation, CAL. CODE REGS. tit. 14, § 3704.1 (2003) (providing that *any* “open pit excavation created by surface mining activities for the production of metallic minerals shall be backfilled . . .”).

expropriation claim challenging these measures. Below, the United States first demonstrates that Glamis’s challenge to the California measures is not ripe. We then show that neither the SMGB regulation nor SB 22 deprived Glamis of a property right and, therefore, they cannot be said to be expropriatory. Finally, we demonstrate that, even if the Tribunal finds that Glamis did have a property right to engage in the proscribed activities, neither the SMGB regulation nor SB 22 constituted an indirect expropriation of Glamis’s property.

1. Glamis’s Expropriation Claim Challenging the California Measures Is Not Ripe

Glamis does not contest that a cognizable expropriation claim under international law requires more than the threat of interference with a property right. Nor does Glamis contest that the California measures have not been applied to the Imperial Project.⁴ Instead, Glamis asserts that it “has already been deprived of the value” of its unpatented mining claims by California’s adoption of the challenged measures.⁵ That assertion is incorrect, and Glamis’s expropriation claim should be denied for lack of ripeness.

As stated by the U.S. Supreme Court in *Williamson County*, until an administrative agency “has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question,” factors critical to a takings analysis, *i.e.*, the extent of economic impact and interference with reasonable

⁴ See Reply ¶¶ 290-92 (arguing that the challenged measures will be, rather than have been, applied to Glamis) (“[t]he entire novel regulatory scheme was aimed at the Glamis Imperial Project, and there are no exceptions to its requirements”; “[t]he State of California made it perfectly clear that the mandatory and complete backfilling requirements applied to Glamis”; “nearly three years have passed since California’s deprivatory regulations were enacted . . . [s]till, no further action has been taken by the State of California . . . on the pending Plan of Operations”).

⁵ *Id.* ¶ 290.

investment-backed expectations, “simply cannot be evaluated.”⁶ Glamis does not respond to this fundamental point. Instead, Glamis conflates the *adoption* of the SMGB regulation and SB 22 with the *application* of the regulation and legislation to the Imperial Project.⁷

Glamis also attempts to avoid potential causation obstacles by simply attributing *all* its alleged damages to SB 22 and the SMGB regulation, without considering the potential impact of any other regulatory requirements on the value of its proposed project.⁸ Moreover, determining the date on which regulations are actually applied to the property in question is critical for any damages analysis, particularly in the gold mining context, as is illustrated by the doubling of gold prices since the adoption of the SMGB regulation in December 2002. Without the application of regulatory measures – challenged or otherwise – to the proposed Imperial Project, Glamis’s damages claim cannot be evaluated.

Glamis’s first legal challenge related to the proposed Imperial Project and filed against the Department of Interior in U.S. court was dismissed on ripeness grounds. The court found that the target of Glamis’s legal challenge, the 1999 DOI Solicitor’s Opinion (“1999 M-Opinion”), “may alter the legal regime that BLM must employ in its ongoing

⁶ *Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985).

⁷ *See, e.g.*, Reply ¶ 2 (asserting that the California measures “imposed retroactively on Glamis’ pending Project mandatory complete backfilling and site recontouring”); Behre Dolbear, *Valuation of Glamis Gold Ltd.’s Imperial Gold Project, Imperial County, California* (Apr. 2006) (“Behre Dolbear Rep.”), at 7 (characterizing role as “independently determining the fair-market value of the [Imperial] Project after imposition of the Mandatory Backfill Regulation”); *id.* at 10 (“Behre Dolbear’s base case valuation is effective as of midnight on December 11, 2002, immediately prior to the imposition of the Mandatory Backfill Regulation”); *id.* at 21 (“Behre Dolbear has demonstrated that the entire value of the Project was effectively destroyed upon imposition of the Mandatory Backfill Regulation”).

⁸ *See* Counter-Mem. at 118 & n.560 (listing several regulatory requirements that could apply to the Imperial Project and affect its economic value); BLM, Mineral Report, at 81 (Sept. 27, 2002) (6 FA tab 255) (referencing the need to incorporate additional mitigation measures into the plan of operations, as addressed in the FEIS 2000).

review of the Imperial Project, and may reduce the Project’s chances for ultimate approval, but it does not mandate any specific decision or carry any other direct legal consequences.”⁹ That reasoning applies equally to Glamis’s challenge to SB 22 and the SMGB regulation made in this arbitration: those measures may “alter the legal regime” employed by Imperial County and BLM in their review of the Imperial Project plan of operations, but they do not “mandate any specific decision.” Indeed, in Glamis’s view, the California measures *cannot* alter the legal regime because the measures are preempted and, thus, invalid.¹⁰

Notwithstanding its position that the California measures are preempted by federal law, Glamis contends that the measures, by their very existence, “already” have destroyed the value of its unpatented mining claims.¹¹ Attempting to support this assertion, Glamis repeatedly refers to the United States’ valuation analysis prepared by Navigant which, in its view, “concedes” or “recognizes” that “the California regulations already have devalued Glamis’ mining claims at least to some extent.”¹² Glamis’s assertion is baseless.

First, the very language in the valuation analysis relied on by Glamis – that the California measures “would reduce” the value of Glamis’s mining claims¹³ – undermines Glamis’s position. A finding that the California measures “would reduce” the value of

⁹ *Glamis Imperial Corp. v. Babbitt*, Case No. 00-CV-1934 W (S.D. Cal.), Order (Oct. 31, 2000), at 6.

¹⁰ See Letter from Timothy McCrum, Counsel for Glamis Gold Ltd., Crowell & Moring LLP, to Fred E. Ferguson, Jr., Associate Solicitor, DOI (Apr. 2, 2003) (7 FA tab 46).

¹¹ Reply ¶ 290. Glamis similarly overstates the impact of the 1999 M-Opinion which, it states, “dictated the outcome of BLM’s review of the Glamis plan of operations.” Mem. ¶ 326. Remarkably, Glamis maintains this assertion notwithstanding the U.S. court’s finding, when dismissing Glamis’s legal challenge on ripeness grounds, that the 1999 M-Opinion had no “direct legal consequences” for Glamis. See *Glamis Imperial Corp. v. Babbitt*, Case No. 00-CV-1934 W (S.D. Cal.), Order (Oct. 31, 2000), at 6.

¹² Reply ¶ 290.

¹³ *Id.* (quoting Counter-Mem. at 180).

Glamis's claims in no way "concedes" or "recognizes" that the measures *have reduced* the value of those claims. The unmistakable implication of the language quoted by Glamis is that the California measures would increase the cost of reclamation for Glamis *if those measures were applied to Glamis*.

Second, the United States clearly stated that its valuation analysis was premised on "the assumption that the reclamation requirements were applied" to Glamis.¹⁴ Navigant relied on that assumption when responding to Behre Dolbear's "Post-Backfill Scenario," under which "Behre Dolbear concludes that Glamis' mining claims were rendered worthless when the Reclamation Requirements were adopted" by the SMGB on December 12, 2002.¹⁵ Although Behre Dolbear repeatedly refers to the December 12, 2002 "imposition" of the SMGB regulation on the Imperial Project,¹⁶ the regulations were not applied to the Imperial Project on that date, and have not been applied to the Imperial Project since that date.¹⁷ Contrary to Glamis's assertion, the United States does not concede that the SMGB regulation reduced the value of Glamis's unpatented mining claims on December 12, 2002; rather, the United States valuation analysis responds to Behre Dolbear's valuation analysis on the terms set by Behre Dolbear. Those terms consider the *adoption* of the SMGB regulation to be equivalent to the *application* of those

¹⁴ Counter-Mem. at 171.

¹⁵ Navigant Rep. at 48.

¹⁶ *See supra* n.7.

¹⁷ Indeed, "imposing" the SMGB regulations on the Imperial Project would not have been possible on December 12, 2002, given that Glamis had requested, three days earlier, that BLM suspend processing of its Imperial Project application. *See* Counter-Mem. at 115.

regulations to Glamis,¹⁸ a premise the United States rejects but, in this instance, assumes in order to respond to the Behre Dolbear report.

Furthermore, Glamis's position that the California measures are preempted by federal law¹⁹ undermines its assertion that the adoption of the California measures "dictated the outcome" of BLM's review.²⁰ Accordingly, Glamis's futility argument, which assumes no available defense to the application of the California measures to the Imperial Project,²¹ is unavailing.

Glamis's position on preemption likewise undermines its attempt to distinguish *Williamson County Planning Commission* on grounds that "there were (and are) no variance procedures for Glamis to pursue."²² In this matter, Glamis did not seek a variance from the California measures – Glamis sought to invalidate them outright on preemption grounds.²³ Rather than pressing DOI to complete its processing for the

¹⁸ See, e.g., Behre Dolbear Rep. at 7 (characterizing role as "independently determining the fair-market value of the [Imperial] Project after imposition of the Mandatory Backfill Regulation").

¹⁹ See, e.g., Letter from Timothy McCrum, Counsel for Glamis Gold Ltd., Crowell & Moring LLP, to Fred E. Ferguson, Jr., Associate Solicitor, DOI (Apr. 2, 2003) (7 FA tab 46), at 9 ("[W]e urge the Solicitor's Office to promptly render a legal opinion finding California's backfilling mandate to be preempted and invalid, as applied to federal lands subject to the Mining Law.").

²⁰ Even assuming, *arguendo*, that the California measures were adopted "with the express goal of killing the Imperial Project," Reply ¶ 297, under Glamis's preemption theory, the application of those measures to the Imperial Project would be invalid and, thus, the measures would have no effect on the outcome of BLM's review.

²¹ See Reply ¶ 291 (California "made it perfectly clear" that the backfilling and recontouring requirements "applied to Glamis to prevent the Imperial Project from proceeding . . . [i]t would therefore be futile for Glamis to participate in further administrative processing of the Imperial Project Plan of Operations"); *id.* ¶ 292 ("[F]urther processing of a proposed mine that faces insurmountably 'cost prohibitive' reclamation requirements would be futile. It would likewise be futile for Glamis to withdraw the pending proposed Plan of Operation and resubmit a plan that it could not financially perform."). Any reliance on the *Whitney Benefits* case, see Reply ¶ 299, likewise assumes the lack of an available defense to the application of the California measures.

²² *Id.* ¶ 296 (emphasis omitted).

²³ Glamis's position on preemption also undermines its attempt to distinguish *Mariner Real Estate Ltd. v. Nova Scotia* (Attorney General), 90 A.C.W.S. (3d) 589 (Can.), on grounds that "[i]n Glamis' case there is no permit that will allow it to circumvent the California mandatory full backfilling regulations." Reply ¶ 296. Glamis cannot, on the one hand, maintain that the California measures are preempted on federal lands

proposed Imperial Project and take action to preempt the California measures, however, Glamis opted to initiate this arbitration. Glamis thereby failed to obtain a determination on whether, and precisely how, DOI or the county would apply the California measures to the Imperial Project. Under *Williamson County*, therefore, Glamis's expropriation claim "simply cannot be evaluated."²⁴

Glamis's complaint that "under Respondent's apparent theory, BLM can enjoy permanent immunity from the requirement to compensate Glamis . . . by simply failing to take final action on the proposed Plan of Operation"²⁵ is baseless. In July 2003, after providing notice to the United States of its intent to commence arbitration in this matter, Glamis's actions with respect to DOI and BLM changed radically. Prior to July 2003, Glamis communicated persistently with DOI and BLM officials concerning its Imperial Project application.²⁶ In July 2003, however, Glamis notified the United States that it intended to commence arbitration to recover the fair market value of its mining claims. Glamis also sent a letter to DOI, characterizing its mining claims as having been "effectively expropriated" and observing that "the underlying issues involved have, unfortunately, become so intractable that new avenues must be pursued."²⁷ Any "failure" by DOI to take final action on Glamis's proposed plan of operations is directly attributable to Glamis's July 2003 communication to DOI, which made clear that Glamis had decided to pursue through arbitration financial recovery for its "effectively

while, on the other hand, assert that there are no available options to circumvent the reclamation requirements under those measures.

²⁴ *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985).

²⁵ Reply ¶ 294.

²⁶ See Counter-Mem. at 89 & n.436.

²⁷ Letter from Timothy McCrum, Counsel for Glamis Gold Ltd., Crowell & Moring LLP, to Patricia Morrison, Deputy Assistant Secretary for Land and Minerals, DOI (July 21, 2003) (7 FA tab 47), at 1, 3.

expropriated” mining claims.²⁸ Since that communication, Glamis has made no further request for DOI to continue processing its plan of operations.²⁹

Finally, Glamis’s reliance on *Lucas* in an attempt to demonstrate the ripeness of its expropriation claim is unavailing. In *Lucas*, a 1990 amendment enacted after briefing and argument before the court below, but prior to the release of the court’s opinion, authorized “in certain circumstances” the issuance of “special permits” for construction otherwise prohibited by the Beachfront Management Act.³⁰ As characterized by the U.S. Supreme Court, the court below had “shrugged off the possibility of further administrative and trial proceedings” and thereby reached the merits of the takings claim, notwithstanding the enactment of the 1990 amendment.³¹ Under that ruling, the Supreme Court observed, “Lucas would plainly be unable (absent our intervention now) to obtain further state-court adjudication” with respect to any alleged deprivations predating the

²⁸ Glamis’s references to the federal government’s “failure” to take final action contrast sharply with its prior views on the continued processing of the Imperial Project plan in the face of a legal challenge. Upon learning that DOI’s processing of the Imperial Project application was ongoing notwithstanding its challenge to the 1999 M-Opinion, Glamis stated that it was “appalled.” See Counter-Mem. at 83. Now, however, Glamis seeks damages for DOI’s failure to process its plan in the face of a legal challenge, even though the current legal challenge (i) alleges the expropriation of Glamis’s entire investment; (ii) places the very processing of its application by DOI directly at issue; and (iii) targets alleged actions by California undertaken independently of DOI.

²⁹ Glamis’s assertion that it “firmly expected” the continued processing of its Imperial Project plan of operations, notwithstanding its notice of intent to commence arbitration in this matter, is unsupported by the record and is inconsistent with its own actions. See Reply ¶ 8. Given Glamis’s persistent approaches to DOI during the months preceding the release of the validity report, see Counter-Mem. at 89 & n.436, any “firm expectation” of continued processing surely would have been accompanied by additional approaches by Glamis to DOI. But Glamis cut off communications with its July 2003 letter to DOI, stating that “we very much appreciate the efforts that . . . Interior Department officials have taken to resolve this controversy, [but] Glamis Gold believes that the underlying issues involved have, unfortunately, become so intractable that new avenues must be pursued.” Letter from Timothy McCrum, Counsel for Glamis Gold Ltd., Crowell & Moring LLP, to Patricia Morrison, Deputy Assistant Secretary for Land and Minerals, DOI (July 21, 2003) (7 FA tab 47), at 1.

³⁰ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1010-11 (1992).

³¹ *Lucas*, 505 U.S. at 1011.

1990 amendment.³² “In these circumstances,” the Supreme Court reasoned, “we think it would not accord with sound process to insist that Lucas pursue the late-created ‘special permit’ procedure before his takings claim can be considered ripe.”³³

No such special circumstances apply here: Glamis raised its preemption argument with DOI in April 2003, again challenged the applicability of the California measures in a May 2003 meeting with DOI, and then abandoned the issue in July 2003 after notifying DOI of its intent to commence arbitration.³⁴ There is nothing “late-created” about the procedures that have been available to, and abandoned by, Glamis.

The adoption of the SMGB emergency regulations in December 2002 (or the enactment of SB 22 in April 2003 or the adoption of permanent regulations in May 2003) is *not* equivalent to the application of those measures to the Imperial Project. Glamis, in its preemption argument, directly challenges the applicability of the California measures to the Imperial Project. And only upon the actual application of those measures to the Imperial Project can their economic impact be evaluated.³⁵ Glamis’s reclamation plan has not been denied, and the California measures have not been applied to it. Glamis’s expropriation claim challenging those measures is therefore not ripe and should be denied.

³² *Lucas*, 505 U.S. at 1012. The decision below did not preclude Lucas “from applying for a permit under the 1990 amendment for *future* construction, and challenging, on takings grounds, any denial.” *Id.* at 1011 (emphasis added).

³³ *Id.* at 1012.

³⁴ See Letter from Timothy McCrum, Counsel for Glamis Gold Ltd., Crowell & Moring LLP, to Fred E. Ferguson, Jr., Office of the Solicitor, DOI (Apr. 2, 2003) (7 FA tab 46) (presenting preemption argument); Mem. ¶ 355 (stating that Glamis “made clear its conditions for ongoing settlement negotiations,” which included a demand that DOI “assume that the new California complete backfilling requirements . . . did not apply to the Imperial Project”); Letter from Timothy McCrum, Counsel for Glamis Gold Ltd., Crowell & Moring LLP, to Patricia Morrison, Deputy Assistant Secretary for Land and Minerals, DOI (July 21, 2003) (7 FA tab 47) (informing DOI of intent to commence arbitration).

³⁵ See Counter-Mem. at 118 & n.560; *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985).

2. The California Measures Could Not Have Expropriated Glamis's Investment Because They Do Not Interfere With Any Property Right Owned By Glamis

Both the United States and Glamis agree that when considering a claim of expropriation under international law, a first step in that analysis is the review of domestic law to determine the scope of the property interest at issue.³⁶ Glamis also agrees with the United States that property rights are subject to legal limitations existing at the time the property rights are acquired, and any subsequent burdening of property rights by such limitations cannot be expropriatory.³⁷ As Professor Sax noted in his first Report, where there is no property interest, there is no taking.³⁸

In this case the scope of Glamis's property interest is narrowed by three limitations that predate Glamis's acquisition of its unpatented mining claims: *first*, the principle of religious accommodation under the First Amendment of the U.S. Constitution and Article I of the California Constitution; *second*, the prohibition on causing irreparable damage to Native American sacred sites absent a showing of necessity under the Sacred Sites Act, enacted in 1976;³⁹ and *third*, the requirement that mined lands be reclaimed to a "usable condition" and pose no danger to public health and safety under SMARA, enacted in 1975.⁴⁰

³⁶ See, e.g., Wälde Rep. at III-32 ("international investment law protection starts by respecting how national law creates a property right, including any pre-existing inherent limitations").

³⁷ See, e.g., Reply ¶ 50 (acknowledging that "no regulatory surprise" would result from the mere implementation of pre-existing limitations on property rights) (quoting Wälde Rep. at III-35); Wälde Rep. at III-32 (analysis under U.S. takings jurisprudence, and *Lucas* in particular, where "the application or crystallization by administrative action of 'pre-existing limitations inherent in the property' . . . were considered to preclude the determination of a taking . . . is largely consonant with international law").

³⁸ See Expert Report of Professor Joseph L. Sax (Sept. 19, 2006) ("Sax Rep."), ¶ 25.

³⁹ CAL. PUB. RES. CODE § 5097.9 (2001)

⁴⁰ CAL. PUB. RES. CODE § 2733 (2001).

The California measures challenged by claimants implemented the above pre-existing limitations. SB 22 implemented both the Constitutional principle of religious accommodation and the Sacred Sites Act's prohibition on irreparably damaging Native American sites. The SMGB regulations implemented SMARA's reclamation standard. Because property rights are acquired subject to the limitations in then-existing laws and regulations, the implementation of pre-existing limitations on property rights cannot be expropriatory.

Although Glamis contends that the above pre-existing principles do not apply to its unpatented mining claims, its arguments in support of that proposition do not withstand scrutiny. First, Glamis errs in asserting that states lack the authority to limit property interests granted by the federal government under the Mining Law. Second, Glamis's assumption that the Sacred Sites Act does not apply to federal lands is plainly wrong. And third, Glamis's contention that the pre-existing limitations in this case cannot limit property rights because they are not sufficiently specific is legally unsound. As demonstrated below, Glamis did not have any property right that was affected by the California measures, and, therefore, its expropriation claim challenging those measures should be denied.

a. The Federal Mining Law Does Not Prohibit California From Imposing Its Reclamation Requirements On Federal Land

Glamis's unpatented mining claims are located on federal land, and are governed by the Mining Law. The locator of an unpatented mining claim holds only a possessory interest in the land on which its claims are located. The United States retains title to the

land, and substantial regulatory powers over the claims.⁴¹ This possessory interest gives a mining claimant the right to enter onto the land and extract minerals. It does not give the mining claimant the right to extract those minerals in a particular manner, nor does it include the right to leave the land unreclaimed after mining is complete. Indeed, a mining claimant may not proceed with its operations until it obtains a permit to do so. To obtain such a permit, a claimant must have a plan of operations approved by the relevant federal, state and local governments, and that plan of operations must contain a reclamation plan.⁴²

Because it cannot refute the United States' arguments on their terms, Glamis argues that it "need not possess nor assert any such rights" – *i.e.*, a right to engage in mining activities free from state reclamation requirements – because "that the actions of the Respondent are legitimate or lawful or in compliance with the law from the standpoint of the Respondent's domestic laws does not mean that they conform to the Agreement or to international law."⁴³ Glamis ignores the threshold issue that must be determined *before* it can be decided whether the actions violated international law:

⁴¹ See Counter-Mem. at 7-10, 120-27; *United States v. Locke*, 471 U.S. 84, 104-05 (1985) ("Although owners of unpatented mining claims hold fully recognized possessory interests in their own claims, we have recognized that these interests are a 'unique form of property.' The United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired Claimants thus must take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests.") (citations omitted); *M & J Coal v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995) ("[A]t the time M & J acquired its mining rights, whatever they were, it knew or should have known that it could not mine in such a way as to endanger public health or safety and that any state authorization it may have received was subordinate to the national standards that were established by SMCRA and enforced by OSM.").

⁴² See Counter-Mem. at 19-23.

⁴³ Reply ¶ 24 (citing *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award ¶ 120 (May 29, 2003)).

whether it had a property right to engage in the activity that was prohibited by the challenged measures.⁴⁴

Whether something constitutes a property right is determined by the relevant domestic law of the State where the property is located – not international law.⁴⁵ But the question, in any event, is not, as Glamis frames it, whether Glamis has a property right in its mining claims – the United States has never disputed that it does – but rather whether that property right includes the right to be free from California’s reclamation requirements.

To use the U.S. Supreme Court’s language, the issue is whether the use that is prohibited by the regulation in question was part of the claimants’ “bundle of rights” when it acquired the property.⁴⁶ “[I]f the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with,”⁴⁷ because the prohibition “inhere[s] in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership,” then no compensation will ever be due, regardless of the economic impact of the challenged regulations.⁴⁸

⁴⁴ See, e.g., *M & J Coal Co. v. United States*, 47 F.3d at 1153-54 (it is necessary to “determine whether the use interest proscribed by the governmental action was part of the owner’s title to begin with” as a threshold inquiry in any takings analysis). As the United States also explained in its Counter-Memorial, international law recognizes the expropriation only of property rights or interests. Counter-Mem. at 119, n.563.

⁴⁵ See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 414 (6th ed. 2003) (“Ownership in international law is normally seen either in terms of private rights under national law . . . or in terms of territorial sovereignty.”); B.A. WORTLEY, *EXPROPRIATION IN PUBLIC INTERNATIONAL LAW* 15 (1959) (“Municipal law determines whether a property right has been acquired and whether it is vested in the claimant.”) (quoting K. Lipstein, *Conflict of Laws Before International Tribunals*, 29 *TRANSACTIONS OF THE GROTIUS SOCIETY* 51, 61 (1943)).

⁴⁶ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992); see also Counter-Mem. at 127-137.

⁴⁷ *Lucas*, 505 U.S. at 1027.

⁴⁸ *Lucas*, 505 U.S. at 1029; see also Counter-Mem. at 127-37; *infra* Sec. I.A.2.c.

Glamis maintains that the background principles of state property law at issue here, specifically, California’s constitutional authority to accommodate Native American religious practices, its authority under the Sacred Sites Act to prevent irreparable harm to Native American sacred sites, and its authority under SMARA to ensure that mined lands are fully reclaimed cannot “prevail” over its “federal-law property interest” in its mining claims.⁴⁹ This is a consistent undercurrent throughout Glamis’s Reply – *i.e.*, that state regulations are somehow implicitly preempted, and, as such, a state background principle cannot narrow a property interest acquired pursuant to federal law.⁵⁰ Glamis’s argument is meritless. First, preemption is purely a question of municipal law, and therefore not a valid ground for decision before an international tribunal. Second, under U.S. law, neither SMARA nor the Sacred Sites Act is preempted.

As an initial matter, the Tribunal should not engage in an inquiry into whether SMARA or the Sacred Sites Act is preempted. It is a basic principle of international law that States have broad discretion to decide how to structure their internal political systems, and the particular allocation of power between the states and the federal government in the United States is a matter that falls within this realm of exclusive domestic authority. While international tribunals look to municipal law to determine the scope of a claimant’s property right, they do not have the power to opine on the internal

⁴⁹ See Reply ¶¶ 57, 61.

⁵⁰ The same presumption is present in Mr. Olson’s report, as he states, “it is not clear that [SMARA and the Sacred Sites Act] were actually capable of redefining the fundamental nature of a *federal-law* property interest.” Expert Report of Theodore B. Olson (Dec. 14, 2006) (“Olson Rep.”), ¶ 51 (emphasis in original); see also *id.* ¶ 54 (beginning his argument in the alternative, by stating, “even if Congress’s *failure to preempt* state regulations were to give States the ability to redefine the extent of a federal property interest . . .”) (emphasis added).

validity of rules of national law.⁵¹ International arbitration is simply not the proper forum for deciding whether, as a matter of municipal law, the Sacred Sites Act or SMARA are valid. Therefore, the Tribunal should disregard Glamis's suggestion that the Sacred Sites Act and SMARA are preempted by federal law, and instead should accept the internal validity of the laws at issue.

In any event, neither the Sacred Sites Act nor SMARA is preempted by federal law. It is well-established that states retain the power to enforce their criminal and civil laws on federally-owned lands unless Congress has determined to preempt the state law.⁵² If the federal government has not preempted state law either explicitly or implicitly, the "limitations on the property interests mining claimants can obtain may be mandated by state law, whether or not equivalent restrictions are required by the federal statutes governing mining or management of the federal lands."⁵³ That is precisely the teaching of *Granite Rock*. Absent explicit preemption, an implicit intent to preempt may be found only if: (1) Congress intended to occupy the entire field; (2) the state law "actually conflicts" with federal law to the point that compliance with both provisions is "impossible," or (3) "where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."⁵⁴

⁵¹ See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 39 (6th ed. 2003) ("International tribunals cannot declare the internal validity of rules of national law since the international legal order must respect the reserved domain of domestic jurisdiction.").

⁵² See, e.g., *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987) ("[T]he State is free to enforce its criminal and civil laws on federal land so long as those laws do not conflict with federal law.") (quoting *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976)); see also *id.* ("The Property Clause itself does not automatically conflict with all state regulation of federal land.").

⁵³ Second Expert Report of Professor Joseph L. Sax (Mar. 13, 2007) ("Sax Supp. Rep.") ¶ 6.

⁵⁴ *Granite Rock*, 480 U.S. at 581 (internal quotation marks omitted).

Applying these principles in *Granite Rock*, the U.S. Supreme Court held that federal mining law did not preempt California's environmental permit requirement on unpatented mining claims located on federal lands.⁵⁵ There, as Glamis does here, the mining company argued that upholding California's regulation would effectively give California a "veto" over some mining claims.⁵⁶ In rejecting the challenge to the regulations, the Court reasoned that, in the heavily-regulated field of mining, if the detailed administrative regulations do not show an intent to preempt, then likely no such intent existed, and therefore the state measures are not preempted.⁵⁷ Looking at the pertinent statutes and regulations, the Court not only found no evidence that Congress intended to preempt, but also found extensive evidence in the regulations that Congress intended to allow more stringent state environmental protections.⁵⁸ Therefore, the Court concluded that the California permit requirement, even though it would effectively give California a "veto" over some mining claims, was not preempted.⁵⁹

⁵⁵ *Id.* at 575, 581-82.

⁵⁶ *Cal. Coastal Comm'n v. Granite Rock Co.*, Br. for Appellee (No. 85-1200) (1985 WL 669185) (1985), at 10, 12, 20.

⁵⁷ *Granite Rock*, 480 U.S. at 582-83.

⁵⁸ *Id.* at 584 ("It is impossible to divine from these regulations, which expressly contemplate coincident compliance with state law as well as federal law, an intention to pre-empt all state regulation of unpatented mining claims in national forests.").

⁵⁹ *Id.* at 582. *Granite Rock* also argued that the federal mining law preempted "land use planning," but not "environmental regulations." *Id.* at 582, 580. The Court neither accepted nor rejected this distinction, but instead assumed *arguendo* its validity, and concluded that California's permit requirement was not a "land use planning" measure and that it was therefore not preempted. *See id.* at 585. Crucial to this finding was the Court's narrow definition of "land use planning." The Court stated that "[l]and use planning in essence chooses particular uses for the land," while "environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within proscribed limits." *Id.* at 587. Under the Court's definition, SMARA and the Sacred Sites Act are clearly environmental regulations, not land use planning measures. They do not prohibit mining on certain lands or require that land be used for some other purpose. Like the California permit requirement in *Granite Rock*, SMARA and the Sacred Sites Act merely require that "however the land is used, damage to the environment is kept within proscribed limits," and Congress and the California Legislature have construed historic and cultural preservation laws such as the Sacred Sites Act to be a form of environmental

In the present case, the applicable federal regulations explicitly provide that they are *not* intended to preempt more stringent state law. With respect to reclamation, BLM's original 3809 regulations specifically provided that "[n]othing in this part shall be construed to effect a preemption of State laws and regulations relating to the conduct of operations or reclamation on federal lands under the mining laws."⁶⁰ The current 3809 regulations, promulgated in 2001, also make clear that "there is no conflict if the State law or regulation requires a higher standard of protection for public lands than this subpart."⁶¹ In short, because these governing regulations "expressly contemplate coincident compliance with state law as well as with federal law," the California statutes are not preempted.⁶²

The case of *Seven Up Pete*, discussed in the Counter-Memorial, also supports the conclusion that state environmental regulations are not preempted by the federal mining laws.⁶³ The statewide ban on cyanide heap-leach mining at issue in *Seven Up Pete* also

legislation. *See infra* Sec. I.A.3.c. Thus, even if the federal mining laws preempt state land use planning laws, SMARA and the Sacred Sites Act would not be preempted.

⁶⁰ 43 C.F.R. § 3809.3-1(a) (1981).

⁶¹ 43 C.F.R. § 3809.3 (2001); *see also, e.g.*, 43 C.F.R. § 3809.420(a)(5) (2001) ("You must conduct all operations in a manner that complies with all pertinent Federal *and state* laws.") (emphasis added); 43 C.F.R. § 3809.415(a) (2001) (in order to comply with "unnecessary or undue degradation" standard, mine operators must "[c]omply[] with . . . other Federal *and State* laws related to *environmental protection* and *protection of cultural resources*") (emphasis added); 43 C.F.R. § 3809.420(b)(2) (2001) ("All tailings, dumps, deleterious materials or substances, and other waste produced by the operations shall be disposed of so as to prevent unnecessary or undue degradation and in accordance with applicable Federal *and state* laws.") (emphasis added); 43 C.F.R. § 3809.202(b)(3) (2003) ("A State environmental protection standard that exceeds a corresponding Federal standard is consistent with the requirements of this subpart."); 43 C.F.R. § 3809.5 (2001) ("*Unnecessary or undue degradation* means conditions, activities, or practices that: (1) Fail to comply with one or more of the following: the performance standards in § 3809.420, the terms and conditions of an approved plan of operations, operations described in a complete notice, and other Federal *and state* laws related to *environmental protection* and *protection of cultural resources*.")) (emphasis added).

⁶² *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 584 (1987).

⁶³ Glamis attempts to distinguish *Seven Up Pete Venture v. Montana*, 327 Mont. 306, 114 P.3d 1009 (Mont. 2005), on the basis that "the court's primary focus in evaluating the property rights was the wide discretion afforded the regulatory authority under the state lease at issue." Reply ¶ 27. As noted in the Counter-

applies on federal lands in Montana. The BLM subsequently, and expressly, acknowledged the applicability of that regulation to federal mining claims:

There are also certain situations where the State law or regulations may provide a higher standard of protection than subpart 3809, such as the restriction on cyanide leaching-based operations approved by voters in Montana. In this situation, the State law or regulation will operate on public lands. BLM believes that this is consistent with FLPMA, the mining laws, and the decision in the Granite Rock case.⁶⁴

Following the Supreme Court's *Granite Rock* decision, California, the BLM and the U.S. Department of Agriculture entered into a state-federal Memorandum of Understanding ("MOU") recognizing that SMARA's reclamation provisions are applicable to federal lands within California's borders.⁶⁵ Therefore, not only does the Mining Law contemplate compliance with environmental laws such as SMARA, but also the federal government has explicitly *recognized* California's right to regulate reclamation on federal lands.⁶⁶

Memorial, however, the property rights at issue in that case included not only the state lease, but also "private mineral leases or fee ownership of minerals . . ." *Seven Up Pete*, 327 Mont. at 320; *see also* Counter-Mem. at 124-25. In any event, California has the authority to deny Glamis's reclamation plan, just as Montana did with respect to the permits in *Seven Up Pete*. *See* CAL. CODE REGS. tit. 14, § 3704.1 (2003) ("[N]o reclamation plan . . . shall be approved by a lead agency unless the reclamation plan meets the provisions of this section."). California has not yet had the occasion to act on Glamis's reclamation plan. *See* Counter-Mem. at 115-16. Moreover, even before the 1999 M-Opinion was issued, the federal government possessed the authority to deny a plan of operations for violating undue impairment even if the plan otherwise satisfied all other regulatory requirements. *See Eric L. Price, James C. Thomas*, (I.B.L.A. 88-373), 116 I.B.L.A. 210 (Oct. 4, 1990); *infra* Sec. II.D.2.c. (demonstrating that DOI did not act arbitrarily in interpreting the "undue impairment" standard).

⁶⁴ Mining Claims Under the General Mining Laws, 65 Fed. Reg. 69,998, 70,009 (Nov. 21, 2000).

⁶⁵ Memorandum of Understanding between the Department of Conservation and the SMGB, the Forest Service, and BLM (Oct. 19, 1992) (10 FA tab 108).

⁶⁶ Mr. Olson argues that the Mining Law only requires mining claimants to comply with state regulations that "pertain directly to the *establishment* of the mining claim" and not to "independent regulations that would affect how a claimant may go about extracting its mineral interests once the claim has been established." Olson Rep. ¶ 52 (emphasis in original). But this view is contradicted by the BLM's regulations, which contemplate that a mining claimant must comply with state reclamation requirements. *See* 43 C.F.R. § 3809.3 (2001) ("Nothing in this subpart shall be construed to effect a preemption of State laws and regulations *relating to the conduct of operations or reclamation on federal lands* under the mining law.") (emphasis added); *see also* 43 C.F.R. § 3809.3-1(a) (1981). Reclamation requirements, by their nature, do not pertain to the "establishment" of a mining claim, but to what occurs after mining has begun

The conclusion that Congress did not intend to preempt state laws was also reflected in DOI's 1980 California Desert Area Conservation Plan:

An October 1980 memorandum from the Department of the Interior Solicitor's Office, which analyzed the applicability of State environmental and reclamation laws to the public lands, concluded that under the provisions of the General Mining Law of May 10, 1872, Congress had not pre-empted the right of a State to regulate mining activities on the public lands, as long as the State laws are not inconsistent with Federal laws and regulations. Therefore, [SMARA] does apply to the public lands, including the CDCA. . . . The combined Bureau and [SMARA] requirements, whichever are stricter in terms of required mitigation measures, will be the requirements that the operator will eventually have to meet.⁶⁷

Similarly, there is absolutely no evidence that the Federal Government intended to preempt California's authority, under its own Constitution or the Sacred Sites Act, to accommodate religious practice by preventing severe and irreparable damage to cultural properties. To acknowledge that California is not preempted from regulating on federal lands, as Glamis does, while denying that California retains the authority to place limitations on property rights granted by the federal government under the Mining Law is a contradiction, and one that turns the principle of federalism on its head. As Professor Sax explains:

California could only be incapable [of redefining a federal property interest] if the federal mining law had intended to grant certain unspecified entitlements to mining law claimants, and to preempt the state from denying or limiting those entitlements. In this case, that would have to include a federally granted right to mining companies to be free from California's right under its own Constitution to require such companies to accommodate the free exercise of religion. That would be quite an extraordinary congressional policy – effectively prohibiting states from

or is complete. The reclamation plan also affects how a claimant will go about extracting minerals. *See* Rejoinder Expert Report of Norwest Corporation ¶ 20 (Mar. 15, 2007) (“Norwest Supp. Rep.”).

⁶⁷ BLM, California Desert Conservation Area Plan at 91 (1980) (amended 1999) (“CDCA Plan”), at 103 (10 FA tab 96).

implementing a state constitutional authority to accommodate religious freedom within their borders.⁶⁸

Mr. Olson asserts that in *Granite Rock*, “the Court addressed only the non-remarkable point that Congress had not affirmatively preempted the operation of state environmental regulations on federal land. But concurrent regulation is simply not the same thing as a concurrent power to redefine the extent of the federal property interest that was transferred to private hands.”⁶⁹ Mr. Olson opines that the government’s authority to accommodate religion cannot be a limitation “that inheres in title unless it is actually reserved as such at the time title is created.”⁷⁰ But this observation does not acknowledge that *California* exercised its discretion to accommodate free exercise when it enacted the Sacred Sites Act in 1976 *prior to* the location of Glamis’s unpatented mining claims. That Act expressly provides that “no private party using or occupying public property . . . shall in any manner whatsoever interfere with the free expression or exercise of Native American religion.”⁷¹ As observed by Professor Sax, there could not be “a clearer actual reservation of a government’s discretionary ability to accommodate religion.”⁷²

State regulation that predates the grant of a federal property interest does not “redefine” that interest, as Glamis contends.⁷³ Rather, the federal property interest – in this case, the unpatented mining claims – was subject to pre-existing state regulation from its inception. And here, SMARA (enacted in 1975) and the Sacred Sites Act (enacted in

⁶⁸ Sax Supp. Rep. ¶ 8.

⁶⁹ Olson Rep. ¶ 53.

⁷⁰ *Id.* ¶ 46.

⁷¹ CAL. PUB. RES. CODE § 5097.9 (2001).

⁷² Sax Supp. Rep. ¶ 3.

⁷³ Reply ¶ 73 n.106.

1976) predated the inception of those claims. As Professor Sax notes, “[W]here federal law acknowledges concurrent state jurisdiction, applicable state law is lawfully embraced within federal governance as a fundamental element of federalism in a federal system of government.”⁷⁴ And because the federal regulations explicitly permit states to provide more stringent protections for cultural sites and the environment, including more stringent reclamation standards, SMARA and the Sacred Sites Act are not preempted by federal law. They are, rather, valid background principles of state law that limited Glamis’s property right from its inception.

There is, in summary, no support for Glamis’s argument that California may not act, (i) pursuant to its own Constitution, to accommodate Native American spiritual practices; (ii) pursuant to the Sacred Sites Act to prevent irreparable damage to Native American sacred sites; or (iii) pursuant to SMARA to ensure that mined lands are reclaimed to a usable condition, which creates no danger to public health or safety. As recognized by the Court in *Granite Rock*, neither the Mining Law nor FLPMA preempts the states from acting in this manner. The principle of religious accommodation, the Sacred Sites Act, and SMARA are background principles of state law. Glamis thus never had the right to cause irreparable damage to Native American sacred sites or to leave the land in an unusable condition without eliminating hazards to public health and safety. Therefore, when California enacted SB 22 and the SMGB regulation, merely implementing these pre-existing background principles, California did not interfere with any property right that Glamis holds.

⁷⁴ Sax Supp. Rep. ¶ 9.

b. California's Sacred Sites⁷⁵ Act Applies To The Land On Which Glamis's Unpatented Mining Claims Are Located

As discussed above, the ability of states to impose their criminal and civil laws on federal land is well-settled.⁷⁶ Glamis's contention that California's Sacred Sites Act does not apply on federal land and therefore cannot constitute a background principle of California law which limits the rights Glamis holds in its unpatented mining claims is without merit. According to its express terms, the Sacred Sites Act prohibits public agencies and private parties "using or occupying *public property*, or operating on *public property*" pursuant to a "public license, permit, grant, lease, or contract made on or after July 1, 1977" from interfering "with the free expression or exercise of Native American religion" or from causing "severe or irreparable damage to any Native American

⁷⁵ Glamis takes issue with the United States' description of this statute as California's "Sacred Sites Act," choosing instead to refer to the statute as the "Sacred Shrines Act," which it describes as "more in keeping with its scope." Reply ¶ 56 n.75. Glamis's criticism is misplaced. *First*, as originally chaptered by the California State Archivist, the statute was described as "[a]n act to repeal and add Chapter 1.75 . . . of the Public Resources Code, relating to Native Americans . . ." Statutes of California, Statutes of 1976, Ch. 1332, at 6027, available at <http://192.234.213.35\clerkarchive>. Chapter 1.75 of the California Public Resources Code is entitled, "Native American Historical, Cultural and Sacred Sites." *Id.* *Second*, when discussing the need for federal legislation to prevent the destruction of Native American religions in 1978, the United States House of Representatives' Committee on Interior and Insular Affairs described this statute as the California "Native American Historical, Cultural and Sacred Sites Act of 1976" and characterized it as taking "giant strides in overcoming the problems of access" for Native Americans to their sacred lands. H.R. REP. No. 95-1308, at 3-4 (1978), reprinted in 1978 U.S.C.C.A.N. 1262, 1264-65. *Third*, commentators similarly have referred uniformly to the statute as the California "Native American Historical, Cultural and Sacred Sites Act." See e.g., Christopher A. Amato, *Digging Sacred Ground: Burial Site Disturbances and the Loss of New York's Native American Heritage*, 27 COLUM. J. ENVTL. L. 1, 25 n.129 (2002); Sarah B. Gordon, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447, 1457 n.49 (1985). Glamis's characterization of the statute as the "Sacred Shrines Act" in an effort to make it seem less protective of the sacred sites at issue in this arbitration rings hollow, as Glamis simply cannot evade the California Legislature's express provision for the protection of Native American religious and ceremonial sites, as well as sacred shrines, located on public property in the state.

⁷⁶ See *supra* Sec. I.A.2.a; see also *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976) (explaining that the federal government does not exercise exclusive jurisdiction over federal lands in any state, and "the State is free to enforce its criminal and civil laws on those lands."); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917) ("[A] state has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with the full power in the United States to protect its lands, to control their use, and to prescribe in what manner others may require rights in them."); *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 539 (1885) (absent affirmative federal action, "the legislative power of the state over the places acquired [by the federal government] will be as full and complete as over any other places within her limits.").

sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on *public property*” absent “a clear and convincing showing that the public interest and necessity so require.”⁷⁷ The term “public property” is not defined in the Act. For the reasons set forth below, Glamis’s argument that the term should be construed to exclude federal lands cannot be sustained.

First, the primary provision of the Sacred Sites Act specifically exempts from its scope:

The public property of all cities, counties, and city and county located within the limits of the city, county, and city and county, except for all parklands in excess of 100 acres, . . .⁷⁸

Thus, although the legislature chose not to define the term “public property” in the Act, it did specify what the term should *not* be construed to include: municipal property located within municipal bounds and county property of less than 100 acres.⁷⁹ The California Supreme Court has clearly maintained that “where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed” absent discernible and contrary legislative intent.⁸⁰ This maxim of statutory construction, *expressio unius est exclusio alterius*, is also widely accepted in international law.⁸¹ Thus,

⁷⁷ CAL. PUB. RES. CODE § 5097.9 (2001) (emphasis added).

⁷⁸ *Id.*

⁷⁹ See Enrolled Bill Report, Department of Resources (Office of the Secretary), at 1 (Sept. 21, 1976) (11 FA tab 312) (interpreting the bill as prohibiting, “after July 1, 1977, public agencies or private parties using public property (except for city property located within the city and county property of less than 100 acres”).

⁸⁰ *Wildlife Alive v. Chickering*, 553 P.2d 537, 539 (Cal. 1976) (citing *State Bd. of Educ. v. Levit*, 343 P.2d 8 (1959) and *Estate of Pardue*, 70 P.2d 678 (1937)) (invoking this maxim of statutory construction when refusing to exempt the California Fish and Game Commission from CEQA’s environmental impact report requirements, because the California Legislature had expressly exempted certain agencies from the Act’s requirements but did not list that commission among them); see also *Sierra Club v. State Bd. of Forestry*, 876 P.2d 505, 515 (Cal. 1994) (same).

⁸¹ See, e.g., *Nat’l Grid PLC v. Argentine Republic*, UNCITRAL, Award ¶ 82 (June 20, 2006) (invoking the principle of *expressio unius est exclusio alterius* before finding that the most favored nation clause in the

because the California Legislature specifically excluded municipal and some county land from the scope of the Sacred Sites Act, to interpret the term “public property” to also exclude federal lands would violate a well-established principle of statutory construction.

There is nothing in either the plain language of the Sacred Sites Act, or its legislative history, which suggests that the California Legislature intended that its provisions should not be applied on federal lands. As an initial matter, the Sacred Sites Act empowers the Native American Heritage Commission (NAHC) “[t]o assist state agencies in any negotiations with agencies of the federal government for the protection of Native American sacred places that are located on federal lands.”⁸² Contrary to Glamis’s suggestion, this language demonstrates only that the California Legislature expected the NAHC to assist state agencies in relevant negotiations with the federal government involving federal lands; it does not evidence legislative intent that the NAHC’s jurisdiction be restricted to state lands.⁸³ Furthermore, the legislative committee from

UK-Argentina BIT should extend to dispute resolution procedures, in part because “dispute resolution is not included among the exceptions to the application of the clause”); *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction ¶ 30 (Apr. 29, 2004) (invoking “the well established presumption of *expressio unius est exclusio alterius*” when finding that because the Ukraine-Lithuanian BIT expressly defined Lithuanian investors according to the state of their incorporation, it could not look to other factors, not listed in that provision, when determining the claimant’s standing to bring a claim under the treaty).

⁸² CAL. PUB. RES. CODE § 5097.94(j) (2001).

⁸³ Glamis’s reliance on language in the NAHC’s 1979 report to the California Legislature describing its power to “bring legal action to prevent damage to and to assure Native American access to sanctified cemeteries, places of worship, religious or ceremonial sites, and sacred shrines located on public property administered by the State” cannot be construed as support for the conclusion that the Sacred Sites Act does not apply on federal land. *See* Report to the Legislature by the Native American Heritage Commission on Protection of Native American Sacred Places in California, at 5 (Jan. 1, 1979) (11 FA tab 313). This statement obviously was not intended to capture the extent of the NAHC’s authority, as the plain language of the statute expressly empowers the NAHC to commence actions to prevent damage to Native American sacred sites not only on state-administered land, but also on certain park lands administered by municipal and county governments. *See* CAL. PUB. RES. CODE § 5097.9 (2001). Furthermore, construing this statement as an indication of the extent of the NAHC’s authority cannot be squared with the NAHC’s own description of its “daily workload” as including “review of environmental impact reports for federal projects on federal land and under state jurisdiction.” Native American Heritage Commission, [at](http://www.nahc.ca.gov/sp.html) <http://www.nahc.ca.gov/sp.html> (14 FA tab 158).

which the bill emerged described the statute as designed to increase the role of Native Americans in the preservation of sacred sites on land administered by both the state and federal government. The Assembly Committee on Resources, Land Use and Energy described the Sacred Sites Act as designed “to give Native Americans a significant role in the preservation and protection of sites which have special religious or cultural importance to them,” while noting that neither the State Historical Resources and Parks Commissions nor the U.S. Park Service was structured to ensure that the historic preservation concerns of Native Americans were adequately addressed.⁸⁴

Glamis looks to an enrolled bill report from the Department of Resources that provides that the Sacred Sites Act “would give the proposed commission strong control over all state and local government properties containing sites thought to be of any Native American significance by the commission”⁸⁵ to support its contention that the California Legislature intended that the NAHC would provide only an advisory function on federal lands.⁸⁶ But when examined in the context of the entire report, this language simply reflects the *Department of Resources*’ concerns regarding the potentially disruptive effects that the statute might have on the administration of its projects.⁸⁷ It cannot be read to evidence a discernible intent on the part of the *California Legislature* to preclude the statute’s application on federal land.

⁸⁴ See Bill Analysis, Assembly Committee on Resources, Land Use, and Energy, at 2 (May 3, 1976).

⁸⁵ Enrolled Bill Report, Department of Resources (Office of Secretary), at 1 (Sept. 21, 1976) (11 FA tab 312).

⁸⁶ Reply ¶ 67.

⁸⁷ See Enrolled Bill Report, Department of Resources (Office of Secretary), at 1-2 (Sept. 21, 1976) (11 FA tab 312) (the bill analysis specifically cautioned that “[a] site could be determined to be ‘sacred’ even in the absence of any ruins or archaeological artifacts,” and that “[a] broad interpretation of ‘sacred sites’ could adversely affect numerous departmental programs with the agency.”).

Second, Glamis’s contention that the Tribunal should interpret the term “public property” in the pertinent provisions of the Sacred Sites Act in accordance with the definition of the term “public lands” in a provision of another statute should be rejected.⁸⁸ The term “public lands” is defined in Chapter 1.7 of the Public Resources Code, which the California Assembly added with the passage of the Archaeological, Paleontological and Historical Sites Act in 1965, more than ten years prior to the passage of the Sacred Sites Act.⁸⁹ That definition is limited to a specific section of that statute, not at issue here.⁹⁰ Given that the California Legislature expressly limited that definition of “public lands” for use when interpreting only a specific provision of the Archeological, Paleontological and Historical Sites Act, there is no justification for using that definition to interpret an entirely different term in the Sacred Sites Act.⁹¹

⁸⁸ Reply ¶ 67.

⁸⁹ CAL. PUB. RES. CODE § 5097.5 (2001).

⁹⁰ CAL. PUB. RES. CODE § 5097.5(b) (2001) (“*As used in this section*, ‘public lands’ means lands owned by, or under the jurisdiction of, the state, or any city, county, district, authority, or public corporation, or any agency thereof.”) (emphasis added). The California Legislature is presumed to be aware of other relevant provisions of law. *See People v. Wiedert*, 39 Cal. 3d 836, 844 (1985) (“[t]he enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted”) (quotations omitted); *Pasadena Police Officers’ Ass’n v. City of Pasadena*, 51 Cal. 3d 564, 576 (1990) (“[w]hen the Legislature ‘has employed a term or a phrase in one place and excluded it in another, it should not be implied where excluded’”) (quoting *Philips v. San Luis Obispo County Dept. etc., Regulation*, 183 Cal. App. 3d 372, 379 (1986); *cf. San Bernardino Valley Audubon Soc’y v. City of Moreno Valley*, 44 Cal. App. 4th 593, 604 (1996) (omission of provision from federal Endangered Species Act from parallel provision of California Endangered Species Act is an indication that the Legislature did not intend to incorporate this provision into the California statute). Thus, the fact that the California Legislature did not adopt a restrictive definition of “public property” in the Sacred Sites Act, as it did the term “public lands” in the Archaeological, Paleontological and Historic Sites Act, suggests it did not intend the statute’s reach to be so limited.

⁹¹ The term “public property” is used in Section 5097.9, 5097.94(g) and 5097.97 of the Sacred Sites Act – which are the provisions of the Act upon which the United States relies. The provision of the Archeological, Paleontological and Historic Sites Act for which the term “public lands” is defined is the only provision in that Act which imposes criminal liability for its violation, which may explain why the Legislature sought to limit the definition of “public lands” in that section. *See* CAL. PUB. RES. CODE § 5097.5(a) (2001). Although the term “public lands” is also used in provisions in the Sacred Sites Act, it is not defined in that statute.

Third, Glamis’s reliance on *obiter dicta* in a decision of the California Court of Appeals that had no occasion to consider the question of the Act’s applicability on federal land is also unavailing.⁹² In that case, the Court of Appeals was charged with considering whether the board of trustees of California State University had standing to challenge the constitutionality of the statute creating the NAHC, and it introduced its discussion of the Sacred Sites Act by noting that it authorizes the NAHC to seek “relief to mitigate proposed development of state-owned land” so that such development does not “irreparably damage, or prevent appropriate access to, the land for Native American worship.”⁹³ Because the underlying NAHC action in that case was to enjoin the development of land that was indisputably owned by the state, the Court did not examine whether the NAHC could bring an action to enjoin a public agency from taking action that would severely or irreparably damage a Native American “sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine” on federal land. The fact of the matter is that California courts have been called upon to consider the powers of the NAHC on only a few occasions and have never considered the statute’s application to federal lands.⁹⁴

⁹² Reply ¶ 68.

⁹³ *Native Am. Heritage Comm’n v. Bd. of Trs. of the Cal. State Univ.*, 59 Cal. Rptr. 2d 402, 402 (Cal. Ct. App. 1996) (in that action, the board of trustees argued that Sections 5097.9, 5097.94 and 5097.97 were unconstitutional because they permitted the NAHC to “control the use of public property for religious purposes . . .” *id.* at 407, but the Court of Appeals held that the general rule barring political subdivisions from challenging state statutes on any federal constitutional ground prohibited such an action).

⁹⁴ *See Dixon v. Super. Ct. of Orange County*, 30 Cal. App. 4th 733 (1995) (considering the merits of a Strategic Lawsuit Against Public Participation (SLAPP suit) which was filed in the course of the *NAHC v. Board of Trustees of the California State University* dispute); *People v. Van Horn*, 218 Cal. App. 3d 1378, 1392 (1990) (examining Section 5097.99 of the Sacred Sites Act, which was added to the statute in 1982 and prohibits persons from obtaining or possessing Native American artifacts taken from a Native American grave, and describing the Act’s initial provisions as delineating “the Commission’s powers and duties with respect to places of special religious or social significance to Native Americans on public property.”); *Envtl. Prot. Info. Ctr., Inc. v. Johnson*, 170 Cal. App. 3d 604 (1985) (finding that CEQA requires consultation with the NAHC when a proposed project regards places of religious significance to

Fourth, Glamis complains that if the Sacred Sites Act were applicable to Glamis's Project, the federal and California governments should have raised the question of its applicability at some point during the nearly decade-long review of the Imperial Project.⁹⁵ But Glamis was well aware that the implementation of its proposed Imperial Project "would require local and state agencies to demonstrate compliance with CEQA" throughout the entire review of its project.⁹⁶ The California Court of Appeals has interpreted CEQA and its guidelines to require state and local agencies preparing environmental impact reports to consult with the NAHC regarding places of religious significance to Native Americans, because CEQA's provisions "reflect a strong legislative policy choice in favor of the preservation of Native American archaeological sites, cemeteries, and other sacred grounds."⁹⁷ Thus the discovery of Native American sacred sites in the proposed Imperial Project area triggered the application of the Sacred Sites Act – a requirement that California courts have found to be "consistent not only with the literal terms of CEQA and its guidelines, but with the acknowledged policy of interpreting CEQA's scope as broadly as possible to accomplish the ends of the act."⁹⁸

Native Americans and finding that California Department of Forestry's failure to consult with the NAHC regarding the potential impacts on sacred sites of a proposed timber harvesting plan was an abuse of discretion); *Soc'y for Cal. Archaeology v. County of Butte*, 65 Cal. App. 3d 832, 837 (1977) (noting only that "[t]he term 'environment,' as used in CEQA, includes 'objects of historic or aesthetic significance'" and citing the Sacred Sites Act for the proposition that "[i]t cannot be disputed that archaeological sites are encompassed within this inclusion").

⁹⁵ Reply ¶ 70.

⁹⁶ *Imperial Project Final Environmental Impact Statement / Environmental Impact Report*, Vol. 1, at 4-89 (Sept. 2000) (8 FA tab 61).

⁹⁷ *Env'tl. Prot. Info. Ctr.*, 170 Cal. App. 3d at 626 (citing CAL. PUB. RES. CODE § 21083.2, CEQA Guidelines, App. K) (holding that CEQA required the California Department of Forestry to consult with the NAHC before approving a proposed timber harvesting plan that threatened to destroy a Native American archaeological site even though the California Forest Practice Act exempted the Department from the obligation of completing a complete environmental impact statement).

⁹⁸ *Id.*

Furthermore, BLM entered into a formal Memorandum of Agreement with the NAHC when it published the Final Environmental Impact Statement and Proposed Plan for the CDCA, which specifically mentions its obligation under both the Sacred Sites Act and CEQA to coordinate its NEPA-mandated environmental review process with the appropriate California Native American Tribal groups.⁹⁹ Finally, Glamis cannot possibly claim to have been unaware of the existence of the Sacred Sites Act before receiving the United States' Counter Memorial in this proceeding, because one of the principal criticisms leveled against SB 1828,¹⁰⁰ the piece of legislation that was initially joined to the bill that became SB 22, was that the existing provisions of CEQA and the Sacred Sites Act were adequate to achieve its ends.¹⁰¹ Thus even if ignorance of the law were a defense, Glamis cannot invoke it in this instance.

Fifth, Glamis contends that the United States' reliance on the Sacred Sites Act in this case cannot be squared with the fact that the State of California did not rely on the statute when it challenged the U.S. Forest Service's decision to permit timber harvesting

⁹⁹ *California Desert Conservation Area Final Environmental Impact Statement and Proposed Plan*, App. VIII: Native American (Sept. 1980) (13 FA tab 136).

¹⁰⁰ Governor Davis ultimately vetoed SB 1828, arguing that the bill was a "flawed attempt" to protect sacred sites, in part because it was both over- and under-inclusive, and because it failed to address concerns regarding the confidentiality of certain sacred sites. *See* Governor's Veto Message, SB 1828, at 1 (Sept. 30, 2002) (6 FA tab 256).

¹⁰¹ *See* Business, Transportation and Housing Agency, Enrolled Bill Report for SB 1828, at 2 (Sept. 11, 2002) (6 FA tab 250) (recommending that the Governor veto SB 1828 in part because the Sacred Sites Act already empowered the NAHC "to recommend mitigation measures for consideration by the public agency proposing to take action on public properties" and to "ask the Attorney General to take appropriate legal action" if such mitigation measures were not accepted by the responsible agency threatening severe or irreparable damage to a sacred site); Governor's Office of Planning and Research, Enrolled Bill Report, at 7 (Sept. 9, 2002) (recommending veto for other reasons, but noting that "[a]lthough [the Sacred Sites Act] appears to provide adequate protections for Native American sacred sites, because most agencies have no formal process for notifying tribes when a project is taking place, affected cultural resources may not be identified until it is too late"); Department of Finance, Enrolled Bill Report, at 1 (Aug. 26, 2002) (recommending veto because it was unclear why CEQA's existing provisions were inadequate to ensure the protection of sacred sites). Both Glamis Gold, Inc. and Glamis Imperial Corp. are listed among the opponents of SB 1828. *See* Governor's Office of Planning and Research, Enrolled Bill Report, at 13 (Sept. 9, 2002).

and the construction of a service road on federal forest land traditionally used by Native American religious practitioners in *Lyng v. Northwest Indian Cemetery Protective Association*.¹⁰² While the State of California and the NAHC chose to invoke the First Amendment and AIRFA as the legal basis for that challenge, when briefing its position in that case before the United States Supreme Court, California opened with the assertion that it “has charged its Native American Heritage Commission with the responsibility to protect the right to practice traditional Indian religion on public land” and cited the Sacred Sites Act for the proposition that “[p]rotection includes access to sacred sites and prevention of severe and irreparable damage to those sites.”¹⁰³ Furthermore, neither the State of California, nor the federal government, nor any court at any stage in that proceeding ever challenged the standing of the NAHC to bring an action to prevent severe and irreparable damage to Native American sacred sites indisputably located on federal land. Contrary to Glamis’s assertions, the fact that the NAHC brought the *Lyng* action at all cannot be squared with its restrictive reading of the statute that gives rise to the Commission’s jurisdiction.

c. The Pre-Existing Limitations Identified By the United States Are Consistent With *Lucas*

Glamis challenges the pre-existing limitations identified by the United States on grounds that they do not constitute “specific legal prescriptions or prohibitions.”¹⁰⁴

¹⁰² Reply ¶ 70. See *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988).

¹⁰³ *Lyng v. Northwest Indian Cemetery Protective Ass’n*, No. 86-1013, 1987 WL 880350, Brief for Respondent State of California on Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, at *1 (Oct. 22, 1987) (urging the Supreme Court to find that the construction of the G-O Service road would burden Native American free exercise rights, as well as arguing that the preservation of this road was required by the American Indian Religious Freedom Act (AIRFA)).

¹⁰⁴ Reply ¶ 47.

Although Glamis cites Mr. Olson in support of its purported specificity requirement,¹⁰⁵ Mr. Olson does not advocate any such standard. Instead, Mr. Olson relies on the standard set forth in *Lucas*, namely, that a background principles defense must be based on “an objectively reasonable application of relevant precedents.”¹⁰⁶ The United States agrees that this is the correct standard to be applied. And, as demonstrated below, SB 22 and the SMGB regulation, which applied the pre-existing limitations identified by the United States, meet that standard.

i. The *Lucas* Framework

As found by the Supreme Court in *Lucas*, “regulations that prohibit all economically beneficial use of land” give rise to a compensable taking unless the imposed limitations “inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”¹⁰⁷ Under *Lucas*, it remains “open to the State at any point to make the implication of . . . background principles of nuisance and property law explicit.”¹⁰⁸ By making such background principles explicit, the state clarifies, in a given instance, that the use of property “for what are now expressly prohibited purposes was always unlawful.”¹⁰⁹

The required showing under *Lucas* is clear: the state “must identify background principles of nuisance and property law that prohibit the uses [the property owner] now

¹⁰⁵ *Id.*

¹⁰⁶ See Olson Rep. ¶ 33 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1032 n.18 (1992)) (emphasis omitted).

¹⁰⁷ *Lucas*, 505 U.S. at 1029.

¹⁰⁸ *Id.* at 1030.

¹⁰⁹ *Id.* (emphasis omitted).

intends in the circumstances in which the property is presently found.”¹¹⁰ Nowhere does the Supreme Court in *Lucas* refer to a need for such background principles to be “specific”; nor does *Glamis* address how general prohibitions under the law of nuisance, such as restrictions on “excessive noise,”¹¹¹ could possibly meet its purported specificity requirement.

As observed by Mr. Olson, *Lucas* requires that a background principles defense be based on “an objectively reasonable application of relevant precedents,” which would exclude the property owner’s “beneficial uses in the circumstances in which the land is presently found.”¹¹² As discussed below, Senate Bill 22 and the SMGB regulation meet this standard.

ii. SB 22 And The SMGB Regulation Meet The “Objectively Reasonable Application” Standard Under *Lucas*

Consistent with the *Lucas* standard, the backfilling and recontouring requirements under Senate Bill 22 and the SMGB regulation reflect an objectively reasonable application of the pre-existing limitations identified by the United States.

¹¹⁰ *Lucas*, 505 U.S. at 1031. The Court offered several examples in which such “common law principles” would apply, *id.* at 1031, including the discovery of an earthquake fault beneath a nuclear generating plant and the imposition of a navigational servitude on privately-held “submerged lands . . . bordering on a public navigable water.” *Id.* at 1028-29 (quoting *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900)).

¹¹¹ See Sax Rep. ¶ 10.

¹¹² Olson Rep. ¶ 33 (quoting *Lucas*, 505 U.S. at 1032 n.18) (emphasis omitted). *Glamis*’s reliance on the *Whitney Benefits* case in support of its attack on the pre-existing limitations identified by the United States, see Reply ¶ 26, is misplaced. Leaving aside that *Whitney Benefits* predated *Lucas*, the court’s determination that the government was not acting to abate a nuisance, under the particular circumstances of that “fact-specific” case, sheds no light on the background principles issue here – *i.e.*, whether the pre-existing limitations identified by the United States are consistent with *Lucas*. See *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1171, 1176 (Fed. Cir. 1991). In addition, the character of the government action in *Whitney Benefits* is distinguishable from the government actions at issue here. See *infra* Sec. I.A.3.c.

a) SB 22 Reflects An Objectively Reasonable Application Of Pre-Existing Constitutional Principles Of Religious Accommodation

Senate Bill 22 requires, for approval of metallic surface mines on certain classes of lands within the CDCA that are located on or within one mile of any “Native American sacred site,” that reclamation plans ensure mined lands are returned to their approximate original contours through backfilling and regrading.¹¹³ The legislation defines a “Native American sacred site” as an area considered “sacred by virtue of its established historical or cultural significance to, or ceremonial use by, a Native American group”¹¹⁴

The First Amendment of the United States Constitution provides that the United States Congress “shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹¹⁵ The U.S. Supreme Court has long interpreted the First Amendment as permitting government accommodation of the free exercise of religion.¹¹⁶ Similarly, Article I of the California Constitution guarantees the free exercise and enjoyment of religion without discrimination or preference to all California citizens and directs that the California Legislature make no law respecting an establishment of religion.¹¹⁷

As demonstrated in the United States Counter-Memorial, allowing Glamis to mine in accordance with its proposed plan of operations for the Imperial Project without complying with the reclamation measures set forth in Senate Bill 22 would have

¹¹³ CAL. PUB. RES. CODE § 2773.3 (2001).

¹¹⁴ *Id.*

¹¹⁵ U.S. CONST. amend. I.

¹¹⁶ *See* Counter-Mem. at 137; *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005).

¹¹⁷ *See* CAL. CONST. of 1879, art. I, § 4; *see also* CAL. CONST. of 1849, art. I, § 4 (same).

prevented the Quechan from using the area for cultural and religious purposes.¹¹⁸ By requiring the complete backfilling and regrading of surface mines in close proximity to Native American sacred sites, the California Legislature sought to alleviate the burden that could be placed upon Native American religious practice by mining activities authorized under the Mining Law. The Quechan, for example, have emphasized that the proposed mine would prevent them from using the area in the future as a center for the transmission of their cultural and religious tradition, because the 300 foot waste stockpiles contemplated under Glamis's proposed plan would obstruct the view from the Running Man site to the Picacho Peak and Indian Pass areas.¹¹⁹ Accordingly, the reclamation requirements under Senate Bill 22 reflect, consistent with *Lucas*, an objectively reasonable application of pre-existing principles of religious accommodation under the U.S. and California Constitutions.

Glamis does not contest that a discretionary governmental accommodation of religion can serve as a pre-existing limitation on property rights.¹²⁰ Instead, Glamis asserts that for a government's discretionary accommodation of religion to constitute a background principle under *Lucas*, it must be "actually reserved as such at the time title is created."¹²¹ Otherwise, as stated by Mr. Olson, the *Lucas* standard cannot be met because "there is no 'relevant precedent[]' that can be applied in an 'objectively reasonable' way

¹¹⁸ See Counter-Mem. at 139.

¹¹⁹ See Counter-Mem. at 69.

¹²⁰ See Reply ¶ 54 (asserting that, in this instance, a discretionary accommodation of religion could "override" a taking claim only "where the government had exercised its discretion to accommodate religion in creating the mining law") (citing Olson Rep. ¶ 48).

¹²¹ Olson Rep. ¶ 46.

to indicate that the government affirmatively exercised its discretion to accommodate religion.”¹²²

As discussed above, however, Glamis fails to consider whether *California* – as opposed to the U.S. Congress – exercised its discretionary authority to accommodate Native American religion prior to the creation of any property interest in Glamis’s unpatented mining claims.¹²³ California exercised such authority in the 1975 Sacred Sites Act, which provides that “no private party using or occupying public property . . . shall in any manner whatsoever interfere with the free expression or exercise of Native American religion.”¹²⁴ Accordingly, Glamis cannot maintain that at the time its unpatented mining claims were created – no earlier than 1980¹²⁵ – there was no “applicable rule” of discretionary religious accommodation that could serve as a background principle to defeat its claim.¹²⁶ Consistent with *Lucas*, Senate Bill 22 reflects

¹²² *Id.* (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1032 n.18 (1992)).

¹²³ See *supra* Sec. I.A.2.a.

¹²⁴ CAL. PUB. RES. CODE § 5097.9 (2001); see also Sax Supp. Rep. ¶ 3; *supra* Sec. I.A.2.a.

¹²⁵ BLM, Mineral Report, Plat Showing Mining Claim Locations, Attach. I-3 (Sept. 27, 2002) (10 FA tab 98).

¹²⁶ See Reply ¶ 54. Glamis’s reliance on the *Cutter* and *Lyng* cases is similarly unavailing. Glamis asserts that the *Cutter* decision “explicitly repudiates” the purported U.S. position that “other significant interests must simply give way” to a governmental accommodation of religion. *Id.* ¶ 57. But *Cutter* concerned the need to balance a governmental accommodation against *existing* interests. See *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) (governmental accommodation “must be measured so that it does not override other significant interests”). Here, by contrast, the issue is *whether* a purported property interest exists, given the pre-existing governmental accommodation of religion. Under the Sacred Sites Act, Glamis never held a right to interfere with Native American religious practice on public lands. Accordingly, there is no such property interest that must “give way” to California’s accommodation of Native American religion in Senate Bill 22.

Glamis also asserts that *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 448 (1988) is applicable to this case as it “relates to the proper analysis of First Amendment claims on federal public lands,” Reply ¶ 58 n.80. As noted previously, however, the Supreme Court in *Lyng* expressly observed that its holding – that the Free Exercise Clause did not *prohibit* the United States from permitting timber harvesting and road construction on a Native American sacred site in a National Forest – should not discourage the government from accommodating religious practices even where the Free Exercise Clause did not compel it to do so. See Counter-Mem. at 142. Glamis’s vague reference that “the Free Exercise

an objectively reasonable application of pre-existing principles of religious accommodation under the U.S. and California Constitutions.

b) SB 22 Reflects An Objectively Reasonable Application Of The Sacred Sites Act's Prohibition On Causing Irreparable Damage To Native American Sacred Sites Absent A Showing Of Necessity

As discussed above, Senate Bill 22 requires, for metallic surface mines located on or within one mile of a Native American sacred site on certain classes of lands within the CDCA, that reclamation plans provide for the return of mined lands to their approximate original contours through backfilling and regrading.¹²⁷

The Sacred Sites Act prohibits private parties operating on public property from causing “severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, except on a clear and convincing showing that the public interest and necessity so require.”¹²⁸ Where a proposed action by a public agency could cause “severe or irreparable damage” to a Native American sacred site, the Sacred Sites Act empowers the Native American Heritage Commission to conduct investigations, hold public hearings, recommend mitigation measures, and, ultimately, approach the California Attorney General with a recommendation to initiate legal proceedings to enjoin the action.¹²⁹

The Quechan have consistently maintained, and the archaeological surveys have demonstrated, that allowing Glamis to mine in accordance with its proposed plan of operations would disturb a sacred area containing a complex trail system which the

Clause and the Establishment Clause of the First Amendment are two sides of the same coin,” Reply ¶ 58 n.80, does nothing to clarify its bare assertion that *Lyng* is “applicable” to this case.

¹²⁷ CAL. PUB. RES. CODE § 2773.3 (2001).

¹²⁸ CAL. PUB. RES. CODE § 5097.9 (2001).

¹²⁹ See Counter-Mem. at 145.

Quechan believe was laid out for them by their creator, and which is regarded by the Quechan as a place of spiritual significance and a key teaching area for their religious leaders.¹³⁰ As discussed above, the Quechan have emphasized that the proposed mine would prevent them from using the area in the future as a center for the transmission of their cultural and religious tradition, because, among other things, abandoned waste stockpiles would obstruct the view from the Running Man site to the Picacho Peak and Indian Pass areas.¹³¹

Senate Bill 22, which requires that Glamis reclaim the land to its original contours, merely implements the Sacred Sites Act's prohibition against causing "severe or irreparable" damage to Native American sacred sites on federal lands. Pursuant to its authority under the Sacred Sites Act, the California NAHC could have sought similar protections through litigation.¹³² Given that Senate Bill 22 does "no more than duplicate the result that could have been achieved in the courts" by the California NAHC under the Sacred Sites Act,¹³³ the application by SB 22 of the pre-existing prohibition against damaging Native American sacred sites plainly satisfies the "objectively reasonable" standard under *Lucas*.

¹³⁰ See *id.* at 69, 147.

¹³¹ See *id.* at 69.

¹³² See CAL. PUB. RES. CODE § 5097.94(g) (2001) (authorizing the NAHC to bring "an action to prevent severe and irreparable damage to, or assure appropriate access for Native Americans to," sacred sites); see also Counter-Mem. at 147. Indeed, as noted above, one of the principal criticisms leveled against SB 1828, the piece of legislation that was initially joined to the bill that became SB 22, was that the existing provisions of CEQA and the Sacred Sites Act were adequate to achieve its ends. See *supra* Sec. I.A.2.a.

¹³³ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

c) The SMGB Regulation Reflects An Objectively Reasonable Application Of The SMARA Requirement That Mined Lands Be Reclaimed To A Usable Condition And Pose No Danger To Public Health And Safety

Glamis does not challenge the pre-existing limitation under SMARA that mined lands must be reclaimed to “a usable condition which is readily adaptable for alternate land uses” and pose no danger to public health and safety.¹³⁴ Glamis also does not dispute that SMARA expressly contemplates the potential use of “backfilling . . . or other measures” to achieve such reclamation.¹³⁵ Nor does Glamis question the SMGB’s mandate under SMARA, which expressly includes the setting of backfilling and recontouring requirements¹³⁶ as well as the obligation to continuously review and, where appropriate, revise its regulations.¹³⁷

Rather than address the fundamental point that SMARA’s requirements predated the creation of its unpatented mining claims, and that those claims were acquired subject to SMARA’s requirements, Glamis instead asserts a “prior use” argument. Specifically, Glamis observes that California had not, prior to the adoption of the SMGB regulation in December 2002, required complete backfilling for open-pit mining projects.¹³⁸ Glamis then asserts that the adoption of a complete backfilling requirement in the SMGB

¹³⁴ CAL. PUB. RES. CODE § 2712 (2001).

¹³⁵ CAL. PUB. RES. CODE § 2733 (2001); *see also* CAL. PUB. RES. CODE § 2756 (2001) (providing that state policy shall include “measures to be employed by lead agencies in specifying . . . backfilling . . . and other reclamation requirements”); CAL. PUB. RES. CODE § 2773(b) (2001) (requiring the SMGB to adopt regulations “specifying minimum, verifiable statewide reclamation standards,” including standards for “[b]ackfilling . . . and recontouring”).

¹³⁶ *See* Counter-Mem. at 96, 148.

¹³⁷ *See id.* at 148.

¹³⁸ *See* Reply ¶ 76.

regulation constituted a “new restriction” that Glamis “could not possibly have identified or reasonably expected.”¹³⁹

Glamis’s argument that the prior absence of a complete backfilling requirement rendered unforeseeable the SMGB’s later adoption of the requirement, even where pre-existing limitations expressly contemplated the use of backfilling to reclaim mined lands and expressly required that state reclamation policy be “continuously reviewed” and revised where appropriate, is baseless.

Under *Lucas*, when the government applies background principles of law, it transforms implied limitations into “explicit” limitations.¹⁴⁰ But engaging in activity before an implied restriction is made explicit does not establish a property interest in such activity. As observed by the court in *American Pelagic*:

[S]imply because many commercial fisherman . . . continued to fish for Atlantic mackerel and herring in the [Exclusive Economic Zone], it does not follow that those fisherman had a property interest in the use of their vessels to fish in the EEZ. They simply were enjoying a use of their property that the government chose not to disturb. In other words, use itself does not equate to a cognizable property interest for purposes of a taking analysis.¹⁴¹

Glamis nevertheless attempts to equate prior use with a cognizable property interest, asserting that because California “had never once required full backfilling in the past,” the SMGB’s adoption of complete backfilling requirements deprived it of its property rights.¹⁴² But there was no deprivation of property rights when California found that hydraulic mining constituted a nuisance, even though such activity had been

¹³⁹ *Id.* ¶ 75.

¹⁴⁰ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992).

¹⁴¹ *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1377 (Fed. Cir. 2004).

¹⁴² Reply ¶ 76.

permitted in the past.¹⁴³ Nor was there a deprivation of property rights when American Pelagic's fishing permits were revoked by Congress pursuant to its pre-existing statutory authority under the Magnuson-Stevens Act.¹⁴⁴

A governmental decision "not to disturb" a particular use of property does not transform that use into a property interest.¹⁴⁵ Furthermore, in the particular context of SMARA, decisions by local lead agencies not to require complete backfilling of open-pit metallic mines resulted in inadequately reclaimed mines, which "underscored the need to clarify how the existing reclamation standards under SMARA should be applied to future open-pit metallic mines."¹⁴⁶ Such decisions by local lead agencies not to disturb enormous open pits remaining on metallic mine sites did not meet *existing* SMARA standards, much less create a property right to abandon unreclaimed open pits. Glamis's "prior use" argument is meritless.

The *Feldman* tribunal similarly rejected a "prior use" argument by the claimant, who attempted to establish a property interest in certain cigarette tax rebates by highlighting prior grants of the rebates by Mexican authorities.¹⁴⁷ A longstanding requirement under Mexican tax law provided that to be eligible for a tax rebate, the tax

¹⁴³ *Woodruff v. N. Bloomfield Gravel Mining Co.*, 18 F. 753, 808-09 (C.C.Cal. 1884); *People v. Gold Run Ditch & Mining Co.*, 4 P. 1152, 1159-60 (Cal. 1884). See also *Mugler v. Kansas*, 123 U.S. 623, 669 (1887) ("[i]t is true, when the defendants in these cases purchased or erected their breweries, the laws of the state did not forbid the manufacture of intoxicating liquors. But the state did not thereby give any assurance, or come under any obligation, that its legislation upon that subject would remain unchanged").

¹⁴⁴ *Am. Pelagic*, 379 F.3d at 1379.

¹⁴⁵ *Id.* at 1377.

¹⁴⁶ Supplemental Declaration of Dr. John G. Parrish (Mar. 14, 2007) ("Parrish Supp. Declaration") ¶ 6.

¹⁴⁷ Likewise, Professor Wälde, in his dissenting opinion in the *Thunderbird* decision, found no right for Thunderbird to continue its prohibited gaming operations, notwithstanding a "presumption of discrimination," in Professor Wälde's view, arising from the ongoing activities of Thunderbird's "competitor with comparable operations." *Int'l Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award (Jan. 26, 2006) ("*Thunderbird* Award"), Separate Op. by T. Wälde ¶ 2. The majority decision in *Thunderbird* similarly found that the claimant "never enjoyed a vested right" in its prohibited gaming operations. *Thunderbird* Award ¶ 208.

must be stated separately from the purchase price on the producer's invoice.¹⁴⁸ Resellers, such as the claimant, did not have access to such itemized invoices, and thus could not meet the invoice requirement.¹⁴⁹ The tribunal acknowledged, but found unavailing, claimant's "prior use" argument, recognizing that the claimant had been granted the tax rebates "for a sixteen month period . . . even though [Mexican officials] were well aware that it was impossible for the Claimant to obtain [the required] invoices[.]"¹⁵⁰ The tribunal also found "considerable evidence in the record of some sort of an informal agreement or understanding" between the claimant and Mexican tax authorities "based on a number of meetings and correspondence."¹⁵¹

Notwithstanding the above considerations, however, the tribunal found no expropriation, concluding that the claimant "never really possessed a 'right' to obtain tax rebates upon exportation of cigarettes" because the investor could not have obtained the required invoices.¹⁵² The tribunal observed that "[u]nfortunately, tax authorities in most countries do not always act in a consistent and predictable way,"¹⁵³ and highlighted that at all relevant times, the invoice requirements "had not been changed by Mexican officials (except to the extent or non-extent of enforcement) to the detriment of Claimant."¹⁵⁴

Notably, when considering whether the invoice requirement could serve as a pre-existing limitation on the claimant's property rights, the *Feldman* tribunal looked to the

¹⁴⁸ *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award ¶ 15 (Dec. 16, 2002).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* ¶ 125.

¹⁵¹ *Id.*

¹⁵² *Id.* ¶ 118.

¹⁵³ *Id.* ¶ 113.

¹⁵⁴ *Id.* ¶ 119.

consistency of the requirement as written, not as enforced.¹⁵⁵ Here, too, the SMARA reclamation standard has been consistent, while instances of non-compliance with that standard had left some previous mines “inadequately reclaimed.”¹⁵⁶ Consistent with the SMGB’s mandate to continuously review its regulations,¹⁵⁷ the SMGB responded to such inadequately reclaimed mines by specifying how the SMARA reclamation standard would be applied to open-pit metallic mines going forward.¹⁵⁸

Given the consistent pre-existing reclamation standard under SMARA, Glamis’s argument that California’s prior lack of a complete backfilling requirement somehow created a property interest in conducting mining activities free from SMARA’s reclamation standard should be rejected, as similar arguments were under U.S. (*American Pelagic*) and international (*Feldman*) law. Consistent with *Lucas*, the backfilling and recontouring requirements under the SMGB regulation reflect an objectively reasonable application of SMARA’s reclamation standard.

iii. Glamis’s Purported Specificity Requirement For Pre-Existing Limitations On Property Rights Is Meritless

Glamis asserts that the U.S. takings cases cited by the United States “closely follow” the “conclusion” it attributes to Mr. Olson that only “specific legal prescriptions or prohibitions” qualify as background principles under *Lucas*.¹⁵⁹ To the contrary, the background principles at issue in the takings cases cited by the United States are quite

¹⁵⁵ *Id.*

¹⁵⁶ See Declaration of Dr. John G. Parrish (Sept. 16, 2006) (“Parrish Declaration”), ¶ 16.

¹⁵⁷ See Counter-Mem. at 148.

¹⁵⁸ See Parrish Declaration ¶ 16.

¹⁵⁹ Reply ¶ 47

general in nature, and certainly no more specific than the preexisting limitations identified by the United States.¹⁶⁰

In *M & J Coal*, for instance, the court rejected a takings claim where the plaintiff had been ordered to stop its existing mining operations and, going forward, to mine pursuant to a revised subsidence control plan.¹⁶¹ The court found that the plaintiff's property rights were limited by background principles under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), which prohibited activity that creates an "imminent danger to the health or safety of the public."¹⁶² Glamis's assertion that "pre-existing law [*i.e.*, SMCRA] provided for precisely the measures that [the government agency] undertook in the *M & J Coal* case,"¹⁶³ offers no support for its specificity theory, given that the background principle at issue – the prohibition on creating "imminent danger" to public health or safety – was undeniably general in nature.

A similarly general background principle was applied by the court in *American Pelagic*, which found no expropriation where Congress revoked the plaintiff's fishing permit given Congress's express assumption, under the pre-existing Magnuson-Stevens Act, of "sovereign rights and exclusive fishery management authority over all fish" in the

¹⁶⁰ See Sacred Sites Act, CAL. PUB. RES. CODE § 5097.9 (2001) (prohibiting private parties using or occupying public property from interfering with "the free expression or exercise of Native American religion"); CAL. PUB. RES. CODE § 5097.97 (2001) (prohibiting private parties operating on public property from causing "severe or irreparable damage" to Native American "religious or ceremonial" sites absent a showing of necessity); SMARA, CAL. PUB. RES. CODE § 2712 (2001) (requiring mined lands to be reclaimed to "a usable condition which is readily adaptable for alternate land uses").

¹⁶¹ *M & J Coal Co. v. United States*, 47 F.3d 1148, 1150 (Fed. Cir. 1995). "Subsidence" refers to "the lowering of strata overlying a coal mine, including the land surface, cause by the extraction of underground coal." *Id.* at 1150 n.1.

¹⁶² *Id.* at 1150 (quoting 30 U.S.C. § 1271).

¹⁶³ Reply ¶ 49.

Exclusive Economic Zone.¹⁶⁴ That background principle itself was subject to a general standard, which permitted congressional interference with “recognized legitimate uses of the high seas” only where “necessary for the conservation and management of fishery resources.”¹⁶⁵

In *Kinross Copper*, the court considered whether the denial of a permit to discharge wastewater into publicly-owned waters of the state deprived the applicant of any property right.¹⁶⁶ The court found that the plaintiff’s property rights were limited by background principles under the Desert Land Act of 1877 which, as interpreted by a 1935 Supreme Court decision, severed water rights from the grant of mining rights under the Mining Law.¹⁶⁷ Following the Desert Land Act of 1877, water rights had to be obtained under the water rights laws of the state in which the site of the claim was located.¹⁶⁸ This background principle did not constitute a “specific prohibition” on the mining company’s right to discharge wastewater into a state waterway; nevertheless, the court found that the severance of water rights from mining rights under the Desert Land Act of 1877, together with the mining company’s failure to show that it held any water rights permit, defeated the takings claim.¹⁶⁹ Other cases applying background principles under *Lucas* similarly

¹⁶⁴ *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1378 (Fed. Cir. 2004) (quoting 16 U.S.C. § 1811).

¹⁶⁵ *Id.* at 1380 (quoting 16 U.S.C. § 1801(c)(2)).

¹⁶⁶ *Kinross Copper Corp. v. Oregon*, 981 P.2d 833, 839-40 (Ore. Ct. App. 1999).

¹⁶⁷ *Id.* at 839 (citing *Power Co. v. Cement Co.*, 295 U.S. 142, 158-62 (1935)).

¹⁶⁸ *Id.* (citing *Power Co. v. Cement Co.*, 295 U.S. 142, 158-62 (1935)).

¹⁶⁹ *Kinross Copper*, 981 P.2d at 840. Glamis characterizes a 1977 administrative rule in *Kinross* as a “specific, pre-existing prohibition unlike any at issue here.” Reply ¶ 31. But the court’s *Lucas* analysis in *Kinross* concerned the Desert Lands Act of 1877, not the 1977 administrative rule. *See Kinross Copper*, 981 P.2d at 840 (“Plaintiff’s unpatented mining claims came into existence in 1976, nearly 100 years after the enactment of the Desert Lands Act of 1877, which severed water rights from the grant of an unpatented mining claim. As a result, when the unpatented mining claims came into existence, no water rights were conferred with them.”). Indeed, the 1977 administrative rule, commonly known as the “Three Basin Rule”

concern principles that are general in nature.¹⁷⁰ And the background principle at issue in *Hunziker* – concerning a state archaeologist’s authority to deny permission to disinter human remains upon determining that such remains “have state and national significance from an historical or scientific standpoint for the inspiration and benefit of the people of the United States” – was no more specific than the background principles at issue here.¹⁷¹

In addition, Glamis incorrectly characterizes the hydraulic mining cases cited by the United States as concerning “specific, identifiable, [and] legally binding” nuisance principles, which were “entirely consistent with both the U.S. and customary international law standards for ‘background principles.’”¹⁷² Contrary to Glamis’s argument, the nuisance principles applied in those cases were quite general. In *Woodruff v. North Bloomfield Gravel Min. Co.*, the court found that the hydraulic mining practices at issue satisfied the definition of “public nuisance” under the California Code.¹⁷³ That definition was general in nature, covering any nuisance “which affects, at the same time, an entire community, or neighborhood, or any considerable number of persons[.]”¹⁷⁴ The definition of “nuisance” under the California Code was similarly general in nature,

(prohibiting “any new or increased waste discharges” into any of three identified river basins), was adopted after the unpatented mining claims at issue had been staked. *See id.* at 835.

¹⁷⁰ *See, e.g., Rith Energy, Inc. v. United States*, 44 Fed. Cl. 108, 115 (1999) (applying background principle under Tennessee Water Quality Control Act prohibiting mining operations “that would cause a condition of pollution affecting the state’s waters”); *Hendler v. United States*, 38 Fed. Cl. 611, 615, 617 (1997) (observing that “California law broadly defines nuisance” and finding that “there was a preexisting limitation on plaintiffs’ property rights for the abatement of a nuisance”); *Colo. Dep’t of Health v. The Mill*, 887 P.2d 993, 1002 (Colo. 1995) (en banc) (applying background principles of Colorado nuisance law, including the duty “to prevent activities and conditions on [one’s] land from creating an unreasonable risk of harm to others” and the prohibition against any “unlawful pollution or contamination of any surface or subsurface waters”) (emphasis, internal quotations and citation omitted).

¹⁷¹ *Hunziker v. Iowa*, 519 N.W.2d 367, 370 (Iowa 1994) (quoting IOWA CODE § 263B.9 (1993)); *see supra* n.160.

¹⁷² Reply ¶ 80.

¹⁷³ *Woodruff v. N. Bloomfield Gravel Mining Co.*, 18 F. 753, 769-70 (C.C.Cal. 1884).

¹⁷⁴ *See id.* at 770 (quoting CAL. CIV. CODE § 3480 (1997)).

covering any “obstruction to the free use of property” which “interfere[s] with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use in the customary manner of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway.”¹⁷⁵ Glamis does not challenge the application of the above nuisance principles in *Woodruff*, or Professor Sax’s observation that the “determination of whether particular conduct constitutes a nuisance [ordinarily] has to await . . . specification in legislative form.”¹⁷⁶

Professor Wälde, who acknowledges that he “cannot opine on the details of U.S. takings law” and that he “lack[s] sufficient expertise in U.S. domestic law to comment” on Professor Sax’s Report, nevertheless asserts that background principles under *Lucas* are limited to pre-existing nuisance law and cannot be “expanded to cover ‘principles’ (*i.e.*, non-specific legal restrictions).”¹⁷⁷ Professor Wälde cites no authority for this proposition, and ignores that the background principles doctrine in U.S. jurisprudence refers to background “principles,” not “specific legal restrictions.”¹⁷⁸ Moreover, the assertion simply misstates *Lucas*, which expressly included as sources of background principles both nuisance *and property* law.¹⁷⁹ In any event, nuisance law prohibitions against interfering with “the comfortable enjoyment of life or property”¹⁸⁰ and

¹⁷⁵ See *id.* (quoting CAL. CIV. CODE § 3479 (1997)). Similarly, property rights in *People v. Gold Run Ditch & Mining Co.* were limited by broad nuisance principles which prohibited “all unauthorized intrusions upon a water highway for purposes unconnected with the rights of navigation” and guaranteed the public “free use and enjoyment of their property.” *People v. Gold Run Ditch & Mining Co.*, 4 P. 1152, 1155-56 (Cal. 1884).

¹⁷⁶ Reply ¶ 81 (quoting Sax Rep. ¶ 24).

¹⁷⁷ Wälde Rep. at I-17, III-33 n.181.

¹⁷⁸ Wälde Rep. at I-17.

¹⁷⁹ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028-29 (1992).

¹⁸⁰ *Woodruff v. N. Bloomfield Gravel Mining Co.*, 18 F. 753, 770 (C.C.Cal. 1884) (quoting CAL. CIV. CODE § 3479 (1997)).

unauthorized intrusion “upon a water highway for purposes unconnected with the rights of navigation”¹⁸¹ plainly constitute “non-specific legal restrictions.”¹⁸² Professor Wälde’s argument, that background principles cannot be expanded to cover principles, is meritless.

Nor do decisions of international arbitral tribunals cited by the United States “confirm,” as Glamis asserts, “that only specific legally binding restrictions . . . can limit after-acquired property interests.”¹⁸³ The pre-existing limitation considered in *Tradex Hellas* concerned references in a joint venture agreement (and in the subsequent authorization of that agreement) to a 1991 Albanian Land Law, which created the *possibility* that some or all of the state-owned farmland to be developed by the joint venture “might” be privatized “on the basis of” the Land Law.¹⁸⁴ The mere potential for some future privatization of uncertain scope does not constitute a “specific prohibition” on the development of state-owned farmland. Nevertheless, the tribunal in *Tradex* made clear that if Tradex’s property rights had been subject to the Land Law “from the very beginning” of the investment, Albania would be able to argue that “the actual application of the Land Law at a later stage did not infringe the investment and thus did not constitute an expropriation.”¹⁸⁵

Thunderbird and *Feldman* likewise concerned pre-existing limitations that were no more specific than the pre-existing limitations at issue here. In *Thunderbird*, the pre-

¹⁸¹ *Gold Run Ditch.*, 4 P. at 1155-56.

¹⁸² Wälde Rep. at I-17.

¹⁸³ Reply ¶ 36.

¹⁸⁴ *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award ¶ 130 (Apr. 29, 1999).

¹⁸⁵ *Id.* ¶ 130. As previously noted, *see* Counter-Mem. at 133 n.633, because the tribunal in *Tradex Hellas* found no expropriation of Tradex’s rights by Albania, it did not address the issue of whether Tradex’s property rights had been subject to the Land Law “from the very beginning” of the investment. *Tradex Hellas* Award ¶ 131.

existing limitation concerned a general ban on gambling under Mexican law¹⁸⁶ – not, as characterized by Glamis, a specific ban on “gaming machines.”¹⁸⁷ Indeed, as observed in Professor Wälde’s dissenting opinion in *Thunderbird*, the issue raised by claimant’s gaming operations concerned whether video poker machines “could be exempted from the Gambling Law” due to their alleged “‘skill’ character.”¹⁸⁸ A general ban on gambling under Mexican law (subject to a potential exemption for skill-based video poker machines) does not constitute a specific prohibition on “the operation of gaming machines.”¹⁸⁹ Nor did the tribunal in *Thunderbird* refer to a need for pre-existing limitations on property rights to be specific; rather, the tribunal held that in all cases, “compensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited.”¹⁹⁰

Similarly, the *Feldman* tribunal’s analysis of a pre-existing limitation on the investor’s property right did not turn on the limitation’s specificity. As discussed above, the pre-existing limitation concerned an invoice requirement under Mexican law for obtaining tax rebates, which required itemized invoices that were available to cigarette producers, but not resellers (like the claimant). When determining whether the claimant’s property rights were limited by the pre-existing invoice requirement, the *Feldman*

¹⁸⁶ See *Thunderbird* Award ¶ 124.

¹⁸⁷ Reply ¶ 39.

¹⁸⁸ *Thunderbird* Award, Separate Op. by T. Wälde ¶ 76.

¹⁸⁹ Reply ¶ 39.

¹⁹⁰ *Thunderbird* Award ¶ 208.

tribunal looked to the consistency of the limitation as written and did not consider its degree of specificity.¹⁹¹

For the reasons set forth above, neither U.S. nor international law imposes a specificity requirement on pre-existing limitations on property rights. Glamis's proffered specificity requirement reflects Professor Wälde's concern that "[i]t does not seem to have been the *Lucas* court's intention to allow private property to be inherently limited by an unbounded reference to 'principles' of the broad type found in numerous constitutional and other legal references."¹⁹² But it was precisely such a concern that gave rise to the "objectively reasonable application" standard in *Lucas*, which, as demonstrated above, has been met by Senate Bill 22 and the SMGB regulation.¹⁹³

Finally, Glamis briefly argues that SB 22 and the SMGB regulation cannot implement background principles because their reclamation requirements do not apply retroactively to existing mines.¹⁹⁴ This proposition is doubly flawed.

First, retroactive application of regulations is generally disfavored,¹⁹⁵ and as observed by Professor Sax, "[n]ew requirements are routinely applied only prospectively, exempting existing and already-approved facilities, even though existing operations may

¹⁹¹ *Feldman Award* ¶ 119.

¹⁹² Wälde Rep. at I-17.

¹⁹³ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1032 n.18 (1992) (offering the objectively reasonable application standard in response to Justice Blackmun's concern over the "manipulable" nature of background principles).

¹⁹⁴ See Reply ¶ 61 ("under U.S. takings law, SB 22 and the SMGB regulations are untenable as articulations of pre-existing background principles . . . 'because they contain grandfather clauses that require their rules to be applied in a way that is inconsistent with the nature of generally applicable background principles'") (quoting Olson Rep. ¶ 51).

¹⁹⁵ See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law.").

be engaged in the same activities that are to be constrained for the future.”¹⁹⁶ Congress and state legislatures often exempt pre-existing operations even when regulating activities that implicate public health and safety and/or nuisance concerns.¹⁹⁷ Indeed, according to Glamis, “‘legitimately enacted legislation and regulations’ must be adopted to have a prospective effect only, as retroactive application is prohibited in international and domestic law.”¹⁹⁸ Moreover, in this instance the SMGB grandfathering provision at issue was *proposed by* the California Mining Association.¹⁹⁹

Second, Glamis’s grandfathering argument attacks the measures *implementing* the relevant background principles, *i.e.*, Senate Bill 22 and the SMGB regulation, rather than the legal sources of those background principles, *i.e.*, the U.S. and California Constitutions, the Sacred Sites Act, and SMARA.²⁰⁰ But a legislature’s implementation

¹⁹⁶ Sax Supp. Rep. ¶ 11.

¹⁹⁷ *See, e.g.*, FLPMA, 43 U.S.C. § 1782(c) (2000) (application of non-impairment standard is subject to “the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted” on the date of FLPMA’s enactment); SMARA, CAL. PUB. RES. CODE § 2776 (2001) (exempting from permit requirements persons who obtained vested rights to conduct surface mining operations prior to its enactment); SMCRA, 30 U.S.C. § 1272(a)(6) (1977) (exempting existing surface coal mining operations from planning requirements); Clean Air Act (Prevention of Significant Deterioration of Air Quality Program), 42 U.S.C. § 7475 (1990) (setting forth permit requirements applicable to major emitting facilities constructed after the date of enactment of the Clean Air Act Amendments of 1977); Hazardous Materials Transportation Act, 49 C.F.R. § 173.23 (2005) (authorizing continuing uses for “[p]reviously authorized packaging”); New York Environmental Quality Review Act (SEQRA), N.Y. ENVTL. CONSERV. LAW § 8-0111.5(a) (1976) (exempting from environmental impact statement requirements “[a]ctions undertaken or approved prior to the effective date of this article”); *see also United States v. Cinergy Corp.*, 458 F.3d 705, 709 (7th Cir. 2006) (“[t]he Clean Air Act treats old plants more leniently than new ones because of the expense of retrofitting pollution-control equipment”).

¹⁹⁸ Reply ¶ 262 (quoting Wälde Rep. at IV-56 n.592). As noted in the United States Counter-Memorial, however, there is no general prohibition against retroactivity under international law. *See* Counter-Mem. at 246 & n.1070. In any event, Glamis cannot credibly assert, for purposes of its expropriation claim, that California’s failure to apply new permitting requirements retroactively to existing mines precludes the operation of background principles, while at the same time asserting, for purposes of its fair and equitable treatment claim, that international and domestic law prohibit the retroactive application of laws and regulations.

¹⁹⁹ *See* Counter-Mem. at 99, 243, 246.

²⁰⁰ Because there is no assertion here that Senate Bill 22 and the SMGB regulation are themselves background principles of law, Mr. Olson’s reliance on language from *Palazzolo* in support of Glamis’s grandfathering argument is inapposite. *See* Olson Rep. ¶ 54 (a “regulation or common-law rule cannot be a

of a background principle need not be coextensive with the breadth of the background principle itself. The legislature’s adoption of a regulation implementing a background principle of law in a particular instance does not affect the general applicability of the underlying background principle itself.

In *American Pelagic*, for example, the Magnuson-Stevens Act provided the relevant background principle, specifically Congress’s express assumption of “sovereign rights and exclusive fishery management authority over all fish” in the EEZ.²⁰¹ Congress implemented that background principle when passing a rider to an appropriations act that “effectively cancelled” American Pelagic’s permits to fish in the EEZ.²⁰² Even though Congress, when passing the appropriations rider, did not implement the background principle in a generally applicable manner (opting “not to disturb” the activities of “many” other commercial fisherman in the EEZ),²⁰³ the court found the background principle itself to be consistent with *Lucas*’s requirements.²⁰⁴ California’s decision to include grandfather provisions in Senate Bill 22 and the SMGB regulation when

background principle for some owners but not for others”) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001)).

²⁰¹ *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1378 (Fed. Cir. 2004) (quoting 16 U.S.C. § 1811 (1976)).

²⁰² *Id.* at 1368.

²⁰³ *Id.* at 1377.

²⁰⁴ *Id.* at 1379 (“the sovereign rights of the United States in the EEZ ‘inhere[d] in the title itself, in the restrictions that background principles of the [federal government’s] law . . . already place[d] upon . . . ownership”) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992)). Mr. Olson refers to language from *Lucas*, 505 U.S. at 1031, which observes that permitting “similarly situated” landowners “to continue the use denied to the claimant” will “ordinarily import[] a lack of any common law prohibition. . . .” See Olson Rep. ¶ 51. But Glamis does not address how property owners holding permits to mine are “similarly situated” to property owners who do not hold such permits. Nor does Glamis challenge *American Pelagic*’s application of *Lucas*.

implementing background principles similarly has no bearing on whether the underlying background principles themselves are consistent with *Lucas*'s requirements.²⁰⁵

For the above reasons, California's inclusion of grandfather clauses in Senate Bill 22 and the SMGB regulation does not render those measures "untenable" as articulations of pre-existing background principles.

* * *

As demonstrated above, Glamis's property rights are narrowed by pre-existing limitations under the U.S. and California Constitutions, the Sacred Sites Act, and SMARA. Consistent with *Lucas*, the reclamation requirements under SB 22 and the SMGB regulations reflect an objectively reasonable application of the pre-existing limitations identified by the United States. Accordingly, the reclamation requirements under SB 22 and the SMGB regulation do not interfere with any property right held by Glamis and thus are not expropriatory.

²⁰⁵ In addition, in many instances where courts have found background principles under *Lucas*, the legal sources of those principles themselves contain grandfather provisions. *See, e.g.*, Magnuson-Stevens Act (source of background principle in *American Pelagic*) (exempting from general ban on foreign fishing within EEZ fishing undertaken pursuant to international fishery agreements in effect on the date of enactment) (16 U.S.C. § 1821(b) (2000)); SMCRA (source of background principle in *M & J Coal*) (exempting existing surface coal mining operations from planning requirements) (30 U.S.C. § 1272(a)(6) (1977)); FLPMA (source of background principle in *Reeves v. United States*, 54 Fed. Cl. 652 (2002)) (exempting existing mining and grazing uses from application of non-impairment standard) (43 U.S.C. § 1782(c) (2000)); South Carolina Coastal Zone Management Act (source of background principle in *Grant v. S.C. Coastal Council*, 461 S.E.2d 388 (S.C. 1995)) (exempting pre-existing users of "critical area" coastal lands from permit requirements) (S.C. CODE ANN. § 48-39-130(C) (1994)); New York State Department of Environmental Conservation Regulations (source of background principle in *Gazza v. N.Y. State Dep't of Env'tl. Conserv.*, 679 N.E.2d 1035 (N.Y. 1997)) (exempting from tidal wetlands land use permit requirements the "continuance of lawfully existing uses") (N.Y. COMP. CODES R. & REGS. tit. 6, § 661.5 (1991)). *See also Kinross Copper Corp. v. Oregon*, 981 P.2d 833, 839 (Ore. Ct. App. 1999) (Desert Land Act of 1877, which served as the source of a background principle under *Lucas*, established the rule that "'for the future the land should be patented separately'" from water rights) (quoting *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935)) (emphasis added).

3. Neither SB 22 Nor The SMGB Regulation Have Effected An Indirect Expropriation Of Glamis's Investment

As explained above, a threshold inquiry in determining whether an expropriation has occurred is whether the claimant has proven that it has a compensable property interest. In this case, Glamis's property interest in its mining claims was always subject to the background principles in California law referred to above; however, even if Glamis's property right were not constrained by these background principles, the California measures cannot be found to have indirectly expropriated Glamis's investment in its mining claims.

A claimant challenging governmental action as expropriatory "bears a substantial burden."²⁰⁶ Determining whether government regulatory action constitutes an expropriation involves "ad hoc, factual inquiries,"²⁰⁷ and the weighing of several factors, including: (1) the economic impact of the regulation; (2) the regulation's interference with reasonable investment-backed expectations; and (3) the character of the governmental action.²⁰⁸

Because the inquiry in an expropriation case is so fact specific, and because the three factors listed above are not necessarily the only factors to be considered, the factors are to be balanced, with no factor necessarily receiving more weight than any other.²⁰⁹

²⁰⁶ *E. Enters. v. Apfel*, 524 U.S. 498, 520 (1998) (citing *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989)).

²⁰⁷ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

²⁰⁸ See 2004 U.S. Model Bilateral Investment Treaty, ann. B ¶ 4; Free Trade Agreement, U.S.-Sing., State Dept. No. 04-36, Exchange of Letters of May 6, 2003, ¶ 4(a); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

²⁰⁹ See, e.g., 2004 U.S. Model Bilateral Investment Treaty ("[t]he determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry" that considers several factors, including, but not limited to, factors similar to those articulated by the U.S. Supreme Court in *Penn Central*); see also *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987) (explaining that the Supreme Court has generally "been unable to

Glamis, therefore, is mistaken when it implies that it must demonstrate the severity of the economic impact of the challenged measures, and that the burden then shifts to the United States to “show that ‘the public welfare purpose advanced for justifying the government measures’ is legitimate.”²¹⁰

Glamis, not the United States, bears the burden of proving that an indirect expropriation has occurred.²¹¹ The burden does not shift to the United States merely because Glamis alleges to have demonstrated that it suffered injury.²¹² Although various factors must be balanced in making a determination of expropriation, the government’s actions are *presumed* to be non-expropriatory.²¹³ This is a presumption that Glamis cannot, on the facts of this case, overcome.

develop any ‘set formula’ for determining when” compensation is due, “[r]ather, it has examined the ‘taking’ question by engaging in essentially ad hoc, factual inquiries that have identified several factors . . . that have particular significance”) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)). Neither international law nor the U.S. Supreme Court’s jurisprudence suggests that the indirect expropriation factors involve a burden shifting mechanism.

²¹⁰ Reply ¶ 166 (citing Wälde Rep. at I-24).

²¹¹ See UNCITRAL Arbitration Rules, art. 24(1) (“Each party shall have the burden of proving the facts relied on to support his claim or defence.”); see also BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS & TRIBUNALS 327 (1987) (“International judicial decisions are not wanting which expressly hold that there exists a general principle of law placing the burden of proof upon the claimant and that this principle is applicable to international judicial proceedings.”); *id.* at 334 (“[T]here is in substance no disagreement among international tribunals on the general legal principle that the burden of proof falls upon the claimant, *i.e.*, the plaintiff must prove his contention under penalty of having his case refused.”) (internal quotation omitted); JACOMJIN J. VAN HOF, COMMENTARY ON THE UNCITRAL ARBITRATION RULES 160-61 nn.298-99 (1991) (citing cases where UNCITRAL Article 24 was characterized as a generally accepted principle of international arbitration law).

²¹² In his discussion of the *Penn Central* factors, Mr. Olson does not subscribe to Glamis’s view that the United States has a burden to prove any of the factors, but notes the Supreme Court’s statement that it has been “unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government,” Rather, there are “a series of factors that [are] germane to the inquiry” among which is the character of the action. Olson Rep. ¶ 30 (quoting *Penn Central*, 438 U.S. at 124.).

²¹³ See, e.g., M. SORNARAJAH, INTERNATIONAL LAW ON FOREIGN INVESTMENT 385 (2d ed. 2004) (“The starting point must always be that the regulatory interference is presumptively non-compensable.”); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 535 (6th ed. 2003) (“State measures, *prima facie* a lawful exercise of powers of government, may affect foreign interests considerably without amounting to expropriation.”); *Mabo v. Queensland* (1988) 83 A.L.R. 14 (Austl.), ¶ 11 (noting a “strong presumption against a legislative intent to confiscate or extinguish vested proprietary rights or interests in land without compensation”); cf. BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS

As the United States establishes, each of the foregoing three factors strongly weighs in favor of a finding that Glamis's mining claims have not been expropriated.

a. The California Reclamation Requirements Do Not Deprive Glamis Of All Economic Use Of Its Investment

The economic impact of the challenged government measure on the claimant's investment is the first – and sometimes the dispositive – factor to be considered in an indirect expropriation claim. If the economic impact is not severe enough – as is the case here – this alone compels denial of the claim. Having alleged an expropriation,²¹⁴ Glamis bears the burden of proving that the government measures it challenges destroyed the economic value of its investment or otherwise interfered with it so severely as to have effectively “taken” its investment.²¹⁵

In its Reply, Glamis appears to reject this basic principle of international law. It is not enough, Glamis argues, for a company to make a profit; “it must turn an economically strategic profit[.]”²¹⁶ Thus, according to Glamis, “If the anticipated profit is insufficient to attract a reasonable mining company to proceed with extraction, then the property – the mineral rights – have no value.”²¹⁷ The suggestion, then, is that property may be deemed expropriated simply because it has become insufficiently profitable.

AND TRIBUNALS 305-06 (1987) (“[I]nternational tribunals constantly have recourse to the rebuttable presumption of the regularity and validity of acts and recognize that this is a general principle of law. . . . [Therefore, t]he party alleging a violation of international law giving rise to international responsibility has the burden of proving its assertion.”); *Asian Agric. Prods. Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award ¶ 56 (June 27, 1990), *reprinted in* 30 I.L.M. 577, 604 (1991) (“The international responsibility of the State is not to be presumed. The party alleging a violation of international law giving rise to international responsibility has the burden of proving the assertion.”).

²¹⁴ Glamis does not allege, however, that it has lost ownership rights in, or control of, its mining claims; in fact, Glamis retained full ownership of and control over its mining claims following the alleged expropriation and then transferred those claims to its successor-in-interest. *See infra* nn.240-41.

²¹⁵ *See* Counter-Mem. at 161 (citing cases).

²¹⁶ Reply ¶ 103.

²¹⁷ *Id.*

This suggestion, however, is wrong, for two reasons. First, it contradicts textbook economics. Citing a seminal text on corporate finance, Navigant explains:

If the net present value is positive, it means that the project's positive cash flows outweigh the cost and risk associated with investing in the project. Any project that has a positive net present value is a worthwhile investment.²¹⁸

In light of this basic principle, it is not surprising that Glamis's own valuation expert declined to endorse the company's erroneous valuation theory.

Second, Glamis's theory contradicts a fundamental principle of international law, which provides that “an impairment of economic value’ is tantamount to expropriation only if the degree of impairment is *equivalent* to expropriation.”²¹⁹ The issue is whether that impairment “is sufficiently restrictive to support a conclusion that the property has been ‘taken’ from the owner,”²²⁰ and not, as Glamis argues, whether the project has become *insufficiently profitable*.²²¹ Notably, Glamis has cited no authority for its novel theory of expropriation.

²¹⁸ Navigant Supp. Rep. ¶ 273 (citing ROSS, WESTERFIELD & JAFFE, CORPORATE FINANCE (“Net Present Value Rule: An investment is worth making if it has a positive NPV. If an investment’s NPV is negative, it should be rejected.”)).

²¹⁹ *GAMI Invs., Inc. v. United Mexican States*, NAFTA/UNCITRAL, Final Award ¶ 125 (Nov. 15, 2004) (quoting *Pope & Talbot v. Gov’t of Canada*, NAFTA/UNCITRAL, Interim Award ¶ 104 n.86 (June 26, 2000)) (emphasis in original); see also *Pope & Talbot v. Gov’t of Canada*, NAFTA/UNCITRAL, Interim Award ¶ 102 (June 26, 2000) (holding that “mere interference is not expropriation; rather, a significant degree of deprivation of fundamental rights of ownership is required”) (citation and internal quotations omitted); *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award ¶ 262 (May 12, 2005) (“The essential question is therefore to establish whether the enjoyment of the property has been effectively neutralized.”); *Starrett Hous. Corp. v. Iran*, Award No. ITL 32-24-1 (Dec. 19, 1983), 4 IRAN-U.S. CL. TRIB. REP. 122, 154 (1983) (holding that only where the State “interfere[s] with property rights to such an extent that these rights are rendered . . . useless” may the measures be deemed expropriatory).

²²⁰ *Pope & Talbot v. Gov’t of Canada*, NAFTA/UNCITRAL, Interim Award ¶ 102 (June 26, 2000); see also Counter-Mem. at 161 (citing cases).

²²¹ Professor Wälde asserts that “[d]eprivations of less than 50% may well be seen as an indirect taking if there are other contributing factors (breach of legitimate expectations, discriminatory elements, full deprivation with respect to an important discrete component of the integrated investment arrangements, breach of specific assurances).” Wälde Rep. at III-27. Professor Wälde has offered no authority whatsoever for this assertion.

In any event, as demonstrated below, even if the California reclamation requirements had been applied to Glamis's mining claims, those measures cannot be considered to have expropriated them, as the claims continue to have substantial value.

i. Glamis's Contemporaneous Valuations Disprove Its Claim That The Measures Rendered Its Mining Claims Valueless

Glamis itself appears to recognize the weakness of its "strategic profit" theory of expropriation, as it argues elsewhere in its Reply that the challenged "federal and state measures effected a *full* deprivation of the value of [its] property interests."²²² This claim, however, is equally unfounded, as it directly contradicts contemporaneous valuation evidence. The United States produced with its Counter-Memorial two valuations of the Imperial Project that Glamis prepared contemporaneously with the California reclamation requirements.²²³ These contemporaneous valuations expressly confirm the Imperial Project's *positive* net value, even with complete backfilling,²²⁴ and directly contradict the valuation that Glamis commissioned for this arbitration.²²⁵ These contemporaneous documents alone thus disprove Glamis's expropriation claim.²²⁶

²²² Reply ¶ 85 (emphasis added).

²²³ Counter-Mem. at 162.

²²⁴ See Confidential Memorandum from Jim Voorhees, Chief Operating Officer, Glamis Gold Ltd., to Charles Jeannes, Senior Vice President, and C. Kevin McArthur, President, Glamis Gold Ltd. (Jan. 9, 2003) (App. to Navigant Rep., tab 13) (reporting a \$9.1 million net present value of the Imperial Project, assuming complete backfilling, a 10% discount rate, and \$325-per-ounce gold prices, but not valuing the Singer pit mining claims).

²²⁵ See Confidential Memorandum from C. Kevin McArthur, President, Glamis Gold Ltd., to Charles Jeannes, Senior Vice President, Glamis Gold Ltd. (Apr. 28, 2002) (App. to Navigant Rep., tab 11) (reporting a \$26 million net present value of the Imperial Project, assuming a 10% discount rate and \$325-per-ounce gold prices, but not assuming complete backfilling, and not valuing the Singer pit mining claims). Using this valuation, and taking into account Behre Dolbear's \$6.4 million valuation of the Singer pit claims, the Imperial Project would be valued at \$32.4 million. Behre Dolbear Rep. at 4. Although Glamis's April 2002 valuation concluded that "the Imperial Project should be valued at somewhere around \$50 million," Glamis arrived at that conclusion by using a 5% "internal" discount rate. See Confidential Memorandum from C. Kevin McArthur, President, Glamis Gold Ltd., to Charles Jeannes, Senior Vice President, Glamis Gold Ltd. (Apr. 28, 2002) (App. to Navigant Rep., tab 11). Even Behre Dolbear concludes, however, that a 5% discount rate is inappropriate for determining the Imperial Project's

Glamis asks this Tribunal to ignore these contemporaneous valuations and, instead, to credit Glamis's post-arbitration valuation, which better supports its current legal theories. Glamis, however, has failed to identify a single case in which an arbitral tribunal disregarded a party's contemporaneous valuation in favor of its post-arbitration valuation. This is unsurprising, as Glamis's request contravenes two fundamental rules of evidence: (1) contemporary documents produced in the ordinary course of business are more reliable than *post hoc* evidence offered to bolster a party's arbitration claims;²²⁷ and (2) "contradictory statements of an interested party should be construed against that party."²²⁸

Having offered no legal justification for ignoring its contemporaneous valuations, Glamis seeks to diminish their importance, dismissing them as "back of the envelope'

fair market value, which is the only value relevant to this arbitration. See Behre Dolbear Rep. at 3 (concluding that the "appropriate after-tax discount rate" for determining the Imperial Project's fair market value "is between 6 and 7 percent").

²²⁶ Because the California reclamation requirements did not deprive Glamis of the full value of its investment, there necessarily cannot be "a *per se* finding of expropriation," as Glamis claims. Reply ¶ 83.

²²⁷ See, e.g., Charles N. Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules*, 28 INT'L LAW. 47, 54-55 (1994) ("Whatever the modes of proof to which parties may resort for substantiation of their respective claims, international tribunals, generally speaking, give greater probative significance to evidence contemporaneous to the events involved in the case."); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 318-19 (1987) ("[D]ocumentary evidence stating, recording, or sometimes even incorporating the facts at issue, written or executed either contemporaneously or shortly after the events in question by persons having direct knowledge thereof, and for purposes other than the presentation of a claim or the support of a contention in a suit, is ordinarily free from this distrust and considered of higher probative value."); *Sola Tiles, Inc. v. Iran*, AWD 298-317-1 (Apr. 22, 1987), 14 IRAN-U.S. CL. TRIB. REP. 223, 238 (1987) ("Fortunately, the record contains an independent, contemporaneous report on [the company's] business that provides the Tribunal with an additional source on which to base the valuation of [the company] at the date of the taking."); *Beddingfield v. Sec'y of Health and Human Servs.*, 50 Fed.Cl. 520, 524 (2001) ("As between contemporaneous documentary evidence, later documentary evidence, and later oral evidence, we find binding precedents and good sense strongly suggest that contemporaneous documentary evidence deserves the most weight.").

²²⁸ *Woodward-Clyde Consultants v. Iran*, AWD 73-67-3 (Sept. 2, 1983), 3 IRAN-U.S. CL. TRIB. REP. 239, 249 ("Given the fact that one conclusion was stated close in time to the events in issue and that the other was stated in the course of this litigation, and considering the general rule of evidence that contradictory statements of an interested party should be construed against that party, the Tribunal finds that the Claimant has obtained the clearance required by the Agreement and is entitled to payment of the amount retained under the social insurance guarantee.").

calculation[s] undertaken for the purpose of a ‘preliminary evaluation’ of the economic impact of the measures.”²²⁹ This characterization, however, cannot withstand scrutiny. Far from being informal “back of the envelope” calculations, Glamis’s valuations are the product of the company’s computer-valuation model; they are supported by spreadsheets evidencing their methodology and conclusions; and they were prepared by, and presented to, Glamis’s top executives in the ordinary course of business.²³⁰

There can be no question, moreover, concerning Glamis’s competence to have accurately revised its computer-valuation model for the Imperial Project to account for the costs of complete backfilling and recontouring. When Glamis’s Vice-President and General Counsel, Charles Jeannes,²³¹ was asked at a congressional hearing whether Glamis found “it difficult to accurately estimate reclamation and closure costs,”²³² he emphatically responded in the negative:

We actually have quite a bit of experience at reclamation. Because Glamis operates only heap leach oxide minutes [*sic*] above the water table, no pit lakes, no acid drainage, *it is quite simple to estimate the costs of reclamation* because you are simply talking about the time of rinsing a heap and then of moving a certain number of yards of dirt and then reseeding and revegetating.

So, we have done a lot of it, and *we think we are very good at estimating the cost, yes.*²³³

²²⁹ Reply ¶ 89 (quoting First Statement of C. Kevin McArthur ¶ 24).

²³⁰ The first valuation was prepared by Kevin McArthur, Glamis’s President and CEO, and sent to Charles Jeannes, Senior Vice-President Administration, Chief Financial Officer, and General Counsel; the second valuation was prepared by Jim Voorhees, Vice-President Operations and Chief Operating Officer, and sent to Mr. McArthur.

²³¹ Mr. Jeannes is now Executive Vice-President of Corporate Development of Goldcorp, Inc. See Goldcorp Inc., Senior Executives, at http://www.goldcorp.com/about_us/senior_executives/.

²³² Response of Behre Dolbear & Company (Dec. 2006) (“Behre Dolbear Supp. Rep.”), at A4-66 (question from B. Cubin, Chairman, House Subcommittee on Energy and Mineral Resources).

²³³ Behre Dolbear Supp. Rep. at A4-66 (testimony of Charles Jeannes) (emphasis added).

There is no reason, therefore, for this Tribunal to ignore Glamis's contemporaneous estimate of the costs of complete backfilling – or the value of the Imperial Project incorporating the cost of complete backfilling – in favor of Glamis's *post hoc* valuation.

ii. The “Objective Measures of Value” Cited By Glamis Are Neither Objective Nor Measures Of Value

In the face of this contemporaneous valuation evidence, Glamis has put forward its own putative “objective” measures of the Imperial Project's value. Glamis first notes that it “completely wrote off” the value of the Imperial Project in 2001. Thus, according to Glamis, “[t]he U.S. would have to adduce very persuasive evidence” to counter this “objective measure[] of value.”²³⁴ This is simply wrong. A write-off is an accounting measure that may have nothing to do with actual market value, and to conflate the two concepts is to confuse elementary valuation principles.²³⁵ A company, for instance, may depreciate a truck over five years, after which it may be “booked” at zero value, but that hardly renders the truck worthless. Indeed, Glamis itself has acknowledged the *market value* of the Imperial Project in several analyses and on numerous occasions following its write-down.²³⁶ Perhaps unsurprisingly, support for Glamis's “write-down” theory of valuation comes not from its valuation expert, but from its international law expert, Professor Wälde, whose opinion on the matter would appear beyond the scope of his stated expertise.²³⁷

²³⁴ Reply ¶ 86 (quoting Wälde Rep. at III-30-31) (internal quotations omitted).

²³⁵ See Navigant Supp. Rep. ¶ 295.

²³⁶ See Navigant Supp. Rep. ¶ 296 n.268.

²³⁷ Wälde Rep. at III-31. Professor Wälde cites in this regard the OPIC determination in the *Ponderosa* case, observing that “[t]he write-off of the investor's investment following this governmental interference was considered to indicate the severe economic deprivation suffered.” *Id.* at III-19 (*citing* Overseas Private Investment Corporation, Memorandum of Determinations, Expropriation Claim of Ponderosa Assets, L.P. / Argentina, Contract of Insurance No. D733 (Aug. 2, 2005)). In that case, however, OPIC commissioned its own accounting firm to verify the company's write-off. OPIC concluded that “the total write-off of

Moreover, the fact that Glamis wrote off its investment is more a function of its litigation plans than a reflection of an objective valuation using an accepted methodology. No claimant could continue to reflect the value of its investment on its books while claiming that that investment has been expropriated; doing so is entirely inconsistent with its claim. Thus, in effect, Glamis and Professor Wälde posit that the fact that a claim has been made, and conforming accounting entries carried out, is proof of the merit of that very claim, a proposition so unreasonable that it requires no further discussion.

Glamis also asserts that it “has not received even a single offer to purchase the [Imperial Project’s] mining claims,” and then touts this as a second “objective” measure that its mining claims are worthless.²³⁸ Glamis does not argue, however, that it affirmatively sought to sell its mining claims. It simply notes that no one has come forward with an unsolicited offer to buy them. Glamis’s theory is counterintuitive. One’s home does not lack value merely because buyers have not appeared on one’s doorstep with offers to buy it. Glamis fails to cite any authority to support its “unsolicited tender offer” theory of valuation, and the authority, in fact, is to the contrary. The Iran-United States Claims Tribunal, for instance, expressly rejected this notion in *Ebrahimi v. Iran*, when it ruled that “fair market valuation does not require the valuer to

Ponderosa’s investment was justified using the equity method of accounting,” and “Ponderosa has provided extensive additional information as necessary for OPIC to compute and substantiate compensation.” Memorandum of Determinations, at 17. There was, therefore, independent confirmation that the write-off did in fact reflect the property’s actual value. See Navigant Supp. Rep. ¶ 297.

²³⁸ Reply ¶ 88.

identify any concrete candidate buyer to substantiate his conclusions on the company's market value."²³⁹

In any event, Glamis's claim is factually incorrect. In November 2006, Goldcorp, Inc. acquired Glamis, including Glamis's interest in the Imperial Project.²⁴⁰ On February 23, 2007, Goldcorp announced its "2006 Reserves, Production and Cash Costs,"²⁴¹ in which it included 2.1 million ounces of gold for the Imperial Project, "as reported by the former owner, Glamis Gold Corp.[.]"²⁴² Glamis, therefore, not only received an offer for its Imperial Project mining claims (which it alleges to have been expropriated four years earlier), but apparently found a buyer as well. This transaction casts serious doubt on the continued viability of Glamis's expropriation claim.

iii. Behre Dolbear's Valuation Methodology Is Unreliable

Glamis also has introduced a post-arbitration valuation (prepared by Behre Dolbear) to support its legal theories in this case. In light of the two actual objective measures of value – *i.e.*, the contemporaneous valuations performed by Glamis, and Goldcorp's apparent acquisition of the Imperial Project – this Tribunal has no need to resort to that valuation. Even if this Tribunal were inclined to consider Glamis's post-arbitration valuation, however, it would not be appropriate to do so in this case, as the Behre Dolbear report is so riddled with methodological errors, contradictions, hearsay,

²³⁹ *Shahin Shaine Ebrahimi v. Iran*, AWD 560-44/46/47-3 (Oct. 12, 1994), 30 IRAN-U.S. CL. TRIB. REP. 170, 206 (1994).

²⁴⁰ See Goldcorp, Inc., News Release, *Goldcorp Completes Acquisition of Glamis*, Nov. 4, 2006, available at http://www.goldcorp.com/news_releases/index.php?mod=cnt&act=cnt&id=542.

²⁴¹ Goldcorp Inc., News Release, *Goldcorp Announces 2006 Reserves, Production And Cash Costs*, available at http://www.goldcorp.com/news_releases/index.php?mod=cnt&act=cnt&id=619.

²⁴² Goldcorp Inc., News Release, *Goldcorp Announces 2006 Reserves, Production And Cash Costs*, available at http://www.goldcorp.com/news_releases/index.php?mod=cnt&act=cnt&id=619 (listing 1.53 million ounces of "measured and indicated resources" and 0.56 million ounces of "inferred resources") (emphasis added).

and unsupported allegations as to destroy its evidential value.²⁴³ Indeed, the Behre Dolbear report veers from, and even contradicts, Behre Dolbear's own valuations performed outside of this arbitration.

Navigant has identified four systemic errors in Behre Dolbear's valuation methodology. *First*, contrary to applicable mineral valuation codes and standards,²⁴⁴ Behre Dolbear failed to produce *any* evidence supporting critical valuation conclusions. These codes and standards emphasize the importance of transparent and verifiable appraisals. The VALMIN code, for instance, states that “[t]he valuation process must be [] transparent, objective and rigorous,” and every valuation report should contain “sufficient information about the valuation method(s) used so that another Expert can understand the procedures used and replicate the Valuation.”²⁴⁵ The CIMVal standards similarly call upon appraisers to “[p]rovide details of [the] database used to support each method” and “a clear description and analysis of the information utilized, the methods followed, and the reasoning that supports the analysis, opinions and conclusions[.]”²⁴⁶

Behre Dolbear's report, however, is neither transparent nor verifiable. In its mixed-method valuation, Behre Dolbear did not produce a transparent discounted cash

²⁴³ See Navigant Supp. Rep. ¶¶ 3-71.

²⁴⁴ The parties' valuation experts principally rely on two codes and standards: the “VALMIN code” and the “CIMVal standards.” The VALMIN code was adopted by the Australasian Institute of Mining and Metallurgy in 2005. See Code for the Technical Assessment and Valuation of Mineral and Petroleum Assets and Securities for Independent Expert Reports (Apr. 2005), at http://www.ausimm.com.au/codes/valmin_2005.pdf. The CIMVal standards were adopted by the Special Committee of the Canadian Institute of Mining, Metallurgy and Petroleum on Valuation of Mineral Properties in 2003. See Standards and Guidelines for Valuation of Mineral Properties (Feb. 2003), at http://www.cim.org/committees/CIMVal_Final_Standards.pdf. Although these codes and standards do not bind the valuation professionals in this arbitration, both Behre Dolbear and Navigant recognize their utility in valuing mining properties such as the Imperial Project.

²⁴⁵ See Navigant Supp. Rep. ¶¶ 33, 152 (quoting VALMIN code).

²⁴⁶ *Id.* ¶ 154 (quoting CIMVal standards).

flow (DCF) model,²⁴⁷ and failed to document how it calculated its average valuation multiple of \$25.71 per ounce of gold. Behre Dolbear claims to have derived its valuation multiple from an internal “database” titled “A Decade of Deals: Gold and Copper Ore Reserve Acquisition Costs, 1990–1999” and its supplement.²⁴⁸ In its first report, Navigant criticized Behre Dolbear for failing to produce that database, as this prevented Navigant from testing Behre Dolbear’s conclusions.²⁴⁹ Behre Dolbear’s supplemental report, however, *continues to rely on that database*, but the company still refuses to submit it as evidence.²⁵⁰

The Iran-United States Claims Tribunal confronted this issue in *INA Corporation v. Iran*.²⁵¹ There, Iran argued that the claimant was not entitled to compensation for the expropriation of shares in an Iranian insurance company because the company had a negative net worth. Iran produced a post-expropriation audit report in support of its valuation, but failed to produce critical documents underlying that report. The tribunal concluded that Iran’s non-production had made it “impossible” “to evaluate the results of the audit.”²⁵² The tribunal thus rejected the audit report and awarded the claimant the full amount claimed.²⁵³

²⁴⁷ Indeed, Behre Dolbear did not provide any support for its current valuation.

²⁴⁸ Behre Dolbear Rep. at 18.

²⁴⁹ Navigant Rep. ¶ 70; *see also* Counter-Mem. at 168 (criticizing Behre Dolbear for failing to reveal the basis for its valuation multiple).

²⁵⁰ Behre Dolbear Supp. Rep. at 13. Because the Tribunal’s Procedural Order No. 1 requires the parties to submit with their respective pleadings all documents on which they rely, and because Glamis has failed to submit with its Memorial or Reply Behre Dolbear’s alleged “database” of information, that database is not, and cannot become at a later date, part of the record of this case. *See* Procedural Order No. 1, at ¶ 5(e) (Mar. 3, 2005).

²⁵¹ *INA Corp. v. Iran*, AWD 184-161-1 (Aug. 12, 1985), 8 IRAN-U.S. CL. TRIB. REP. 373 (1985).

²⁵² *Id.* at 382.

²⁵³ *Id.* at 382-83.

This Tribunal likewise should reject Behre Dolbear's attempt to support its valuation on the basis of key documents that it refuses to produce. Behre Dolbear's withholding of evidence not only contravenes the very mineral valuation codes upon which Behre Dolbear purports to rely, but also deprives the United States of its due process right to confront critical evidence underlying Glamis's valuation. This Tribunal, therefore, should disregard Behre Dolbear's valuation on this ground alone.

Second, the Behre Dolbear report departs from basic valuation principles, apparently due to the company's mistaken belief that "the valuation of mineral properties is unique, because the asset being valued is hidden beneath the surface."²⁵⁴ It is true that mineral-property valuations can raise unique *technical* issues, such as calculating the amount and grade of ore, the life of the mine, and the capital and operating costs of extraction and production.²⁵⁵ Here, however, these technical issues are largely irrelevant, as Navigant and Norwest have accepted virtually all of Behre Dolbear's technical and cost assumptions, save for the incremental cost of backfilling under the new reclamation requirements (discussed below). There is, therefore, nothing "unique" about the valuation of the Imperial Project.

Indeed, even the mineral valuation codes and guidelines cited by Behre Dolbear confirm that, when there is no dispute about what "is hidden beneath the surface," there is nothing unique about mineral-property valuation. Those codes, in fact, explicitly align themselves with general international valuation codes and standards. The VALMIN code, for instance, confirms its compatibility with international valuation codes "in terms

²⁵⁴ Behre Dolbear Supp. Rep. at 9.

²⁵⁵ Navigant Supp. Rep. ¶ 111.

of fundamental principles and general approach.”²⁵⁶ Mineral codes and standards, moreover, aspire to “the set of standards for valuation of all types of property and assets in all settings,”²⁵⁷ and thus “should not be considered unique in their applicable valuation concepts and principles.”²⁵⁸ There is, therefore, no justified reason for Behre Dolbear to have veered from standard valuation methodology and to have crafted its own idiosyncratic valuation of the Imperial Project.

Third, contrary to Behre Dolbear’s claim, there is no dispute about “reserves” and “resources” in this arbitration. Glamis observes that *reserves* are “proven and probable mineral deposit[s] of known character,” whereas *resources* are “lesser known deposit[s] with exploration potential.”²⁵⁹ Although Glamis and Behre Dolbear fault Navigant for referring to the Singer pit’s mineralization as “reserves,” they overlook the fact that Behre Dolbear itself converted the pit’s resources into reserves for purposes of its own valuation. In its initial report, Behre Dolbear first identified “significant additional hard rock gold resources” at the Imperial Project.²⁶⁰ It then “conservatively estimated that there is a better than a 50 percent probability of adding an additional 500,000 ounces of gold from the already defined resources at the Property.”²⁶¹ It projected that “half of the 500,000 ounces would be produced,” and it “valued the probability-adjusted additional

²⁵⁶ Navigant Supp. Rep. ¶ 101 (citing VALMIN code).

²⁵⁷ *Id.* ¶ 104 (quoting Terry Ellis, *Mineral Property Valuation Standards – A U.S. Perspective*, 39 PROFESSIONAL GEOLOGIST 6 (May 2002)).

²⁵⁸ *Id.* ¶ 103 (quoting Terry Ellis, *Philosophy and Application of the International Valuation Standards for Minerals and Petroleum*, 41 PROFESSIONAL GEOLOGIST 17 (Jan.-Feb. 2004)).

²⁵⁹ Reply ¶ 95.

²⁶⁰ Behre Dolbear Rep. at 17.

²⁶¹ *Id.* at 18.

gold reserve additions as a development-stage project.”²⁶² Behre Dolbear then concluded that “[t]he adjusted additional gold reserve is thus 250,000 ounces of gold, which the market values at \$25.71 per ounce or \$6.43 million.”²⁶³ Because Navigant simply adopted Behre Dolbear’s own conversion of the Singer pit’s resources into reserves, the parties are in complete agreement as to the *quantity* of reserves.²⁶⁴

The only issue, then, is whether the Singer pit’s “probability-adjusted additional gold reserves” can be calculated in an income valuation, as Navigant has done in its DCF analysis. Although Behre Dolbear claims that they cannot,²⁶⁵ the mineral valuation codes and standards that it cites (but does not quote) establish the opposite. The CIMVal standards, for instance, approve the inclusion of “Mineral Resources in the Income Approach if Mineral Reserves are also present and if, in general, mined ahead of the Mineral Resources in the same Income Approach model,” and if the appraiser adopts methods to address the higher-risk mineralization (such as by “reducing the quantum of the Mineral Resources”).²⁶⁶ This is precisely the case here, and hence precisely why Navigant valued these resources (as converted by Behre Dolbear into reserves) in its income approach.

Indeed, outside of this arbitration, even Behre Dolbear accepts Navigant’s approach. When appraising another mining project, Behre Dolbear stated that “[i]f exploration properties are an extension of, or adjacent to, an existing mining operation and will provide additional ore to feed an existing plant, and opportunities for expansion

²⁶² *Id.* at 19.

²⁶³ *Id.*

²⁶⁴ Navigant Supp. Rep. ¶ 98.

²⁶⁵ Behre Dolbear Supp. Rep. at 6, 11.

²⁶⁶ Navigant Supp. Rep. ¶¶ 20-21, 119-20 (quoting CIMVal standards).

or extension of property life, *Behre Dolbear usually values the exploration property by the Income Approach reflecting, through factoring, its ability to add to the generation of additional cash flow to the operation.*²⁶⁷ Again, this is precisely what Navigant has done, based on Behre Dolbear's own resource-reserve conversion. Behre Dolbear's claim that the income approach "is clearly inappropriate" for valuing mineral resources is thus incorrect.²⁶⁸

Behre Dolbear's failure to account for the Singer pit's "probability-adjusted additional gold reserves" in its DCF analysis has enormous consequences for its valuation of the Imperial Project. As Navigant reports, these additional reserves add two distinct elements of value: (1) the income accruing from the additional reserves themselves (which Behre Dolbear values at \$6.4 million); and (2) the incremental (or "strategic") value created by the fact that mining the additional reserves would delay backfilling of the large East pit by some two years, thus reducing the present value of backfilling costs by approximately \$6 million.²⁶⁹

Fourth, Behre Dolbear failed to use different valuation approaches to test the reliability of its valuation of the Imperial Project. "One of the key tenets of valuation theory and practice," Navigant explains, "is that multiple valuation approaches should be adopted in order to obtain a robust and reliable estimate of value."²⁷⁰ Using multiple approaches allows appraisers to determine whether their conclusions are reasonable by comparing the results from each approach.²⁷¹

²⁶⁷ *Id.* ¶¶ 23, 124, 238 (quoting Behre Dolbear Azerbaijan Valuation Report) (emphasis added).

²⁶⁸ Behre Dolbear Supp. Rep. at 11.

²⁶⁹ Navigant Supp. Rep. ¶¶ 132, 240.

²⁷⁰ *Id.* ¶ 134.

²⁷¹ *Id.* ¶¶ 91, 134.

The use of multiple valuation approaches finds ample support in the mineral valuation codes and standards that Behre Dolbear claims “typically” to follow.²⁷² The CIMVal standards, for instance, state that “[m]ore than one approach should be used in the Valuation of each Mineral Property[.]”²⁷³ The Extractive Industries’ supplement to the International Valuation Standards adds that, “Where one or more of the [income, market, and cost] valuation approaches has been applied in preference to others, the reasons for this must be stated.”²⁷⁴

International arbitral jurisprudence similarly supports the use of multiple valuation approaches. At the Iran-United States Claims Tribunal, for instance, “evidence of market value, supplied through expert testimony, comparable transactions, recent transactions or a combination thereof, frequently has formed the basis for the Tribunal’s valuation of tangible assets.”²⁷⁵

Consistent with mineral-valuation standards and international arbitral jurisprudence, Navigant valued the Imperial Project using multiple approaches, including a complete DCF valuation, a complete market-transaction valuation, and a complete past-transaction valuation. Navigant also explained why it declined to value the Imperial Project using a comparable public company approach.²⁷⁶ Each of Navigant’s approaches

²⁷² Behre Dolbear Supp. Rep. at 9 (“Behre Dolbear’s valuation reports will typically follow the requirements of the two aforementioned [CIMVal and VALMIN] codes and the TSX.V. exchange.”). The TSX.V. exchange is not designed for determining fair market value, and thus Behre Dolbear should not have relied on it in its valuation. Navigant Supp. Rep. ¶ 118 n.85.

²⁷³ *Id.* ¶¶ 134-37 (citing various codes).

²⁷⁴ *Id.* ¶ 136 (citing supplement).

²⁷⁵ CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 591 (1998).

²⁷⁶ Navigant Rep. ¶ 58 (explaining that, because “publicly traded gold mining companies are essentially a portfolio of mining claims which may be in different stages of development, the normalized market value of these companies . . . is not a reliable indicator of an individual mining project” such as the Imperial Project).

produced valuations that were reasonably consistent with one another and that correlated closely with Glamis's own contemporaneous valuations. Based on these multiple, mutually reinforcing valuations, Navigant confidently appraised the Imperial Project at \$34.5 million in the pre-backfill scenario and \$21.5 million in the post-backfill scenario.²⁷⁷

Behre Dolbear, by contrast, utilized only a single approach in reaching its \$49.1-million pre-reclamation valuation and its *negative* \$8.9-million post-reclamation valuation. This single approach, moreover, was not even a single *individual* approach, but resulted from Behre Dolbear's idiosyncratic mixed-method valuation. Behre Dolbear valued part of the Imperial Project using a DCF analysis and another part by simply assigning an average valuation multiple of \$25.71 to the Singer pit's gold reserves (based on the erroneous assumption that it could not value the Imperial Project's "probabilized reserves" in a DCF valuation). Navigant demonstrated that if Behre Dolbear had appropriately applied a DCF analysis to all of the mining claims, it would have valued the Imperial Project, pre-reclamation, at \$35.3 million.²⁷⁸ Likewise, if Behre Dolbear had applied its \$25.71 average valuation multiple to the project's total estimated gold reserves, it would have valued the project at \$36.6 million.²⁷⁹ Instead, Behre Dolbear opted to pick and choose among these techniques, thus artificially inflating the appraised pre-reclamation value of the Imperial Project by some 30%, to \$49.1 million. As the

²⁷⁷ In its first report, Navigant reported a pre-reclamation value of \$32.7 million. After correcting its transaction multiple, Navigant has revised that valuation upward slightly, to \$34.5 million. *Id.* ¶ 171.

²⁷⁸ Navigant Rep. ¶ 127.

²⁷⁹ *Id.* ¶ 84.

Iran-United States Claims Tribunal has observed, “a valuation based on a piecemeal approach, item by item, is unsatisfactory if used on its own.”²⁸⁰

In sum, each of these four errors of methodology critically undermines Behre Dolbear’s valuation. That valuation, therefore, cannot be relied upon to demonstrate that Glamis suffered a total deprivation of the value of its investment. This becomes even clearer when reviewing Behre Dolbear’s valuation of the Imperial Project before and after California imposed complete backfilling requirements.

iv. Behre Dolbear’s Valuation Of The Imperial Project Mining Claims In The “Pre-Backfill Scenario” Is Seriously Flawed

Navigant and Behre Dolbear have ascribed very different values to the Imperial Project before California promulgated complete backfilling requirements for open-pit metallic mines. Navigant reconciled its three separate valuation approaches (DCF, market transaction, and prior transaction) to value the project at \$34.5 million, in line with Glamis’s own contemporaneous valuation of \$32.4 million.²⁸¹ Behre Dolbear, by contrast, employed its single, mixed-method approach (part DCF and part market transaction, based on information that it failed to produce) to value the project at \$49.1 million. Navigant has identified four principal errors in Behre Dolbear’s pre-reclamation valuation, in addition to the four systemic errors discussed above.

First, Behre Dolbear materially miscalculated the applicable discount rate. Because cash flow analyses are extremely sensitive to the discount rate, small changes in the discount rate can cause large changes in the appraised value. In this case, for

²⁸⁰ *Sola Tiles, Inc. v. Iran*, AWD 298-317-1 (Apr. 22, 1987), 14 IRAN-U.S. CL. TRIB. REP. 223, 238 (1987).

²⁸¹ Glamis’s contemporaneous valuation did not include the Singer pit claim’s estimated \$6.4 million value. When taken into account, Glamis’s contemporaneous valuation increases from \$26.0 million to \$32.4 million. *See supra* n.225.

instance, the experts' varying discount rates account for the vast majority of the difference in the parties' pre-backfill DCF valuations.²⁸²

Navigant calculated a discount rate of 9.2% using the traditional capital asset pricing method, or CAPM, which produces an after-tax discount rate.²⁸³ Navigant then confirmed its rate by comparing it to discount rates used in similar projects and by reconciling it with the other valuation methods employed for the Imperial Project.²⁸⁴

Behre Dolbear similarly calculated a 9.28% discount rate using the risk build-up method, but then discounted that rate by 30% (to 6.5%), ostensibly to account for taxes.²⁸⁵ Behre Dolbear, moreover, declined to reconcile its reduced discount rate with discount rates used in similar projects or with any other valuation method.

The relevant issue, then, is whether the experts' respective discount rate methodologies are pre-tax or after-tax. Citing its own past practice, Behre Dolbear argues that its approach returns a pre-tax discount rate, and that the discount rate therefore should be adjusted to account for taxes.²⁸⁶ Navigant, by contrast, cites authoritative commentary and standard industry practice to show that the experts' discount rates necessarily are calculated after taxes, and therefore should not be adjusted to account for taxes a second time.²⁸⁷ One standard authority, for instance, reports that, "CAPM discount rates are always taken on an after-tax basis, and are applied to after-tax

²⁸² Navigant Supp. Rep. ¶¶ 42, 193.

²⁸³ Navigant Rep. ¶ 116.

²⁸⁴ *Id.* ¶ 117.

²⁸⁵ Behre Dolbear Rep. at A6-7.

²⁸⁶ Behre Dolbear Supp. Rep. at 16-17.

²⁸⁷ Navigant Supp. Rep. ¶¶ 182-85.

cash outlays.”²⁸⁸ Indeed, even the one commentary that Behre Dolbear cites to support its unorthodox approach recognizes that “[t]he easiest thing to do is just get the after-tax discount rate from the market (hopefully) or from the CAPM model (which is also the market).”²⁸⁹ Behre Dolbear’s claim that the experts’ respective valuation methodologies produce “*pre-tax* discount rate[s]” thus is mistaken.²⁹⁰

Behre Dolbear reports that it has used its pre-tax DCF approach for years. This may be true, but it is irrelevant. Neither Behre Dolbear nor Glamis has produced evidence showing that other valuation professionals accept Behre Dolbear’s unorthodox approach, or that others share the company’s peculiar understanding of accounting methodology. In the absence of such evidence, and in the face of ample evidence supporting Navigant’s traditional approach, this Tribunal should reject Behre Dolbear’s discount rate calculation.

Second, Behre Dolbear underestimated the project development time by assuming that Glamis could develop, construct, and commence operations at the Imperial Project in just 19 days. By contrast, after reviewing the contemporaneous evidence – including Glamis’s internal schedule, the EIS/EIR, and the “definitive” Final Feasibility Study²⁹¹ – Navigant showed that Glamis would require at least six months to prepare for and commence mining operations.²⁹² Behre Dolbear’s supplemental report not only ignores this contemporaneous evidence, but ignores the entire issue. It remains uncontested,

²⁸⁸ *Id.* ¶ 185 (quoting Shimon Awerbuch, *The True Cost of Fossil-Fired Electricity in the EU: A CAPM-based Approach*, at 10).

²⁸⁹ *Id.* ¶ 180 (quoting Mary Ann Lerch, *Pretax / Aftertax Conversion Formula for Capitalization Rates and Cash Flow Discount Rates* (1990)).

²⁹⁰ Behre Dolbear Supp. Rep. at 16-17 (emphasis added).

²⁹¹ See Reply ¶ 99 (citing the 1996 Final Feasibility Study as “the definitive source of technical information for the Project”).

²⁹² Navigant Rep. ¶ 118.

therefore, that Behre Dolbear erroneously assumed that gold-production could begin at least six months earlier than was possible. Based on this false assumption, Behre Dolbear artificially increased the claimed present value of the Imperial Project's cash flow, and hence exaggerated the project's overall appraised value.

Third, Behre Dolbear's approach to calculating the "transaction multiple" for gold reserves is incorrect, and its criticism of Navigant's approach is misguided. As part of its mixed-method valuation, Behre Dolbear purported to review a large database of sales information in order to calculate the per-ounce "transaction multiple" of \$25.71 for the Singer pit's gold reserves.²⁹³ As discussed above, this figure cannot be accepted, as Behre Dolbear failed to produce the "database" upon which it claims to have relied. Neither Navigant nor this Tribunal, therefore, is able to examine and verify the "comparables" Behre Dolbear purported to rely upon for its calculations, including the date, location, geologic domain, grade of gold, size of deposit, operating costs, and other relevant characteristics of the projects being compared.

Behre Dolbear's non-production forced Navigant to incur the time and expense of independently calculating its own transaction multiple. Unlike Behre Dolbear, Navigant revealed the data supporting its calculation, and illustrated precisely how the identified transactions shared comparable attributes with the Imperial Project.²⁹⁴ Navigant's

²⁹³ Behre Dolbear Rep. at 18-19.

²⁹⁴ Behre Dolbear also criticizes Navigant for including comparable transactions that occurred after the alleged expropriation date, claiming that valuations for takings must be based on information known or available on the date of the valuation. *See* Behre Dolbear Supp. Rep. at 12. Navigant, however, correctly observes that "information which only becomes known after the valuation date should be excluded from the analysis *if* such information would inappropriately bias the valuation higher or lower." Navigant Supp. Rep. ¶ 220 (emphasis in original). Here, California's reclamation requirements had no effect on global market conditions, which were generally unchanged immediately before and after the alleged expropriation date. Because the two transactions Behre Dolbear complains of occurred outside of California, Navigant properly considered information regarding their sales.

transparent and verifiable approach should be preferred over Behre Dolbear's reliance on its secret "database" of comparables.

Navigant also observed that, once again, Behre Dolbear's valuation methodology has veered from the approach it has taken in other valuations. In this arbitration, Behre Dolbear calculates the Imperial Project's valuation multiple by evaluating sales over a seven-year period, whereas it has used a two- to three-year period in other valuations.²⁹⁵ As Navigant observes, comparing transactions over seven years produces unreliable results, due to changes in external market conditions, which is why Navigant and Behre Dolbear (outside of this arbitration) generally evaluate transactions over a two-year period.²⁹⁶ Behre Dolbear has offered no explanation for its departure from past practice.

Fourth, when assigning a value to the Imperial Project in the pre-backfill scenario, Behre Dolbear failed to evaluate prior transactions involving mining claims there, including Glamis's own purchase in 1994 of 35% of the Imperial Project's mining claims. Navigant observed that the data from the 1994 transaction offers an additional contemporaneous measure of the Imperial Project's value.²⁹⁷ Behre Dolbear dismisses this prior transaction on grounds that, at that time, the project contained only resources, not reserves. When evaluating the 1994 transaction, however, Navigant specifically

Navigant's approach accords with international arbitral practice. In the *Sedco* case, for instance, the Iran-United States Claims Tribunal accepted – as an "approximate guide" – information regarding a comparable sale that occurred nearly two years after the date of the alleged taking. *See Sedco, Inc. v. Iran*, AWD 309-129-3 (July 2, 1987), 15 IRAN-U.S. CL. TRIB. REP. 23, 37-38, 50-51 (1987). The issue in that case was not whether the information post-dating the alleged expropriation could be accepted (it was), but whether the relevant market had changed so radically as to render the information reliable (it had not). *See id.* Here, neither issue is relevant, as Navigant has relied on sales that occurred within *months*, not years, of the alleged expropriation.

²⁹⁵ *See* Navigant Supp. Rep. ¶ 214.

²⁹⁶ *See* Navigant Rep. ¶ 75.

²⁹⁷ Navigant Supp. Rep. ¶ 230; *see also* CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 599 (1998) ("Very useful evidence concerning the current market value of tangible property also can be found in recent transactions concerning that same property.").

adopted the “Preliminary *Reserve* Estimation” that Glamis itself had commissioned for the transaction and considered the relevance of this information as part of its overall valuation approach.²⁹⁸

Behre Dolbear’s mixed-method valuation, by contrast, produced much higher multiples: \$25.71 per ounce for the Singer pit’s “probabilized” reserves (relying on Behre Dolbear’s secret “database”), and \$36.40 per ounce for the East and West pits’ proven and probable reserves (using a poorly supported DCF model). Had Behre Dolbear utilized prior-transaction information (or, indeed, any other valuation approach), it would have realized that its \$25.71 - \$36.40 estimates were out of line and thus unreliable.

As a result of these four errors, Behre Dolbear overestimated the Imperial Project’s pre-reclamation value by approximately \$14.6 million.

v. Behre Dolbear’s Valuation In The “Post-Backfill Scenario” Likewise Is Seriously Flawed

Navigant has demonstrated that Behre Dolbear *underestimated* the Imperial Project’s value in the post-backfill scenario by \$30.4 million. Although Behre Dolbear has conceded at least one significant error in its post-reclamation valuation – it double-counted \$4.77 million in mining costs²⁹⁹ – it nonetheless continues to argue that the Imperial Project is worth a *negative* \$8.9 million in the post-backfill scenario.³⁰⁰

Navigant’s two valuation reports, however, have identified five principal errors in Behre Dolbear’s post-reclamation valuation, in addition to the systemic errors discussed

²⁹⁸ Navigant Supp. Rep. ¶ 232 (citing Mine Reserves Associates, Inc., *Preliminary Reserve Estimation of the Indian Rose and Ocotillo Gold Projects* (1994)) (emphasis added).

²⁹⁹ Behre Dolbear Supp. Rep. at 8 (acknowledging its double-counting).

³⁰⁰ *Id.* at 4.

above.³⁰¹ These five errors demonstrate that the Imperial Project retains substantial value and that, as such, the California reclamation requirements cannot be found to have effected a full deprivation of Glamis's investment, even assuming, for purposes of this valuation exercise, that those requirements had been imposed on Glamis.

First, Behre Dolbear claims that Glamis would have been required to post a \$61.1-million cash bond to meet its financial-assurance obligation for reclamation.³⁰² Navigant's initial report, however, pointed out that Behre Dolbear has managed to find the most expensive means for Glamis to meet its financial-assurance obligation for the Imperial Project, and that Glamis could have augmented the project's net present value by approximately \$12 million simply by obtaining a letter of credit in lieu of a cash bond, as other mining companies routinely have done.³⁰³

Based on a "personal discussion" with Mr. Jeannes, Behre Dolbear now argues that "a 100% cash funding requirement for the bonds was the *best* arrangement possible" for Glamis.³⁰⁴ Glamis similarly argues that "cash equivalent financial assurances were *virtually* the only option available to a company like Glamis."³⁰⁵ These statements, however qualified, contradict Mr. Jeannes's recent testimony before the United States Congress. There, Mr. Jeannes explained that because Glamis is "unable to obtain surety

³⁰¹ Navigant's reports rely in part on Norwest's two expert reports. Norwest has reported significant additional errors in Behre Dolbear's valuation reports, including: (1) adding \$15.4 million in "equipment refurbishment" costs, despite the fact that Glamis appears to have factored such costs into its reclamation plan; and (2) erroneously assuming that backfilling costs are equivalent to excavation costs less blasting costs. Norwest Supp. Rep. ¶¶ 66-67.

³⁰² To assure adequate reclamation, the SMGB regulations require financial assurance mechanisms, which, for non-governmental mining operators, include surety bonds, irrevocable letters of credit, and trust funds. *See* CAL. CODE REGS. tit. 14, § 3803 (2003).

³⁰³ Navigant Rep. ¶ 196.

³⁰⁴ Behre Dolbear Supp. Rep. at 19 (emphasis added).

³⁰⁵ Reply ¶ 101 (emphasis added).

bonding in the current regulatory and market environment,” the company has had “to put up cash or equivalents in the amount of 100% of the required bond amount, *or to attempt to enter into . . . letters of credit for bonding.*”³⁰⁶ “Glamis is fortunate,” Mr. Jeannes added, “to have the financial capacity to meet its bonding requirements in this fashion.”³⁰⁷ Cash-equivalent financial assurances, therefore, clearly were not “the only option available to a company like Glamis.”³⁰⁸

Further evidence that Glamis never anticipated meeting its financial-assurance obligation with 100% cash-funding comes from Glamis’s January 2003 confidential valuation of the Imperial Project. In that memorandum, Mr. Voorhees (Glamis’s COO) presented Mr. Jeannes and Mr. McArthur (Glamis’s CEO) with a detailed breakdown of the costs of complying with California’s reclamation requirements. Notably absent from that breakdown, however, is the *millions of dollars* in additional costs that Behre Dolbear now claims Glamis would have incurred to meet its financial-assurance obligation for reclamation. Glamis asks this Tribunal to disregard Mr. Voorhees’ “preliminary internal” estimate of the backfilling costs, in part precisely because Mr. Voorhees failed to account for the financial-assurance costs of reclamation.³⁰⁹ Implicit in Glamis’s argument, however, is the suggestion that Glamis’s Chief Operating Officer was so ill-informed that he would notify the company’s President and CEO in writing that the Imperial Project had significant *positive* value without realizing that Glamis’s financial-assurance

³⁰⁶ Behre Dolbear Supp. Rep. at A4-50 (congressional testimony of C. Jeannes).

³⁰⁷ *Id.* (congressional testimony of C. Jeannes).

³⁰⁸ Reply ¶ 101 (emphasis added).

³⁰⁹ *Id.* ¶ 102; Second Statement of C. Kevin McArthur ¶ 2.

obligation would have eviscerated the project's entire positive value. More plausibly, Mr. Voorhees never reported those costs because Glamis never planned to incur them.

In any event, Glamis has failed to provide *any* documentary evidence establishing the actual costs to Glamis of its (or other mining companies') financial-assurance obligations for reclamation, despite the critical importance of this issue to its expropriation claim.³¹⁰ The significance of this omission cannot be overstated. As reported in the Counter-Memorial: "even accepting all of Behre Dolbear's other mistaken assumptions, correcting for this single error would still leave the Imperial Project mining claims with a *positive* net present value after complying with the reclamation requirements."³¹¹ Glamis's entire expropriation claim therefore can be disposed of on this basis alone.

Second, Behre Dolbear overestimated the volume of material required to be backfilled, principally by inflating the Imperial Project's "swell factor" (the amount by which material expands when removed from the pits). The greater the swell factor, the greater the volume of waste material that must be backfilled, and hence the greater the costs of reclamation. Indeed, because the volume of waste material is the "primary driver of increased reclamation costs,"³¹² calculating the swell factor is critical to establishing an accurate post-backfill valuation.

Behre Dolbear has calculated a 35% swell factor, which is 66% greater than the 23% weighted average swell factor determined by Norwest, by BLM, and even by

³¹⁰ Navigant, by contrast, cites numerous examples of other mining companies that were able to obtain letters of credit that were not backed by cash for reclamation assurances. Navigant Supp. Rep. ¶ 255.

³¹¹ Counter-Mem. at 177-78 (emphasis in original).

³¹² Behre Dolbear Supp. Rep. at 1.

Glamis itself.³¹³ Prior to this arbitration, in fact, Glamis *consistently* calculated a weighted average 23% swell factor, including in a 1995 memorandum sent to Glamis's President and CEO (and copied to Glamis Project Geologist Dan Purvance), and in a 1996 letter from Mr. Purvance to a Glamis consultant.³¹⁴

Behre Dolbear now claims that the 1996 letter was not for the purpose of establishing the swell factor, and that the pages attached to the 1995 memorandum "apparently were attached improperly from another document [that] dealt with swell factors."³¹⁵ This startling information is found not in Mr. Purvance's witness statement, but in Behre Dolbear's supplemental report, which relies for this information exclusively on a "personal communication with Mr. Dan Purvance of Glamis."³¹⁶ Glamis thus asks this Tribunal to ignore at least 2 critical contemporaneous documentary evidence establishing a 23% swell factor because Mr. Purvance supposedly told Behre Dolbear that, "apparently," the documents supporting the 1995 memorandum "were attached improperly from another document," and that the 1996 letter means something other than what it says. Although Mr. Purvance furnished a witness statement with Glamis's Reply, he failed to confirm either allegation.³¹⁷ Glamis has offered no justification for this Tribunal to credit Behre Dolbear's hearsay evidence over the plain meaning of contemporaneous documents prepared by Glamis in the ordinary course of business.

³¹³ Norwest Rep. Table 3 (citing BLM and Glamis documents).

³¹⁴ *Id.*

³¹⁵ Behre Dolbear Supp. Rep. at 27-28.

³¹⁶ *Id.* at 27.

³¹⁷ As jurists for centuries have recognized, "If he who could and ought to have explained himself has not done it, it is to his own detriment." EMMERICH DE Vattel, *THE LAW OF NATIONS: OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* (Joseph Chitty ed., 1835), Ch. XVII, §264.2d (Book II).

In any event, the alternative evidence proffered by Behre Dolbear to demonstrate its claimed 35% swell factor is entirely inapposite. Behre Dolbear purports to have “derived its 35% swell factor from Glamis’ 1996 Final Feasibility Study for the Imperial Project[.]”³¹⁸ That document, however, is silent on the swell factor for reclamation. Rather, as Behre Dolbear itself admits, it discusses the loose density of waste material in order to “determine *equipment production capacity* and to estimate the number and size of the units of equipment required” for excavation.³¹⁹ Behre Dolbear’s swell factor was tangentially derived from one of seventeen different assumptions incorporated into a “Loader Productivity” analysis.³²⁰ Behre Dolbear also arbitrarily applied the same 35% swell factor to the Imperial Project’s ore, waste rock, and gravel.³²¹

Norwest, by contrast, derived its 23% weighted average swell factor from three separate analyses that dealt solely and specifically with the Imperial Project’s in-place and loose material densities.³²² These analyses appropriately account for the differing component swell factors for ore, waste rock, and gravel, and thus appropriately are used to calculate the *swell factor for reclamation*.³²³

As Norwest explains, material generally does not have the same volume at different stages of production, but becomes increasingly compacted after it has been excavated, hauled, dumped, driven over, and so forth.³²⁴ Thus, generally speaking, virgin waste has no swelling, blasted waste has some swelling, waste in the excavation bucket

³¹⁸ Reply ¶ 99.

³¹⁹ Behre Dolbear Supp. Rep. at 27 (emphasis added).

³²⁰ See Navigant Supp. Rep. ¶ 261.

³²¹ Norwest Supp. Rep. Table 5.

³²² *Id.*

³²³ Norwest Supp. Rep. Table 5, ¶ 40.

³²⁴ *Id.* ¶ 43.

has the most swelling, waste in haul trucks has less swelling, and waste in stockpiles and pits has even less swelling.³²⁵

Behre Dolbear has failed to explain why this Tribunal should ignore Glamis's and BLM's contemporaneous documents created specifically to address the Imperial Project's swell factor in favor of a document created to determine equipment productivity.

Because of the inflated swell factor and inefficient backfilling method,³²⁶ Behre Dolbear's valuation erroneously assumes that an additional 40 million tons of material would need to be handled during reclamation.³²⁷ This, in turn, led Behre Dolbear to overstate the Imperial Project's reclamation costs by approximately \$14.1 million.³²⁸

Third, Behre Dolbear significantly inflated the Imperial Project's reclamation costs by inventing onerous backfilling obligations nowhere found in the reclamation regulations. Behre Dolbear interprets the "engineered backfilling" requirement in California's SMGB regulation to require Glamis to perform a complete, "bottom-up" reclamation, with layered compacting (as opposed to allowing it to dump waste material from the pit crest). In doing so, however, Behre Dolbear ignores the regulations' previous section, which distinguishes urban uses (which may require complete, bottom-up reclamation) from non-urban uses (which do not). Section 3704 provides in relevant part:

³²⁵ *Id.* ¶ 44.

³²⁶ The method employed by Behre Dolbear for backfilling the East pit also is flawed and inefficient. Behre Dolbear incorrectly assumed that all of the mined waste that was not backfilled into the West pit would need to be either backfilled into the East pit or spread to surface level. This is incorrect; only the material exceeding 25 feet above the original topography of the two waste dumps would need to be backfilled. *Id.* ¶ 50 (citing regulations).

³²⁷ *Id.* Table 9 (reporting 187 million tons of material requiring backfilling, as opposed to 227 million tons, as reported by Behre Dolbear).

³²⁸ *See* Norwest Supp. Rep. Table 10 (40-million-ton difference multiplied by Behre Dolbear's \$0.353 unit cost per ton equals \$14.1 million).

- (a) Where backfilling is proposed for urban uses (e.g., roads, building sites, or other improvements sensitive to settlement), the fill material shall be compacted in accordance with the Uniform Building Code . . . as appropriate for the approved end use.
- (b) Where backfilling is required for resource conservation purposes (e.g., agriculture, fish and wildlife habitat, and wildland conservation), fill material shall be backfilled to the standards required for the resource conservation use involved.³²⁹

Section 3704.1 – the regulation at issue in this arbitration – then provides that engineered backfilling, recontouring, and revegetating shall be required so as to protect surface water and groundwater and to create a final surface area consistent with the surrounding topography and end-use of the land.³³⁰ Behre Dolbear seizes upon the term “engineered” to suggest that Section 3704.1 requires complete, bottom-up backfilling, with layered compacting of waste material.³³¹ This assumption, however, simply reads out of existence the distinction made in Section 3704 between urban and non-urban reclamation. The Imperial Project is not in an urban setting; it is in the CDCA desert, on land designated for “limited use.” Behre Dolbear’s treatment of the Imperial Project area as if a skyscraper were being built on the reclaimed land is simply not tenable.

Even more illogically, Behre Dolbear assumes that bottom-up reclamation (with layered compacting of the waste material) would be required for the large East pit, but not for the smaller West and Singer pits.³³² That is, Behre Dolbear not only reads non-existent backfilling requirements into the SMGB regulations, but then picks and chooses

³²⁹ CAL. CODE REGS. tit. 14, § 3704 (2003).

³³⁰ CAL. CODE REGS. tit. 14, § 3704.1 (2003).

³³¹ Behre Dolbear Supp. Rep. at 32-33 (“A plain reading of the backfilling regulations . . . specifies special engineering considerations”).

³³² *Id.* at 33 (“Movement of backfill materials *into the East Pit* with equipment and placement, rather than dumping from the crest of the pit, was contemplated in the previous Behre Dolbear analysis in order to fulfill the above requirements” of § 3704.1) (emphasis added).

how it intends to apply those regulations in its valuation.³³³ Behre Dolbear's inaccurate interpretation of the SMGB regulations seems designed for one purpose: to inflate the backfilling costs in order to arrive at a negative value for the Imperial Project.

Fourth, Behre Dolbear refuses to acknowledge the Imperial Project's "real option value," which is the value to Glamis arising from its ability to defer mining operations until the price of gold or other economic factors improve (as in fact they have).³³⁴ Behre Dolbear claims that a "real option value is not applicable to the valuation of mining properties."³³⁵ Behre Dolbear even chastises Navigant for a "lack of expertise in valuing mineral properties and the mineral industry by making this argument."³³⁶ Curiously, though, Mr. Jeannes recently highlighted in public statements the "real option value" of Glamis's mines. He observed: "People aren't just buying [gold companies] based on what our cash flow will be – they also buy us because they want to participate in the increase in margins if the price of gold goes up."³³⁷ "To get that option," he added, "they're willing to pay multiples of cash flow, earnings and net asset value that you don't see getting paid in other sectors."³³⁸ He noted that "it takes a while to get your arms around the traditional earnings and cash flow multiples that we trade at because our underlying commodity has an optionality built into it."³³⁹ Apparently, Behre Dolbear has

³³³ Behre Dolbear also ignores the practice of other mining companies. Norwest reports other instances where mining companies effectively and safely reclaimed pits by dumping waste material from the crest. Norwest Supp. Rep. ¶ 34.

³³⁴ Navigant Rep. ¶¶ 147, 212.

³³⁵ Behre Dolbear Supp. Rep. at 22.

³³⁶ *Id.*

³³⁷ Joshua Hamerman, *Gold Mining Takeout Multiples Glitter*, MERGERS & ACQUISITIONS REP., Jan. 29, 2007, at 1.

³³⁸ *Id.*

³³⁹ *Id.*

not gotten its arms around the “real options” concept, as it continues to argue, erroneously, that “[r]eal option value is not applicable to the valuation of mining properties.”³⁴⁰ The real option to delay the start of production means that the Imperial Project has always had positive value before and after California promulgated complete backfilling requirements.³⁴¹

Fifth, Behre Dolbear has premised its valuation on an outdated mining plan. Navigant observed that the imposition of complete backfilling requirements would impel any rational mining operator to re-evaluate and redesign its mining plan, to minimize additional costs and to maximize operational efficiencies.³⁴² Behre Dolbear dismisses Navigant’s observations as mere “speculation,” claiming that it would be too expensive and time-consuming to redesign an existing mining plan.³⁴³ But if a project’s reclamation costs were to increase from \$3 million to nearly \$100 million (as Behre Dolbear claims),³⁴⁴ it would seem beyond “speculation” that a rational actor would redesign its mining plan to minimize those costs and to increase operational efficiencies.³⁴⁵

Indeed, the best evidence of what a rational actor would do is to look at what other actors actually have done. When Golden Queen, for instance, announced its

³⁴⁰ Behre Dolbear Supp. Rep. at 22. The CIMVal standards also include option-pricing valuation in their list of acceptable mineral-property valuation methodologies. See Navigant Supp. Rep. ¶¶ 280-81 (citing CIMVal standards). A large body of academic work also supports the applicability of real-option valuation to mineral properties. See *id.* ¶ 283.

³⁴¹ Navigant Supp. Rep. ¶ 70.

³⁴² Navigant Rep. ¶ 136; see also Norwest Supp. Rep. ¶ 20.

³⁴³ Behre Dolbear Supp. Rep. at 21.

³⁴⁴ *Id.* at 1 (claiming that reclamation costs have increased “from \$3 million to \$83.1 million given the complete backfilling, re-contouring, and financial assurance provisions of the Mandatory Backfill Regulation (excluding \$15.4 million required for rebuilding mobile equipment)”).

³⁴⁵ Norwest has made some preliminary revisions to Glamis’s mining plan to demonstrate the cost-savings and operational efficiencies arising from a mining plan revised to account for complete backfilling. Norwest Supp. Rep. ¶¶ 30-32.

intention to proceed with its Soledad Mountain Project notwithstanding the SMGB backfilling regulations, it publicly reported that it had “rethought and re-engineered” the project “in an effort to find sound technical and cost-effective solutions that [would] permit the Project to proceed.”³⁴⁶ Glamis could have done the same, but it opted instead to commence this arbitration.

vi. With Gold Prices Skyrocketing, Glamis’s Mining Claims Are Worth More Now Than Ever

Gold prices have skyrocketed in recent years, rising from \$325 in 2002 to more than \$675 today.³⁴⁷ The commodities market and industry experts anticipate further gains.³⁴⁸ Glamis’s CEO, for instance, recently predicted that gold prices will rise to \$1,000 per ounce by 2008 or 2009.³⁴⁹ In light of these dramatic changes in the market, Navigant has estimated a *current* value for the Imperial Project (even with complete backfilling) in excess of \$159 million.³⁵⁰

Despite the meteoric rise of gold prices, Behre Dolbear claims that the value of the Imperial Project has actually *decreased* in recent years, because operating costs have “risen in lockstep with the gold price.”³⁵¹ As Navigant illustrates, however, the average gold-mining company’s *share price* more than doubled from 2002 to 2006, thus

³⁴⁶ *Id.* ¶ 22 (quoting Golden Queen Mining Co. Ltd., Overview, available at <http://www.goldenqueen.com>). The Brewer Gold Mine in South Carolina provides a similar example. There, the original reclamation plan called for turning the mine’s open pit into a deep lake. After environmental problems surfaced with that plan, the mining company revamped the mining plan and, following excavation, *completely backfilled the open pit*. *The Mineral Industry of South Carolina*, U.S. Geological Survey and South Carolina Geological Survey Publication (1997), available at <http://minerals.usgs.gov/minerals/pubs/state/984598.pdf>.

³⁴⁷ Navigant Supp. Rep. ¶ 307 (figure 2).

³⁴⁸ See Navigant Rep. ¶¶ 217-18 (citing information regarding gold-futures market).

³⁴⁹ Diane Francis, *Goldcorp Sees Golden Age*, FIN. POST, Feb. 17, 2007, at FP2.

³⁵⁰ Navigant Supp. Rep. ¶ 314.

³⁵¹ Behre Dolbear Supp. Rep. at 2.

undermining Behre Dolbear's unsupported cost assumptions.³⁵² Navigant further observes that if Behre Dolbear's price and cost assumptions were correct (*i.e.*, \$337 per-ounce gold prices and 85% increases in mine operating costs), the Imperial Project would have a negative value today even *without the reclamation requirements*.³⁵³

In fact, neither Behre Dolbear's price nor its cost assumptions are correct. Behre Dolbear claims that, because "mineral commodity prices are too volatile to base long-term future prices on other than historical prices," the company "used a standardized 10-year average price approach in its valuation – *as it has for all other similar mineral appraisals over the past decade*, including for the U.S. Government."³⁵⁴ This claim, however, is demonstrably false. In the two publicly available valuations performed outside of this arbitration that Navigant was able to locate, Behre Dolbear *increased* historic gold prices to account for current market conditions. In a recent valuation, for instance, the company reported:

Behre Dolbear typically uses historic prices over a 10-year period as the basis for the prices used in cash flows. *The strength being exhibited in the present metals markets and the projected continuation of that strength, however, cannot be ignored.* The metal prices utilized in the Income Approach valuation cash flows, accordingly, are derived from the *average of the 10-year historic prices* for gold, silver, copper, lead and zinc *and the average of the prices for these commodities over the first six months of 2004*.³⁵⁵

Behre Dolbear employed this same methodology in its recent Azerbaijan valuation.³⁵⁶ As such, Behre Dolbear's criticism of Navigant's consideration of the current strength of the

³⁵² Navigant Supp. Rep. ¶ 307 (figure 2).

³⁵³ *Id.* ¶ 315.

³⁵⁴ Behre Dolbear Supp. Rep. at 4, 9 (emphasis added).

³⁵⁵ Navigant Supp. Rep. ¶ 319 (quoting Behre Dolbear's Hellas Gold Mine Valuation Report) (emphasis added).

³⁵⁶ *Id.* ¶ 320 (quoting Behre Dolbear's Anglo Asian Mining's Azerbaijan Gold and Copper Claims).

gold market when calculating the Imperial Project's *current* value is not only wrong, but is proven to be wrong by its own valuations.³⁵⁷

Behre Dolbear's cost assumptions are equally erroneous. Behre Dolbear asserts that mining production costs have increased 85% since 2002, but has introduced no support for its claim. Navigant, by contrast, has cited the Western Mine Engineering Cost Index to show that, between 2002 and 2006, mining companies' average capital costs increased by 18.09% and average operating costs increased by 26.44%.³⁵⁸ In any event, Behre Dolbear itself apparently does not believe that production costs have risen by 85%. If it did, it would have calculated the Imperial Project's current value at a *negative \$242.5 million* in the post-backfill scenario as of 2006 (instead of negative \$23.8 million, as it claims).³⁵⁹ Indeed, assuming these cost and price projections, Behre Dolbear would value the Imperial Project today at a negative \$118 million, *even without complete backfilling requirements*.³⁶⁰

* * *

In sum, even assuming that SB 22 and the SMGB regulation were applied to Glamis, the evidence shows that the Imperial Project was worth at least \$21.5 million as of the date of the alleged expropriation, and is worth at least \$159 million today. An evaluation of the economic impact of the California measures thus weighs heavily in

³⁵⁷ Indeed, in its valuations of the Hellas Gold and Anglo Asian Mining's Azerbaijan projects, Behre Dolbear itself acknowledged that the value of *gold properties* depends upon the *current gold price*. See Navigant Supp. Rep. ¶¶ 319-20. This directly contradicts Behre Dolbear's stated position in this arbitration.

³⁵⁸ *Id.* ¶ 314. It is noteworthy that Glamis (now Goldcorp) touts itself as "the world's lowest cost gold producer." See <http://www.goldcorp.com>.

³⁵⁹ Navigant Supp. Rep. ¶ 77.

³⁶⁰ *Id.* ¶ 315.

favor of the United States. Indeed, in light of the fact that Glamis's investment retains significant value, its expropriation claim fails on this basis alone.

b. The California Measures Could Not Have Frustrated An Investor's Reasonable Investment-Backed Expectations

Given the regulatory climate in California at the time Glamis made its investments, including SMARA, Glamis could have had no reasonable expectation that the SMGB would not amend its regulations to require complete backfilling of open-pit metallic mines. And, even assuming *arguendo* that the Quechan's sacred sites had not been discovered until after Glamis had made its investments in the Project,³⁶¹ Glamis could not have had a reasonable expectation that California would not legislate in the form of SB 22 to protect those sites.

i. An Investor's Expectations Must Be Informed By The Regulatory Framework Existing At The Time Of The Investment

Glamis's analysis of whether its expectations were reasonable is premised on a fundamental misunderstanding of the proper legal question. Glamis phrases the issue as "whether Glamis was reasonable in its view, informed by the applicable law and regulations, that such measures would not result in the full devaluation of its property rights."³⁶² Glamis also states that "there was no way for even the most prudent of investors to recognize that so-called cultural-resource protection would yield an expropriation of Glamis's Imperial mining claims."³⁶³ These statements, of course, beg

³⁶¹ See Counter-Mem. at 50-58 (describing the extensive evidence in existence prior to Glamis's acquisition of its mining claims that the area in which the Imperial Project is located contained Native American sacred sites).

³⁶² Reply ¶ 144.

³⁶³ *Id.* ¶ 150.

the question. The analysis of whether an investor's expectations were reasonable does not ask whether an investor could have expected its property to be expropriated. Rather, the issue is whether the claimant can show that it acquired its property "in reliance on the non-existence of the challenged regulation,"³⁶⁴ and the extent to which further regulation was foreseeable.³⁶⁵ The inquiry into an investor's expectations is an objective one, and Glamis's "subjective expectations are irrelevant to the reasonableness of the expectations."³⁶⁶ Glamis's claims that its expectations were "reasonable based on its understanding as to the Quechan Tribe's position on the Imperial Project area," and its understanding of the applicable federal and state requirements is therefore inapposite.³⁶⁷

Consideration of whether an industry is highly regulated is a standard part of the legitimate expectations analysis, and Glamis does not contest this. "[T]he regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of [the investor's] expectations."³⁶⁸ Glamis's claim that the United States is trying to "create an exception to its NAFTA obligations" by noting mining's regulated nature is mistaken.³⁶⁹ The United States does not contend that "expropriations are somehow excusable where an industry is regulated."³⁷⁰ Rather, where an industry is already highly regulated, reasonable extensions of those regulations are foreseeable. In such circumstances, the reasonable expectations prong of the analysis weighs against a finding of expropriation.

³⁶⁴ *Good v. United States*, 189 F.3d 1355, 1360 (Fed. Cir. 1999) (citations omitted).

³⁶⁵ *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004).

³⁶⁶ *Id.* at 1349 n.5.

³⁶⁷ Reply ¶ 144.

³⁶⁸ *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring).

³⁶⁹ Reply ¶ 151.

³⁷⁰ *Id.*

Glamis argues that, prior to the enactment of the challenged California measures, “California never once implemented a complete and mandatory backfilling alternative for any mining plan of operations”³⁷¹ As explained above, however, Glamis’s argument that California’s laws did not previously include the specific requirement to completely backfill and recontour and, therefore, the later imposition of these specific requirements frustrated its expectations, is unavailing.³⁷² The United States Supreme Court has long recognized that “[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.”³⁷³ “The reasonable expectations test does not require that the law existing at the time of processing would impose liability;” rather, “[t]he critical question is whether extension of existing law could be foreseen as reasonably possible.”³⁷⁴ As even Professor Wälde, acknowledges, “[t]he investor has also to accept a natural evolution of host state regulation; if no specific stabilization guarantee is obtained (and possibly even then), he/she is not protected from changes in the host state’s law if they express a normal evolution of the law.”³⁷⁵

Examples abound in international and U.S. law of regulatory and legislative action that were found to be reasonably foreseeable extensions of preexisting rules. In *Methanex v. United States*, for example, the claimant complained that it had made certain

³⁷¹ Reply ¶ 76.

³⁷² See *supra* Sec. I.A.2.c.

³⁷³ *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993) (citing *Fed. Hous. Admin. v. Darlington, Inc.*, 358 U.S. 84, 91 (1958)).

³⁷⁴ See *Cane Tenn., Inc. v. United States*, 63 Fed. Cl. 715, 728 (2005) (citing *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001)), *aff’d*, *Cane Tenn., Inc. v. United States*, No. 06-5045, 2007 WL 188155 (Fed. Cir. 2007) (*per curiam*, unpublished decision).

³⁷⁵ Wälde Rep. at III-49; see also *id.* at III-50 (recognizing that “[m]ere commercial expectations are not protected, nor is normal business risk, including the general risk that the regulatory regime will evolve in response to emerging attitudes and the dynamics of the political process”).

investments in its methanol business prior to California's determination to ban MTBE, a methanol-based substance, after concluding that MTBE was the cause of groundwater contamination.³⁷⁶ The Tribunal rejected Methanex's expropriation claim, noting:

Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons.³⁷⁷

In *District Intown Properties Ltd. v. District of Columbia*, the plaintiff purchased an apartment building and land across from the National Zoo in Washington, D.C. and years later sought permits to build on the land.³⁷⁸ Five days before the permits were approved, the property was declared a historic landmark. Subsequently, the plaintiff's building applications were denied. The court concluded that the plaintiff had no reasonable investment-backed expectations that the landmark laws would not be applied to its property, even though its property had not been declared a landmark at the time plaintiff sought a permit. The court found that the plaintiff "knew, or should have known, that the property was potentially subject to regulation under the landmark laws. . . . Businesses that operate in an industry with a history of regulation have no reasonable expectation that regulation will not be strengthened to achieve established legislative ends."³⁷⁹ It was relevant to the court that the plaintiff operated in an industry that had

³⁷⁶ *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Final Award (Aug. 3, 2005).

³⁷⁷ *Methanex Award*, Part IV, Ch. D, ¶ 9.

³⁷⁸ *Dist. Intown Props. Ltd. v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999).

³⁷⁹ *Id.* at 883-84 (citing *Concrete Pipe & Prods. of Cal.*, 508 U.S. at 645); see also *George Washington Univ. v. District of Columbia*, 391 F. Supp. 2d 109, 113 (D.D.C. 2005) (The court found that the imposition of new zoning requirements on the university did not interfere with investment-backed expectations because the university knew that its property was subject to regulation. "Moreover, the Board expressed

historically been subject to regulation, and that before and during the application process the property in question “was the subject of increasing public activity devoted to restricting development through landmark designation.”³⁸⁰

In *Good v. United States*, a land developer asserted that the Army Corps of Engineers’ (“Corps”) denial of his permit to fill a wetlands area amounted to an unlawful taking of his property.³⁸¹ In 1984, Good had obtained county, state, and federal approval to develop his project. After doing so, however, a state commission found that the county had erred in its analysis of the project, and ordered the county to review the project again. In the interim, the county adopted new regulations that prohibited certain land development techniques that Good’s project proposed to use.

Litigation ensued, and Good eventually submitted a new plan in 1990. Shortly before he did so, however, the Lower Keys marsh rabbit was listed as an endangered species under the Endangered Species Act. After he filed his new application, the silver rice rat was also listed as an endangered species. Although the U.S. Fish and Wildlife Service initially found that Good’s plan would not harm the marsh rabbit, it reversed this determination in view of the changed circumstance of the declining marsh rabbit population. The Corps denied Good’s application in 1994, on the grounds that it posed a threat to the rice rat and the marsh rabbit.

In affirming the lower court, the Court of Appeals for the Federal Circuit concluded that no taking had occurred. The court found that, although the animals in

concern in 1985 about the University’s growth and – following its decision to undergo a ‘sharp expansion’ in enrollment in the late 1990s – the University should have anticipated that further regulation might be imminent.”).

³⁸⁰ *Dist. Intown Props.*, 198 F.3d at 884.

³⁸¹ *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999).

question were not protected when Good acquired his property, “In view of the regulatory climate that existed when Appellant acquired the subject property, Appellant could not have had a reasonable expectation that he would obtain approval to fill ten acres of wetlands in order to develop the land.”³⁸² The court further noted, “rising environmental awareness translated into ever-tightening land use regulations. Surely Appellant was not oblivious to this trend.”³⁸³

In *Appolo Fuels, Inc. v. United States*, the plaintiff alleged that its coal mining leases were taken when lands on which its leases were located were declared unsuitable for mining. The plaintiff alleged that “years of practical experience in the mining industry led it to believe that a [lands unsuitable for mining (“LUM”)] petition would not be filed in the first instance and once filed, would not be granted”³⁸⁴

The court found that the specific determination that lands were unsuitable for mining, although very rare, was foreseeable because the “broad scope” of SMCRA’s LUM provisions “gave notice sufficient to defeat Appolo’s reasonable expectations by providing for a process by which OSM could designate lands as unsuitable for mining under a broad array of circumstances,” and found that “Appolo . . . identified no regulatory decision pursuant to SMCRA that would have suggested that the LUM petitions were *unavailable* in the circumstances such as the ones here.”³⁸⁵

³⁸² *Id.* at 1361-62.

³⁸³ *Id.* at 1362.

³⁸⁴ *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004).

³⁸⁵ *Id.* at 1350 (emphasis added); *see also Cane Tenn., Inc. v. United States*, 63 Fed. Cl. 715, 730 (2005) (finding, on facts similar to those in *Appolo Fuels*, that “the enforcement of the [lands unsuitable for mining] provisions of SMCRA was foreseeable as a reasonable possibility even if not foreseeable as a certainty”).

The foregoing cases make it clear that investors who operate in highly regulated industries could not reasonably expect that they would not be subject to extensions of those regulations. Further, the issue in such cases is not whether an investor could have foreseen the particular *facts* that gave rise to the application of the regulation or legislation, but rather whether the general regulatory climate at the time should have led an investor to conclude that a state might act to protect certain values if they were discovered to be threatened. As discussed below, absent specific assurances to the contrary – which are not present in this case – an investor operating in the highly regulated field of mining could not reasonably have expected that it would not be subject to the reasonable extensions of pre-existing laws that both SB 22 and the SMGB represented.

ii. Absent Specific Assurances, It Is Not Reasonable For An Investor To Expect To Be Exempt From Reasonable Extensions Of Regulations

As the United States explained fully in its Counter-Memorial, in the absence of specific commitments that the government would refrain from enacting particular measures, an investor can have no reasonable expectation that the government will not so regulate.³⁸⁶ This principle is consistent with the rule under U.S. law, for example, that recovery for a taking is limited to situations where a property owner can prove that it acquired the property “in reliance on the non-existence of the challenged regulation.”³⁸⁷ The government has broad authority to regulate, particularly where, as here, the claimant’s mining activities would take place on the public lands, and the property right

³⁸⁶ Counter-Mem. at 181-88.

³⁸⁷ *Good v. United States*, 189 F.3d 1355, 1360 (Fed. Cir. 1999) (citing *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994)).

in question emanates solely from a grant by the federal government.³⁸⁸ Further, at the time Glamis made its investments, the federal and state governments had already heavily regulated the mining industry and imposed onerous permitting requirements. Given this situation, an investor in Glamis's position could not reasonably have acquired its mining claims in reliance on the non-expansion of the pre-existing mining regulations absent some overt promise from California that it would not further regulate mining in the state. Glamis received no such assurances.

Glamis fails to distinguish the arbitral decisions cited in the United States' Counter-Memorial that articulate this "specific assurances" principle.³⁸⁹ As the United States explained in its Counter-Memorial, in *Methanex Corp. v. United States* the tribunal found that:

[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless *specific commitments* had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.³⁹⁰

Glamis dismisses this language by citing the unsupported statement of Professor Wälde that it "probably misrepresents the current state of customary international law."³⁹¹ But Glamis can provide no other support for this speculation. As the United States

³⁸⁸ See *United States v. Locke*, 471 U.S. 84, 105 (1985) (as title holder to the underlying land on which an unpatented mining claim is located, the United States has "substantial regulatory power over those interests"); see also Counter-Mem. at 196-97 and cases cited therein.

³⁸⁹ Several additional international arbitral tribunals have emphasized the importance of specific assurances in assessing whether an investor has legitimate expectations, although those tribunals have done so in the context of the fair and equitable treatment analysis, which, as the United States explains below, is not the appropriate framework for the reasonable expectations analysis. See *infra* Sec. II.C.

³⁹⁰ *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Final Award, Part IV, Ch. D ¶ 7 (Aug. 3, 2005) (emphasis added); see also Counter-Mem. at 182-83 (discussing the *Methanex* decision).

³⁹¹ Reply ¶ 184 n.364.

demonstrated in its Counter-Memorial, Glamis's criticism of the *Methanex* tribunal's holding is unfounded.³⁹²

Glamis also fails in its attempt to distinguish the reasoning in *Feldman v. Mexico*. In *Feldman*, as the United States explained, the tribunal dismissed the claimant's expropriation claim in large part for lack of evidence of specific assurances that the claimant would receive certain tax treatment.³⁹³ Glamis attempts to diminish this by stating that in *Feldman* the tribunal "found that in the context of [a specific, pre-existing legal] requirement, the claimant could not demonstrate that its pursuit of the venture was *reasonable* absent some indication from the government that an exception to the pre-existing law would be permitted."³⁹⁴ It is evident, however, that the *Feldman* tribunal concluded that specific assurances from the government in respect of its future actions vis-à-vis the investor affected whether that investor's expectations were reasonable.³⁹⁵

³⁹² See Counter-Mem. at 182-83 & n.821. In any event, Glamis misconstrues the *Methanex* tribunal's statement. Glamis states that "[t]o argue, as Respondent does, that regulations that are non-discriminatory and enacted for a public purpose are not subject to the compensation requirement effectively renders the language of sub-sections (a) and (b) meaningless." Reply ¶ 184. NAFTA Article 1110 lists the criteria (including that the action be (a) for a public purpose; and (b) non-discriminatory) that must exist for an expropriation to be lawful. It does not define what an expropriation is.

³⁹³ See Counter-Mem. at 183-85 (discussing *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002), reprinted in 42 I.L.M. 625 (2003)).

³⁹⁴ Reply ¶ 142 (emphasis in original).

³⁹⁵ It is also noteworthy that Glamis acknowledges that the claimant in the *Thunderbird* case could not have had any reasonable expectation that it could engage in the activity prohibited by Mexico, Glamis's expert, Professor Wälde, dissented on that very point. In *Thunderbird*, Mexico shut down claimant's gaming operations pursuant to its law prohibiting gambling and luck-related games. See *Thunderbird* Award ¶ 73. *Thunderbird* claimed that it had been given assurances by the Mexican Government that it could operate its machines, and relied on that assurance in making its investments. But the Mexican Government had merely told *Thunderbird* that *if* its gaming machines were as described – *i.e.*, they did not involve chance or wagering and betting – then they could be used lawfully. *Id.* ¶ 55. The NAFTA Chapter Eleven tribunal rejected claimant's claim that it had received any specific assurance, noting that it had misrepresented its gaming machines to the Mexican agency as "skill machines" when they clearly were no such thing. Professor Wälde dissented, arguing that claimants had been given specific assurances. Professor Wälde dismissed the clear language of the government's letter providing that only skill machines were lawful, instead concluding that "[a] gambling industry person can only hear when the term 'predominantly skill' emerges the message: 'Yes allowed.'" *Thunderbird* Award, Separate Op. by T. Wälde ¶ 83. Given this

Glamis cannot demonstrate that it received assurances – specific or otherwise – that California would not impose a complete backfilling requirement. Glamis was never guaranteed approval for the plan of operations that it submitted for the Imperial Project. Indeed, as noted in the Counter-Memorial, in 1997 and 1998 California officials notified Glamis that they were contemplating requiring backfilling of all three pits in the Imperial Project.³⁹⁶ In its Reply, Glamis accused the United States of having “played loose with the facts,” arguing that “both of the exhibits [the United States] cites to support this statement are intra-agency correspondence, and neither indicates that it was shared with Glamis.”³⁹⁷

It is Glamis, not the United States, that is playing “loose” with the facts, however. Both of the documents that the United States cited in its Counter-Memorial were, in fact, sent to Glamis, as is evidenced by the copies of those documents that the United States obtained from Glamis’s offices in Reno, Nevada during the discovery phase of this arbitration.³⁹⁸ The first letter, from James Pompy, Manager of the Office of Mine Reclamation in the Department of Conservation, notes that, “[t]he issue of site safety around the excavated pits still remains to be addressed to the satisfaction of the county.

reasoning, it would be difficult to imagine any circumstances where Professor Wälde would find that an investor had not received a specific assurance or lacked legitimate expectations.

³⁹⁶ See Counter-Mem. at 192. The statement in the Counter-Memorial that California notified Glamis of the possibility of backfilling all three of the Imperial Project pits “as early as 1996,” rather than 1997, was a typographical error.

³⁹⁷ Reply ¶ 147.

³⁹⁸ See Letter from James S. Pompy, Manager, Office of Mine Reclamation, to Jesse Soriano, Imperial County Planning/Building Department (Feb. 21, 1997), at 2 (13 FA tab 121) (showing the Bates stamp reserved for documents from Glamis’s files and a fax line indicating that the document was sent from the Imperial County Planning/Building Department); Letter from Jason Marshall, Assistant Director, Department of Conservation, to John Morrison, Assistant Planning Director, Imperial County Planning/Building Department, and Douglas Romoli, BLM (Feb. 26, 1998), at 2 (13 FA tab 122) (showing the Bates stamp reserved for documents from Glamis’s files and a fax line indicating that the document was sent from the Department of Conservation).

*One possible solution to this issue would be to backfill all excavated pits. . . . Another positive aspect of backfilling the pits is that they could be reclaimed to a beneficial end use.*³⁹⁹ The second, written just over a year later, from Jason Marshall, Assistant Director, Department of Conservation, to John Morrison, Assistant Planning Director, Imperial County Planning/Building Department, similarly states that, “The reclamation plan does not demonstrate that the East Pit will be reclaimed to a beneficial end use *A possible solution could be to backfill all excavated pits.*”⁴⁰⁰ The fax lines indicate that Glamis received these letters on April 25, 1997, and February 28, 1998, respectively.

Those letters were, in fact, written after Glamis (then Chemgold) General Manager Steve Baumann and Project Geologist Dan Purvance attended an Imperial Project site visit on January 23, 1997, with representatives from the California Department of Conservation and Imperial County.⁴⁰¹ During that site visit, representatives of the Department of Conservation and Imperial County notified Glamis that it was concerned with visual impacts and site safety resulting from the design of the proposed Imperial Project and its location a sensitive desert habitat, and they specifically informed Chemgold representatives that backfilling all of the pits, and regrading the waste piles may be required to mitigate the adverse environmental impacts of the proposed Imperial Project.⁴⁰² Any suggestion by Glamis that it was unaware of or

³⁹⁹ Letter from Pompy to Soriano (Feb. 21, 1997), at 2 (13 FA tab 121) (emphasis added).

⁴⁰⁰ Letter from Marshall to Morrison (Feb. 26, 1998), at 2 (13 FA tab 122) (emphasis added).

⁴⁰¹ See Declaration of Catherine Gaggini (Mar. 13, 2007); Declaration of Mary Ann Showers (Mar. 13, 2007). Mr. Purvance submitted two witness statements in this arbitration, but did not mention in either of them the January 23, 1997 site visit or the conversations with, or these letters from, California.

⁴⁰² See Declaration of Catherine Gaggini ¶ 5 (Mar. 13, 2007); Declaration of Mary Ann Showers (Mar. 13, 2007).

“surprised” by California’s decision, almost five years later, to require complete backfilling, is disingenuous and should be disregarded.

Moreover, none of the other statements or actions on which Glamis relies as a justification for its expectation that California would not impose the backfilling requirement at issue should have given Glamis any comfort. Glamis’s reliance on statements contained in various statutes and regulations is misplaced and, in any event, cannot constitute specific assurances. As an initial matter, statements contained in the mining laws and regulations do not serve as contractual or quasi-contractual promises with respect to a mining company’s plan of operations.⁴⁰³

Glamis’s continued reliance on the statement in the California Desert Conservation Area Plan (“CDCA Plan”) that mitigation requirements must be “subject to technical and economic feasibility,” as a basis for its reasonable investment-backed expectations is misplaced, in any event.⁴⁰⁴ As explained above, compliance with California’s reclamation requirements is both technically and economically feasible.⁴⁰⁵ Not only did Glamis not receive any specific assurances via the CDCA Plan, but Glamis also ignores the fact that the CDCA Plan was created to protect sensitive cultural

⁴⁰³ U.S. courts have expressly rejected the argument that the “plethora of rules, regulations and statutes involving federal mining law” form an implied contract between the Government and a mining claimant. *Last Chance Mining Co. v. United States*, 12 Cl. Ct. 551, 555-56 (1987), *aff’d*, 846 F.2d 77 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 823 (1988).

⁴⁰⁴ Reply ¶ 153.

⁴⁰⁵ *See supra* Sec. I.A.3.a. The fact that the Mineral Report concluded that backfilling was not economically feasible could not have informed Glamis’s investment-backed expectations because, as Glamis implicitly acknowledges, actions that occurred after Glamis made its investments in the Imperial Project could not have informed its investment-backed expectations. *See* Reply ¶ 163. Nor should the Mineral Report have “confirmed” the reasonableness of Glamis’s expectations, because the backfilling costs in the Mineral Report were based on information provided to BLM by Glamis, and was not independently verified by the BLM. *See* BLM, Mineral Report, 68 (Sept. 27, 2002) (6 FA tab 255) (“Under this review, and as indicated above, we will take Glamis-Imperial’s financial data that they had developed for the subject property through exploration and feasibility work, and factor this information into a cash flow analysis.”).

resources, that it was based on the principle of “multiple use” of the public lands, and that identification of cultural resources within the CDCA is an ongoing process.⁴⁰⁶ Moreover, the CDCA Plan clearly provides that “The combined [BLM and SMARA] requirements, whichever are stricter in terms of required mitigation measures, will be the requirements that the operator will eventually have to meet.”⁴⁰⁷

Furthermore, the CDCA Plan, FLPMA, BLM’s 3809 regulations and the NHPA, all relate to *federal* oversight of mining activity.⁴⁰⁸ Statements in federal statutes regarding BLM’s review of mining plans of operations could not inform Glamis’s expectations with respect to *California’s* imposition of environmental regulations. As explained above, California’s reclamation requirements apply on federal land, and there is no conflict with federal laws when state mining laws or regulations require “a higher standard of protection for public lands” than federal law.⁴⁰⁹

Glamis’s continued reliance on the no “buffer zone” provision contained in the California Desert Protection Act (“CDPA”) is similarly misplaced. To the extent that this one-time observation indicated anything at all about Congress’s future intent, the

⁴⁰⁶ Counter-Mem. at 11-17.

⁴⁰⁷ BLM, California Desert Conservation Area Plan (1980) (amended 1999), at 91.

⁴⁰⁸ See Reply ¶¶ 153-56. Additionally, the statements in the 1999 NAS/NRC Report that Glamis cites regarding backfilling were all qualified statements. See Counter-Mem. at 241-42. Even the National Mining Association, which submitted a Non-Disputing Party Submission in this case, does not go so far as to suggest that complete backfilling is never feasible. See, e.g., Non-Disputing Party Submission of the National Mining Association, at 13 (Oct. 13, 2006) (“Complete backfilling imposes an economic burden that renders *many* open-pit mining operations cost-prohibitive.”) (emphasis added); *id.* at 14 (citing HARDROCK MINING ON FEDERAL LANDS (4 FA tab 169) for the proposition that there is no “basis to establish a general presumption either for or against backfilling in all cases”); *id.* (citing Letter from Richard Grabowski, Chief, Western Field Operations Center, Bureau of Mines, to Ed Hastey, State Director, BLM (June 11, 1990) (1 FA tab 29) for the proposition that complete backfilling “*could* make an otherwise profitable mine uneconomic . . .”) (emphasis added). Indeed, in 1997 the Brewer Gold Mine in South Carolina, an open-pit mining operation that used cyanide heap leaching, completely backfilled its pit. See *The Mineral Industry of South Carolina*, U.S. Geological Survey and South Carolina Geological Survey Publication (1997), available at <http://minerals.usgs.gov/minerals/pubs/state/984598.pdf>.

⁴⁰⁹ 43 C.F.R. § 3809.3 (2002); see also *Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572 (1987); *supra* Sec. I.A.2.a; Counter-Mem. at 122-23.

statement in the CDPA that Congress did not intend to create “buffer zones” around wilderness areas should not have served as an indicator to Glamis that California would not enact reclamation measures that govern mining elsewhere within the CDCA.⁴¹⁰ The legislative history for the CDPA is explicit that activities within the CDCA that are outside of wilderness areas would still “be subject to regulation, if any, flowing only from the application of other law.”⁴¹¹

Glamis maintains that the California Desert Protection Act (“CDPA”) “was intended by the Congress to settle the question over which lands were available for multiple use development and which lands were to be permanently preserved as wilderness.”⁴¹² But regardless of whether this statement (for which Glamis provides no citation) is an accurate reflection of Congressional intent, it has no bearing on whether California could continue to regulate for reasons *other than to protect the wilderness areas*, on the lands that were available for multiple use development.⁴¹³

Unable to argue with the clear language of the statute, Glamis begrudgingly concedes that California could still regulate mining in the CDCA, and can only respond by stating “that ‘other law[s]’ might regulate how a mining operation would be conducted did not provide license to use such regulation – as California did here – as a subterfuge to extend and expand the protected area.”⁴¹⁴ There is no evidence, however, to even suggest that SB 22 or the SMGB regulation were a “subterfuge” to expand *wilderness areas*

⁴¹⁰ See *id.* at 185-88.

⁴¹¹ H.R. REP. NO. 103-498, at 55 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3598.

⁴¹² Reply ¶ 158.

⁴¹³ See Counter-Mem. at 185-86 (discussing “buffer zones” provision in the CDPA, which provides that “The fact that nonwilderness activities or uses can be seen or heard from areas within a wilderness area shall not, *of itself*, preclude such activities or uses up to the boundary of the wilderness area.”) (emphasis added).

⁴¹⁴ Reply ¶ 158.

within the CDCA.⁴¹⁵ In sum, Glamis received no specific assurances that California would not enact reclamation measures that could be applied to its proposed Imperial Project.

iii. The SMGB Regulation Was A Reasonably Foreseeable Development In The Law

Glamis does not directly address the purpose and effect of the SMGB regulation in its submissions. Instead, it treats it as one and the same as SB 22. As noted above, however, the SMGB regulation did not implement SB 22.⁴¹⁶ The regulations are separate, broader measures that apply statewide, regardless of proximity to Native American sacred sites.

As explained in the United States' Counter-Memorial, SMARA, which requires mined lands to be reclaimed "to a usable condition which is readily adaptable for alternate land uses and create *no danger* to public health or safety," was enacted more than a decade before Glamis located its Imperial Project mining claims.⁴¹⁷ The fact that California historically did not require complete backfilling does not make reasonable

⁴¹⁵ "Wilderness" is a defined term in FLPMA, which means, as per the Wilderness Act of 1964, 16 U.S.C. § 1131(c): "an area where the earth and its community of life are untrammelled by man where man himself is a visitor who does not remain . . . an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value." Given this definition, it is difficult to see how SB 22 and the SMGB regulations, which allow mining but require backfilling, could "expand" the wilderness areas within the CDCA.

⁴¹⁶ See *supra* Sec. I.

⁴¹⁷ CAL. PUB. RES. CODE § 2733 (2001) (emphasis added); see also CAL. PUB. RES. CODE § 2756 (2001) ("State policy shall apply to the conduct of surface mining operations and shall include, but shall not be limited to, measures to be employed by lead agencies in specifying grading, *backfilling* . . .") (emphasis added); CAL. PUB. RES. CODE § 2773(b)(2) (2001) ("[T]he Board shall adopt regulations specifying minimum, verifiable statewide reclamation standards. Subjects for which standards shall be set include, but shall not be limited to the following: . . . [*b*]ackfilling, regrading, slope stability, and recontouring.") (emphasis added).

Glamis's apparent expectation that California would never require complete backfilling, particularly given that SMARA specifically cautioned that reclamation was required and "may require backfilling."⁴¹⁸

Glamis asserts that the statement in SMARA that mineral extraction is "essential" to the state had a bearing on its expectation that complete backfilling would not be required, and that "[e]ven though the law states that reclamation 'may require backfilling . . .' the fact remains that before December 2002" California had not imposed complete backfilling requirements.⁴¹⁹ This argument should be rejected. First, where there exists a state law that explicitly provides that backfilling might be required, it cannot be reasonable for an investor to expect that the law would not later require a particular type of backfilling. Accepting Glamis's line of reasoning, any regulation that imposed a new restriction on an industry would interfere with "reasonable expectations." If a regulation does not impose any restrictions that were not previously specifically required, however, there would be no reason to enact the regulation in the first place.

Faced with the clear language of SMARA, which contemplated reclamation, including the possibility of backfilling, to the extent necessary to ensure there is *no* danger to public health and safety, it is difficult to understand how Glamis could have been "surprised" when the SMGB implemented regulations to ensure more fulsome compliance by mining companies with SMARA's stated requirements. This is especially

⁴¹⁸ CAL. PUB. RES. CODE § 2733 (2001). As explained by Dr. Parrish, "[p]rior to the SMGB's adoption of the regulation, many open-pit metallic mines in California had reclamation plans approved by local lead agencies that did not fully satisfy the existing reclamation standards in . . . SMARA. . . . The amended regulations did not create a new reclamation standard, but clarified how to implement existing standards." Parrish Supp. Declaration ¶ 6. Glamis is incorrect to suggest that "[b]efore December 2002, the counties – as lead regulatory agencies under SMARA – had the discretion to modify the applicable reclamation standards" Reply ¶ 264.

⁴¹⁹ *Id.* ¶ 159.

true given the fact that Glamis was notified as early as 1997 that California was concerned about the issue of site safety and the apparent lack of a beneficial end use for the land, and that Glamis was told that complete backfilling would address these problems.⁴²⁰

The SMGB regulation represented an incremental change in the requirements. Backfilling in some form had long been required for many mines.⁴²¹ Glamis planned to backfill two of its three pits.⁴²² The SMGB regulation, if it were applied to Glamis, would require that Glamis also fill the third pit and recontour the overburden to the approximate original contours of the land. This was not the “seismic shift”⁴²³ in the law or in administrative practice that Glamis would have this Tribunal believe. Rather, it was a reasonably foreseeable – and a reasonable clarification and application of – the preexisting law. As such, the expectations factor weighs strongly in favor of a finding that no expropriation has occurred.

iv. SB 22 Was A Reasonably Foreseeable Development In The Law

Glamis could not reasonably have expected that California would not take action, as it did in SB 22, to protect Native American sacred sites. In discussing its investment-backed expectations, Glamis misstates the issue as whether it “could have known earlier about the late 1997 ‘discovery’ of a Trail of Dreams.”⁴²⁴ The pertinent question, however, is not whether Glamis knew or should have known that the Imperial Project

⁴²⁰ See *supra* Sec. I.A.3.b.2.

⁴²¹ A significant number of the other mines in the CDCA at the time also incorporated some backfilling as part of their reclamation efforts.

⁴²² See Glamis Imperial Corp., Imperial Project Plan of Operations (Sept. 1997), Attach. B (Reclamation Plan), at 20 (14 FA tab 150).

⁴²³ Reply ¶ 147.

⁴²⁴ Reply ¶ 109.

area contained sacred sites, but whether Glamis could have had a reasonable expectation that the government would not impose specific reclamation requirements to enforce its already-stated broader principles regarding protection of Native American sacred sites if such sites were identified.⁴²⁵ “[T]he critical question is whether extension of existing law could be foreseen as reasonably possible.”⁴²⁶

The plaintiff in *Good* could not reasonably complain that, prior to his acquisition of the property, he did not know about the condition of species on his property that made them subject to designation as endangered. The plaintiff in *District Intown* could not reasonably complain that, prior to receiving his permit, he did not know about the historical value of his property that made it subject to designation as a historic landmark. Methanex could not reasonably complain that, prior to its having made all of its investments, it did not know of the contaminating effects to groundwater posed by MTBE that rendered its use as a gasoline additive subject to being banned. As was the case in *Good*, *District Intown* and *Methanex*, Glamis too cannot reasonably complain that, prior to acquiring its mining claims, it was unaware of the presence of vulnerable Native American sacred sites within the Imperial Project area that made the area subject to protective regulation.

Glamis operates in an industry that has been historically subject to regulation, as did the plaintiff in *District Intown*. Before and during its mining permit process, the

⁴²⁵ See Michael C. Blum, *Lucas's Unlikely Legacy: The Rise of Background Principles As Categorical Takings Defense*, 29 HARV. ENVTL. L. REV. 321, 326 (2005) (“Courts evaluate background principles as of the date of the acquisition of the relevant property, and their effectiveness as a defense does not depend on the landowner’s knowledge of the background limitation. For instance, a landowner has no right to maintain a nuisance, regardless of whether or not the owner know the contested use amounted to a nuisance.”).

⁴²⁶ See *Cane Tenn., Inc. v. United States*, 63 Fed. Cl. 715, 728 (2005) (citing *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1357 (Fed. Cir. 2001)).

Imperial Project area was the subject of increasing federal activity devoted to protecting Native American sacred sites.⁴²⁷ Moreover, just as the area at issue in *District Intown* was subject to increasing public concern during the plaintiff's permitting process, so was the Imperial Project area during the mine permitting process. The Sacred Sites Act and other efforts to protect Native American resources existed long before Glamis acquired its interest in its mining claims.⁴²⁸ The fact that California had not imposed specific reclamation requirements on open-pit metallic mines in the vicinity of Native American sites in order to ensure the protection of such sites until after Glamis acquired its claims does not make reasonable Glamis's expectation that California would not later regulate in this manner.

Glamis must be tasked with knowledge of the underlying laws and regulations that governed its property, including the California Constitution and the Sacred Sites Act. In this case, a reasonable investor should have known that the regulatory climate throughout the United States, but particularly in California, was one that was increasingly protective of Native American cultural resources and religious freedom. As a result, a reasonable investor could not have invested in California in reliance on the belief that California would not act to protect such values. SB 22 was a reasonably foreseeable extension of the preexisting law and, as such, the expectations factor weighs heavily in favor of a finding that it is not expropriatory.

⁴²⁷ See, e.g. Exec. Order No. 13007, § 1(a), 61 Fed. Reg. 26,771 (May 29, 1996), *reprinted in* 42 U.S.C. § 1996 (2000); Patricia L. Parker & Thomas F. King, "Guidelines for Evaluating and Documenting Traditional Cultural Properties" (1998), *available at* <http://www.cr.nps.gov/nr/publications/bulletins/nrb38> (10 FA tab 109); *see also* Counter-Mem. at 24-33.

⁴²⁸ *See id.* at 32-33.

c. The Character Of The California Measures Supports A Finding That There Has Been No Expropriation

The third prong of the indirect expropriation analysis involves consideration of the character of the government action, which requires inquiry into whether the interference with property “can be characterized as a physical invasion by government” or whether it is regulatory in nature, *i.e.*, it “arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”⁴²⁹ The California measures cannot be characterized as physical invasions. Rather, they are non-discriminatory regulatory measures of general applicability. As the United States explained in detail in its Counter-Memorial, except in rare circumstances, non-discriminatory regulations enacted for a public purpose will not be deemed expropriatory.⁴³⁰

Glamis argues that, even if the California measures are non-discriminatory, that does not exempt the United States from paying compensation for expropriation.⁴³¹ But again, that statement assumes its own conclusion. The question of the character of the action is just one of the factors that should be considered to determine whether the government’s action was expropriatory.

⁴²⁹ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

⁴³⁰ *See* Counter-Mem. at 195-201. In its 2004 Model BIT, the United States noted that, “[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations.” 2004 U.S. Model Bilateral Investment Treaty ann. B, ¶ 4(b). This is consistent with the 2003 Canadian Model Foreign Investment Protection and Promotion Agreement ann. B.13(1)(C), available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf> (“Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.”).

⁴³¹ Reply ¶ 190.

Contrary to Glamis's assertion, the United States does not bear the burden of proving anything with respect to the character of the action.⁴³² The character of the government action is simply one of the factors in the *ad hoc*, factual inquiry in an indirect expropriation analysis. It is not, as Professor Wälde claims, a "defense" that the United States has alleged and must prove.⁴³³ Glamis has the burden of proving its claims.

Glamis and Professor Wälde spill much ink arguing that a "disproportionate burden" has been placed on Glamis, that the Tribunal must evaluate the measures' "least restrictiveness" and "suitability,"⁴³⁴ and that the United States must prove "that the policy goal is legitimate," and "show a link between that policy and the measures."⁴³⁵ In essence, Glamis is arguing that the measures are not *bona fide*. Glamis's suggested methodology is, however, inappropriate.

Where a State proclaims that it is enacting a non-discriminatory statute or regulation for a *bona fide* public purpose, courts and tribunals rarely question that characterization.⁴³⁶ The Restatement (Third) of Foreign Relations, for instance, notes that the public purpose requirement "has not figured prominently in international claims practice, perhaps because the concept of public purpose is broad and not subject to

⁴³² See, e.g., *id.* ¶ 166 (stating, with citation only to Professor Wälde, that "Respondent must be able to demonstrate baseline factual predicates," including that "the public welfare purpose advanced for justifying the government measures is legitimate") (internal quotations omitted).

⁴³³ Wälde Rep. at III-70. Professor Wälde provides no support for his "burden shifting" theory. A majority of the arbitral panel in the *Thunderbird* case rejected another burden shifting theory proffered by Professor Wälde. See *Thunderbird Award*, Separate Op. by T. Wälde. A U.S. District Court similarly refused to endorse Professor Wälde's theory. See *Int'l Thunderbird Gaming Corp. v. United Mexican States*, Mem. Op., Civ. Action 06-00748 (HHK) (D.D.C. 2007).

⁴³⁴ Reply ¶ 169.

⁴³⁵ *Id.* ¶ 168 (citing Wälde Rep. at I-24).

⁴³⁶ See Counter-Mem. at 202. Although Glamis questions the authority of the sources cited by the United States based on their age, Glamis has offered no authority to the contrary. See Reply ¶ 171 n.338. Nor does Glamis take issue with the similarly dated sources cited by Professor Wälde. In fact, while Glamis criticizes the United States' reliance on Professor Christie's article, Professor Wälde repeatedly refers to that same article as a "seminal analysis." See Wälde Rep. at III-36 n.196; see also *id.* at III-1 n.66 & III-42.

effective reexamination by other states.”⁴³⁷ As explained in the Counter-Memorial, *bona fide*, non-discriminatory regulations are generally non-compensable.⁴³⁸

Furthermore, Glamis’s suggested approach has been squarely rejected by the United States Supreme Court. In *Lingle v. Chevron*, the Supreme Court categorically stated that “whether a regulation of private property is *effective* in achieving some legitimate public purpose . . . is not a valid method of discerning whether private property has been ‘taken’”⁴³⁹ The correct question is not whether the regulation is effective in achieving its goals, but rather the extent to which the property rights in question are unreasonably burdened by the regulation.⁴⁴⁰ This is because the inquiry as to whether a regulation achieves its goals:

reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property⁴⁴¹

Just as it is incorrect to contend that a tribunal should evaluate the legitimacy of a State’s expressed policy goals, so too is it inappropriate for a tribunal to second-guess a legislature’s or agency’s factual determinations and assess whether the State’s means (in this case, SB 22 and the SMGB regulation) achieve their stated ends (*i.e.*, protecting

⁴³⁷ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 712, cmt. e (1987).

⁴³⁸ See Counter-Mem. at 197-200 (citing B.A. WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 50 (1959); S. FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 50-51 (1953); G.C. Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRIT. Y.B. INT’L L. 307, 335 (1962); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 509 (6th ed. 2003); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 357 (2004).

⁴³⁹ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005) (emphasis in original).

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.* (emphasis in original).

sacred sites, accommodating the free exercise of religion, and ensuring adequate land reclamation post-mining).⁴⁴²

Similarly, the U.S. Supreme Court has rejected the notion that it is proper for a U.S. court to inquire into the suitability of a regulation:

We do not suggest that courts have ‘a license to judge the effectiveness of legislation’ . . . or that courts are to undertake ‘least restrictive alternative’ analysis in deciding whether a state regulatory scheme is designed to remedy a public harm or is instead intended to provide private benefits. That a land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it. But, on the other hand, *Pennsylvania Coal* instructs courts to examine the operative provisions of a statute, not just its stated purpose, in assessing its true nature.⁴⁴³

In short, both international expropriation law and U.S. takings law reject the notion that a judicial body should closely scrutinize whether a regulatory measure is *bona fide*.

Given this deference, the Federal Circuit has noted recently that “[t]he Supreme Court has never found a compensable taking on the theory that the government acted without a legitimate interest”⁴⁴⁴ And the Supreme Court has for decades made it clear that “[t]he concept of the public welfare is broad and inclusive The values it represents are spiritual as well as physical, aesthetic as well as monetary Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them.”⁴⁴⁵ The concept of a “public

⁴⁴² See, e.g., Reply ¶ 168.

⁴⁴³ *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 487 n.16 (1987) (internal citations omitted); see also, e.g. *Mugler v. Kansas*, 123 U.S. 623, 662 (1887) (“[I]t is not for the courts, [to expound] upon their views as to what is best and safest for the community, [or] to disregard the legislative determination of that question.”).

⁴⁴⁴ *Seiber v. United States*, 364 F.3d 1356, 1367 (Fed. Cir. 2004).

⁴⁴⁵ *Kelo v. City of New London*, 545 U.S. 469, 481 (2005) (quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954)).

purpose” is a broad one, and it is not appropriate to search for a State’s alleged ulterior motives when a State has articulated plausible reasons for enacting the measures in question.⁴⁴⁶

There can be little debate that SB 22 and the SMGB regulation were enacted for public purposes. SB 22 was enacted to mitigate damage to Native American sacred sites. The SMGB regulation was enacted to ensure compliance with SMARA’s reclamation standard, namely, to ensure that “mined lands are reclaimed to a usable condition which is readily adaptable for alternative land uses.”⁴⁴⁷

Although neither Glamis nor Professor Wälde cites any authority in support of their novel approach, Glamis’s international law expert asks this Tribunal to embark on “a serious and dispassionate examination of the actual religious practices of the Quechan and to what extent complete back-filling would make a positive difference.”⁴⁴⁸ Professor Wälde would require that the United States prove “specifically and in detail that there are ‘sacred sites’ beyond their average distribution in the arid desert area, that these are actually used for significant religious practices”⁴⁴⁹ Although Professor Wälde purports to extend a “margin of appreciation and deference to regulatory decision-making”⁴⁵⁰ his analysis clearly would grant no such deference, and instead would require the Tribunal to question not only whether California’s stated public purposes were legitimate, but also, remarkably, whether the Quechan’s spiritual practices were real and

⁴⁴⁶ See G.C. Christie, *What Constitutes a Taking of Property Under International Law*, 38 BRIT. Y.B. INT’L L. 307, 332 (1962); see also Counter-Mem. at 202-03.

⁴⁴⁷ CAL. PUB. RES. CODE § 2712(a) (2001).

⁴⁴⁸ Wälde Rep. at I-24.

⁴⁴⁹ *Id.*

⁴⁵⁰ Wälde Rep. at III-66.

significant enough to warrant imposition of mine reclamation standards, including “the question of whether there are reasonable alternatives for the Quechan religious practices”⁴⁵¹ Such a detailed inquiry into the purpose of SB 22 would be inappropriate, as it would require that the Tribunal reopen the entire legislative and administrative record to draw its own factual conclusions.

Glamis’s complaint that the SMGB’s regulations are not environmental regulations because they do not apply to non-metallic mines, and because they were not based on scientific or technical studies is similarly unavailing.⁴⁵² Glamis does not even address the explanations provided by Dr. Parrish for why such studies would be superfluous in these circumstances and why the application of the regulations to non-metallic mines would be futile.⁴⁵³ But in any event, as explained above, such attempts to second-guess the factual conclusions of the SMGB are wholly inappropriate.

Glamis also complains that a “disproportionate burden” has been placed on it. It has not. It is not “disproportionate” for a State to require mining operators to internalize the costs of the environmental and cultural damage their own activities cause. “Since the

⁴⁵¹ *Id.* at III-67. Although Professor Wälde states that “Tribunals should not ‘second-guess’ what the best response to a perceived public policy challenge should be,” *id.*, he nevertheless argues that the United States must prove to the Tribunal that the measures are the “least restrictive and appropriate for the purported public policy interest.” *Id.* at III-70. Professor Wälde also inappropriately conducts his own analysis of the “facts” and concludes that “it is difficult to find a plausible link between the complete backfilling and re-contouring obligations and the protection of religious area- (not site-specific) sensitivities.” *Id.*; *see also infra* Sec. II.D.

⁴⁵² Reply ¶ 185.

⁴⁵³ *See* Parrish Declaration ¶ 13 (“Gravel and other non-metallic mines do not pose the same environmental and public health and safety concerns. Most of the excavated material from those types of mines is hauled away and sold, and thus generally there are no large waste piles left on site. Furthermore, because most material associated with gravel and other non-metallic mines is hauled away, backfilling of such mines is usually infeasible . . . because requiring backfilling of pits where there is insufficient material to fill the pits would likely require digging a second massive pit to fill the first one.”); *see also id.* ¶ 18 (“The testimony at the Board hearings and evidence in the rulemaking record clearly demonstrated that leaving large open pits and mounds of waste materials on mined lands was not consistent with SMARA’s reclamation standard. Opponents of the regulations presented no persuasive evidence to the contrary.”). For a further explication of the facts and rationales surrounding the SMGB’s regulations *see infra* Sec. II.D.

owner's use of the property is . . . the source of the social problem, it cannot be said that he has been singled out unfairly."⁴⁵⁴ Indeed, without triggering compensation, the government routinely requires a particular industry or group that is causing a perceived problem to comply with regulations intended to alleviate that problem. As a result, "[l]egislation designed to promote the general welfare commonly burdens some more than others."⁴⁵⁵ The Landmarks Preservation Law at issue in *Penn Central* is illustrative. That law applied to less than one tenth of one percent of the buildings in New York City.⁴⁵⁶ Yet the U.S. Supreme Court concluded that the law was not discriminatory because the landmarks were not "arbitrarily single[d] out . . . for different, less favorable treatment[.]"⁴⁵⁷ Rather, the parcels were selected because they were of "historic or aesthetic interest,"⁴⁵⁸ and thus it was rational for the legislature to regulate only those properties.

Here, it is not "discriminatory" for California to have regulated open-pit metallic mining. Such mines cause the harm to the environment and to Native American sacred sites that California perceived and sought to prevent. The California measures only instruct mining companies throughout the state – not just Glamis – to clean up after themselves, and to reclaim the land to a usable condition for others once their mining activities on the land are complete.

⁴⁵⁴ *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part).

⁴⁵⁵ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 133 (1978); see also, e.g., *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223 (1986) ("In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others.").

⁴⁵⁶ See *Penn Central*, 438 U.S. at 147 (Rehnquist, J., dissenting).

⁴⁵⁷ *Id.* at 132.

⁴⁵⁸ *Id.*

Glamis's reliance on *SPP v. Egypt* is thus entirely misplaced.⁴⁵⁹ In *SPP v. Egypt*, the Egyptian Government *canceled* the claimant's hotel project – after the claimant had begun construction pursuant to specific assurances in the form of, *inter alia*, a presidential decree – and placed the claimant's joint venture company into judicial receivership. Egypt also declared the land on which the claimant's project was located to be public property. The tribunal concluded that “[t]he decision to cancel the project constituted a lawful exercise of the right of eminent domain.”⁴⁶⁰ In other words, the character of the government action in that case was akin to a physical taking of the property. That scenario bears no resemblance to the present case, which involves regulatory action that merely circumscribes the manner in which mining companies must reclaim the public land on which their claims lie. Therefore, although the claimant in *SPP v. Egypt* might have been singled out to bear that which should have been borne by the public, Glamis most certainly was not.

Metalclad Corp. v. Mexico, which Glamis cites, is similarly inapt.⁴⁶¹ In *Metalclad*, the respondent had issued a decree that “had the effect of barring forever the operation” of the claimant's landfill.⁴⁶² As in *SPP v. Egypt*, the government actions in *Metalclad* were not in the nature of a general regulation, because, by their terms, they prevented any further continuation of a particular project.⁴⁶³ Conversely, the California measures do not prevent Glamis from mining its claims.

⁴⁵⁹ See Reply ¶¶ 177-78 (citing *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, Award (May 20, 1992), reprinted in 32 I.L.M. 933 (1993)).

⁴⁶⁰ *SPP* Award at 967.

⁴⁶¹ Reply ¶¶ 174, 187-89 (citing *Metalclad v. United Mexican States*, ICSID Case No. ARB(AF)/91/1, Award (Aug. 30, 2000)).

⁴⁶² *Metalclad* Award ¶ 109.

⁴⁶³ See also Counter-Mem. at 200-01.

The present case also stands in sharp contrast to *Whitney Benefits, Inc. v. United States*, which Glamis cites repeatedly in its submissions.⁴⁶⁴ *Whitney Benefits* involved a mining *ban* on the land on which the plaintiff held its claims. Because in that case there was no possible way plaintiff could continue its business, the government action was more akin to a physical invasion of property. As such, the court concluded that a taking had occurred.⁴⁶⁵ In the present case, the California measures merely regulate the manner in which reclamation must be carried out. In no sense is this a ban on mining. Indeed, the California measures do not go as far as Montana's complete ban on a particular type of mining: cyanide heap leach mining.⁴⁶⁶ And, the BLM has found that Montana's cyanide mining prohibition applies on federal lands and "is consistent with FLPMA, the mining laws, and the decision in the *Granite Rock* case."⁴⁶⁷

This is simply not a case of Glamis being required "to bear public burdens which, in all fairness and justice, must be borne by the public as a whole."⁴⁶⁸ In all fairness and justice, the public should not be forced to bear the burden of reclaiming the open pits left by mining companies on the public lands after the conclusion of their operations.

Moreover, it is instructive that the U.S. Supreme Court has held repeatedly that the character prong favors the government when the challenged regulatory scheme confers a benefit upon the challenger, even if that benefit is minor and indirect and the

⁴⁶⁴ 926 F.2d 1169 (Fed. Cir. 1991).

⁴⁶⁵ *Id.* at 1172 ("When Congress prohibited the mining of that coal, it did not merely regulate, it took, all the property involved in this case.").

⁴⁶⁶ *See Seven Up Pete Venture v. Montana*, 327 Mont. 306 (2005).

⁴⁶⁷ Mining Claims Under the General Mining Laws, 65 Fed. Reg. 69,998, 70,009 (Nov. 21, 2000).

⁴⁶⁸ Reply ¶ 176 (quoting Wälde Rep. at I-26 and Olson Rep. ¶ 39) (internal quotations omitted).

costs imposed are both substantial and direct.⁴⁶⁹ The character prong of the analysis in this case thus further weighs against a finding of an expropriation, because the regulatory scheme confers significant reciprocal benefits on the mining industry. Here, the mining industry obtains benefits from the statutory scheme, and thus the scheme permissibly “adjust[s] the benefits and burdens of economic life to promote the common good.”⁴⁷⁰ The regulatory framework provides mining companies with the right to enter onto federal public lands, extract valuable minerals, and pay no royalties to the government for the privilege of doing so. Furthermore, the mining companies – along with every other person and entity in California – benefit from having a cleaner environment and richer historical and cultural resources, thereby “improving the quality of life in the [state] as a

⁴⁶⁹ See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 134 (1978) (finding that even though the Landmarks law would deprive Penn Central of millions of dollars, “preservation of landmarks benefits all New York citizens and all structures . . . by improving the quality of life in the city as a whole”); *Andrus v. Allard*, 444 U.S. 51, 67 (1979) (although law banning sale of eagle feathers would greatly reduce plaintiff’s business selling items containing eagle feathers, plaintiffs secured an average reciprocity of advantage by gaining the ““advantage of living and doing business in a civilized community””) (citation omitted); *Hodel v. Irving*, 481 U.S. 704, 715-16 (1987) (although owners of small parcels on Indian lands were barred from descending or devising their property, the Court found the character prong to weigh against a taking because the owners would indirectly benefit from the escheat of the land to the Indian tribes); see also, e.g., *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 491 n.21 (1987) (“The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received.”).

⁴⁷⁰ *Penn Central*, 438 U.S. at 124. When considering whether a regulation adjusts the benefits and burdens of economic life to promote the public good, it is appropriate to consider not only benefits conferred by the challenged measure, but also benefits obtained from other measures, including land-use regulations in general, see, e.g., *Keystone*, 480 U.S. at 491 (“Under our system of government, one of the State’s primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.”), and benefits that were conferred on the claimant before the imposition of the challenged measure, see, e.g., *id.*, at 491-92 (statute imposing liability on mining companies for damage caused by subsidence from past mining found to confer an average reciprocity of advantage); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18-19 (1976) (statute requiring coal mine operators to compensate former employees disabled by pneumoconiosis found to adjust benefits and burdens); *Hoffman v. City of Warwick*, 909 F.2d 608, 618 (1st Cir. 1990) (repeal of a prior government benefit found to simply be an adjustment of the benefits and burdens of economic life).

whole.”⁴⁷¹ As explained above, these kinds of reciprocal benefits further support the conclusion that the challenged measure is regulatory in nature.⁴⁷²

In short, the character prong strongly weighs against Glamis’s claim. This is not a case where Glamis is being asked to “give up its property” for the benefit of the public as a whole.⁴⁷³ None of the measures at issue requires that Glamis relinquish its mining claims. The character of the measures at issue is not akin to a physical invasion of property; rather, they are non-discriminatory regulations of general applicability which adjust the benefits and burdens of economic life to promote the public good.

i. The SMGB Regulation Is A Non-Discriminatory Regulatory Measure Of General Applicability

The SMGB’s regulation is a non-discriminatory regulatory measure enacted for a public purpose. That purpose was to ensure that, after the conclusion of metallic mining, open pits are reclaimed “to a usable condition which is readily adaptable for alternative land uses.”⁴⁷⁴ The plain language of the regulation, as well as the rulemaking record, also make it clear that the regulation is non-discriminatory and was intended to be applied statewide, and not only to Glamis.⁴⁷⁵ Indeed, as the United States noted in its Counter-Memorial, the SMGB has found that its regulation applies to the Soledad Mountain Mine operated by Golden Queen Mining Company in Kern County.⁴⁷⁶ Glamis attempts to

⁴⁷¹ *Penn Central*, 438 U.S. at 134.

⁴⁷² *See also L’Hote v. New Orleans*, 177 U.S. 587, 599 (1900) (“If he suffers injury . . . he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure.”).

⁴⁷³ Reply ¶ 176.

⁴⁷⁴ CAL. PUB. RES. CODE § 2712(a) (2001).

⁴⁷⁵ CAL. CODE REGS. tit. 14, § 3704.1(a) (2003) (“An open pit excavation created by surface mining activities for the production of metallic minerals shall be backfilled to achieve not less than the original surface elevation . . .”).

⁴⁷⁶ Counter-Mem. at 101-02.

deflect attention from this fact by relegating it to a footnote in its Reply and stating that “Golden Queen Mining Company recently filed a petition to amend the mandatory complete backfilling and site recontouring regulations to exempt the Soledad Mountain mine.”⁴⁷⁷ But the fact that Golden Queen had to seek an *amendment* to the regulation only shows that the regulation as written is of general applicability. Was it not, Golden Queen would not need an exemption.

Moreover, and in any event, in December 2006, the SMGB denied Golden Queen’s petition to amend its regulations. In so doing, the SMGB noted the problem of California’s legacy of large, open pits surrounded by waste rock, and stated that:

[t]he goal of the SMGB regulations was to require mining companies to address the problems [of un-reclaimed open-pit metallic mines] and to take responsibility for cleaning up their mine sites after the completion of surface mining operations, and return them to a condition that allows alternative uses and avoids environmental harms, thereby meeting the purpose and intent of SMARA.⁴⁷⁸

Golden Queen has announced that it will submit a revised reclamation plan for the Soledad Mountain project that will incorporate the complete backfilling required in the SMGB’s regulation.⁴⁷⁹ Glamis cannot, in the face of this incontrovertible evidence, continue to maintain that the SMGB regulation solely targeted Glamis.

In this case, the character of the government action clearly weighs in favor of a finding that the SMGB’s regulation was legitimate, non-discriminatory and enacted for a public purpose.

⁴⁷⁷ Reply ¶ 173 n.346.

⁴⁷⁸ See Office of Administrative Law, California Regulatory Notice Register, No. 5-Z at 197 (Feb. 2, 2007); see also State Mining and Geology Board, Executive Officer’s Report (Apr. 10, 2003), Agenda Item 3 at 6, 15 (6 FA tab 267); Declaration of Dr. John. G. Parrish ¶ 16 (Sept. 16, 2006).

⁴⁷⁹ Golden Queen Mining Co. Ltd., Overview, at <http://www.goldenqueen.com> (14 FA tab 154).

ii. **SB 22 Is A Non-Discriminatory Regulatory Measure Of General Applicability**

That SB 22 was enacted for a public purpose is indisputable. Even Glamis does not argue that protecting Native American sacred sites is not a worthwhile public value. Glamis, however, complains that “SB 22 was not conceived as either an ‘environmental’ or a ‘health and safety’ regulation.”⁴⁸⁰ As the United States has explained here and in its Counter-Memorial, the purpose of SB 22 was to protect Native American sacred sites, and, as such, it is indeed an environmental regulation.⁴⁸¹ The United States has never contended that SB 22 is a health and safety measure, unlike the SMGB regulation, which is.

SB 22 is also non-discriminatory. As an important initial matter, it is facially neutral. It applies to all open-pit metallic mines “located on, or within one mile of, any Native American sacred site . . . located in an area of special concern”⁴⁸² An “area of special concern” is defined as “any area in the California desert that is designated as

⁴⁸⁰ Reply ¶ 149.

⁴⁸¹ Both NEPA and CEQA contain provisions requiring the protection of the human environment. *See* National Environmental Protection Act, 42 U.S.C. §§ 4331(b)(4), 4332(c) (1988 & Supp. III 1991) (requiring that the federal government use all practicable means of coordination “to the end that the nation may preserve important historic, cultural, and natural aspects of our national heritage” and requiring federal agencies to provide environmental impact statements if a proposed undertaking “significantly affect[s] the quality of the human environment”); California Environmental Quality Act, CAL. PUB. RES. CODE § 21060.5 (2007) (defining the term “environment” to include “objects of historic or aesthetic significance”). As such, both federal and state agencies are required to ensure compliance with federal and state historic preservation statutes when conducting environmental impact reviews. 40 C.F.R. § 1502.16(g) (2007) (instructing that the environmental consequences section of an environmental impact statement must consider “historic and cultural resources”); *Pres. Coalition, Inc. v. Pierce*, 667 F.2d 851, 859, n.3 (9th Cir. 1992) (noting that the National Historic Preservation Act (NHPA) and NEPA “both have the goal of generating information about the impact of federal actions on the environment,” but the NHPA’s focus is more narrow); *Soc’y for Cal. Archaeology v. County of Butte*, 65 Cal. App. 3d 832, 839-40 (1977) (finding that county board of supervisors’ failure to adequately consider project’s adverse impacts on archaeological resources rendered its environmental review process insufficient). For this reason, SB 22, which amended SMARA to ensure greater access to Native American sacred sites, can be considered a form of environmental regulation.

⁴⁸² CAL. PUB. RES. CODE § 2773.3(a) (2001).

Class C or Class L lands or as an Area of Critical Environmental Concern”⁴⁸³ SB 22 thus applies to millions of acres that are open to exploration under the Mining Law, and which may be located within one mile of a Native American Sacred Site.⁴⁸⁴

Indeed, Canyon Resources Corp., which operates the Briggs Mine in the CDCA, has indicated that SB 22 might be applicable to its proposed expansion of that mine because the “project is located in the Panamint Range within the designated limited use land of the CDCA and the nearby Timbisha Shoshone Native American tribe has stated that they consider the entire project area to be sacred. Any new open pit developments on our properties outside the existing plan of operations area might be required to comply with these regulations.”⁴⁸⁵ Thus, Glamis cannot reasonably maintain that SB 22 affects solely the Imperial Project.

In its Reply, Glamis continues to try to make much of statements by Governor Davis and contained in the legislative record to argue that SB 22 was discriminatory.⁴⁸⁶ But inquiry into the legislative history of a statute or regulation is improper where the purpose of the statute is clear:

Legislative history can be a legitimate guide to a *statutory purpose* obscured by ambiguity, but in the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive. Unless exceptional circumstances

⁴⁸³ CAL. PUB. RES. CODE § 2773.3(b)(2) (2001).

⁴⁸⁴ As explained in the Counter-Memorial, only approximately five percent of the CDCA has been inventoried for cultural resources, and further inventory in the area is ongoing. Counter-Mem. at 14.

⁴⁸⁵ Canyon Resources Corp., U.S. Securities and Exchange Commission, Form 10-K, at 9 (fiscal year ended Dec. 31, 2005), available at <http://www.sec.gov/Archives/edgar/data/739460/000103570406000223/d34102e10vk.htm> (13 FA tab 147).

⁴⁸⁶ See, e.g., Reply ¶ 149. Glamis cites Professor Wälde for the proposition that “the statements by the governor, the statements accompanying the ‘emergency regulations’, and the final regulations indicate that the key motivation was not to improve the environmental quality of the mine development” Wälde Rep. at III-83. Such factual conclusions by an international law expert regarding the motivations of the California government are inappropriate and should be disregarded.

dictate otherwise, when we find the terms of a statute unambiguous, judicial inquiry is complete.⁴⁸⁷

As the United States explained in its Counter-Memorial, the statements in the legislative history did not evidence any animus toward Glamis.⁴⁸⁸ In fact, the Governor's signing message, with which Glamis takes great issue, makes it clear that it was the Governor's view that the bill would "prevent mines *such as* the Glamis gold mine in Imperial County, from being developed *unless sacred sites are protected and restored.*"⁴⁸⁹ In other words, the purpose of the bill was to ensure that mining is carried out in a way that protects sacred sites.

It is commonplace for a legislature to react to potential problems as those problems arise. Often a problem is presented by – or is most immediately presented by – an individual company. It is part of the normal functioning of an elected government to act to prevent a harm its constituents face by passing legislation that specifically addresses that harm. There is nothing inappropriate about such legislation. SB 22 is a non-discriminatory, generally applicable regulatory measure that was enacted for a public purpose and, therefore, the character of SB 22 weighs in favor of a finding that no expropriation has occurred.

* * *

The California measures did not deprive Glamis's investment of all of its value; they could not have frustrated Glamis's reasonable expectations; and they are non-discriminatory regulatory measures that were enacted for a public purpose. Taking all of

⁴⁸⁷ *Burlington N. R.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 461 (1987) (citations omitted) (emphasis added).

⁴⁸⁸ Counter-Mem. at 203-205.

⁴⁸⁹ Governor Gray Davis, Signature Message for SB 483 (Sept. 30, 2002) (6 FA tab 257) (emphasis added).

these factors into consideration compels the conclusion that neither SB 22 nor the SMGB regulation expropriated Glamis's investment in its mining claims.

B. The Federal Government's Actions Did Not Expropriate Glamis's Investment

The crux of Glamis's expropriation claim is that the California measures were the cause of its injury.⁴⁹⁰ In its Reply, however, Glamis tries to resurrect its argument that the Federal Government's actions have also somehow expropriated its investment through a seamless set of actions culminating in the lack of approval for its plan.⁴⁹¹ Relying on Professor Wälde's reading of selected decisions of the Iran-U.S. Claims Tribunal, Glamis further alleges that the Federal Government's actions constitute an expropriation because the DOI has acted "in bad faith and against the legitimate expectations of the investor."⁴⁹² None of the cases upon which Professor Wälde purports to rely, however, discusses "bad faith" or "legitimate expectations." Instead, these cases all address whether there has been a failure to act by the government.⁴⁹³

Glamis's continued mischaracterization of the Federal Government's actions cannot withstand scrutiny. As a matter of law, agencies are typically granted considerable deference in administering complex regulatory schemes. Furthermore, as a

⁴⁹⁰ See Reply ¶¶ 91-106.

⁴⁹¹ See *id.* ¶ 196.

⁴⁹² Wälde Rep. at III-38.

⁴⁹³ Even if those two criteria were relevant to this inquiry, however, Glamis cannot prove either one. As discussed fully herein and in the Counter-Memorial, Glamis could not have had reasonable expectations that the Federal Government would not take the action it did. See *supra* Sec. I.A.3(b); Counter-Mem., *Arg.*, Sec. III.B. Likewise, Glamis has presented no evidence that would demonstrate that any of the Federal Government actions would qualify as bad faith. As the United States has demonstrated, the development of the 1999 M-Opinion and DOI's subsequent reliance on it were an appropriate exercise of the Department's authority in response to legitimate competing concerns about the Imperial Project. See *infra* Sec. II.D.2(c); Counter-Mem., *Facts* Sec. IV & *Arg.* Sec. IV.

matter of fact, despite Glamis's assertions to the contrary, the Federal Government has not failed to act. As the United States established in its Counter-Memorial, at each stage of the processing and review of Glamis's Imperial Project application, DOI was actively evaluating and processing Glamis's plan of operations.⁴⁹⁴ The only time when DOI stopped processing Glamis's plan was at Glamis's behest. Finally, Glamis's own actions belie its claim made here that it expected DOI to continue processing its plan of operations after it submitted this case to arbitration.

1. Glamis's Claim Of Delay Is Unfounded

At its core, Glamis's claim of expropriation by delay is unfounded because it is based on the premise that its plan of operations "should have been approved in the usual time range of 2-3 years"⁴⁹⁵ and that the Federal Government's failure to approve its plan of operations in the twelve years since it was first submitted constitutes an expropriation.⁴⁹⁶ This premise, however, is both factually incorrect and legally flawed.

Glamis first errs in contending that mining plans of operations are typically approved within two to three years. As the United States detailed in its Counter-Memorial, the regulatory framework for mining in the United States is extremely complex.⁴⁹⁷ Glamis clearly knew this, despite its claims to the contrary in these proceedings: "Glamis is a seasoned mining operator whose familiarity with the mining law and regulations was bred by many years of experience, including two decades of

⁴⁹⁴ Counter-Mem. at 74-90.

⁴⁹⁵ Reply ¶ 258; *see also id.* ¶ 244 (arguing that it had a legitimate expectation that its plan of operations would be approved "within the typical 2-3 year time frame"); *id.* ¶¶ 195, 198-99.

⁴⁹⁶ *Id.* ¶ 258.

⁴⁹⁷ Counter-Mem. at 48-90.

mining in the California desert.”⁴⁹⁸ Glamis had its headquarters, its executive and administrative functions, and the majority of its shareholders all located in the United States⁴⁹⁹ and was intimately familiar with the complexities of this regulatory regime.

Glamis’s own mining expert, Behre Dolbear, and the National Mining Association (“NMA”), of which Glamis is a member, have both testified that it is not at all unusual for it to take up to ten years to receive permitting approval in the United States.⁵⁰⁰ A Senior Economist for the NMA contrasted this timeframe with the one year to eighteen-month timeframe that is typical to receive a mining permit in Chile, for example.⁵⁰¹ The United States has chosen to enact a comprehensive scheme to regulate the permitting of mines, recognizing that the activity of mining has the potential to cause grave damage to the environment and to public health and safety. The comparatively long timeframe to obtain approval in the United States is due to this fact, and not due to any pernicious behavior on the part of United States’ government officials. As recognized by a senior economist testifying on behalf of the NMA, mining companies investing in the United States are well-aware of the complexity of the regulatory framework and its implications for the length of the permitting process:

The US has many advantages including a stable government, lack of corruption, a strong economy and a strong market, a talented workforce, a technologically advanced and environmentally aware mining industry and, importantly, a strong reserve base for most major metals and minerals. But the US also has disadvantages including an uncertain policy

⁴⁹⁸ Reply ¶ 151.

⁴⁹⁹ See Statement of Charles A. Jeannes ¶ 2 (Apr. 17, 2006).

⁵⁰⁰ Testimony of Donald K. Cooper, President of Behre Dolbear & Company (USA) Inc., House Subcommittee on Energy & Mineral Resources (Mar. 3, 2004) (8 LA tab 143).

⁵⁰¹ *Spike in Metal Prices Part II: Hearing Before the H. Comm. on Small Business*, 108th Cong. 59 (Mar. 25, 2004) (testimony of Connie Holmes, Sr. Economist, National Mining Association), at 8. (8 LA tab 142).

environment, a complex regulatory structure, and very long permitting delays that are excessive and expensive.⁵⁰²

Indeed, in 2001 – before any of the challenged California measures were adopted – Behre Dolbear, Glamis’s expert, ranked the United States 24 out of 25 countries in terms of the time it takes to obtain permitting for mining.⁵⁰³

Just as the legal framework which grants to mining claimants the right to extract minerals from federally-owned lands free of charge is well-known, so is the complexity of the regulatory system governing the permitting approval process in the United States. These are part and parcel of doing business in the United States. Glamis’s allegation that its mining claims were expropriated because its plan of operations was not approved in two to three years should be dismissed on this basis alone.⁵⁰⁴

2. DOI’s Initial Review Of Glamis’s Plan Of Operations Did Not Constitute An Expropriation

As the United States demonstrated in its Counter-Memorial, normal delays in obtaining government actions are not expropriatory under either international or U.S. law.⁵⁰⁵ Where the regulatory scheme is complex – as it is for mining in the United States – the government is afforded significant deference and leeway in determining the time

⁵⁰² *Id.* at 7.

⁵⁰³ Testimony of Donald K. Cooper, President of Behre Dolbear & Company (USA) Inc., House Subcommittee on Energy & Mineral Resources (Mar. 3, 2004). (8 LA tab 143).

⁵⁰⁴ *See, e.g., Wyatt v. United States*, 271 F.3d 1090, 1098 (Fed. Cir. 2001) (denying claim for regulatory taking based on “extraordinary delay” in part because “delay is inherent in complex regulatory permitting schemes”).

⁵⁰⁵ *See* Counter-Mem. at 213-14.

necessary for evaluating whether application for a permit complies with the technical and other requirements under that regulatory scheme.⁵⁰⁶

The initial stage of the processing of Glamis's application demonstrates that, contrary to Glamis's assertions, the time required to process Glamis's application has always been a product of the unique impacts that the proposed Imperial Project had on cultural resources in the CDCA. For example, the Imperial Project's significant, unmitigatable impacts were the catalyst for BLM's request for legal advice from the Solicitor, the Solicitor's comprehensive examination of the Department's authority to approve or deny such a project, and the temporary denial of the Project.⁵⁰⁷

Although Glamis submitted its plan of operations in December 1994, it made significant revisions in 1996 to the plan in response to many of the concerns raised in the more than 400 comments that BLM received on the 1996 DEIS, including concerns about the impact of the project on cultural resources.⁵⁰⁸ Given these changes, BLM decided that it should issue a revised DEIS to provide more details about the Project, which it did in November 1997.⁵⁰⁹ This revised DEIS generated an additional 541 written and oral comments.⁵¹⁰

Once the 1997 DEIS was issued, the BLM initiated two additional significant processes. First, in January 1998, BLM requested a legal opinion from the Department Solicitor regarding the conflict between the Quechan religious beliefs and the Imperial

⁵⁰⁶ See *id.* and cases cited therein.

⁵⁰⁷ Mem. ¶¶ 240-45. Although Glamis accuses the Solicitor and other political appointees of "hijacking" the Imperial Project processing, according to Glamis, the determination that there existed significant, adverse, unmitigatable impacts on important cultural resources (which was published in the 1997 DEIS) predates the Solicitor's direct involvement in the processing, which did not begin until 1998. *Id.*

⁵⁰⁸ Counter-Mem. at 75-76.

⁵⁰⁹ *Id.* at 76.

⁵¹⁰ *Id.* at 77.

Project.⁵¹¹ Second, in August 1998, BLM requested consultations with the ACHP regarding the Imperial Project's significant impact on the area's cultural resources.⁵¹² Both of these processes continued until the end of 1999. During this same period, the EIS/EIR contractor continued responding to the hundreds of comments it had received on the 1997 DEIS,⁵¹³ while BLM continued gathering data for the validity examination.⁵¹⁴

After the ACHP comments were issued and the 1999 M-Opinion was finalized, BLM proceeded to prepare a final EIS for the Imperial Project, which was issued in November 2000.⁵¹⁵ DOI ultimately issued the Record of Decision ("ROD") denying the Imperial Project in January 2001.⁵¹⁶

The denial in January 2001, however, was merely temporary.⁵¹⁷ Glamis challenged this decision in federal court in March 2001⁵¹⁸ and also met once with DOI

⁵¹¹ *Id.* at 81; Memorandum from Ed Hastey, State Director, BLM, to John Leshy, Solicitor, DOI (Jan. 5, 1998) (3 FA tab 98).

⁵¹² Counter-Mem. at 78; Letter from Ed Hastey, State Director, BLM, to John Fowler, Executive Director, ACHP (Aug. 25, 1998) (4 FA tab 139).

⁵¹³ See Counter-Mem. at 106 n.520; Memorandum from Dwight L. Carey, Environmental Management Associates ("EMA"), to Glen Miller, Mick Morrison, & Steve Baumann (Jan. 15, 1999) (7 FA tab 22) (demonstrating that the DOI was continuing to work on processing Glamis's plan).

⁵¹⁴ See Counter-Mem. at 106 n.520; Letter from Robert Waiwood, BLM, to Jerry Eykeibosh, ITS-Bondar-Clegg (Nov. 25, 1998) (7 FA tab 20) (requesting additional testing on ore samples from the Imperial Project); Letter from Robert Waiwood, BLM, to Jerry Eykeibosh, ITS-Bondar-Clegg (Dec. 17, 1998) (7 FA tab 21) (same); Letter from Gary C. Boyle, General Manager, Glamis Imperial Corp., to Robert Waiwood, BLM (June 25, 1999) (7 FA tab 27) (providing justification for the proposed increased gold recovery rate from the Imperial Project).

⁵¹⁵ Counter-Mem. at 84-85.

⁵¹⁶ *Id.* at 85.

⁵¹⁷ Glamis cannot claim any injury from the ten-month period in which the 2001 ROD was in effect. This temporary measure is the quintessential example of a "merely ephemeral" action that does not constitute an expropriation. See *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Eng'rs of Iran*, AWD 141-7-2 (June 22, 1984), reprinted in 6 IRAN-U.S. CL. TRIB. REP. 219, 225; see also Counter-Mem. at 210. As Glamis admits, the company had a plan pending before DOI issued the ROD in January 2001 and was in the same position after the ROD was rescinded in November of that year. See Reply ¶¶ 197-98. The only thing that Glamis lost, in its own words, was "the passage of time." Letter from C. Kevin McArthur, President, Glamis Gold Ltd., to Al Wright, Director, BLM California State Office, 1 (June 15, 2000) (7 FA tab 34). The tribunal in *S.D. Myers*, when considering a similar temporary closure of Canada's border, concluded that such a measure did not constitute an expropriation, but merely "an opportunity [that] was

officials in September 2001.⁵¹⁹ In November 2001, DOI rescinded the ROD denying the Imperial Project, as well as the 1999 M-Opinion upon which it was based.⁵²⁰ One of the factors that prompted DOI's decision to rescind the 1999 M-Opinion was the existence of lawsuits against the Department challenging DOI action based on that Opinion.⁵²¹ Glamis, however, fails to acknowledge its role in the rescission of the 2001 ROD.

In sum, as this chronology clearly demonstrates, from 1994, when Glamis first submitted its plan of operations for the Imperial Project, until November 2001, when DOI rescinded the ROD, the Department was actively processing and reviewing Glamis's plan of operations within the framework of the complex regulatory scheme that governs mining operations in the United States, with Glamis's input and in light of the legitimate competing concerns of the Quechan Tribe. Simply put, there was no failure to act or extraordinary delay during this time period.⁵²²

delayed.” *S.D. Myers, Inc. v. Gov't of Canada*, NAFTA/UNCITRAL, Partial Award ¶¶ 286-87 (Nov. 13, 2000). For Glamis, the ten-month period during which the ROD was in effect also represented an opportunity “delayed,” not denied.

⁵¹⁸ *Glamis Imperial Corp. v. United States Dep't of Interior*, No. 1-01-CV000530 (D.D.C.), Compl. For Declaratory and Injunctive Relief (Mar. 12, 2001).

⁵¹⁹ Letter from Earl E. Devaney, Inspector General, U.S. Department of Interior, to Senator Barbara Boxer, at 2-5 (Mar. 11, 2003) (7 FA tab 45); *see also id.* attach. at 1-2.

⁵²⁰ Counter-Mem. at 86.

⁵²¹ *See* Letter from Earl E. Devaney, Inspector General, U.S. Department of Interior, to Senator Barbara Boxer, at 5 (Mar. 11, 2003) (7 FA tab 45).

⁵²² *Cf. Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1366 (Fed. Cir. 2004) (“The question of whether a delay is extraordinary is not a simple matter of the number of months or years” the Government requires to reach a decision; it is a function of “the nature of the permitting process” and its complexity.) (internal quotation marks omitted).

3. DOI's Actions Following The Rescission Of The ROD Did Not Expropriate Glamis's Investment

Glamis likewise mischaracterizes the time period following the rescission of the 2001 ROD as a “continued refusal” by DOI to approve its plan.⁵²³ Again, this description is not borne out by the evidence. Despite Glamis’s claims to the contrary,⁵²⁴ there has been no extraordinary delay under either international or U.S. law in the Federal Government’s actions following the rescission of the ROD.⁵²⁵ During most of the time in question, BLM was reviewing Glamis’s plan of operations in the context of the complex regulatory regime that governs mining claims and progressing toward a decision within that framework, and Glamis admits as much.⁵²⁶

Glamis incorrectly continues to minimize the complexity of the regulatory framework, asserting that the “lion’s share” of the work on its plan had been completed before the 2001 ROD was issued and that there was “no basis for Interior to do anything with the plan but approve it” after the ROD was rescinded.⁵²⁷ After the 2001 ROD was rescinded, DOI resumed work on the validity exam.⁵²⁸ In the validity exam, DOI concluded that the final mitigation measures for the Project still needed to be determined.⁵²⁹ Furthermore, after the validity exam was issued in September 2002, BLM

⁵²³ See Reply ¶¶ 195-96. Glamis, of course, was not entitled to the approval of a plan, but only to its consideration by DOI. See *supra* Sec. I.A.2.

⁵²⁴ See Reply ¶ 200.

⁵²⁵ See Counter-Mem. at 213-14 and cases cited therein.

⁵²⁶ See Mem. ¶¶ 346-49 (describing BLM’s progress on Glamis’s Mineral Report).

⁵²⁷ See Reply ¶ 200.

⁵²⁸ See Counter-Mem. at 89.

⁵²⁹ See BLM, Mineral Report, at 81 (Sept. 27, 2002) (6 FA tab 255) (“As addressed in the FEIS 2000, there will be mitigating measures incorporated into the approval which will require [Glamis] to avoid cultural and other resource values, within the scope of preventing undue and unnecessary degradation” that would require “small changes in the actual location as proposed in the plan of operations . . .”).

then had to consider whether the existing EIS/EIR was still current or should be revised.⁵³⁰ Before BLM could do so, however, the SMGB's regulations were adopted on an emergency basis in December 2002.⁵³¹ At that point, BLM had to consider the question of whether the existing EIS/EIR for Glamis's plan needed to be updated to take into account the emergency SMGB regulation.

This question is not an easy one to answer. Typically, an EIS must be supplemented when "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" occur.⁵³² When confronted with such circumstances, an agency must give the existing EIS/EIR a "hard look" to determine whether that EIS/EIR remains valid.⁵³³ It is settled under U.S. law that a new EIS is required when the "new information is sufficient to show that the remaining [Federal] action will 'affect the quality of the human environment' in a significant manner or to a significant extent not already considered."⁵³⁴ Whether a change in state law requiring new reclamation procedures qualifies as "changed circumstances" for the purposes of revising an EIS/EIR for a pending plan of operations is uncertain. Were BLM to continue its review, at a minimum, the agency would have to determine whether the existing EIS/EIR was still current or needed to be updated.

Furthermore, to the extent that BLM or DOI were not reviewing Glamis's plan of operations during this time period, it was because Glamis had requested that they refrain

⁵³⁰ See Counter-Mem. at 90, 212; see also *id.* at 91 & n.445 (citing Briefing Document on Glamis Imperial Gold Mine (Apr. 8, 2003), at 2 (6 FA tab 286); Draft Working Document (June 26, 2003) (6 FA tab 292)).

⁵³¹ See Counter-Mem. at 97-98.

⁵³² 40 C.F.R. § 1502.9(c)(1)(ii) (2006).

⁵³³ See *Friends of the Clearwater v. Dombek*, 222 F.3d 552, 557 (9th Cir. 2000) (An "agency that has prepared an EIS cannot simply rest on the original document . . . [but] must be alert to new information that may alter the results of its original environmental analysis.").

⁵³⁴ *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989) (quoting 42 U.S.C. § 4332(2)(c)).

from doing so.⁵³⁵ For example, in December 2002 – only ten weeks after DOI completed the validity examination for the Imperial Project – Glamis requested that BLM suspend “all ongoing efforts to process the Imperial Project Plan of Operations”⁵³⁶ BLM agreed to do so, if Glamis would agree to relieve BLM from any legal liability as a result of the suspension.⁵³⁷ Glamis did not respond to BLM’s request for clarification, however, for almost three months. Only at the end of March 2003 did it retract its request for suspension.⁵³⁸

A few weeks later, Glamis approached DOI to explore how it could avoid complying with the California measures.⁵³⁹ For example, Glamis argued in its April 2003 letter that DOI should conclude that the California measures were “preempted and invalid, as applied to federal lands subject to the Mining Law.”⁵⁴⁰ In May 2003, Glamis

⁵³⁵ The Iran-U.S. Claims Tribunal cases, on which Professor Wälde relies for his interpretation of the international law of expropriation, clearly require the Tribunal to consider the claimant’s own conduct and hold that a State’s failure to act on a license or permit cannot result in an expropriation if the claimant cannot “show that it took all reasonable steps” required to obtain the requested permission and that any inaction by the State is not due to the claimant’s “own failure to act.” *Petrolane, Inc. v. Gov’t of Iran*, AWD 518-131-2, ¶ 86 (Aug. 14, 1991), reprinted in 27 IRAN-U.S. CL. TRIB. REP. 64, 92 (1991); *Houston Contracting Co. v. Nat’l Iranian Oil Co.*, AWD 378-173-3, ¶ 467 (July 22, 1988), reprinted in 20 IRAN-U.S. CL. TRIB. REP. 3, 124 (1988) (requiring claimant to “show that it took all reasonable steps to export the equipment, so as to satisfy the burden of proof to show that the losses suffered by it were incurred as a result of the acts or omissions” of Iran and not the claimant); *Seismograph Serv. Corp. v. Nat’l Iranian Oil Co.*, AWD 420-443-3, ¶ 268 (Mar. 31, 1989), reprinted in 22 IRAN-U.S. CL. TRIB. REP. 3, 71 (1989) (requiring claimant to “establish[] that CFPS [claimant’s subsidiary] itself did not cause the [alleged] deprivation by failing to act in a given manner”). The claimant’s conduct is also a factor in U.S. law when determining whether the Federal Government has expropriated property due to an extraordinary delay. See *Wyatt v. United States*, 271 F.3d 1090, 1098 (Fed. Cir. 2001) (A court “must recognize that delay in the permitting process may be attributable to the applicant as well as the government.”).

⁵³⁶ Letter from C. Kevin McArthur, President, Glamis Gold Ltd., to Mike Pool, California State Director, BLM (Dec. 9, 2002) (6 FA tab 265).

⁵³⁷ See Letter from Mike Pool, California State Director, BLM, to C. Kevin McArthur, President, Glamis Gold Ltd. (Jan. 7, 2003) (6 FA tab 271).

⁵³⁸ Letter from Charles A. Jeannes, Senior Vice President, Glamis Gold Ltd., to Mike Pool, California State Director, BLM (Mar. 31, 2003) (6 FA tab 280).

⁵³⁹ See Letter from R. Timothy McCrum, Counsel for Glamis Gold Ltd., Crowell & Moring LLP, to Fred E. Ferguson, Jr., Associate Solicitor, DOI (Apr. 2, 2003) (7 FA tab 46).

⁵⁴⁰ See *id.* at 9.

met with DOI officials and reiterated its position that the California measures “did not apply to the Imperial Project.”⁵⁴¹

Glamis, however, switched gears in July 2003 and abruptly informed DOI that it was abandoning the regulatory process to pursue “new avenues” of redress.⁵⁴² It is disingenuous for Glamis to now claim that it cannot understand why DOI failed to continue processing its plan of operations even *after* it communicated to DOI its plans to pursue a “new avenue” by commencing arbitration.⁵⁴³

Because Glamis alleges that its investment was expropriated as of December 2002, the date on which the California measures took effect, events occurring after that date are irrelevant for purposes of determining whether an expropriation took place.⁵⁴⁴ Even if these events could be considered for such purposes, however, Glamis still cannot prevail on its claim. Any supposed delay that Glamis alleges is the result of its decision to abandon the regulatory process and not DOI’s purported failure to act.⁵⁴⁵ Although Glamis now protests DOI’s failure to continue processing its plan of operations after it advised DOI that it was filing this arbitration,⁵⁴⁶ its actions – or lack thereof – following the July 2003 letter speak louder than these words. Those actions clearly demonstrate that Glamis did not expect – nor should it have expected – DOI to continue processing its

⁵⁴¹ Mem. ¶ 355.

⁵⁴² Letter from R. Timothy McCrum, Counsel for Glamis Gold Ltd., Crowell & Moring LLP, to Patricia Morrison, Deputy Assistant Secretary for Land and Minerals, DOI, at 1 (July 21, 2003) (7 FA tab 47).

⁵⁴³ See Reply ¶ 200.

⁵⁴⁴ With its filing of the Notice of Arbitration, Glamis claimed that its mining claims had been expropriated. Events that have occurred after the filing of Glamis’s claim cannot serve as the basis for a finding of a violation of the NAFTA. See Decision on Objections to Document Production ¶¶ 23-25 (July 20, 2005) (denying request for post-July 21, 2003 documents because, *inter alia*, the Tribunal was “not disposed at present to regard the documents requested as material”).

⁵⁴⁵ See *supra* n. 535.

⁵⁴⁶ See Mem. ¶ 513; Reply ¶¶ 195-97.

plan of operations after it submitted this claim to arbitration. Consequently, DOI's failure to process its plan of operations after that time cannot form the basis for any expropriation finding.

Notably, Glamis does not claim that it has ever contacted anyone at DOI at any time since July 2003 to inquire about the status of the plan of operations that it now claims remains pending. Glamis's total silence sharply contrasts with its near constant interactions with DOI and BLM officials before July 2003.⁵⁴⁷ Under these circumstances, Glamis has no basis to claim that DOI's failure to approve its plan of operations since it filed this claim has resulted in an expropriation.

Moreover, Glamis's current claim directly contradicts its past practice. When challenging the 1999 M-Opinion in court, Glamis criticized BLM for continuing its review of the company's plan of operations, arguing that "it would be a tremendous waste of money and both BLM and Glamis resources to continue with the process" while Glamis's suit was still pending.⁵⁴⁸ As Glamis advised, the only thing that would be lost if BLM suspended its review would be "the passage of time."⁵⁴⁹ Glamis, however, has failed to explain why, considering that it abandoned the regulatory process over three

⁵⁴⁷ For example, after Glamis submitted its plan of operations, it met repeatedly with officials from both BLM and DOI to discuss the status of its plan, and later, the development and issuance of the 1999 M-Opinion. *See, e.g.*, Letter from Earl E. Devaney, Inspector General, DOI, to Senator Barbara Boxer, attach., at 9-12 (Mar. 11, 2003) (7 FA tab 45) (chronicling meetings and communications between Glamis and Interior officials between Summer 1999 and Fall 2000). Likewise, after the 2001 ROD denying Glamis's plan was issued, Glamis and its legal counsel held nine face-to-face meetings with DOI officials between January 2001 and September 2002. *Id.* at 2-5; *see also id.* attach., at 1-8. Glamis's counsel also made repeated telephone calls and sent e-mails to Interior officials during this same time period. *Id.* at 9.

⁵⁴⁸ Letter from C. Kevin McArthur, President, Glamis Gold Ltd., to Al Wright, Director, BLM California State Office, 1 (Apr. 14, 2000) (7 FA tab 32).

⁵⁴⁹ Letter from C. Kevin McArthur, President, Glamis Gold Ltd., to Al Wright, Director, BLM California State Office, 2 (June 15, 2000) (7 FA tab 34).

years ago, it would not be, in its own words, a waste of “money and effort”⁵⁵⁰ now for DOI to continue processing its plan of operations while its claim is pending in arbitration.

In fact, there is more reason for DOI to have ceased processing Glamis’s plan after Glamis filed this claim than there would have been for DOI to cease its processing in 2000 when Glamis filed its earlier lawsuit challenging the 1999 M-Opinion. In 2000, BLM’s completion of the review would have ended Glamis’s dispute with the DOI over the scope and validity of the 1999 M-Opinion.⁵⁵¹ Now, in light of the California measures, even if BLM were to decide that a revised EIS/EIR is unnecessary, issuing a decision on Glamis’s plan of operations would not resolve Glamis’s dispute with the United States. Glamis recognizes as much when it contends that, given the adoption of SB 22 in April 2003, “[i]t would . . . be futile for Glamis to participate in further administrative processing of the Imperial Project Plan of Operations.”⁵⁵²

Finally, Glamis’s failure to seek domestic avenues of recourse for the Federal Government’s alleged delay seriously weakens its expropriation claim.⁵⁵³ Administrative agencies make many decisions on highly technical matters within their areas of expertise. It is not surprising that these determinations may, at times, be erroneous. In technical matters such as these, however, it is highly unlikely that such errors would rise to the level of a violation of international law.⁵⁵⁴ Such errors are more likely to reach that level

⁵⁵⁰ *Id.* at 1.

⁵⁵¹ Glamis subsequently challenged in federal court the 2001 decision denying its plan as well. *See Glamis Imperial Corp. v. United States Dep’t of Interior*, No. 1:01CV00530 (D.D.C.), Compl. For Declaratory and Injunctive Relief (Mar. 12, 2001).

⁵⁵² Reply ¶ 291; *see also id.* ¶ 292 (arguing that “[i]t would “likewise be futile for Glamis to withdraw the pending proposed Plan of Operation and resubmit a plan that it could not financially perform.”).

⁵⁵³ *See* Counter-Mem. at 214-16.

⁵⁵⁴ *See Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Award ¶ 20.33 (Sept. 16, 2003) (reasoning that an international arbitral panel “does not exercise the function of an administrative review

if the State provides no mechanism for an aggrieved claimant to seek review of such errors, or if the mechanism that is provided fails to accord the claimant fundamental due process protections.⁵⁵⁵ It is, perhaps, for this reason that several international tribunals have held that a claimant's failure to take advantage of available domestic procedures to remedy a perceived administrative error undermines the legitimacy of an international claim for expropriation.

Glamis tries to distinguish its own situation from that of the claimants in the three international decisions on which the United States relies – *Generation Ukraine*, *Feldman*, and *EnCana* – by arguing that those decisions referred to specific domestic procedures that were available to the claimant.⁵⁵⁶ In each of these cases, however, it was the availability of court review for administrative actions – and the claimant's failure to pursue such review – and not the specific domestic procedure that was relevant to the tribunal's rejection of a claim of expropriation at the international level.⁵⁵⁷

As the *Generation Ukraine* tribunal explained, “an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of *exhaustion* of local remedies but

body to ensure that municipal agencies perform their tasks diligently, conscientiously, or efficiently. That function is within the proper domain of domestic courts and tribunals that are cognizant of the minutiae of the applicable regulatory regime”); *see also Feldman Award* ¶ 114 (denying claim of expropriation under international law in part because “the Claimant could have availed himself early on of the procedures available under Mexican law to obtain a formal, binding ruling on the invoice issue from SHCP but apparently chose not to do so”) (citations omitted).

⁵⁵⁵ *See* JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 7-8 (2005).

⁵⁵⁶ *See* Reply ¶ 201.

⁵⁵⁷ *See Generation Ukraine Award* ¶¶ 20.30-34; *Feldman Award* ¶ 114; *EnCana Corp. v. Ecuador*, L.C.I.A. Case UN3481, Award ¶¶ 194-97 (Feb. 3, 2006); *see also* W. Michael Reisman & Robert D. Sloane, *Indirect Expropriation and its Valuation in the BIT Generation*, 74 BRIT. Y.B. INT'L L. 115, 146 (2004) (“It would be destructive of the normative goals of BITs for the law to encourage foreign investors prematurely to claim that their investments have been expropriated and to resort to compulsory dispute resolution under the relevant BIT provision. General international law has long discouraged and reprehended premature invocation of third-party dispute resolution.”).

because the very reality of conduct tantamount to expropriation is doubtful in the absence of a *reasonable* – not necessarily exhaustive – effort by the investor to obtain correction.”⁵⁵⁸ Glamis, however, has failed to pursue any domestic avenues to correct DOI’s alleged delay since the ROD was rescinded in November 2001.

Contrary to Glamis’s contention that there were no specific domestic procedures made available to it, there were, in fact, at least two avenues that Glamis could have pursued any time after July 2003 to remedy DOI’s alleged inaction on its plan before seeking redress under the NAFTA. Glamis could, for example, have simply contacted DOI officials directly to request that the review process continue, as it did many times before it abandoned the regulatory process as “intractable” in July 2003.⁵⁵⁹

Even assuming *arguendo* that the regulatory process was “intractable” as of July 2003, Glamis could have sued DOI in federal court to obtain a more definitive ruling on the status of its plan before resorting to international arbitration.⁵⁶⁰ Glamis, for example, could have sought declaratory or injunctive relief to prevent the application of the California measures to its plan on the grounds that they were pre-empted by federal law,

⁵⁵⁸ *Generation Ukraine Award*, ¶ 20.30 (emphasis in original); *see also id.* ¶ 20.33 (finding that the claimant “did not attempt to compel” the local agency “to rectify the alleged omissions in its administrative management” of the claimant’s investment by suing for action in the local courts); *Feldman Award* ¶ 114 (denying claim for expropriation in part because the claimant could have avoided uncertainty over status by pursuing a ruling in Mexican courts on his status under the tax laws but failed to do so, despite having pursued other legal remedies in Mexican court).

⁵⁵⁹ Letter from R. Timothy McCrum, Counsel for Glamis Gold Ltd., Crowell & Moring LLP, to Patricia Morrison, Deputy Assistant Secretary for Land and Minerals, DOI, at 1 (July 21, 2003) (7 FA tab 47).

⁵⁶⁰ As the record makes clear, Glamis was certainly no stranger to the federal courts on this issue, having first challenged the 1999-M Opinion, and then resulting January 2001 ROD denying its plan of operations. *See Glamis Imperial Corp. v. Babbitt*, No. CV-N-00-0196-DWH-VPC (D. Nev.), Plaintiff’s Mot. for Expedited Consideration of its Motion for Summary Judgment, at 3-4 (July 5, 2000); *Glamis Imperial Corp. v. U.S. Dep’t of Interior*, No. 1:01CV00530 (D.D.C.), Compl. for Declaratory and Injunctive Relief (Mar. 12, 2001). In its challenge of the 1999 M-Opinion, moreover, Glamis acknowledged that it also would have to challenge an adverse decision by BLM on its plan of operations in Interior’s administrative courts. *See Glamis Imperial Corp. v. Babbitt*, No. CV-N-00-0196-DWH-VPC (D. Nev.), Plaintiff’s Motion for Expedited Consideration of its Motion for Summary Judgment, 3 (Apr. 14, 2000).

as it contends.⁵⁶¹ Alternatively, if Glamis indeed believed that the BLM and DOI had unlawfully delayed processing its plan of operations, it could have sued those agencies under the APA.⁵⁶² Glamis fails to explain, however, why it did not pursue either of these avenues of redress before initiating these proceedings.⁵⁶³

As the analysis above demonstrates, the Federal Government has not failed to act or unreasonably delayed a decision on Glamis's plan of operations for the Imperial Project. For these reasons, Glamis's claim that its investment has been expropriated as a result of the Federal Government's actions should be rejected.

II. Glamis's Minimum Standard Of Treatment Claim Should Be Denied

The question before this Tribunal with respect to Glamis's Article 1105 claim is whether the United States' treatment of Glamis fell below the customary international law minimum standard of treatment incorporated therein. The answer is clear from the record before the Tribunal: Glamis has simply failed to show that the minimum standard of treatment incorporated in Article 1105 prohibits any of the United States' actions.

Below, the United States establishes as a threshold matter that Glamis misconstrues the nature of customary international law and thus proffers an analysis of

⁵⁶¹ See *supra* nn. 508-515 and accompanying text.

⁵⁶² The APA authorizes judicial review to "compel agency action" that is "unreasonably delayed" when an agency has failed to carry out a mandatory, non-discretionary duty. 5 U.S.C. § 706(a)(1).

⁵⁶³ Glamis's argument that the NAFTA requires a claimant to waive its right to initiate or continue certain proceedings before filing a NAFTA claim misses the mark. See Reply ¶ 201. The United States is not arguing that Glamis should have pursued domestic remedies *simultaneously* with its NAFTA case but, rather, that its failure to seek domestic relief *prior to* filing its NAFTA case weakens its expropriation claim. See Counter-Mem. at 214-16. The NAFTA does not contain a "fork in the road" provision, *i.e.*, a claimant does not waive its right to file a NAFTA claim just because it has earlier sought relief in domestic court. In any event, although Article 1121(1)(b) requires waiver of the right to initiate administrative or court proceedings, it expressly exempts from that requirement "proceedings for injunctive, declaratory or other extraordinary relief." Both a court challenge that the California measures were preempted and a claim under the APA to compel agency action are actions for injunctive or declaratory relief which would fall squarely within Article 1121's exception.

the legal standard under Article 1105 that is gravely flawed. This confusion, moreover, proves fatal to each of the premises of Glamis's Article 1105 claim. As a result, Glamis fails to meet its burden of establishing the existence of the three rules that it purports to be part of the customary international law minimum standard of treatment, namely, that customary international law requires (i) notice and comment of proposed regulatory actions; (ii) the fulfillment of investors' legitimate expectations; and (iii) flawlessness in legislative and regulatory action. Finally, in any event, Glamis fails to show that the United States acted contrary to these alleged rules. Glamis's Article 1105 claim should, therefore, be denied.

A. Glamis's Analysis Of Article 1105's Requirements Is Seriously Flawed

Although Glamis pays lips service to several basic tenets of customary international law, it proceeds to ignore them throughout its analysis pertaining to its Article 1105 claim. To begin, there is no dispute between the parties that Article 1105 prescribes the customary international law minimum standard of treatment.⁵⁶⁴ The NAFTA Free Trade Commission's 2001 Note of Interpretation confirms as much.⁵⁶⁵ The parties here also agree that Glamis bears the burden of proving the existence of an alleged rule of customary international law and its violation by the United States.⁵⁶⁶ Nor is there any debate that such a rule must be based upon the practice of States followed by them

⁵⁶⁴ Mem. ¶¶ 517-18; Reply ¶ 204.

⁵⁶⁵ See NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, B1 (July 31, 2001), available at <http://www.state.gov/documents/organization/38790.pdf> ("Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party."); see also NAFTA art. 1131(2) ("An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.").

⁵⁶⁶ See Mem. ¶ 483 (burden of proof); *id.* ¶ 518 (customary international law); see also Counter-Mem. at 104 & nn.512-13; *id.* at 222 & nn.972-74.

from a sense of legal obligation.⁵⁶⁷ Establishing the existence of a rule of customary international law, however, is no small task. The International Court of Justice (“ICJ”) has stated that to establish a rule of customary international law, it is “an indispensable requirement” to demonstrate that

State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”⁵⁶⁸

Yet, as the proponent of several supposed rules of customary international law, Glamis has failed to show in each case that State practice has coalesced to achieve the requisite density “in terms of uniformity, extent and representativeness.”⁵⁶⁹

Glamis further errs in several additional respects. *First*, Glamis misconstrues the nature of customary international law; *second*, Glamis assumes that Article 1105 is the same as “autonomous” fair and equitable treatment clauses in other treaties; and *third*, Glamis erroneously asserts that a new rule of customary international law can be proved based solely on arbitral decisions that do not demonstrate, through State practice and *opinio juris*, the existence of such a rule. These fundamental errors prove fatal to Glamis’s Article 1105 claim.

⁵⁶⁷ See Mem. ¶ 518; Counter-Mem. at 219. For a recent official statement by the United States regarding the necessary State practice and *opinio juris* to establish a rule of customary international law, see Letter from John B. Bellinger, III, Legal Adviser, U.S. Department of State, and William J. Haynes, General Counsel, U.S. Department of Defense, to Jakob Kellenberger, President, International Committee of the Red Cross, at 2 (Nov. 3, 2006).

⁵⁶⁸ *North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.)*, 1969 I.C.J. 3, 43 (Judgment of Feb. 20).

⁵⁶⁹ Final Report of the International Law Association Committee on Formation of Customary (General) International Law, *Statement of Principles Applicable to the Formation of General Customary International Law*, § II.C.12, cmt. b (2000), available at <http://www.ila-hq.org/pdf/CustomaryLaw.pdf> (“ILA Report”). If there is too much inconsistency between various States’ practices, then “there is no general custom, and hence no general customary rule.” *Id.* § II.C.13, cmt. c. Although the State practice must be extensive and representative, it need not actually be universal. *Id.* § II.C.14.

1. Glamis Misapprehends Both Its Burden And The Fundamental Nature Of The International Minimum Standard Of Treatment

Glamis's theories about Article 1105 find no support in customary international law. In its Reply, Glamis relies on the proposition, attributed to the *Mondev* tribunal, that "there is an overwhelming body of treaty law establishing states' practice of providing fair and equitable treatment to foreign investors."⁵⁷⁰ However, the fact that treaty practice establishes the repeated inclusion of fair and equitable treatment provisions in bilateral investment treaties ("BITs") proves nothing in and of itself. As the *Mondev* tribunal itself noted, the central question in a Chapter Eleven case still remains: "what is the *content* of customary international law providing for fair and equitable treatment . . .?"⁵⁷¹ Only a handful of such investment treaties can be said to provide any guidance.⁵⁷² Moreover, as demonstrated below, there are significant textual differences among various fair and equitable treatment provisions, which indicates that their meanings are not uniform across agreements. Thus, the existence of thousands of BITs calling for fair and equitable treatment does not by itself provide any basis for Glamis's claims under Article 1105. Because Glamis has failed to establish the content of any customary international

⁵⁷⁰ Reply ¶ 208.

⁵⁷¹ *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award ¶ 113 (Oct. 11, 2002) (emphasis added).

⁵⁷² See, e.g., 2004 U.S. Model Bilateral Investment Treaty, art. 5(2), available at <http://www.state.gov/e/eeb/rls/othr/38602.htm> ("For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) 'full protection and security' requires each Party to provide the level of police protection required under customary international law.").

law rule that would be violated by the treatment it allegedly received from the United States, Glamis's claim should be denied.

Glamis also argues that the minimum standard of treatment varies – indeed, “requires better conduct” in some cases – depending on the level of development of the legal system in the State in question.⁵⁷³ This argument is fundamentally flawed. It is axiomatic that any rule forming part of the customary international law minimum standard of treatment of aliens must be based on *international* law, not *domestic* law: “[I]t is international law and international law alone which is the determining factor of the status of the alien.”⁵⁷⁴ Glamis's view of Article 1105, however, would tie the minimum standard of treatment to the domestic legal system of the respondent in each case.

Such a proposition – in addition to being wholly unsupported by State practice – ignores the very essence of the international minimum standard.⁵⁷⁵ The standard, by definition, sets a minimum. But Glamis nonetheless argues that a country with a highly developed respect for the rule of law, like the United States, should be held to a higher standard. This argument not only disregards the fact that the minimum standard is based

⁵⁷³ Mem. ¶ 519; *see also* Reply ¶¶ 220-21.

⁵⁷⁴ ANDREAS H. ROTH, *THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS* 81 (1949); *see also* BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 172 (1987) (“For the determination of the existence of an unlawful act in international law, it may be said, therefore, that municipal law, as such, is wholly irrelevant.”).

⁵⁷⁵ Glamis's suggestion that there is support in two arbitral decisions for such a higher standard is not borne out. Neither *Generation Ukraine v. Ukraine* nor *X v. Central European Republic* stands for the proposition that the conduct *required* under customary international law varies depending on the host country's level of development. Moreover, in *Generation Ukraine*, there was no fair and equitable treatment claim. *See Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Award ¶ 5.1 (Sept. 13, 2003). And in *X v. Central European Republic*, although there was a fair and equitable treatment claim, the tribunal did not reach the merits; the claim was rejected on jurisdictional grounds because the relevant BIT article was not subject to investor-State dispute settlement. *See X v. Central European Republic*, SCC Case 49/2002, Award (2003), *reprinted in* STOCKHOLM ARB. REP. 141, 165 (2004). Nor did the tribunal evaluate the respondent's conduct, because it dismissed the case for lack of an “investment.” *See id.*

on the “common standard of conduct” observed by States,⁵⁷⁶ but it also measures the minimum standard according to a domestic law yardstick, essentially turning it into a national treatment standard. Such an interpretation cannot stand:

The international minimum standard is a norm of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which States, *regardless of their domestic legislation and practices*, must respect when dealing with foreign nationals and their property.⁵⁷⁷

As the *Genin* tribunal observed, “[w]hile the exact content of this standard is not clear, the Tribunal understands it to require an ‘international minimum standard’ that is separate from domestic law, but that is, indeed, a *minimum* standard.”⁵⁷⁸ Likewise, according to the *Saluka* tribunal, the customary minimum standard:

provides a minimum guarantee to foreign investors, even where the State follows a policy that is in principle opposed to foreign investment; in that context, the minimum standard of ‘fair and equitable treatment’ may in fact provide no more than ‘minimal’ protection.⁵⁷⁹

In short, the Tribunal should reject Glamis’s meritless suggestion that the customary international law minimum standard of treatment requires the United States, based on its level of development, to accord foreign investments a higher standard of treatment than it requires of other countries.⁵⁸⁰

⁵⁷⁶ See ROTH, THE MINIMUM STANDARD, *supra* n.575, at 87.

⁵⁷⁷ OECD, *Fair and Equitable Treatment Standard in International Investment Law*, Working Papers on International Investment (2004), at 8 n.32 (emphasis added) (citing ROTH, THE MINIMUM STANDARD, *supra* n.575, at 127; BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, *supra* n.45, at 502; CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC 46 (1970)).

⁵⁷⁸ *Genin v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award ¶ 367 (June 25, 2001) (emphasis in original).

⁵⁷⁹ *Saluka Invs. BV v. Czech Republic*, UNCITRAL, Partial Award ¶ 292 (Mar. 17, 2007) (“*Saluka* Partial Award”). It is in this sense that the United States argued that the standard sets an absolute minimum floor of treatment. *Compare* Counter-Mem. at 220 *with* Reply ¶ 218 (where Glamis argues that the United States “places an unnatural and undue emphasis on the word ‘minimum,’”).

⁵⁸⁰ Professor Wälde, who also espouses this view in his report, *see* Wälde Rep. at IV-4 & IV-8-9 (“it is a minimum standard in countries with fully developed market economies and which adhere in practice to the rule of law”), fails to cite any State practice or case law in support, *see id.* Moreover, one of the

The Tribunal should also reject Professor Wälde’s invitation for it to follow in the footsteps of other tribunals that have “frequently used [fair and equitable treatment] as a fall-back solution when they find it too difficult to determine an ‘indirect expropriation.’”⁵⁸¹ Creating legal principles in order to justify pre-desired results approximates deciding *ex aequo et bono*, an authority tribunals clearly lack absent explicit consent of the disputing parties.⁵⁸² What *is* required is for tribunals to measure State conduct against the standard alleged to be breached. Neither Glamis nor Professor Wälde has presented any evidence that the NAFTA Parties intended Article 1105 to give rise to liability in circumstances when a State’s conduct does not rise to the level of an

commentators Wälde cites concludes that there is no consensus among “modern arbitral tribunals” as to whether “they can consider the host State’s level of development when applying the international law standard of treatment.” NICK GALLUS, *The Influence of the Host State’s Level of Development on International Investment Treaty Standards of Protection*, 6 J. WORLD INV. & TRADE 711, 727 (2005). Gallus continues: “The issue, therefore, seems ripe for clarification by treaty drafters . . . whether they understand the international law standard of treatment to be an absolute minimum or whether it is influenced by the host State’s level of development.” *Id.* at 728. In this case, the three “treaty drafters” definitively agree that Article 1105 is an absolute – not a relative – standard. *See* Department of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation*, in CANADA GAZETTE (Jan. 1, 1994) (“SOI”), at 149 (where Canada contrasts national treatment, which “provides a relative standard of treatment,” with Article 1105, which “provides for a minimum absolute standard of treatment, based on long-standing principles of customary international law”); *Methanex Corp. v. United States*, Submission of Mexico Pursuant to Article 1128, ¶ 14 (Jan. 30, 2004) (distinguishing between Article 1102’s “relative standard of national treatment” and Article 1105’s “absolute standard, the minimum standard of treatment required by international law”).

⁵⁸¹ Wälde Rep. at I-30; *see also id.* at IV-21 (referring again, without any support, to “the lower-threshold character of Article 1105”).

⁵⁸² UNCITRAL Arbitration Rules, art. 33(2) (“The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorised the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.”). Nor is it the proper role of an expert witness to undertake a results-driven analysis. *Cf.* Wälde Rep. at I-8 & 26 (stating that “[t]he challenge is to . . . not to let the U.S. transfer its potential historic liability to Native American tribes in general and the Quechan tribe in particular to a foreign mining investor” and that the United State “should ‘pay’ against this liability itself and not ‘fob it off’ to a foreign investor”); *id.* at I-1 (setting forth two results-driven – and arguably biased – “questions examined”: “what legal rules would qualify the conduct of the United States . . . as a breach of the U.S. obligations . . . under Article 1110” and “as a breach of the U.S. obligations . . . under Article 1105?”); *id.* at I-32 (posing question for the Tribunal as whether it was “reasonably foreseeable from a prudent operator’s perspective both that the U.S. would continue to dither and that California would use its environmental regulation powers to intentionally impose a prohibitive back-filling obligation”).

expropriation under Article 1110, *i.e.*, as if Article 1105 provided protection for some kind of “expropriation lite.”

Moreover, such a “fall-back” relationship, where State responsibility would arise under customary international law despite the lack of an unlawful expropriation, is belied by history. Although the proscription against uncompensated expropriation has long been a well-recognized part of customary international law, its history has been marked by significant debate and conflicting State practice.⁵⁸³ It is simply untenable to suggest that in the last few years there has been a general and consistent recognition among States that international responsibility could arise from something far less than an unlawful expropriation.

Rather, the historical origin of the minimum standard of treatment demonstrates that the obligation was intended to fill any potential gaps left by domestic law. As the *S.D. Myers* tribunal explained, minimum standard provisions are a necessary “floor” of protection for aliens to “avoid what might otherwise be a gap” when States fail to accord their own nationals a level of treatment that meets international standards.⁵⁸⁴ In this light, this Tribunal must reject any notion of Article 1105 as catch-all provision to find liability when government action does not rise to the level of an expropriation.⁵⁸⁵

⁵⁸³ See Counter-Mem. at 221-22 n.970; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712 (Reporters’ Notes) (1987); OECD, “*Indirect Expropriation*” and the “*Right to Regulate*” in *International Investment Law*, Working Papers on International Investment at 2 n.1 (2004).

⁵⁸⁴ *S.D. Myers, Inc. v. Gov’t of Canada*, NAFTA/UNCITRAL, Partial Award ¶ 259 (Nov. 13, 2000), reprinted in 40 I.L.M. 1408 (“*S.D. Myers* Partial Award”).

⁵⁸⁵ Similarly unfounded is Professor Wälde’s suggestion that Chapter Eleven of the NAFTA was intended to provide more protection to foreign investors than U.S. bilateral investment treaties. See Wälde Rep. at I-31 (describing NAFTA as “history’s most investor-friendly and expansive investment protection treaty”); *id.* at IV-22 (describing Chapter Eleven as “arguably . . . the most extensive model of treaty-based investor protection around”). Many U.S. BITs authorize investor-State tribunals to hear claims for breaches of so-called “investment agreements” and “investment authorizations,” an authority that Chapter Eleven tribunals clearly lack. Compare 2004 U.S. Model Bilateral Investment Treaty, art. 24.1(a)(i) & (b)(i), available at <http://www.state.gov/e/eeb/rls/othr/38602.htm>, with NAFTA arts. 1116 & 1117. Moreover, Glamis has not

2. Article 1105 Cannot Be Interpreted As If It Were The Same As An “Autonomous” Fair And Equitable Treatment Provision

As is well-established, the minimum standard of treatment required by Article 1105 is the customary international law minimum standard of treatment.⁵⁸⁶

Consequently, there can be no debate that Article 1105 differs from bilateral investment treaties and other agreements that either contain no fair and equitable treatment provision or contain such a provision that lacks a reference to international law or to the minimum standard of treatment. In fact, the majority of fair and equitable treatment clauses in international investment agreements do not include any reference to international law.⁵⁸⁷

This is not to argue, as Glamis suggests the United States does, that Article 1105 is *sui generis*.⁵⁸⁸ It is not. There are certainly other agreements in force with provisions similar to Article 1105.⁵⁸⁹ But that does not mean, however, that all fair and equitable treatment provisions are the same.

Glamis, however, pretends otherwise. Referring to other treaties as if they were all comparable to Article 1105, Glamis takes the position that there are no distinctions

cited a single commentator who has described NAFTA, at the time of its entry into force or since, as being more protective on balance than U.S. BITs.

⁵⁸⁶ See *supra* n.565.

⁵⁸⁷ United Nations Conference on Trade and Development, *Fair and Equitable Treatment*, Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/11 (Vol. III) (1999), at 13, available at <http://www.unctad.org/en/docs/psiteiitd11v3.en.pdf>.

⁵⁸⁸ See Reply ¶ 207.

⁵⁸⁹ See, e.g., Free Trade Agreement, U.S.-Chile, art. 10.4, June 6, 2003, State Dep't No. 04-35; Free Trade Agreement, U.S.-Sing., art. 15.5, May 6, 2003, State Dep't No. 04-36; Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., art. 5, Nov. 4, 2005. Contrary to Glamis's contention, the United States does not argue that NAFTA Article 1105 is somehow “less protective” than minimum standard of treatment provisions in other U.S. BITs. Reply ¶ 212. Indeed, as Glamis notes, U.S. practice in the form of Executive Branch transmittal letters to the U.S. Senate describe the fair and equitable treatment provisions that various U.S. BITs require – like Article 1105 – as intended to provide treatment in accordance with the customary international law minimum standard. See *id.* ¶ 212 & n.410.

among fair and equitable treatment provisions.⁵⁹⁰ But the two surveys on which Glamis relies, prepared by UNCTAD and the OECD, actually contradict this argument and, instead, demonstrate that treaty provisions are not always interchangeable.

For example, UNCTAD's study on fair and equitable treatment concludes that "the presence of a provision assuring fair and equitable treatment in an investment instrument does not automatically incorporate the international minimum standard for foreign investors."⁵⁹¹ UNCTAD reports at least four different approaches to fair and equitable treatment in BITs, including BITs that make no reference to the phrase and BITs that make only hortatory references to it. Moreover, the BITs with binding fair and equitable treatment provisions are further divided by UNCTAD into those that link the standard to customary international law and those that do not. According to this study, most international investment agreements do not explicitly link the fair and equitable treatment standard with the international minimum standard of treatment.⁵⁹² Indeed, UNCTAD concluded, "the instances in which States have indicated or implied an equivalence between the fair and equitable standard and the international minimum standard appear to remain relatively sparse."⁵⁹³

Likewise, the OECD's working paper concludes that "[t]he meaning of the 'fair and equitable treatment' standard may not necessarily be the same in all the treaties in

⁵⁹⁰ See *id.* ¶ 213 ("BITs" – without exception – "are reflective of the customary international law standard of treatment owed to foreign investors").

⁵⁹¹ UNCTAD, *Fair and Equitable Treatment*, *supra* n.588, at 40.

⁵⁹² *Id.* at 13.

⁵⁹³ *Id.* at 40.

which it appears.”⁵⁹⁴ This study further reveals that there is a significant debate among governments about the meaning of the “fair and equitable treatment” standard, which refutes Glamis’s oversimplified assumptions:

The obligation of the parties to investment agreements to provide to each other’s investments “fair and equitable treatment” has been given various interpretations by governmental officials, arbitrators and scholars. Discussion of this standard has focused mainly on whether the standard of treatment required is measured against the customary international law minimum standard, a broader international law standard including other sources such as investment protection obligations generally found in treaties and general principles or whether the standard is an autonomous self-contained concept in treaties which do not explicitly link it to international law.⁵⁹⁵

In short, Glamis’s own authorities reject Glamis’s argument that there are no distinctions among fair and equitable treatment provisions.

Various arbitral decisions have drawn the same distinctions noted by UNTAD and OECD. The *Azurix* tribunal, for instance, found that similar fair and equitable treatment clauses in different investment agreements “could reasonably be understood to have a different meaning.”⁵⁹⁶ The *Saluka* tribunal also distinguished between “the customary and the treaty standards,” limiting itself to the interpretation of the latter and finding that “[t]he interpretation of [the fair and equitable treatment provision at issue] does not therefore share the difficulties that may arise under treaties (*such as the NAFTA*) which expressly tie the ‘fair and equitable treatment’ standard to the customary minimum standard.”⁵⁹⁷

⁵⁹⁴ OECD, *Fair and Equitable Treatment Standard in International Investment Law*, *supra* n.578, at 2 (“The proper interpretation may be influenced by the specific wording of a particular treaty, its context, negotiating history or other indications of the parties’ intent.”).

⁵⁹⁵ *Id.* (footnotes omitted).

⁵⁹⁶ *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award ¶ 363 (July 14, 2006).

⁵⁹⁷ *Saluka* Partial Award ¶ 294 (emphasis added).

Glamis, however, denies any distinction. Even though almost every case it cites in support of its Article 1105 claim interprets the fair and equitable treatment provision involved as an “autonomous” standard without reference to the customary international law minimum standard of treatment, Glamis repeatedly relies on those decisions as evidence of the content of the customary international law minimum standard of treatment.⁵⁹⁸ But Glamis has produced no evidence or support for its proposition that the interpretations offered by those tribunals reflect customary international law.⁵⁹⁹ These decisions, therefore, are of scant assistance to the Tribunal.

3. Glamis Cannot Meet Its Burden By Relying Solely On Arbitral Decisions That Do Not Examine State Practice

Moreover, as the United States demonstrates below, even those cases cited by Glamis that do purport to opine on a customary international law minimum standard are of little assistance because none of those cases identifies any State practice in support of the alleged rule of customary international law. There is no dispute between the parties that rules of customary international law are formed through the general and consistent practice of States from a sense of legal obligation.⁶⁰⁰ Likewise, as a part of customary international law, “[t]he minimum standard is the expression of the *common standard of conduct* which civilized States have observed and still are willing to observe with regard to aliens[.]”⁶⁰¹

⁵⁹⁸ See Reply ¶¶ 206-07, 213.

⁵⁹⁹ Cf. *Fisheries Case (Nor.-U.K.)*, 1951 I.C.J. 116, 131 (Judgment of Dec. 18) (noting that although many states had adopted a ten-mile rule as their exclusive fishing areas, and although some arbitral tribunals had applied that rule between those states, other states had adopted a different limit and thus the rule was not sufficiently uniform to acquire authority as customary international law).

⁶⁰⁰ Mem. ¶ 518; Counter-Mem. at 219.

⁶⁰¹ See ROTH, *THE MINIMUM STANDARD*, *supra* n.575, at 87 (emphasis added); see also Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 AM. J. INT’L L. 517, 521 (1910) (“There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form

Thus, in order to prove a rule of customary international law, Glamis must show consistent State practice. The declarations of arbitral tribunals are insufficient. As Judge Shahabuddeen of the I.C.J. observed, “development of customary international law depends on State practice.”⁶⁰² Standing alone, decisions of international tribunals cannot evidence – let alone create – new rules of customary international law, because “decisions of international courts . . . do not constitute State practice.”⁶⁰³ Judge Shahabuddeen explained:

It is difficult to regard a decision of the Court [or an international tribunal] as being in itself an expression of State practice. . . . A decision made by it is an expression not of the practice of the litigating States, but of the judicial view taken of the relations between them on the basis of legal principles which must necessarily exclude any customary law which has not yet crystallised. The decision may recognise the existence of a new customary law and in that limited sense it may no doubt be regarded as the final stage of development, but, *by itself, it cannot create one*. It lacks the element of repetitiveness so prominent a feature of the evolution of customary international law.⁶⁰⁴

U.S. courts agree. In *United States v. Yousef*, for example, the U.S. Court of Appeals for the Second Circuit distinguished between primary sources of customary international law – the “official acts and practices of States” – and secondary sources of

a part of the international law of the world.”); International Court of Justice’s Statute Article 38(1)(b) (describing international custom “as evidence of a general practice accepted as law”).

⁶⁰² MOHAMED SHAHABUDEEN, PRECEDENT IN THE WORLD COURT 71 (1997); *see also* GEORGE A. FINCH, THE SOURCES OF MODERN INTERNATIONAL LAW 51 (1937) (“The evidence of the consent of states to particular rules of international law is furnished by their actions, in their treaties with other states, in their national law and ordinances, in the decisions of their courts, in their state papers and diplomatic correspondence; in fact, every written document, every record of act or spoken work which presents an authentic picture of the practice of states in their international dealings.”) (internal quotation marks and footnote omitted).

⁶⁰³ Robert Cryer, *Of Custom, Treaties, Scholars, and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study*, 11 J. CONFLICT & SECURITY L. 239, 252 (2006); ILA Report, *supra* n.570, Sec. II.B.10.

⁶⁰⁴ SHAHABUDEEN, PRECEDENT IN THE WORLD COURT, *supra* n. 603, at 71-72.

customary international law – “the writings of jurists.”⁶⁰⁵ It explained the difference as follows: “[A] primary source of authority” is one “upon which, standing alone, courts may rely for propositions of customary international law,” while secondary sources, the court continued, “at most provide evidence of the practice of States, and then only insofar as they rest on factual and accurate descriptions of the past practices of [S]tates, not on projections of future trends or the advocacy of the ‘better rule.’”⁶⁰⁶ The court also cautioned that “the incorrect use of such [secondary] sources can easily lead to an incorrect conclusion about the content of customary international law.”⁶⁰⁷

Such is the case here. Glamis provides this Tribunal with no evidence of extensive State practice to support the principles it contends are part of customary international law.⁶⁰⁸ Instead, Glamis relies on a series of very recent arbitral decisions to support the existence of the specific customary rules that it alleges the United States violated here. Customary international law, however, does not evolve every time a new

⁶⁰⁵ *U.S. v. Yousef*, 327 F.3d 56, 93 (2d Cir. 2003) (discussing *The Paquete Habana*, 175 U.S. 677, 700 (1900), and *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 789 (D.C. Cir. 1984)); see also *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 264 (2d Cir. 2003) (“Accordingly, the international tribunal decisions cited by plaintiffs are not primary sources of customary international law.”).

⁶⁰⁶ *U.S. v. Yousef*, 327 F.3d at 99 (emphasis omitted).

⁶⁰⁷ *Id.*

⁶⁰⁸ With respect to U.S. State practice, Professor Wälde argues that U.S. practice is best indicated by its offensive briefs, such as those filed in the *ELSI* case, as opposed to the United States’ “defensive advocacy” before NAFTA tribunals. See Wälde Rep. at IV-4 & IV-16. This argument is baseless. The United States’ submissions before NAFTA tribunals are indeed part of U.S. State practice. The annual publication *Digest of United States Practice in International Law* provides the public with a ready source of the United States’ views and practice in the arena of public and private international law. See Office of the Legal Adviser, *Digest of International Law*, at <http://www.state.gov/s/l/c8183.htm>. This publication routinely includes submissions made by the United States to NAFTA Chapter Eleven tribunals. See, e.g., OFFICE OF THE LEGAL ADVISER, 2004 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 572, 572-601 (Sally J. Cummins ed.) (including excerpts of submission from “[s]elected cases reflecting U.S. practice”). Professor Wälde cites no support whatsoever for his novel view of what constitutes State practice. The idea that State practice only “counts” when the State is acting in a manner that serves the interests of a proponent of that action is absurd. See Wälde Rep. at IV-16 (suggesting that U.S. practice is “best” and more “objective[ly]” indicated by *offensive* advocacy as opposed to “U.S. state practice [] influenced by considerations of defensive advocacy”). If such were the case, a State could simply disavow a portion of its State practice when doing so was expedient.

decision is issued by an arbitral tribunal;⁶⁰⁹ its evolution – if any⁶¹⁰ – depends on evidence of a general practice or custom among States.

Moreover, “[t]he persuasive nature of an international decision does, and ought to, depend on its quality. Given the controversy over customary law, the evidence used for it ought to be of high quality, and care must be taken not to take court decisions simply as correct restatements of custom.”⁶¹¹ In most of the cases relied on by Glamis, however, neither State practice nor *opinio juris* is even discussed. Nor do arbitral decisions interpreting “autonomous” fair and equitable treatment provisions constitute evidence of the content of the customary international minimum standard of treatment.

Glamis has built its case on a group of international arbitral decisions that have been rendered within the last five or six years, each applying fair and equitable treatment provisions in one or another of a variety of treaties, most of which differ from NAFTA Article 1105. In addition to being non-precedential, none of these decisions examines relevant State practice or even purports to offer a correct restatement of custom. But

⁶⁰⁹ Traditionally, the evolution of a new custom has been viewed as being “consecrated by long use, and observed by nations in their mutual intercourse with each other as a kind of law[.]” VATTEL, THE LAW OF NATIONS, *supra* n.317, at Preliminaries § 25. And, even though it can be argued that there is no precise minimum amount of time required to generate a new rule of customary international law, what is essential is a showing of the accumulation of “practice of sufficient *density*, in terms of uniformity, extent and representativeness.” ILA Report, *supra* n.570, Sec. II.C.12; *see also North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.)*, 1969 I.C.J. 3 (Judgment of Feb. 20), at ¶ 74 (“[A]n indispensable requirement would be that within the period of time in question, short though it might be, State practice . . . should have been both extensive and virtually uniform . . . and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.”).

⁶¹⁰ That customary international law may evolve over time as State practice changes does not mean that any particular area of customary international law *must have necessarily* evolved in the last 50 years, for example. To the contrary, customary international law may even devolve. *See, e.g.*, ILA Report, *supra* n.570, at 9 n.21 (“[C]onforming practice after the rule has emerged helps to strengthen it (and is thereby both constitutive of the rule and declaratory – evidence – of it), whilst contrary practice can undermine and, if sufficiently constant and widespread, destroy an existing customary rule.”); Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT’L L. 1, 11-20 (1988) (describing historical examples where State practice has changed or eliminated what had previously been considered a rule of customary international law).

⁶¹¹ Cryer, *Of Custom, Treaties, Scholars, and the Gavel*, *supra* n.604, at 253.

arbitral decisions that do not examine State practice are insufficient to show the content of customary international law.

B. The United States Did Not Breach Article 1105 By Failing To Accord Glamis's Investments "Transparency"

Glamis has failed to meet its burden of demonstrating that the customary international law minimum standard of treatment contains any transparency obligation. Glamis argues that custom recognizes an obligation on the part of States "to provide a transparent . . . framework for investment."⁶¹² However, neither Glamis nor the sources it cites demonstrate that any such rule is part of customary international law, what such a framework would entail, or how – if at all – such a binding customary international practice has evolved. Moreover, to the extent Glamis contends that Article 1105 requires the NAFTA Parties to make public all their laws, regulations and procedures that affect foreign investments, then transparency cannot form the basis of liability here: The United States has made public all of the relevant measures affecting Glamis. Indeed, Glamis does not even appear to argue that the United States has failed to do so.

Instead, Glamis argues that the United States violated the minimum standard of treatment in the process of promulgating or interpreting certain laws and regulations by failing to follow what would amount to an international administrative procedure act. Glamis asserts that customary international law demands that host countries provide foreign investors advance notice and an opportunity to comment (referred to herein as "notice and comment") before adopting any laws or regulations that affect them.⁶¹³ As

⁶¹² Reply Part II.B.

⁶¹³ See *id.* ¶ 246 ("[T]he new interpretation of the 'undue impairment' standard of FLPMA established in his Opinion was adopted in blatant violation of the Administrative Procedure Act . . ."); *id.* ¶ 246 n.496 (The 1999 M-Opinion was issued by Interior "with no prior notice of what the Solicitor was proposing to do."); *id.* ¶ 252 (The 1999 M-Opinion "would not be issued until (after dozens of secret drafts were

the United States demonstrates below, Glamis's assertion does not withstand scrutiny.⁶¹⁴ First, Glamis's assertion is contradicted by extensive evidence showing that transparency is not a rule of customary international law. Second, the authority on which Glamis relies does not establish the existence of a customary international law rule requiring transparency. Third, even those tribunals that have applied transparency obligations under bilateral investment treaties do not interpret the obligation to require notice and comment. Fourth, in any event, both the California and the federal measures were enacted in transparent processes that more than satisfy any possible international minimum standard. Consequently, the Tribunal should deny Glamis's transparency claim.

1. No Transparency Rule Is Required By The International Minimum Standard Of Treatment Reflected In Article 1105(1)

Glamis agrees that it bears the burden of proving sufficiently broad State practice and the *opinio juris* necessary to establish the existence of a rule of customary international law.⁶¹⁵ It ignores authorities, however, that reject the notion that transparency principles have attained the level of custom. The 2004 OECD Working Paper on Fair and Equitable Treatment, which Glamis also cites, is one such source. This paper claims primarily to be a survey of "jurisprudence, literature and state practice related to the fair and equitable treatment standard."⁶¹⁶ Importantly, it observes that there

produced and modified)"); *id.* ¶ 270 ("In the United States, government agencies must follow two overriding principles when developing new rules and regulations. They must provide fair notice and due process to the regulation community about proposed changes in the law, and those proposed changes must bear some rational relationship to a stated and legitimate governmental purpose.").

⁶¹⁴ See Counter-Mem. at 225-26.

⁶¹⁵ See Mem. ¶ 483 (burden of proof); *id.* ¶ 518 (customary international law).

⁶¹⁶ OECD, *Fair and Equitable Treatment Standard in International Investment Law*, *supra* n.578, at 3.

is a lack of consensus that transparency has risen to the level of a customary rule, and also notes the scant support in case law for such an argument:

In a few recent cases, Arbitral Tribunals have defined “fair and equitable treatment” drawing upon a relatively new concept *not generally considered a customary international law standard*: transparency.⁶¹⁷

Although the drafters specifically state that the document “does not necessarily reflect the views of the OECD or those of its Member governments,” the paper benefited from “discussions and a variety of perspectives in the [Investment] Committee.”⁶¹⁸ As a result, the one thing that perhaps may be inferred about the views of OECD Member governments from this paper is the lack of consensus among them on the issues addressed. Under these circumstances, the paper’s finding that transparency is “not generally considered a customary international law standard” belies Glamis’s claim that such a rule is accepted as part of the customary international law minimum standard of treatment.

That transparency is not part of the customary international minimum standard of treatment is also clear from opinions related to three different NAFTA Chapter Eleven disputes: the separate opinion of Dr. Bryan Schwartz in *S.D. Myers, Inc. v. Government of Canada*, the decision of the Supreme Court of British Columbia in the *United Mexican States v. Metalclad Corp.* set aside proceeding, and the *Feldman v. United Mexican States* award. Unlike almost every authority Glamis cites, each of these opinions specifically looks to customary international law and finds no transparency requirement.

In his separate opinion in *S.D. Myers*, Dr. Schwartz concurs in the tribunal’s partial award, including the decision regarding Article 1105. Like Glamis in the instant

⁶¹⁷ *Id.* at 37 (emphasis added).

⁶¹⁸ *Id.* at 1.

case, S.D. Myers in that case complained “that it was denied fair notice that a regulatory change was in the works,” that “it was not consulted,” and that “the federal government breached its own regulatory policy.”⁶¹⁹ Dr. Schwartz rejected S.D. Myers’ argument that “the minimum international standard in Article 1105 of NAFTA includes a general principle of transparency and fairness *in the making* of regulations.”⁶²⁰ As Dr. Schwartz explained:

S.D. Myers has not provided evidence that procedural fairness and transparency *in the making* of regulations is part of general international law and, as such, applicable worldwide. Rather, S.D. Myers has appealed to the letter or spirit of a provision of the 1947 GATT, and case law associated with it, to argue that procedural fairness and transparency is part of the minimum international standard. But the GATT agreement, while widely accepted, has by no means been adopted by all states. *It is far from obvious, in the absence of evidence, that basic GATT norms like transparency and procedural fairness have been accepted by states throughout the world and so have passed into the body of general (or ‘customary’) international law.*⁶²¹

Likewise, in the set aside proceeding in the *Metalclad* arbitration, Justice Tysoe of the Supreme Court of British Columbia found that “there are no transparency obligations contained in Chapter 11.”⁶²² First, the court found that Metalclad had not introduced any authority or evidence during the arbitral proceeding “to establish that transparency has become part of customary international law” and, then, it determined the tribunal had “misstated the applicable law to include transparency obligations.”⁶²³ Thus, in the court’s view, the tribunal exceeded its authority because it based its decision on transparency obligations not found in Chapter 11.

⁶¹⁹ *S.D. Myers* Partial Award (Separate Op. by B. Schwartz) ¶ 241 (concurring in part).

⁶²⁰ *Id.* ¶ 254 (emphasis added).

⁶²¹ *Id.* ¶ 255 (emphases added).

⁶²² *United Mexican States v. Metalclad Corp.*, 5 ICSID REP. 236, ¶ 72 (Sup. Ct. B.C.) (May 2, 2001).

⁶²³ *Id.* ¶¶ 68, 70.

Citing Justice Tysoe's decision, the *Feldman* tribunal also rejected the notion that there is a transparency obligation under customary international law:

[I]t is doubtful that lack of transparency alone rises to the level of violation of NAFTA and international law The British Columbia Supreme Court held in its review of the *Metalclad* decision that Section A of Chapter 11, which establishes the obligations of host governments to foreign investors, nowhere mentions an obligation of transparency to such investors, and that a denial of transparency alone thus does not constitute a violation of Chapter 11 [citation omitted]. While this Tribunal is not required to reach the same result as the British Columbia Supreme Court, it finds this aspect of their decision instructive.⁶²⁴

Furthermore, each of the three NAFTA Parties has expressly rejected the notion that transparency forms part of customary international law and, thus, is an obligation they assumed under Article 1105.⁶²⁵ That is, the United States, Mexico, and Canada all agree that there is no general transparency requirement. The Parties' agreement that NAFTA Article 1105 does not include a transparency requirement must be taken into account in the interpretation of that provision.⁶²⁶

Finally, in addition to the sources already cited, the additional practice of two of the NAFTA Parties – the United States and Canada – refutes Glamis's argument that

⁶²⁴ *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award ¶ 133 (Dec. 16, 2002). Thus, Glamis is – at best – wrong when it avers in its Reply that “no NAFTA tribunal (or other reviewing court) has relied upon the Provincial lower court's decision [in the *Metalclad* set aside proceeding] as an authoritative ruling on the meaning of Article 1105.” Reply ¶ 227.

⁶²⁵ See *Methanex Corp. v. United States*, Rejoinder Memorial of United States on Jurisdiction, Admissibility and the Proposed Amendment, at 33 (June 27, 2001) (citing Justice Tysoe with approval and stating that “there is no general requirement of ‘transparency’ in customary international law”); *United Mexican States v. Metalclad Corp.*, Amended Petition of Mexico to the Supreme Court of British Columbia (Sup. Ct. B.C.) (Oct. 27, 2000), at ¶ 72 (challenging the *Metalclad* tribunal's finding that the NAFTA Parties agreed to include transparency obligations in Chapter Eleven); *United Mexican States v. Metalclad Corp.*, Outline of Argument of Intervenor Attorney General of Canada (Sup. Ct. B.C.) (Feb. 16, 2001), at ¶¶ 31-33 (adopting Mexico's submissions and challenging the *Metalclad* tribunal's “importing transparency requirements into Article 1105”); see also *United Mexican States v. Metalclad Corp.*, Certified Hearing Transcript (Sup. Ct. B.C.) (Feb. 20, 2001) (Statement of P.G. Foy, United Mexican States), at 74: 34-38 (arguing that transparency is not a rule of customary international law).

⁶²⁶ See Vienna Convention on the Law of Treaties, art. 31(3), May 23, 1969, 1155 UNTS 331 (“There shall be taken into account . . . (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . .”).

States are required to publish in advance any proposed legislation or to provide interested parties the opportunity, in advance, to comment on such proposed legislation. In the NAFTA context, both the U.S. Statement of Administrative Action (“U.S. SAA”) and the Canadian Statement of Implementation (“Canadian SOI”) demonstrate that the United States and Canada considered that, unless explicitly provided for elsewhere in the NAFTA, Chapter Eighteen comprised the extent of the Parties’ agreement on their transparency obligations.⁶²⁷ That is, *expressio unius est exclusio alterius*.

According to the U.S. SAA, even though “other chapters of the NAFTA, such as Chapters Seven through Ten, Twelve, Thirteen and Nineteen, provide specific, detailed rules in this area,” it is Chapter Eighteen that “sets out a number of requirements designed to foster openness, transparency and fairness in the adoption and application of the administrative measures covered by the Agreement.”⁶²⁸ Because the NAFTA’s twenty-one chapters address such a wide variety of topics and types of administrative measures, it stands to reason that the Agreement’s primary transparency obligations – which cover all the various matters addressed therein – are contained in a single chapter: Chapter Eighteen. Canada’s SOI concurs:

The Parties must ensure that producers, traders, investors and other interested parties throughout the free-trade area have the opportunity to learn about measures taken by them regarding matters covered by the Agreement. *Chapter eighteen sets out means for complying with this commitment.*⁶²⁹

That customary international law and Article 1105 include the transparency obligations alleged by Glamis is further belied by Canada’s conclusion that “[w]ithout the

⁶²⁷ Mexico did not publish anything akin to the U.S. SAA or the Canadian SOI.

⁶²⁸ NORTH AMERICAN FREE TRADE AGREEMENT, IMPLEMENTATION ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-159, 103d Cong., 1st Sess. at 193 (1993) (“SAA”).

⁶²⁹ SOI, *supra* n.581, at 196 (emphasis added).

guarantee furnished by [chapters eighteen, nineteen and twenty], business would not have the confidence to undertake the restructuring necessary for the growth and prosperity that is the ultimate goal of the Agreement.”⁶³⁰ Thus, Glamis plainly errs when it suggests that, because the NAFTA is an “investment treaty” that “does not expressly provide for transparency,” it implicitly includes it via the fair and equitable treatment obligation.⁶³¹ The NAFTA, however, is much more than an investment treaty. It provides for transparency, explicitly and in detail, in Chapter Eighteen – not Chapter Eleven.

Glamis’s reliance on UNCTAD’s unsupported and brief speculation that transparency may implicitly “be required . . . by the concept of fair and equitable treatment” is unavailing.⁶³² A later UNCTAD survey devoted specifically to transparency provisions in investment treaties contradicts that very speculation. It concludes that provisions, like those in NAFTA Chapter Eighteen, “contemplating the advance publication of investment measures are exceptional and represent a greater degree of intrusion than some countries are willing to accept.”⁶³³ If States are unwilling to accept such obligations in treaties, it would be quite a leap to conclude that those obligations have become binding as a matter of customary international law.

Thus, if any part of the NAFTA contains the type of obligations that Glamis is asking this Tribunal to enforce through Chapter Eleven, it is NAFTA Article 1802(2), and not Article 1105. Article 1802(2) reads:

⁶³⁰ *Id.* Likewise, the notion of transparency having reached the level of custom is at odds with Canada’s frank recognition in the SOI that “[t]he Government will be vigilant in monitoring the implementation of transparency procedures and due process *where they do not exist*” *Id.* at 197 (emphasis added).

⁶³¹ Reply ¶ 229.

⁶³² *Id.* (quoting UNCTAD, *Fair and Equitable Treatment*, *supra* n.588, at 51).

⁶³³ United Nations Conference on Trade and Development, *Transparency*, Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/2003/4 (2004), at 26-27, available at http://www.unctad.org/en/docs/iteiit20034_en.pdf.

To the extent possible, each Party shall (a) publish in advance any [laws, regulations, procedures and administrative rulings of general application respecting any matter covered by the Agreement] that it proposes to adopt; and (b) provide interested persons and Parties a reasonable opportunity to comment on such proposed measures.⁶³⁴

The NAFTA Parties, however, have not consented to arbitrate alleged breaches of obligations in Chapter Eighteen through Chapter Eleven's investor-State arbitration mechanism.⁶³⁵ Moreover, the text of Article 1802(2) – prefaced with “to the extent possible” – makes clear that even a failure to publish proposed measures in advance would not necessarily run afoul of that article.

For the same reason, the most recent U.S. and Canadian model bilateral investment treaties include obligations similar to Article 1802(2), which are explicitly *not enforceable* via investor-State arbitration. In the 2004 U.S. Model BIT, for instance, the notice and comment obligation is contained at Article 11,⁶³⁶ while only Articles 3 through 10 are subject to investor-State arbitration.⁶³⁷ Likewise, Canada's 2003 model Agreement for the Promotion and Protection of Investments contains the same type of obligation in Article 19,⁶³⁸ which cannot be subject to investor-State arbitration.⁶³⁹ Both

⁶³⁴ NAFTA art. 1802(2).

⁶³⁵ See NAFTA arts. 1116 & 1117; see also NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001) (“A determination that there has been a breach of another provision of the NAFTA . . . does not establish that there has been a breach of Article 1105(1).”).

⁶³⁶ Article 11 of the 2004 U.S. Model BIT is very similar to the Transparency chapters of U.S. FTAs, and Article 11(2) is nearly identical to NAFTA Article 1802(2). It reads:

To the extent possible, each Party shall (a) publish in advance any [law, regulation, procedure and administrative ruling of general application . . . respecting any matter covered by this Treaty] that it proposes to adopt; and (b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.

See 2004 U.S. Model BIT, art. 11(2), available at <http://www.state.gov/e/eeb/rls/othr/38602.htm>.

⁶³⁷ *Id.* art. 24(1) (limiting claims for breaches of the treaty to claims for breaches of “an obligation under Articles 3 through 10”).

⁶³⁸ See 2003 Canadian Model FIPA, art. 19(2), available at <http://www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf> (“To the extent possible, each Party shall: (a) publish in advance

of these provisions are also similarly prefaced, like Article 1802(2), by the qualifying phrase “to the extent possible.”⁶⁴⁰

These types of recent commitments by the United States and Canada (and their treaty partners) are not only novel,⁶⁴¹ they have also been described as “expanded” protections. In the Letter of Submittal to the President submitting the U.S.-Uruguay BIT, for example, the Secretary of State explained:

[T]his Treaty with Uruguay is the first BIT concluded in almost six years and the first negotiated on the basis of expanded core investment principles that protect U.S. investments abroad. *These expanded core principles include additional provisions, such as extensive transparency obligations . . .*⁶⁴²

any such measure that it proposes to adopt; and (b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.”).

⁶³⁹ *Id.* art. 22(1) (“An investor of a Party may submit to arbitration under this Section a claim that the other Party has breached an obligation under Articles 2 to 5, 6(1), 6(2), 7, 8(3), 8(4) or 9 to 18 . . .”).

⁶⁴⁰ Compare 2004 U.S. Model BIT art. 11(2) and Canadian Model FIPA art. 19(2) with NAFTA art. 1802(2).

⁶⁴¹ Prior to the 2004 Model, none of the U.S. BITs negotiated in the late 1990s (or before) included notice and comment requirements. Instead, U.S. practice was to include in BITs an article (like NAFTA Article 1802(1)) requiring the Parties to promptly publish their laws and regulations of general application. The only obligation that was included was a publication requirement and it stood apart from the fair and equitable treatment provision. *See, e.g.*, Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. II.7, Nov. 14, 1991 (“Each Party shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments.”), available at http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_000897.asp; Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Bahr., art. 2.5, Sept. 29, 1999 (“Each Party shall ensure that its laws, regulations, administrative practices and procedures of general application, and adjudicatory decisions, that pertain to or affect covered investments are promptly published or otherwise made publicly available.”), available at http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_002777.asp; see also MULTILATERAL AGREEMENT ON INVESTMENT DRAFT CONSOLIDATED TEXT, Transparency Art. ¶ 1 (“Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rulings and judicial decisions of general application as well as international agreements which may affect the operation of the Agreement.”), available at <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf>.

⁶⁴² See Message from the President of the United States Transmitting Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment. S. Treaty Doc. No. 109-9 at v (2006) (including Secretary Rice’s Letter of Submittal); see also Luke Peterson, INVEST-SD: INVESTMENT LAW AND POLICY WEEKLY NEWS BULLETIN, Feb. 23, 2004, available at http://www.iisd.org/pdf/2004/investment_investsd_feb23_2004.pdf (“Among the notable features of the new draft model BIT are extensive transparency commitments on the part of host governments, to publicise and notify new regulations and decisions affecting investment, as well as to create a domestic administrative process to which foreign investors will be guaranteed recourse.”).

This evidence of State practice demonstrates that these types of commitments do not reflect customary international law. Rather, these commitments are relatively new to investment agreements and represent an *expansion* of commitments traditionally included. Such recent commitments cannot be sufficiently general and consistent enough in practice to be viewed as forming part of customary international law. The most recent practice of the United States (and Canada) also establishes that transparency obligations like those contained in NAFTA Article 1802(2) are purely conventional obligations governed by *lex specialis* that do not form a part of customary international law. In sum, the text and structure of the NAFTA, State practice, judicial and arbitral decisions, and the OECD and UNCTAD papers all contradict Glamis's claim that transparency obligations form a part of customary international law.

2. The Authority Glamis Relies On Does Not Establish The Existence Of A Customary International Law Rule Requiring Transparency

With the exception of the UNCTAD survey on fair and equitable treatment referred to above (which was contradicted by a later UNCTAD paper on transparency obligations), Glamis relies exclusively on arbitral awards in an attempt to prove that customary international law and Article 1105 impose on each NAFTA Party a transparency obligation. Standing alone, however, these awards establish no such thing. The award in *Metalclad v. United Mexican States*, upon which Glamis relies heavily,⁶⁴³ is representative of Glamis's failure to support its contention that transparency is now part of the customary international law minimum standard of treatment.

Like many of the arbitral awards to which Glamis refers, the *Metalclad* award did not hold that the minimum standard of treatment includes a transparency obligation. Nor

⁶⁴³ See Mem. ¶¶ 535-36; Reply ¶ 227.

did the *Metalclad* tribunal say anything about transparency as a customary international law obligation; indeed, “[n]o authority was cited or evidence introduced to establish that transparency has become part of customary international law.”⁶⁴⁴ Rather, the tribunal read into Article 1105 a transparency obligation drawn from treaty-based international law, namely, the references to “transparency” in the statement of principles and rules in NAFTA Article 102(1) and in Article 1802(1) of the Transparency Chapter.⁶⁴⁵

Moreover, the *Metalclad* holding on which Glamis relies was vacated specifically “because there are no transparency obligations contained in Chapter 11.”⁶⁴⁶ Justice Tysoe of the reviewing British Columbia court explained:

In addition to specifically quoting from Article 1802 in the section of the Award outlining the applicable law, the Tribunal incorrectly stated that transparency was one of the objectives of the NAFTA. . . . The principle of transparency is implemented through the provisions of Chapter 18, *not Chapter 11*.⁶⁴⁷

The Supreme Court of British Columbia thus vacated the tribunal’s holding on transparency as “a matter beyond the scope of the submission to arbitration.”⁶⁴⁸

Nevertheless, Glamis takes the startling position that the *Metalclad* tribunal’s decision regarding transparency “remains a significant contribution to the meaning of fair and equitable treatment under customary international law”⁶⁴⁹ The opposite, however, is true. Rather than remaining a significant contribution, this portion of the

⁶⁴⁴ *United Mexican States v. Metalclad Corp.*, 5 ICSID REP. 236, ¶ 68 (Sup. Ct. B.C.) (May 2, 2001).

⁶⁴⁵ *Metalclad v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award ¶¶ 71, 74-101 (Aug. 30, 2000). This was clearly an error. See NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions ¶ B.3 (July 31, 2001) (“A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).”), available at <http://www.state.gov/documents/organization/38790.pdf>.

⁶⁴⁶ *United Mexican States v. Metalclad Corp.*, 5 ICSID REP. at ¶ 72.

⁶⁴⁷ *Id.* at ¶ 71 (emphasis added).

⁶⁴⁸ *Id.* at ¶ 72.

⁶⁴⁹ Reply ¶ 227.

Metalclad award has been duly vacated. Both the NAFTA and the New York Convention, which the NAFTA Parties intended to govern the enforcement of Chapter Eleven awards,⁶⁵⁰ expressly leave to municipal courts, like the Supreme Court of British Columbia, the authority to determine whether an arbitral tribunal's award should be set aside.⁶⁵¹ Once set aside, such an arbitral award "loses its legal validity and effect in the country in which it was made," and is unlikely to be enforced "in any country which has adopted the provisions of the New York Convention (or of the Model Law) under which the setting aside of an award in its country of origin is a ground for refusal of recognition and enforcement."⁶⁵²

Chapter Eleven and the New York Convention, thus, envision exactly the review mechanism that was employed in *Metalclad*. Yet Glamis contends that the British Columbia court's decision "has virtually no value in the international context."⁶⁵³ In

⁶⁵⁰ See NAFTA art. 1130 (stipulating that, unless the disputing parties agree otherwise, the legal seat of any Chapter 11 arbitration must be "in the territory of a Party that is a party to the New York Convention"); *id.* art. 1136(7) (providing that "[a] claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention"); *id.* art. 1136(6) (granting that "[a] disputing investor may seek enforcement of an arbitration award under . . . the New York Convention").

⁶⁵¹ See United Nations Conference on International Commercial Arbitration, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 ("New York Convention"), art. V(1)(e) (providing, as one of only five grounds upon which enforcement may be refused: "if [t]he award . . . has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made"); NAFTA art. 1136(3) (providing that Chapter 11 awards may not be enforced until either the disputing parties fail, within three months, to "commence[] a proceeding to revise, set aside or annul the award" or a domestic court "dismiss[es] or allow[s] an application to revise, set aside or annul the award and there is no further appeal"); see also J.C. Thomas, *A Reply to Professor Brower*, 40 COLUM. J. TRANSNAT'L L. 433, 462-63 (2002) ("The NAFTA Parties entrusted their courts to ensure that tribunals do not act outside the scope of the submission to arbitration, commit arbitral error, or render awards that conflict with public policy.").

⁶⁵² ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 322 (1986); see also ALBERT JAN VAN DEN BERG, THE NEW YORK CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 350 (1981) (The New York Convention "unequivocally lay[s] down the principle that the court in the country in which, or under the law of which, the award was made has the exclusive competence to decide on the action for setting aside the award.").

⁶⁵³ Reply ¶ 227 (citing Todd Weiler *in* 9 (5) LATIN AM. L. & BUS. REP. 18, 19 (May 31, 2001)). Respected commentators, in fact, have written about the poor quality of the reasoning of the tribunal in the *Metalclad*

point of fact, that decision is binding Canadian law, reflects the will of the NAFTA Parties, and specifically addresses the content of customary international law. In other words, as a source to elucidate custom on this question, the Canadian court's decision in *Metalclad* is far superior to the decision of the international arbitral tribunal.⁶⁵⁴

All of the other arbitral decisions on which Glamis relies also fail as reliable evidence of a general transparency rule under customary international law or State practice, upon which the “development of customary international law depends.”⁶⁵⁵ For example, the *CMS* tribunal did not address any claim for lack of “transparency.”⁶⁵⁶ And in the *Maffezini* award, although the notion of transparency (or lack thereof) appears once, the arbitrators do not refer to a principle embodied in customary international law.⁶⁵⁷

The more recent decisions on which Glamis relies are equally inapposite. For example, in the *Saluka* arbitration, the tribunal interpreted the “fair and equitable treatment” standard in the Dutch-Czech BIT (at Article 3.1) as an “autonomous”

award. See, e.g., Vaughan Lowe, *Regulation or Expropriation?*, 55 CURRENT LEGAL PROBS. 447, 454 (2002).

⁶⁵⁴ The United States also takes issue with Glamis's wholly unsubstantiated argument that domestic judicial decisions are entitled to less respect than the findings of arbitrators chosen to decide international investment disputes. Reply ¶ 227. As a legal matter, international decisions do not create binding precedent. See, e.g., NAFTA art. 1136(1) (“An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.”). Thus, there is no legal basis for Glamis – or the commentators it cites – to elevate the decisions of international arbiters above domestic judges. See BROWNLIE, *supra* n.45, at 6 (listing both “international and national judicial decisions” as among the numerous potential “material sources of custom”). Moreover, the fact that individuals are appointed by disputing parties to *ad hoc* international tribunals does not necessarily make the arbitrators “world-renowned and respected international legal scholars and experts in the field of international law.” Reply ¶ 227 n.448.

⁶⁵⁵ SHAHABUDEEN, PRECEDENT IN THE WORLD COURT, *supra* n.603, at 71.

⁶⁵⁶ See *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005).

⁶⁵⁷ See *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award ¶ 83 (Nov. 13, 2000) (finding that the unauthorized transfer of a large “loan” from claimant's bank account lacked transparency and was incompatible with the Argentina-Spain BIT's fair and equitable treatment provision).

standard, not as customary international law, and expressly distinguished it from NAFTA

Article 1105(1):

[Article 3.1] omits any reference to the customary minimum standard. The interpretation of Article 3.1 does not therefore share the difficulties that may arise under treaties (such as the NAFTA) which expressly tie the “fair and equitable treatment” standard to the customary minimum standard. Avoidance of these difficulties may even be regarded as the very purpose of the lack of a reference to an international standard in the Treaty. This clearly points to the autonomous character of a “fair and equitable treatment” standard such as the one laid down in Article 3.1 of the Treaty.⁶⁵⁸

As the United States demonstrated in its Counter-Memorial, the *Tecmed* decision is no different in this regard.⁶⁵⁹ Neither tribunal undertook any analysis of customary international law or of State practice in the area of transparency obligations. Although it may be Glamis’s preference to avoid these difficulties of interpretation, this Tribunal cannot simply brush them aside.

Similarly, while Glamis avers in its Reply that the *Champion Trading* tribunal confirmed that “the principle of transparency is firmly established as an obligation under the standard of treatment owed to foreign investors under customary international law,”⁶⁶⁰ that tribunal did no such thing. The tribunal provided no analysis of State practice or *opinio juris*, but rather cited claimants’ reliance on the GATT and the *Tecmed* award – neither of which addresses customary international law.⁶⁶¹ As Dr. Schwartz pointed out in the *S.D. Myers* case, the GATT agreement “has by no means been adopted by all states,” raising serious doubts, “in the absence of evidence, that basic GATT norms

⁶⁵⁸ *Saluka* Partial Award ¶ 294.

⁶⁵⁹ Counter-Mem. at 231-32.

⁶⁶⁰ See Reply ¶ 233 & n.467.

⁶⁶¹ *Champion Trading Co. v. Egypt*, ICSID Case No. ARB/02/9, Award ¶¶ 161-62 (Oct. 27, 2006).

like transparency and procedural fairness . . . have passed into the body of general (or ‘customary’) international law.”⁶⁶²

Glamis’s reliance on *ADC* is also misplaced. The tribunal in that case did not analyze the customary international law minimum standard of treatment. Rather, the tribunal considered the fair and equitable treatment provision under Article 3 of the Hungary-Cyprus BIT. The entirety of the tribunal’s analysis of the obligation is reproduced here:

As regards other investment protection standards set out in Article 3 of the BIT, the Tribunal has no objection to the approach suggested by the Respondent that the meaning of “*fair and equitable treatment*”, “*unreasonable or discriminatory measures*” and “*full security and protection*” are to be determined under the specific circumstances of each specific case. However, in the light of the facts established in this case and under the above approach, the Tribunal is satisfied to conclude that these requirements under Article 3 have all been breached by the Respondent.⁶⁶³

In no way can such a terse finding constitute the evidence required to prove the existence of a rule of customary international law requiring notice and comment of proposed regulations.⁶⁶⁴

Finally, the *Azurix* award is equally unavailing, as that tribunal based its decision regarding claimant’s transparency allegations, not on the “fair and equitable treatment” article of the BIT, but rather on the BIT’s independent, convention-based obligation to make public all laws, regulations, administrative practices and procedures, and

⁶⁶² *S.D. Myers* Partial Award (Separate Op. by B. Schwartz), at ¶ 255.

⁶⁶³ *ADC Affiliate Ltd. and ADC & ADMC Mngmt. Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award ¶ 445 (Oct. 2, 2006) (emphases in original).

⁶⁶⁴ Nor do the *ADC* tribunal’s findings in connection with the expropriation claim assist Glamis in this regard. That tribunal found that the due process of law requirement “in the expropriation context” demands “[s]ome basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, . . . to be readily available and accessible to the investor to make such legal procedure meaningful.” *Id.* ¶ 435. Glamis’s claim against the United States, however, does not concern any adjudicatory proceedings.

adjudicatory decisions affecting investments.⁶⁶⁵ Thus, this decision is of no value in the present matter.

In short, even the arbitral cases on which Glamis relies do not hold that customary international law requires that legislation and regulations be enacted in a transparent manner.

3. Even The Cases That Apply A Transparency Obligation Do Not Equate It With A Notice And Comment Requirement

Moreover, to the extent that any of the arbitral decisions relied on by Glamis apply an obligation of transparency, they merely apply a general obligation to publish relevant laws and regulations – an obligation that the United States has certainly satisfied here. But crucially, these decisions do not support Glamis’s contention that, like the United States’ Administrative Procedure Act (“APA”), Article 1105 requires each NAFTA Party to provide to investments of investors of another Party notice of, and an opportunity to comment on, proposed rulemakings.

For instance, Glamis relies on *Champion Trading*. In that case, the claimant alleged that the terms of certain settlements, whereby Egypt paid certain members of the cotton industry “in a clandestine fashion,” were not made public;⁶⁶⁶ *Champion Trading* did not argue that it was entitled under customary international law to advance notice of a proposed rulemaking or an opportunity to comment. In any event, the tribunal found no BIT violation because all of the laws governing the claimant’s transactions were “public, available, or have been published or produced by the Respondent upon the request of the

⁶⁶⁵ See *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award ¶ 378 (July 14, 2006); see also U.S.-Argentina BIT, *supra* n.642, art. II.7.

⁶⁶⁶ *Champion Trading Co.* ¶ 108.

Claimants.”⁶⁶⁷ Thus, *Champion Trading* does not support Glamis’s contention that notice and comment is required under customary international law.

Likewise, the *Tecmed* tribunal spoke of transparency in terms of an obligation to make known “beforehand any and all rules and regulations that will govern”⁶⁶⁸ Similarly, in *Azurix*, the independent treaty provision at issue that was found to require “transparency” merely required “publication of the laws, regulations, adjudicatory decisions and administrative practices and procedures pertaining [sic] or affecting investments.”⁶⁶⁹ That tribunal even went so far as to find that it “would have been a desirable improvement” for the regulatory body to have published its procedural regulations, but that the lack of publication was not alone enough to violate the treaty’s transparency obligation.⁶⁷⁰

None of these decisions based a finding of a BIT violation on a failure to provide notice and comment. Only three tribunals have found that State actions violated a requirement of transparency – *Tecmed*, *Maffezini*, and *Metalclad*. In *Tecmed*, the administrative agency in question neglected to inform the claimant of certain requirements to renew a permit to operate a landfill in sufficient time for the claimant to comply with those requirements.⁶⁷¹ In *Maffezini*, the government transferred a large

⁶⁶⁷ *Id.* ¶ 164. The BIT at issue in *Champion Trading*, unlike Chapter Eleven, included an independent transparency obligation requiring the parties to make public, among other things, all laws and regulations pertaining to foreign investments. See Treaty Concerning the Reciprocal Encouragement and Protection of Investments, U.S.-Egypt, art. II(8), Mar. 11, 1986 (“Each Party and its subdivisions shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to [or] affect investments in its territory of nationals or companies of the other Party.”).

⁶⁶⁸ *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award ¶ 154 (May 29, 2003).

⁶⁶⁹ *Azurix* Award ¶ 378.

⁶⁷⁰ *Id.*

⁶⁷¹ *Tecmed* Award ¶ 162.

“loan” from the claimant’s bank account to a failing joint venture between the claimant and a government enterprise without the claimant’s express approval.⁶⁷² In *Metalclad* – which was later set aside on this specific point – the claimant was denied a municipal construction permit for its proposed landfill where there were no published rules on whether such a permit was required, there were no established procedures for evaluating such a permit application, and the federal authorities had induced the claimant to make its investment by assuring it that no municipal permit was required.⁶⁷³ In short, none of the decisions that do apply a requirement of transparency recognizes a requirement to provide notice and comment.

4. The Federal And State Measures Were Adopted In A Transparent Manner

As demonstrated below, the United States’ actions were, in any event, fully transparent. Indeed, both the California and the Federal measures were adopted in a sufficiently transparent manner to satisfy even the standard alleged by Glamis.

a. The California Measures Were Adopted In A Transparent Manner

Glamis does not identify any deficiencies in the public availability of the California measures in question. Nor does Glamis contend that the procedures followed by the California Legislature to enact SB 22, or the process employed by the State Mining and Geology Board to promulgate either the emergency or final regulations, contravened any of the existing rules or procedures for taking such action. Like all legislation that California passes, SB 22 was discussed in public committee hearings

⁶⁷² *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award ¶¶ 75, 76, 83 (Nov. 13, 2000).

⁶⁷³ *Metalclad v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award ¶ 88 (Aug. 30, 2000).

before it was enacted.⁶⁷⁴ And, in accordance with the California Administrative Procedure Act, the draft SMGB regulations were made available for public comment and discussed at public hearings before the SMGB adopted them on a permanent basis.⁶⁷⁵ Indeed, both SB 22 and the SMGB regulations were enacted following significant public input, including from Glamis itself, and from the California Mining Association, of which Glamis is a member. Thus, both SB 22 and the SMGB regulations were enacted in a transparent manner.

Glamis's claim to have been prejudiced by a lack of transparency is belied by the fact that the California Mining Association spent more than \$100,000 between June 2002 and March 2003 lobbying against SB 22 and the SMGB regulations – as well as against the preceding proposed bills SB 483 and SB 1828.⁶⁷⁶ And Glamis played an instrumental role in the California Mining Association's lobbying and public relations efforts.⁶⁷⁷ Glamis also participated directly in the comment process before the SMGB. Moreover, the California Mining Association proposed language – which was adopted and made part of the regulations – ensuring the non-retroactivity of the regulations.⁶⁷⁸

⁶⁷⁴ See California Legislative Counsel, *Overview of the Legislative Process*, available at http://www.leginfo.ca.gov/guide.html#Appendix_A; Counter-Mem. at 92-95 (describing the process of enacting SB 22 in the California Legislature).

⁶⁷⁵ See California Administrative Procedure Act, CAL. GOVT. CODE §§ 11346-365 (1980); Final Statement of Reasons for CAL. CODE REGS. tit. 14, § 3704.1 (6 FA tab 304); Transcript of SMGB Regular Business Meeting, Testimony of Adam Harper, Association Manager, California Mining Association, at 14-15 (Apr. 10, 2003) (10 FA tab 116); Charles A. Jeannes, Senior Vice President, Glamis Gold Ltd., Comments before the SMGB (Dec. 12, 2002) (6 FA tab 268). Glamis was even afforded the opportunity to comment on the SMGB regulations before they were adopted on an emergency basis. See Comments of Glamis Chief Operating Officer James S. Voorhees before the SMGB (Nov. 14, 2002) (10 FA tab 104).

⁶⁷⁶ See Counter-Mem. at 94.

⁶⁷⁷ See *id.*; Memorandum from Adam Harper, Policy Analyst, California Mining Association, to Interested Parties (Oct. 1, 2002) (7 FA tab 37) (thanking Glamis for its assistance with the public relations efforts opposing SB 1828); Email from Denise M. Jones, Executive Director, California Mining Association, to Charles Jeannes, Senior Vice President and General Counsel, Glamis Gold, Inc. (Aug. 13, 2002) (7 FA tab 36) (detailing the California Mining Association's public relations efforts).

⁶⁷⁸ Counter-Mem. at 98-99.

Although acknowledging, as it must, that it directly participated in both the legislative and administrative processes that led to California's adoption of SB 22 and the SMGB regulations, respectively, Glamis complains that "[s]imply participating in a democratic process does not necessarily make that process transparent"⁶⁷⁹ As the United States has demonstrated, however, making laws and regulations publicly available, and granting the public the opportunity to make known its views concerning proposed laws and regulations before they are adopted, more than exceeds most treaty-based transparency obligations under international law. Glamis's participation in these processes belies any claim that the adoption of either SB 22 or the SMGB's regulations was non-transparent.

b. The Federal Measures Were Adopted In A Transparent Manner

Glamis's only allegation that the federal actions were non-transparent concerns the 1999 M-Opinion. It is undisputed that the United States made the M-Opinion public when it was issued.⁶⁸⁰ Glamis nevertheless asserts that the 1999 M-Opinion violated the United States APA because that opinion defined the term "undue impairment," which appears in FLPMA, without the DOI having engaged first in a formal rulemaking with a public notice and comment period.⁶⁸¹ Even assuming Glamis were correct that the issuance of the 1999 M-Opinion ran afoul of APA standards, it falls far short of demonstrating a violation of customary international law.

As demonstrated in the United States' Counter-Memorial, customary international law does not require States to follow any particular process in order to promulgate or

⁶⁷⁹ Reply ¶ 270.

⁶⁸⁰ See BLM News Release, BLM Receives Important Legal Opinion Involving Proposed Glamis Imperial Mine in California Desert (Jan. 14, 2000) (10 FA tab 99).

⁶⁸¹ Reply ¶ 245-46.

otherwise give legal effect to their laws, rules, or regulations.⁶⁸² Nor, as we demonstrate above, is there a rule under customary international law requiring a State to provide notice and comment before new adopting new regulations.⁶⁸³ Thus, it must follow – and Glamis has not proved otherwise – that an agency of a State is likewise free to interpret its own regulations in a manner that does not provide for notice and comment without running afoul of customary international law. Indeed, even U.S. law does not require notice and comment in such circumstances. In any event, Glamis has not shown that there was a violation of the U.S. APA.⁶⁸⁴

The 1999 M-Opinion was promulgated in accordance with the Solicitor’s authority to conduct the legal work of the DOI, which includes interpreting the DOI’s enabling statutes and regulations.⁶⁸⁵ Such interpretive rules require no notice and comment under U.S. law.⁶⁸⁶ When the DOI promulgated the 3809 regulations implementing FLPMA in 1980, the BLM received several comments urging it to undertake a separate formal rulemaking for the CDCA, and the “undue impairment” standard.⁶⁸⁷ The DOI decided not to undertake a separate rulemaking for the CDCA, noting the resources of the CDCA would be adequately protected because any plan of operations for mining in the CDCA would be “evaluated to ensure protection against

⁶⁸² See Counter-Mem. at 225-26 (“The variety of legislative and administrative procedures for promulgating rules is so great – involving democratic States and authoritarian States, parliamentary States and presidential States, federal States and centralized States – that no international consensus on what is a required process has emerged or even been proposed.”).

⁶⁸³ See *supra* Sec. II.B.3.

⁶⁸⁴ See *infra* Sec. II.D.2(c).

⁶⁸⁵ See 43 U.S.C. § 1455; 209 Department of Interior Manual §§ 3.1 & 3.2A(11) (1992) (granting the Solicitor “all of the authority of the Secretary” over “[a]ll the legal work of the Department”).

⁶⁸⁶ 5 U.S.C. § 553(b)(3)(A).

⁶⁸⁷ See 45 Fed. Reg. 78902, 78909 (Nov. 26, 1980).

‘undue impairment’ and against pollution of the streams and waters within the Area.’⁶⁸⁸

The 1999 M-Opinion examined this history of the 1980 3809 regulations – which were adopted with notice and comment – and concluded that those regulations left the term “undue impairment” to be applied on a case-by-case basis without further definition in a subsequent formal rulemaking.⁶⁸⁹

Glamis asserts that the 2001 M-Opinion rescinded the 1999 M-Opinion because it was “adopted in blatant violation of the Administrative Procedure Act.”⁶⁹⁰ Although the 2001 M-Opinion determined that the “undue impairment” standard should be defined through a substantive rulemaking before the DOI applied the term to deny a plan of operations, the 2001 M-Opinion did not conclude that the 1999 M-Opinion was a blatant violation of the APA. To the contrary, the 2001 M-Opinion recognized that the 1999 M-Opinion decision to apply the “undue impairment” standard without first promulgating a definition for that term through an APA rulemaking was consistent with the DOI’s intent as evidenced by the 3809 regulations discussed above.⁶⁹¹ In other words, the 2001 M-Opinion found procedural fault not with the process of generating the 1999 M-Opinion, but rather with the Department’s intent in the 1980 rulemaking to apply the “undue impairment” standard on a case-by-case basis without further rulemaking. Glamis cannot demonstrate that a U.S. court would have found that the DOI violated the APA in issuing

⁶⁸⁸ *Id.*

⁶⁸⁹ See 1999 M-Opinion at 11 (5 FA tab 205).

⁶⁹⁰ Reply ¶ 246.

⁶⁹¹ Memorandum from William G. Myers III, Solicitor, DOI, to Gale Norton, Secretary of the Interior (Oct. 23, 2001) (“2001 M-Opinion”), at 18 n.8 (5 FA tab 216) (acknowledging the language in the 1980 version of the 3809 regulations and concluding that “[t]he Department thus appears to have intended to apply this generally-applicable statutory provision [undue impairment] on a case-by-case basis without defining the pertinent terms of the provision”).

the 1999 M-Opinion,⁶⁹² and certainly cannot demonstrate a violation of customary international law on this basis.

Glamis's direct access to the Solicitor during the drafting of both the 1999 and 2001 M-Opinions also belies its claims that the process was not transparent. Glamis was able to meet directly with the Solicitor and submit comments to the Secretary during the preparation of the 1999 M-Opinion.⁶⁹³ Although Glamis alleges that its proffered arguments were "shots in the dark without knowledge of what the Solicitor was contemplating,"⁶⁹⁴ it has acknowledged that the Solicitor told Glamis at their meeting five months before the M-Opinion was issued that "the interpretation of 'unnecessary or undue' versus the 'undue impairment' provisions in FLPMA [was] a live issue."⁶⁹⁵ The 1999 M-Opinion, moreover, directly addressed the arguments that Glamis advanced.⁶⁹⁶ Furthermore, after Glamis's plan of operations was denied in 2001, Glamis had numerous meetings with the new Solicitor and other high-level officials in the DOI where it had the opportunity to discuss its views on both the 1999 M-Opinion and the denial of its plan of operations.⁶⁹⁷ Both the 1999 M-Opinion and the ROD that denied Glamis's plan of operations were subsequently rescinded.

⁶⁹² See also *infra* Sec. II.D.2(c).

⁶⁹³ See Email from Russell Kaldenberg, to John Mills, Joan Oxendine, Carl Rountree, Rolla Queen, Richard Grabowski (Aug. 4, 1999) (7 FA tab 29) (describing meeting between Glamis executives and the Solicitor on July 15, 1999); Letter from Charles Jeannes, Senior Vice President and General Counsel, Glamis Gold, Inc., and Gary Boyle, General Manager, Glamis Imperial Corp., to Bruce Babbitt, Secretary of the Interior (Nov. 10, 1999) (7 FA tab 31) ("Jeannes-Babbitt Letter").

⁶⁹⁴ Reply ¶ 246 n.496.

⁶⁹⁵ Mem. ¶ 306 (quoting Email from Glen Miller, BLM, to Dwight Carey, EMA, at 3 (Aug. 5, 1999) (4 FA tab 197).

⁶⁹⁶ Jeannes-Babbitt Letter, *supra* n.694; 1999 M-Opinion at 17 (5 FA tab 205).

⁶⁹⁷ Letter from Earl E. Devaney, Inspector General, DOI, to Senator Barbara Boxer (Mar. 11, 2003), at 2-3 (7 FA tab 45).

Glamis's direct, and ultimately successful, participation in the regulatory process further undermines its claims that the federal administrative process lacked transparency. Indeed, Glamis fails to provide any evidence that notice and comment are required under customary international law. Nor can it point to a single instance where an international court or tribunal has found a State to have violated an international obligation of transparency where the very measures being challenged were rescinded by the State in accordance with its domestic procedures in order to provide an even more transparent process.

In conclusion, the Tribunal should deny Glamis's claim that the United States violated Article 1105 by failing to provide a transparent framework for investment. Glamis has failed to show that transparency is a rule of customary international law, and Glamis has certainly failed to show that the international minimum standard of treatment requires States to provide notice-and-comment procedures. Finally, and in any event, the California and the Federal Government actions challenged by Glamis were more than sufficiently transparent.

C. The United States Did Not Breach Article 1105 By Frustrating Glamis's Expectations

Glamis has failed to demonstrate that customary international law, and thus Article 1105(1), includes a rule prohibiting the frustration of an investor's reasonable expectations. In any event, the United States did not frustrate any reasonable expectations on the part of Glamis. Thus, Glamis's contention that the United States violated Article 1105 by frustrating its "legitimate expectation" of project approval should be denied.⁶⁹⁸

⁶⁹⁸ See Reply ¶¶ 224-34.

1. Frustration Of A Foreign Investor's Expectations Does Not Give Rise To State Responsibility Under Customary International Law

As the United States explained in its Counter-Memorial, the Tribunal should reject Glamis's attempt to lift one factor to be considered in an indirect expropriation analysis and elevate that factor to be the sole determinant of whether there has been a violation of customary international law.⁶⁹⁹ First of all, a United States court would squarely reject Glamis's claim. U.S. courts consider an investor's legitimate, investment-backed expectations when evaluating Fifth Amendment takings claims, but standing alone, a showing that one's legitimate expectations have been frustrated is insufficient to prove that a constitutional violation has occurred.⁷⁰⁰ In fact, "[i]nvestment-backed expectations, though important, are not talismanic under *Penn Central*" and such an evaluation is but "one factor that points toward the answer to the question whether the application of a particular regulation to particular property 'goes too far.'"⁷⁰¹ Glamis has provided no evidence to support its theory that Article 1105 was intended to provide for "fall-back" liability when the elements of an unlawful expropriation under Article 1110 are not met. State practice is, in fact, inconsistent with Glamis's claim.

Glamis responds by arguing that the concept of legitimate expectations plays a role in other aspects of U.S. jurisprudence, such as in quasi-contractual claims, and by relying on arbitral awards interpreting an "autonomous" fair and equitable treatment standard divorced from customary international law. These arguments, however, do

⁶⁹⁹ See Counter-Mem. at 233-34.

⁷⁰⁰ *Id.* at 234.

⁷⁰¹ *Palazzolo v. Rhode Island*, 533 U.S. 606, 634 (2001) (O'Connor, J., concurring) (emphasis in original) (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

nothing to advance its claim that frustration of an investor's expectations is prohibited by customary international law.

None of the arbitral cases on which Glamis relies for the proposition that the fair and equitable treatment standard protects against disappointment of an investor's expectations explains how any such principle became part of the minimum standard of treatment under customary international law.⁷⁰² If those tribunals had undertaken such an analysis, they would have found evidence demonstrating just the opposite. Indeed, Glamis overlooks important State practice that refutes the notion that mere frustration by a host State of a foreign investor's expectations – legitimate or not – gives rise to State responsibility under international law.

To begin, a related international law principle proves that much more than dashed expectations is needed to show a violation of the customary international law minimum standard of treatment. It is well-settled, and has long been the position of the United States, that a State cannot be held to have violated the minimum standard upon a showing of mere breach of a contract with a foreign investor.⁷⁰³ For a claim against a State to

⁷⁰² Counter-Mem. at 230-32; *see also supra* Sec. II.A (describing severe flaws in Glamis's methodology for showing customary international law).

⁷⁰³ *See SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction ¶ 167 (Aug. 6, 2003) (noting "the widely accepted principle . . . that under general international law, a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law"); *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction ¶ 122 (Jan. 29, 2004) (citing *SGS v. Pakistan* with approval); *Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, art. 4, cmt. ¶ 6, International Law Commission, 53d Sess. (2001) ("Of course the breach by a State of a contract does not as such entail a breach of international law."); F.V. García-Amador, Special Rapporteur, *International Responsibility: Fourth Report*, U.N. Doc. A/CN.4/119 (Feb. 26, 1959), in 1959 Y.B. INT'L L. COMM'N, vol. II ¶ 123 ("Diplomatic practice and international case-law have traditionally accepted almost as dogma the idea that the mere non-performance by a State of its obligations under a contract with an alien individual does not in itself necessarily give rise to international responsibility."); F. A. MANN, *State Contracts and State Responsibility*, 54 AM. J. INT'L L. 572, 578 (1960) (pointing out that no States other than Switzerland and France have adopted the view that mere contractual breaches give rise to a breach of international law and that the United States "has, for more than a century and a half, been clearly opposed to it").

amount to a violation of the minimum standard of treatment, and thus Article 1105(1), a claimant must demonstrate something more than breach of contract, such as a denial of justice or that the State repudiated the contract in a way that is discriminatory or motivated by non-commercial considerations.⁷⁰⁴ Accordingly, there is no basis under NAFTA Chapter Eleven to even allege, under Article 1105 or otherwise, a claim for mere breach of contract.⁷⁰⁵

To suggest, then, that Article 1105 provides a basis for an investor to submit a claim under Chapter Eleven for mere frustration of a legitimate expectation is nonsensical. If breach of contract – which also necessarily frustrates expectations – is not protected by the minimum standard of treatment, certainly frustrated expectations in the absence of such an express commitment cannot give rise to a violation of that standard. Glamis offers no evidence that – or rationale why – international law would not recognize mere breach of a contract as wrongful, but would find cognizable disappointment of an investor’s expectations based on a lesser form of assurance.⁷⁰⁶ Thus, the fact that breach

⁷⁰⁴ See *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 4, cmt. ¶ 6 (“Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party.”); RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS § 712(2)(a) (1987); *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, 41 I.L.M. 1135, Decision on Annulment ¶ 110 n.78 (July 3, 2002) (“*Vivendi II*”) (explaining that the determination of whether particular conduct violates a treaty cannot be satisfied by an examination of that conduct in context of contractual rights and duties alone; also citing ROBERT JENNINGS & ARTHUR WATTS, *OPPENHEIM’S INTERNATIONAL LAW* 927 (9th ed. 1992): “It is doubtful whether a breach by a state of its contractual obligations with aliens constitutes per se a breach of an international obligation, unless there is some additional element as denial of justice, or expropriation, or breach of treaty, in which case it is that additional element which will constitute the basis for the state’s international responsibility.”).

⁷⁰⁵ See *Azinian v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award ¶ 87 (Nov. 1, 1999) (“NAFTA does not, however, allow investors to seek international arbitration for mere contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes.”).

⁷⁰⁶ Even if “something more” could be demonstrated in addition to frustrated expectations, it would not thereby transform the frustration of legitimate expectations into a violation of customary international law. Rather, it is the “something more” that constitutes the international delict, just as is the case where mere breach of contract is alleged. See *Vivendi II* at ¶ 110 n.78 (“it is that additional element which will constitute the basis for the state’s international responsibility”).

of contract does not violate the customary international law minimum standard of treatment demonstrates that frustration of an investor's expectations cannot form the basis for a finding that the State has violated customary international law.

Furthermore, that other international investment treaties contain provisions allowing for claims for breaches of "investment agreements" likewise confirms that no responsibility arises under customary international law for the mere frustration of legitimate expectations.⁷⁰⁷ If Glamis were right that the fair and equitable treatment standard proscribed the mere frustration of legitimate expectations, such provisions would be superfluous. A breach of an "investment agreement" is but a type of frustrated legitimate expectation – albeit one characterized by a robust form of assurance. No "investment agreement" provision would actually be needed if a claimant could state a claim under the fair and equitable treatment article for frustration of its legitimate expectations. States' practice of negotiating specific "investment agreement" provisions thus refutes that there is any widespread sense on the part of States that responsibility arises for the frustration of foreign investors' legitimate expectations.⁷⁰⁸

⁷⁰⁷ See Free Trade Agreement, U.S.-Chile, *supra* n.590, arts. 10.15.1(a)(i)(C), (b)(i)(C), 10.27 (providing that investors may submit a claim for breach of an "investment agreement," which is defined as a written agreement between a foreign investor or its investment and a national authority of the host State granting certain rights, e.g., rights with respect to natural resources, and accompanied by reliance on the part of the investor or investment); Free Trade Agreement, U.S.-Sing., *supra* n.590, arts. 15.15.1(a)(i)(C), (b)(i)(C), 15.1.14 (same); Free Trade Agreement, U.S.-Central America-Dom. Rep., *supra* n.590, arts. 10.16.1(a)(i)(C), (b)(i)(C), 10.28 (same); Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Uru., *supra* n.590, arts. 24.1(a)(i)(C), (b)(i)(C), 1 (same).

⁷⁰⁸ A conclusion that mere frustration of expectations violates the minimum standard of treatment would also render meaningless the debate on whether the so-called "umbrella clauses" that are found in some investment treaties transform breaches of investor-State contracts into treaty violations. See, e.g., *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction ¶ 84 (Aug. 6, 2003); *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/06, Decision on Jurisdiction ¶ 128 (Jan. 29, 2004); *El Paso Energy v. Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction ¶ 72 (Apr. 27, 2006); *Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Award ¶ 42 (Oct. 12, 2005).

In addition to the fact that such a claim lacks support in State practice, the consequences of agreeing with Glamis that mere frustration of a foreign investor's legitimate expectations rises to the level of a customary international law violation would be momentous.⁷⁰⁹ The volume of claims for frustration of expectations could far exceed those for breach of contract. Consider, by comparison, how vast municipal law liability would be if governments could be sued for merely frustrating expectations. U.S. law, not surprisingly, provides no cause of action for dashed expectations.⁷¹⁰

Indeed, under U.S. law, the concepts of promissory estoppel and detrimental reliance are utilized in quasi-contractual claims; that is, they are used when there is not a contract *per se*, but the law implies a contract in the absence of an express agreement because it is just to do so under the circumstances.⁷¹¹ In general, plaintiffs must demonstrate that “(1) defendants made an unambiguous promise to plaintiff, (2) plaintiff relied on such a promise, (3) plaintiffs [sic] reliance was expected and foreseeable by

⁷⁰⁹ *SGS Société Générale de Surveillance S.A. v. Pakistan*, ¶ 167 (noting that the consequences of accepting the claimant's argument that the umbrella clause in the Swiss-Pakistan BIT transformed all contractual obligations entered into by a State party into treaty obligations, would be “far-reaching in scope,” “automatic and unqualified and sweeping in their operation,” and “burdensome in their potential impact upon a Contracting Party”).

⁷¹⁰ *See, e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) (stating that “our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations”). As the United States explained in its Counter-Memorial, in the Trade Promotion Authority Act of 2002, Congress explicitly instructed the United States Trade Representative to negotiate free trade agreements that “[do] not accord[] greater substantive rights [to foreign investors] with respect to investment protections than United States investors in the United States [are accorded under U.S. law].” Bipartisan Trade Promotion Authority Act of 2002 (“TPA”), 19 U.S.C. § 3802(b)(3); *see* Counter-Mem. at 233-34. This suggests that neither did Congress intend for Article 1105(1), which encompasses the same minimum standard of treatment obligation found in trade agreements negotiated subject to the TPA, to extend greater protections to Canadian and Mexican investors than those available to U.S. investors under U.S. domestic law. As such, the Tribunal can infer that Congress would not construe Article 1105 as conferring responsibility upon the United States for the frustration of a foreign investors' expectations, when no such liability exists under U.S. domestic law.

⁷¹¹ *See* 4 WILLISTON ON CONTRACTS § 8:4 ¶ 2 (2006) (explaining that “courts have applied the principle of [promissory] estoppel in effect to form a contract, when the promisee suffered detriment in reliance” on a promise that was otherwise unenforceable for lack of consideration); *Dumas v. Infinity Broadcasting Corp.*, 416 F.3d 671, 677 (7th Cir. 2005) (describing promissory estoppel as “a common law equitable device wherein a contract may be implied where none is found to exist”).

defendants, and (4) plaintiff relied on the promise to its detriment.”⁷¹² Thus, while Glamis is correct that legitimate expectations is a concept also used in the U.S. law doctrines of promissory estoppel and detrimental reliance, this observation is immaterial. The most that these domestic law doctrines accomplish is to imply the existence of a contractual commitment.⁷¹³ But because mere breach of contract does not ordinarily give rise to international liability, the fact that the concept of legitimate expectations plays a role in domestic quasi-contract jurisprudence does little to advance Glamis’s claim that frustration of an investor’s expectations gives rise to State responsibility under customary international law.

Furthermore, the standard for asserting a common law promissory estoppel or detrimental reliance⁷¹⁴ claim against the United States government is particularly stringent. Estoppel “may not ordinarily be asserted against the United States when it acts in its sovereign capacity.”⁷¹⁵ More particularly, “[w]here an agency of the federal government acts in a sovereign capacity for the benefit of the public, the United States is not subject to an estoppel which would impede the exercise of its governmental

⁷¹² *Dumas v. Infinity Broadcasting Corp.*, 416 F.3d 671, 677 (7th Cir. 2005); see also *Chrysler Corp. v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1032 (Del. 2003); 31 C.J.S. *Estoppel and Waiver* § 92 (2007) (“[A] promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.”).

⁷¹³ See *Dumas*, 416 F.3d at 678 (holding that failure to demonstrate the essential elements of a contract, “e.g. offer, acceptance and a meeting of the minds,” effectively forecloses any promissory estoppel claim).

⁷¹⁴ A claim of detrimental reliance is typically associated with the doctrines of promissory and equitable estoppel, which are distinct in that “equitable estoppel is available only as a defense, while promissory estoppel can be used as the basis for a cause of action for damages.” *Burnett v. United States*, 40 Fed. Cl. 806, 810 (Fed. Cl. 1998). As such, claims of detrimental reliance are often not recognized as separate causes of action, but are instead simply analyzed under the doctrine of promissory estoppel. See, e.g., *Thayer v. Dial Indus. Sales, Inc.*, 85 F. Supp. 2d 263, 271 (S.D.N.Y. 2000).

⁷¹⁵ 31 C.J.S. *Estoppel and Waiver* § 179.

functions.”⁷¹⁶ Even though the United States “implicitly promises that it will not use its power to destroy the legitimate expectations of its contracting partners,” this obligation “has at its predicate the existence of a valid, mutually assented-to contract.”⁷¹⁷ Glamis cannot demonstrate the existence of any such contract with the United States in this matter. In fact, U.S. courts expressly have rejected the argument that the “plethora of rules, regulations and statutes involving federal mining law” form an implied contract between the government and a mining claimant.⁷¹⁸

In sum, the Tribunal should reject the notion that the customary international law minimum standard of treatment requires States to compensate foreign investors merely because their expectations have been frustrated. Glamis provides no evidence of such a rule of customary international law and, indeed, State practice refutes it. It is nearly universally accepted that mere breaches of contract do not give rise to international liability. Absent specific clauses in investment treaties – none of which are present in NAFTA Chapter Eleven – arbitral tribunals have declined to accept jurisdiction over claims for breaches of contract. And U.S. domestic law – which is evidence of State practice – does not provide a cause of action for frustration of expectations in the absence of a contractual or quasi-contractual relationship between the parties. Given this

⁷¹⁶ *Id.*

⁷¹⁷ *Night Vision Corp. v. United States*, 68 Fed. Cl. 368, 389 (Ct. Cl. 2005) (internal quotation marks omitted), *aff'd* 469 F.3d 1369 (Fed. Cir. 2006). In *Night Vision Corp.*, the Court of Federal Claims held that the contractor could not claim that the United States breached its “duty of good faith and fair dealing,” because it failed to demonstrate the existence of a contract “for which a covenant arises that proscribes the government from interfering with reasonable expectations flowing from that particular contract.” *Id.* The Court of Claims also noted that neither the statutory nor the administrative scheme at issue in that litigation, which required federal agencies to reserve a portion of their research and development budgets for small business concerns, obligated the government to award such a grant to the claimant. *See id.* at 390. Therefore, claimant could not assert a cause of action simply because its expectation that it would receive a grant did not demonstrate the existence of an express or implied contract.

⁷¹⁸ *See, e.g., Last Chance Mining Co. v. United States*, 12 Cl. Ct. 551, 555 (Cl. Ct. 1987) (internal quotation marks omitted), *aff'd*, 846 F.2d 77 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 823 (1988).

evidence, it would be extraordinary for this Tribunal to conclude that although customary international law does not even protect expectations that are backed up by contractual commitments, it does so where there are lesser – or indeed no – forms of assurances made.

2. Glamis’s Argument That Its Expectations Have Been Frustrated Fails In Any Event

Even assuming, for the sake of argument, that Glamis could elevate one factor from the indirect expropriation analysis to become the sole determinant of whether there has been a violation of customary international law, Glamis’s claim would still fail.

As detailed above and in the Counter-Memorial, Glamis could not have had a reasonable expectation that its plan of operations would be approved in two to three years. Nor could Glamis have reasonably expected that California would not adopt legislation or regulations requiring further reclamation to protect Native American Sacred Sites and ensure compliance with SMARA’s reclamation standards.⁷¹⁹

Tribunals that have examined an investor’s expectations in the context of a fair and equitable treatment claim have consistently rejected claims based on the investor’s subjective expectations regarding the legal environment in which it was operating.⁷²⁰ Like tribunals examining the role of expectations in the expropriation context, these tribunals have also held that it is not reasonable for an investor to expect that the legal and regulatory systems which govern the terms of any foreign investment will remain

⁷¹⁹ See *supra* Sec. I.A.3(b).

⁷²⁰ See, e.g., *Saluka* Partial Award ¶ 304 (“[T]he scope of the Treaty’s protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors’ subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances.”) (emphasis omitted).

static.⁷²¹ And those tribunals have found the frustration of an investor's expectations to be actionable only when based on explicit or implicit representations made by the government which it later refused to honor.⁷²² Thus, even if this Tribunal were to accept Glamis's claim that frustration of expectations gives rise to State responsibility under customary international law, Glamis's claim would fail on the facts. Glamis's alleged expectation that the California and Federal Governments would not act in the manner in which they did was unreasonable, and the United States did not make any assurances to

⁷²¹ See, e.g., *id.* ¶ 305 (emphasizing that it would be unreasonable for an investor to “expect that the circumstances prevailing at the time the investment is made remain totally unchanged,” and noting that, in determining whether the investor's expectations were reasonable, “the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well”); *id.* ¶ 358 (finding that the claimant was “not justified to expect that [the governmental authority] would not introduce a more rigid system of prudential regulation and thereby change the framework for [its] investment”).

⁷²² See, e.g., *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Award ¶¶ 266-81, 55-58 (May 12, 2005) (finding that Argentina had breached its obligation of fair and equitable treatment “by evisceration of the arrangements in reliance upon [which] the foreign investor was induced to invest,” which included an Information Memorandum the Government prepared when it sold its interest in Transportadora de Gas del Norte to the claimant and an operating license which the Argentine legislature passed that gave CMS the right to calculate its tariffs in dollars and adjust them in keeping with the United States Producer Price Index (US PPI)); *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award ¶ 375 (July 14, 2006) (finding that Argentina violated its fair and equitable treatment obligation when the regulatory authority established to oversee the privatized water and sewerage business that claimant owned failed to let it raise its tariffs as provided for by the provisions in its Concession Agreement); *ADC Affiliate & ADC & AMDC Mgmt. Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award ¶¶ 375, 379 (Oct. 2, 2006) (explaining that legislation requiring that the operator of an airport be an organization in which the State was a majority owner violated Hungary's fair and equitable treatment obligation, because that requirement frustrated the expectations claimant had formed on the basis of its contract with the Hungarian federal air traffic authority to renovate, build and operate certain terminals at that airport); *Saluka Partial Award* ¶ 351 (finding that, in the absence of a specific assurance by the government that the privatization of the four main banks would proceed in a substantially similar manner, the claimant “had no basis for expecting that there would be no future change in the Government's policy towards the banking sector's bad loan problem”); *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award ¶ 160 (May 29, 2003) (finding a breach of the fair and equitable treatment provision where the “relocation agreement has not been memorialized in an instrument signed by all the parties involved, [but] the evidence submitted leads to the conclusion that there was such an agreement”); *id.* ¶ 167 (emphasizing that the breach of the fair and equitable treatment obligation could only be understood in the context of the legal relationship between claimant and the Mexican governmental authorities created by various contractual and quasi-contractual agreements).

Glamis that were eviscerated by any of the challenged measures.⁷²³ Consequently, the Tribunal should deny Glamis’s frustration-of-expectations claim.

D. The United States Did Not Breach Article 1105 By Engaging In Allegedly Arbitrary Actions

Glamis concedes – quite correctly – that “[h]ost states are entitled to make changes to their laws” and that “mere arbitrariness” is insufficient to make out a violation of international law.⁷²⁴ Indeed, the experts and authorities on which Glamis relies agree that States are entitled to a significant degree of deference in legislative and regulatory actions.⁷²⁵ Nevertheless, Glamis asks this Tribunal to find a violation of Article 1105 based on what it perceives to be unwise legislation and alleged mistakes made in the administrative processing of its application. International law, however, cannot be construed to rectify such alleged wrongs, even if proven. Glamis, in any event, has failed to prove that the California and federal measures it challenges were “arbitrary” under any plausible definition of the term.

Below, the United States first demonstrates that international law grants States broad discretion in making legislative decisions, and that tribunals will not second-guess a State’s determination to enact economic legislation or regulations to address a matter of public concern. Second, the United States shows that neither the SMGB regulations nor SB 22 can be construed as “arbitrary” legislation or regulations under any interpretation of that term. Third, the United States demonstrates that tribunals applying international

⁷²³ See *supra* Sec. I.A.3(b).

⁷²⁴ Reply ¶¶ 262, 239.

⁷²⁵ See Wälde Rep. at IV-15 (“Certainly, there has to be respect for the ‘margin of appreciation’ by government and deference to governmental decision-making.”); *S.D. Myers* Partial Award ¶ 263; *Thunderbird* Award ¶ 125; *Saluka* Partial Award ¶¶ 305, 337.

law accord a high degree of deference to States in their administrative processes, and that a showing of a violation of domestic administrative law is insufficient to establish State responsibility. Finally, the United States shows that none of the federal agencies' determinations and actions challenged by Glamis – including the agencies' determination that the Imperial Project would irreparably damage Native American sacred sites, Solicitor Leshy's construction of FLPMA's standards, and the DOI's actions taken while processing Glamis's plan of operations – can be deemed “arbitrary.” Accordingly, the Tribunal should deny Glamis's claim that the United States breached Article 1105 by acting arbitrarily.

1. Imperfect Legislation Or Regulation Does Not Give Rise To State Responsibility Under Customary International Law

As a legal matter, even if Glamis were able to demonstrate that the California measures were “[un]necessary, [un]suitable,” or “[dis]proportionate,”⁷²⁶ that would not support a finding of a violation of the international minimum standard. Under international law, every State is free to “change its regulatory policy.”⁷²⁷ And every State “has a wide discretion with respect to how it carries out such policies by regulation and administrative conduct.”⁷²⁸ States are thus necessarily accorded “wide regulatory ‘space’” for carrying out their objectives.⁷²⁹

Arbitral tribunals consequently afford States great deference when deciding challenges to regulatory or legislative measures that impact foreign investments, and arbitral awards are replete with examples of tribunals refusing to second-guess decisions

⁷²⁶ Wälde Rep. at I-15; *see also id.* at I-24; Reply ¶¶ 169-193.

⁷²⁷ *Thunderbird Award* ¶ 127.

⁷²⁸ *Id.*

⁷²⁹ *Id.* (internal quotations omitted); *see also id.*, Separate Op. of T. Wälde, ¶ 102 (noting importance of “the very legitimate goal of retaining ‘policy space’ and governmental flexibility”).

made by government legislators and regulators. As the *S.D. Myers* NAFTA Chapter Eleven tribunal correctly observed:

Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.⁷³⁰

The *Saluka* tribunal agreed, stating that it was “clearly not for this Tribunal to second-guess the Czech Government’s privatisation policies.”⁷³¹

International courts are similarly restrained when addressing challenges to *bona fide* State legislation and regulation. The European Court of Justice, for instance, accords governmental acts a wide “margin of appreciation.”⁷³² As such, “the legality of a measure adopted in that sphere can be affected only if the measure is *manifestly inappropriate*.”⁷³³

United States and Canadian State practice further supports the conclusion that legislation and regulation are afforded great deference. In *Williamson v. Lee Optical*, for instance, the United States Supreme Court held that “it is for the legislature, not the courts, to balance the advantages and disadvantages” of competing legislative measures in the economic sphere.⁷³⁴ Under U.S. law, legislation may be consistent with due

⁷³⁰ *S.D. Myers* Partial Award ¶ 261.

⁷³¹ *Saluka* Partial Award ¶ 337.

⁷³² See, e.g., *Spain v. Council*, Case C-310/04, 2006 ECJ CELEX LEXIS 121, ¶ 75 (Mar. 16, 2006).

⁷³³ *Parliament v. Council*, Case C-317/04, 2005 ECJ CELEX LEXIS 624, 2005 E.C.R.I. 04721, ¶ 232 (Nov. 22, 2005) (emphasis added).

⁷³⁴ *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955); see also *id.* at 488 (“For protection against abuses by legislatures the people must resort to the polls, not to the courts.”) (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876)); see, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 64 (1973) (“We

process even if it is “unwise [or] improvident,” “needless [or] wasteful,” or even not “in every respect logically consistent with its aims.”⁷³⁵ Rather, “[i]t is enough that there is an evil at hand for correction, and that it *might be thought* that the particular legislative measure was a rational way to correct it.”⁷³⁶ That is, a measure will be upheld if it is at all consistent with any legitimate rationale,⁷³⁷ regardless of whether there was any evidence that that rationale was actually considered by the legislature at the time the measure was adopted.⁷³⁸ Thus, under U.S. law, the issue is not what motivated the legislature:⁷³⁹ the only issue reserved for the courts is whether the measure is rationally related to a legitimate governmental purpose.⁷⁴⁰

do not sit as a super legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.”) (internal quotation marks omitted).

⁷³⁵ *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. at 487-88.

⁷³⁶ *Id.* at 488 (emphasis added).

⁷³⁷ See *Heller v. Doe*, 509 U.S. 312, 320 (1993) (“[A] legislature . . . need not actually articulate at any time the purpose or rationale supporting its classification. Instead, a classification must be upheld . . . if there is *any reasonably conceivable state of facts* that could provide a rational basis for the classification.” (emphasis added) (internal quotation marks and citations omitted)); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. at 487 (discussing what the legislature hypothetically “might have” or “may have” concluded); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (upholding an under-inclusive economic measure based on what the legislature “may well have concluded”).

⁷³⁸ See *Heller*, 509 U.S. at 320 (“A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.”) (internal quotation marks omitted).

⁷³⁹ Of course motivation is relevant when the complainant alleges invidious discrimination or infringement of “fundamental” rights, see, e.g., *Washington v. Davis*, 426 U.S. 229, 239-40 (1976) (plaintiff alleging racial discrimination must show discriminatory intent); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) (same for discrimination based on gender), but Glamis makes no such allegations here, and it is well-settled that economic rights and economic classifications are subject only to rational basis review, see, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963) (“[W]e emphatically refuse to go back to the time when courts used the Due Process Clause to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”) (internal quotation marks omitted).

⁷⁴⁰ See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. at 487-88; *Railway Express Agency*, 336 U.S. at 110.

For example, the statute challenged in *Lee Optical* plainly favored some economic actors (optometrists) and disfavored others (opticians);⁷⁴¹ indeed the statute at issue in *Lee Optical* has been characterized as a classic example of legislative capture by special interest groups.⁷⁴² But a legislative motivation to favor (or disfavor) particular economic actors was not merely insufficient to warrant overturning the measure, it did not even enter into the Court's calculus.⁷⁴³ Thus, as long as the measures adopted by California could be thought to be rationally related to a legitimate goal, they would be deemed valid under U.S. law.

The Supreme Court of Canada has ruled similarly, according the same kind of deference that U.S. courts give legislators and regulators in economic matters.⁷⁴⁴ Indeed, quoting *Williamson v. Lee Optical*, the court has accepted legislators' freedom to weigh different policy options, to legislate piecemeal, and to solve some problems but not others:

Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The

⁷⁴¹ See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. at 486 (“The effect of [the statute] is to forbid the optician from fitting or duplicating lenses without a prescription from an . . . optometrist.”).

⁷⁴² See, e.g., Michael J. Klarman, *An Interpretive History of Equal Protection*, 90 MICH. L. REV. 213, 250 (1991) (describing the statute as a “blatant piece of special interest legislation, privileging optometrists and ophthalmologists over opticians to no apparent public purpose”).

⁷⁴³ See, e.g., *United States v. O'Brien*, 391 U.S. 367, 383 (1968) (“It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.”); *McCray v. United States*, 195 U.S. 27, 56 (1904) (“The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.”).

⁷⁴⁴ *Edwards Books and Art Ltd. v. The Queen*, [1986] S.C.R. 713, 772 (Can.); see also *Quebec v. Irwin Toy Ltd.*, [1989] 1 S.C.R. 927, 934 (Can.) (“This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups.”).

legislature may select one phase of one field and apply a remedy there, neglecting the others.⁷⁴⁵

Glamis has presented no evidence to suggest that the United States and Canada intended to grant to NAFTA Chapter Eleven tribunals the power to second-guess the wisdom of or motivations underlying domestic economic policy – a power their domestic courts so emphatically lack. Nowhere has Glamis shown, nor could it, that customary international law requires a higher standard of review than due process. Therefore, economic regulations that are rationally related to a legitimate government purpose do not violate Article 1105.

Consistent with this understanding, Glamis’s own authorities characterize “arbitrariness” in the international sense as necessarily a higher standard than “arbitrariness” or “reasonableness” in a domestic law sense:

[U]nlawfulness cannot be said to amount to arbitrariness. . . . Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law[.]⁷⁴⁶

Indeed, given the extreme deference accorded States in this sphere, the esteemed legal scholar Oscar Schachter has questioned whether the term “arbitrary” should ever be used “to describe legislation to carry out economic, social or political objectives.”⁷⁴⁷ “[I]f used at all,” he suggested, the term “should apply only to a governmental action involving no claim of legal right based in legislation or contract[.]”⁷⁴⁸ He acknowledged that a legislative act might be deemed arbitrary “if it had *no reasonable basis*,” but he

⁷⁴⁵ *Edwards Books and Art Ltd.*, [1986] S.C.R. at 772 (Can.) (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. at 489 (1955)) (internal quotations omitted).

⁷⁴⁶ *Elettronica Sicula S.P.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. 15, ¶ 124 (Judgment of July 20).

⁷⁴⁷ OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 313 (1991).

⁷⁴⁸ *Id.*

cautioned that “an international tribunal or a foreign State can rarely claim that another State’s legislation lacks a reasonable basis or justification in the public interest of that State.”⁷⁴⁹

Glamis attempts to turn these well-established international law principles on their heads, reversing the presumption favoring the validity of State action,⁷⁵⁰ seeking to impose on the United States the burden of justifying its regulatory and legislative measures,⁷⁵¹ and according zero deference to the State’s decision-making authority.⁷⁵² Indeed, Glamis thus seeks to impose on the United States the burden of proving, “in detail” and “specifically,” that the challenged regulatory and legislative measures were made without any “relevant flaws,” that they conformed to “international and U.S. best practice,” that they were the “least restrictive” measures available, and that they were “necessary, suitable and proportionate.”⁷⁵³ This second-guessing of State action, however, has no basis in NAFTA Chapter Eleven or, indeed, in United States or Canadian law.⁷⁵⁴ The Tribunal should not interfere with matters reserved for the state political processes, but should instead deny Glamis’s Article 1105(1) claim challenging the California measures.

⁷⁴⁹ *Id.* (emphasis added).

⁷⁵⁰ Wälde Rep. at I-13 (concluding that California’s “burden of justification of such regulations – in terms of the ‘indirect expropriation’ standard of Article 1110, the ‘legitimate expectations’ and ‘arbitrariness’ is therefore much higher than it might be had California done nothing but simply align itself with international and U.S. best practice and prevailing scientific guidelines”).

⁷⁵¹ *Id.* at I-14 (arguing that “it must be proved in detail, substantiated specifically, that and how the mine would disrupt the spiritual pathway and linked practices severely”).

⁷⁵² *Id.* at I-13 (finding “no particular reason to accord much – or perhaps any – deference to California’s introduction of a novel ‘total back-filling’ requirement”).

⁷⁵³ *Id.* at I-13-15; *see also id.* at I-24.

⁷⁵⁴ *S.D. Myers* Partial Award ¶ 261.

a. The SMGB Regulations Are Not Arbitrary

Even assuming *arguendo* that Glamis could establish that international law provides that tribunals may second-guess States' economic policies and inquire into whether such measures are "arbitrary," the Tribunal should still deny Glamis's claim that the California State Mining and Geology Board acted "arbitrarily" when it promulgated the amendments to the SMGB regulations.

Glamis makes two primary arguments in support of its contention that the amendments to the SMGB regulations were arbitrary: *first*, that the regulations apply only to open-pit metallic, as opposed to open-pit non-metallic, mines; and *second*, that the SMGB did not rely on any formal technical or scientific reports when promulgating the amendments.⁷⁵⁵ As explained below, neither of these assertions renders the regulations arbitrary from the international perspective.

Requiring complete backfilling and recontouring is plainly a rational way of returning lands damaged by open-pit metallic mines to a usable condition and ensuring that those mines pose no danger to public health and safety. Glamis nevertheless argues

⁷⁵⁵ Reply ¶¶ 272-82. Glamis's further criticism that "[i]t stretches the bounds of reasoned rulemaking to suggest that a seismic change in reclamation standards with limited environmental or safety benefit but dramatic impacts on an entire industry would be hurriedly adopted without careful analysis and study in order to apply it to a solitary pending mining proposal," Reply ¶ 272, mischaracterizes the SMGB regulations, which are regulations of general applicability that apply to all open-pit metallic mines in California. When the SMGB regulations were enacted there were at least two other mining companies, Golden Queen and Canyon Resources, that inquired as to the regulations' potential impact on their projects. *See* Counter-Mem. at 101-03. And, as discussed above, in light of the SMGB's rejection of Golden Queen's application for an amendment to the regulations, Golden Queen has announced that it plans to submit a revised reclamation plan for an open-pit gold mine in California that incorporates complete backfilling. Golden Queen Mining Co. Ltd., U.S. Securities and Exchange Commission, Form 10-KSB, at 15 (Mar. 31, 2006).

In addition, any argument by Glamis based on "strong indications" of retroactivity in the SMGB regulations, *see* Wälde Rep. at IV-67, is undermined by the SMGB's decision to fully address the retroactivity concerns of the California Mining Association, of which Glamis is a member. As discussed in the United States' Counter-Memorial, the language proffered by the California Mining Association in response to its retroactivity concerns was incorporated directly into the SMGB regulations. *See* Counter-Mem. at 99, 243, 246.

that the SMGB regulations are arbitrary because they apply to metallic, but not non-metallic, mines.⁷⁵⁶ This argument is meritless. First, international law does not require that States address all related issues in one fell swoop.⁷⁵⁷ Second, the distinction between metallic and non-metallic mines is plainly rational. Indeed, Glamis simply ignores the stated reason for applying the complete backfilling requirement only to open-pit metallic mines. As explained in the Counter-Memorial and statement of Dr. John Parrish, in the case of non-metallic mines, a large volume of the mined material is removed from the site, thus leaving smaller waste piles and insufficient material to completely backfill the mine pit.⁷⁵⁸ And as addressed in Dr. Parrish's Supplemental Declaration, lead agencies often require open pits on non-metallic mine sites to be refilled because those sites tend to be located close to urban areas on highly valued land.⁷⁵⁹ Moreover, the open pits on

⁷⁵⁶ Reply ¶¶ 273-76.

⁷⁵⁷ See *S.D. Myers*, Partial Award ¶ 261 (stating that the minimum standard of treatment does not give rise to "an open-ended mandate to second-guess government decision-making . . . [g]overnments have to make many potentially controversial choices . . . [i]n doing so, they may appear to have . . . adopted solutions that are ultimately ineffective or counterproductive"); see also *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (There is "no requirement . . . that all evils of the same genus be eradicated or none at all.").

⁷⁵⁸ Counter-Mem. at 240; Parrish Decl. ¶ 13. This point is reflected throughout the administrative record for the SMGB regulations. See, e.g., Secretary Nichols, Department of Conservation, SMGB Regular Business Meeting Transcript, at 7-8 (Apr. 10, 2003) (14 FA tab 160) ("[w]e understand that metallic mining is unique . . . unlike aggregate mining where the product is essentially all used at the time leaving relatively little in the way of waste . . . open pit mining has a unique impact on the environment [by creating] huge cavities [and] large piles of waste . . . so in effect, it has a double impact on the environment"); Letter from John M. Taylor, Counsel to Teichert, Inc., to John Parrish, Executive Officer, SMGB, at 1-2 (Dec. 11, 2002) (13 FA tab 129) ("[t]he environmental concerns sought to be addressed by the proposed emergency regulation (e.g., excess overburden, waste piles, leach piles, etc.) would not occur with . . . aggregate mining operations. . . . unlike metallic minerals, which typically represent only a small fraction of the excavated material, aggregate typically comprises the bulk of material removed from an aggregate mine"); Letter from Charles L. Rea, Assistant Executive Director, Construction Materials Association of California, to John Parrish, Executive Officer, SMGB (Dec. 10, 2002) (13 FA tab 128) ("As you know, aggregate operations primarily extract and process rock, sand, and gravel products for use in road-building and construction. . . . By the nature of the deposit, these aggregate operations do not accumulate large quantities of overburden, and do not use the heap leach method to recover metallic minerals. As such, we request clarification that this emergency regulation does not apply to operations whose primary activity is the extraction of aggregates.") (emphasis omitted).

⁷⁵⁹ Parrish Supp. Decl. ¶ 12.

non-metallic mine sites usually are much smaller than open pits on metallic mine sites because metallic mining normally involves low-grade ores requiring extensive excavation.⁷⁶⁰ Accordingly, as stated by Dr. Parrish, non-metallic mines pose “different environmental and health and safety risks than metallic mines.”⁷⁶¹

Glamis is also incorrect to assert that the SMGB exempted non-metallic mines because the lack of sufficient backfill material would make backfilling those mines expensive.⁷⁶² The SMGB exempted non-metallic mines from the backfilling requirement because, in most instances, it would be *futile* to require complete backfilling of non-metallic mines. Requiring those open pits to be filled would require *another* hole to be dug to acquire the fill material.⁷⁶³

For the same reason, the regulations do not require complete backfilling of metallic open-pit mines where insufficient material remains on site to completely fill the open pits.⁷⁶⁴ When adopting this rule, the SMGB expressly considered the possibility of an aggregate mine that (i) “has managed to sell off all of its original aggregate product and has no material left to ‘backfill’ the remaining pit,” and (ii) “unexpectedly qualifies as a metallic mine under this regulation.”⁷⁶⁵ This potential scenario arose from the SMGB’s decision to “intentionally set the defining threshold for metallic mines” at a relatively low level given “the importance attached to reclaiming metallic mine sites, and

⁷⁶⁰ *Id.* Dr. Parrish further observed that “open metallic mine pits often contain large amounts of exposed sulfide materials”; when exposed to weathering processes, such materials break down to form sulfuric acid, creating the risk of acid lake formation in large open pits. *See id.*

⁷⁶¹ *Id.*

⁷⁶² Reply ¶ 273.

⁷⁶³ Counter-Mem. at 240-41; Parrish Decl. ¶ 13; Final Statement of Reasons for CAL. CODE REGS. tit. 14, § 3704.1, at 3, 8-9 (6 FA tab 304).

⁷⁶⁴ Reply ¶ 274.

⁷⁶⁵ Final Statement of Reasons for CAL. CODE REGS. tit. 14, § 3704.1, at 8-9 (6 FA tab 304).

the negative environmental impact often associated with metallic mines.”⁷⁶⁶ Thus, the SMGB intentionally defined “metallic mine” broadly to increase the reach of the environmental protections under the regulations, while adopting safeguards to address situations in which complete backfilling is not feasible due to a lack of surface materials. In short, it was not “arbitrary” for California to choose to regulate only metallic mines; to the contrary, this decision was both rational and well within the state’s broad discretion.

Glamis also faults the SMGB for failing to cite any formal scientific or technical studies to support its conclusion that open-pit, metallic mines posed environmental and safety hazards.⁷⁶⁷ Glamis, however, ignores the testimony of Dr. Parrish as well as the voluminous administrative record on this point. As stated by Dr. Parrish, the SMGB received “hundreds of comments”⁷⁶⁸ voicing concerns over “the environmental and public health and safety problems posed by inadequately reclaimed open-pit metallic mines.”⁷⁶⁹ Such concerns included threats to wildlife, the potential creation of hazardous pit lakes and attractive nuisances, and the unusable condition of mined lands.⁷⁷⁰

⁷⁶⁶ *Id.* at 8 (rejecting commentator suggestion that the revenue threshold for qualifying as a metallic mine under the regulations, *i.e.* the minimum percentage of gross revenues that must be derived from production of metallic minerals, be increased from 10% to 50%).

⁷⁶⁷ See Reply ¶¶ 275-76.

⁷⁶⁸ Parrish Decl. ¶ 11.

⁷⁶⁹ Parrish Decl. ¶ 10. Examples of such comments are found throughout the administrative record. See, *e.g.*, Letter from Daniel R. Patterson, Center for Biological Diversity, to Allen Jones, Chairman, SMGB (Nov. 13, 2002) (13 FA tab 123) (“[t]he practice of mining metallic minerals, such as gold, leaves large pits that scar the landscape and render the land unfit for any beneficial use. . . . massive holes [and] mounds of mining waste . . . destroy[] wildlife habitat”); Letter from Bill Allayaud, Sierra Club, California, to Allen Jones, Chairman, SMGB (Nov. 13, 2002) (13 FA tab 124) (“[t]he practice of mining metallic minerals leaves large pits that scar the landscape and render the land unfit for any further productive or beneficial use, whether economic or recreational”); Letter from Jay Thomas Watson, The Wilderness Society, to Allen Jones, Chairman, SMGB (Nov. 13, 2002) (13 FA tab 125) (open pits and waste mounds “can impact wildlife habitat”); Letter from Kimberly Delfino, Defenders of Wildlife, to Allen Jones, Chairman, SMGB (Nov. 13, 2002) (13 FA tab 126) (“huge mounds of mining wastes . . . destroy wildlife habitat”); Letter from Jason Swartz, California Wilderness Coalition, to Allen Jones, Chairman, SMGB (Nov. 14, 2002) (13 FA tab 127) (open pits and waste mounds present a safety hazard); Letter from Edie Harmon, Sierra Club San Diego Chapter, to SMGB, at 2 (Dec. 12, 2002) (13 FA tab 130) (“[l]eaving a pock marked and wasted

Those same concerns were “starkly illustrated” by OMR staff in a December 2002 presentation to the SMGB.⁷⁷¹ In that presentation, OMR staff reviewed several “reclaimed” open-pit metallic mines in California, including the Jamestown Mine (pit lake containing high arsenic levels), the McLaughlin Mine (pit containing acid water), the Royal Mountain King Mine (pit containing water with high arsenic levels), and the Castle Mountain Mine (enormous open pits and a cyanide leach pad covering 265 acres).⁷⁷² Testimony from supporters of the proposed SMGB regulations “generally corroborated” the environmental and public health and safety concerns outlined above, while testimony from opponents of the regulations:

did not present any persuasive evidence demonstrating that inadequately reclaimed open pits had been or could be successfully converted to any usable second purpose . . . or that such open pits and waste piles posed no environmental or public health and safety hazards.⁷⁷³

open pit mine site without clearly defined readily usable beneficial alternate end uses is . . . inconsistent with the intent of SMARA”); Letter from Keith Hammond, California Wilderness Coalition, to SMGB (Mar. 6, 2003) (13 FA tab 131) (“[a]ppropriately engineered backfilling is critical for reclaiming mined lands for alternative uses [and] protecting public health and safety”); Letter from Johanna H. Wald, Natural Resources Defense Council, and Deborah S. Reames, Earthjustice, to John Parrish, Executive Officer, SMGB (Mar. 18, 2003) (13 FA tab 132) (“open pit mining involves tremendous environmental problems [including] destruction of wildlife habitat [and] displacement of species . . . as well as serious public health and safety hazards”); Letter from Terry Weiner, Desert Protective Council, Inc., to Allen Jones, Chairman, SMGB, at 1-2 (Mar. 24, 2003) (13 FA tab 133) (“[o]pen-pit mines that have ceased operations can attract children and adults . . . [toxic pit lakes pose] a hazard for birds and other animals attracted to the water”); Secretary Nichols, Department of Conservation, SMGB Regular Business Meeting Transcript, at 9 (Apr. 10, 2003) (14 FA tab 160) (“it really can no longer be the case that we allow these unfilled pits and gigantic stockpiles to simply trump all other potential uses of the land or to pass on to the general public the cost of remediation”).

⁷⁷⁰ Parrish Decl. ¶ 10.

⁷⁷¹ *Id.* ¶ 11.

⁷⁷² *Id.*

⁷⁷³ Parrish Decl. ¶ 12. Professor Wälde maintains that if his “assumptions prove factually correct . . . there is no justification for extending any substantial or even any particular deference” to the SMGB regulations. Wälde Rep. at III-69. On this point, Professor Wälde relies in part on jurisprudence of the European Court of Human Rights (“ECHR”), a Court that is not empowered to “create new rules of customary international law.” *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 264 (2d Cir. 2003). In any event, the ECHR decision in *Taskin v. Turkey*, as Professor Wälde observes, provided that when a state “must determine complex issues of environmental and economic policy,” in order to “strike a fair balance” between environmental

In short, even if international law somehow required a State to have scientific evidence before legislating, the SMGB had such evidence, and thus California would have satisfied even this standard.

Glamis also attempts to cast doubt over whether “open pits actually pose an attractive nuisance.”⁷⁷⁴ But Glamis fails to address the evidence upon which the SMGB relied demonstrating the clear public safety concerns arising from the enormous open pits and waste mounds that are associated with metallic mines.⁷⁷⁵ It was rational – and far from arbitrary – for California to credit this evidence and to conclude that open-pit, metallic mines were hazardous to both the environment and public safety.

and individual rights, the decision-making process “must firstly involve appropriate investigations and studies.” *Taskin v. Turkey*, App. No. 46117/99, ¶ 119 (Nov. 10, 2004) (Final Mar. 30, 2005). But Professor Wälde’s core assumption – that the SMGB regulations were not supported by “appropriate investigations and studies,” is misplaced. Professor Wälde does not address Dr. Parrish’s testimony discussing the hundreds of comments and detailed presentations made to the SMGB, which outlined the environmental and public health and safety hazards posed by inadequately reclaimed open-pit metallic mines. See Parrish Decl. ¶¶ 10-11. Nor does Professor Wälde consider the active participation by opponents of the regulations throughout the SMGB rulemaking process, notwithstanding the ECHR’s guidance in *Taskin* that when balancing environmental and individual rights, a court should consider “the extent to which the views of individuals were taken into account throughout the decision-making process.” *Taskin* ¶ 118. Furthermore, in this instance, the parties opposing the regulations failed to present any persuasive evidence rebutting the presentations made by supporters of the regulations. See Parrish Declaration ¶ 12. Also unaddressed by Professor Wälde is the subsequent review and approval of the SMGB’s regulations by the Office of Administrative Law. See *id.* ¶¶ 15, 17. As made clear in the *Taskin* decision, the ECHR “has repeatedly stated that in cases raising environmental issues the State must be allowed a wide margin of appreciation.” *Taskin* ¶ 116. An unsupported assumption that regulations lack “appropriate investigations and studies” cannot overcome such a margin of appreciation.

⁷⁷⁴ Reply ¶ 275.

⁷⁷⁵ See, e.g., Letter from Terry Weiner, Desert Protective Council, Inc., to Allen Jones, Chairman, SMGB, at 1-2 (Mar. 24, 2003) (13 FA tab 133) (“[o]pen pit mines that have ceased operations can attract children and adults who love to explore their surroundings but do not understand the possible dangers [which] include falling from rocks, drowning in pit lakes, or swimming in toxic waters . . . [toxic pit lakes pose] a hazard for birds and other animals attracted to the water”). Nor does Glamis address the safety hazards associated with the proposed open pits and waste mounds at the Imperial Project site in particular, which include threats to “people on foot near the pits” and “hikers or off-highway vehicle enthusiasts.” See Counter-Mem. at 39 n.164; *id.* at 40 n.168. See also Letter from James S. Pompy, Manager, Office of Mine Reclamation, to Jesse Soriano, Imperial County Planning/Building Department (Feb. 21, 1997), at 2 (13 FA tab 121) (“The issue of site safety around the excavated pits still remains to be addressed to the satisfaction of the county. One possible solution to this issue would be to backfill all excavated pits.”).

Glamis also attacks the SMGB for acknowledging that the regulations do not address “cyanide heap leaching as a process in mining.”⁷⁷⁶ But, contrary to Glamis’s assertion, this acknowledgment does not “reveal[] that the environment was not [the SMGB’s] real concern.”⁷⁷⁷ Environmental concerns under SMARA extend beyond issues related to the cyanide heap leaching process. The SMGB confronted the inconsistency between, on the one hand, unreclaimed open pits and waste mounds on metallic mine sites, and, on the other hand, SMARA’s requirement that mined lands be reclaimed to a usable condition. The SMGB’s response to that inconsistency – requiring backfilling of open pits and recontouring of waste mounds – was in no way arbitrary. Lands free of enormous open pits and waste mounds plainly are more usable than lands containing those hazards. California acted well within its authority in choosing to eliminate such open pits and waste mounds without reaching the broader issue of cyanide heap leaching as a process in mining.

Nor does Glamis’s assertion that “complete backfilling may not actually improve environmental protection” support its contention that the amendments are arbitrary.⁷⁷⁸ U.S. courts have held that “[W]hether *in fact* the provision will accomplish its objectives is not the question[.]”⁷⁷⁹ As noted above, an economic regulation is consistent with U.S. due process requirements – and *a fortiori* Article 1105 – provided that the state “*rationaly could have believed* that the [measure] would promote its objective.”⁷⁸⁰

⁷⁷⁶ Reply ¶ 277 (internal quotations omitted).

⁷⁷⁷ *Id.* (internal quotations omitted).

⁷⁷⁸ Reply ¶ 281.

⁷⁷⁹ *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-72 (1981) (emphases in original).

⁷⁸⁰ *Id.* (emphases in original).

This standard is equally applicable, and is obviously satisfied, here. As an initial matter, the authorities on which Glamis relies do not conclude that complete backfilling is detrimental to the environment. Rather, they make qualified statements that backfilling may affect groundwater and may “be of uncertain environmental and social benefit.”⁷⁸¹

Any criticisms that the amendments would adversely affect groundwater, moreover, are baseless. The amendments to the regulations clearly provide that backfilling must be completed in accordance with the applicable Regional Water Quality Control Board’s Water Quality Control Plan.⁷⁸² These water quality safeguards directly address any concerns over potential groundwater impacts in California.

Finally, the fact that some individuals or agencies may have made qualified statements regarding the uncertain environmental benefits of the regulations – while others testified and provided evidence of the environmental and safety hazards posed by un-backfilled mines – cannot render the regulations arbitrary. Glamis’s complaint that the SMGB did not have “any conclusive evidence” in the record to support its decision to adopt the regulations⁷⁸³ is belied by the record and, in any event, would be woefully insufficient if it were challenging the regulations in a U.S. court. Glamis’s complaints fall far short of what is necessary to establish that such action violates the minimum standard of treatment and to impose international liability on the part of the United States.

b. SB 22 Is Not Arbitrary

Requiring complete backfilling and grading of open-pit metallic mines operating within a mile of Native American sacred sites is a rational way of protecting the future

⁷⁸¹ Reply ¶ 281.

⁷⁸² CAL. CODE REGS. tit. 14, § 3704.1(b) (2003).

⁷⁸³ Reply ¶ 275.

use of those sacred sites. Because, as demonstrated below, SB 22 is rationally related to achieving a legitimate governmental purpose, it passes muster under U.S. law and more than satisfies the customary international law minimum standard of treatment required by Article 1105.

In its Reply, Glamis asserts that SB 22 – which the United States has demonstrated was intended to offer protection to Native American sacred sites – is arbitrary because complying with the law’s reclamation requirements would result in greater surface disturbance and, thus, would jeopardize more archeological sites than otherwise would occur if no such requirement were imposed.⁷⁸⁴ That argument is meritless, not least because it amounts to an argument that California appears to have “made mistakes” or “proceeded on the basis of a misguided economic or sociological theory” – neither of which offends international law.⁷⁸⁵

As an initial matter, Glamis’s argument focuses solely on preservation of archeological sites. Many factors in addition to archaeological evidence of religious and ceremonial use, however, may render an area sacred for Native Americans. The California Legislature recognized this fact, as it defined a Native American site in the statute at issue “as sacred by virtue of its established historical or cultural significance to, or ceremonial use by, a Native American group, *including, but not limited to,*” areas containing archaeological evidence of such use.⁷⁸⁶ Members of the Quechan Tribe, for example, describe the proposed Imperial Project area as one of four key teaching areas, where traditional religious practitioners, particularly orators, have gone to understand the

⁷⁸⁴ *Id.* ¶ 283.

⁷⁸⁵ *S.D. Myers Partial Award* ¶ 261.

⁷⁸⁶ CAL. PUB. RES. CODE § 2773.3(b)(1) (2006).

nature of their world.⁷⁸⁷ The Tribe emphasized the particular role that the area's "sense of solitude" and "expansive views, particularly in the direction of Picacho Peak and Picacho Basin" play in contributing to the area's significance."⁷⁸⁸ Without SB 22's complete backfilling requirement, the 300 to 400 foot tall waste piles described in Glamis's plan of operations would destroy these views, as well as impede the Tribe's ability to use it as a teaching area to ensure the transmission of their cultural heritage.⁷⁸⁹

The California Legislature could have intended to protect these views and this sense of solitude, and the complete backfilling and recontouring requirement is a rational way of achieving these plainly legitimate goals. Indeed, Glamis offered nothing in its Memorial or Reply to demonstrate that SB 22 is not rationally related to protecting these aspects of the sacred sites.

In any event, Glamis's argument that SB 22 would require greater surface disturbance at the Imperial Project site, thus damaging more archeological sites, is flawed.⁷⁹⁰ Glamis's argument is, essentially, that SB 22 was not rationally related to its end of protecting the use of Native American sacred sites. But, as explained above, there is no basis for this Tribunal to second-guess the factual findings of state legislatures. The legislature's belief that backfilling would reduce surface disturbance was rational.⁷⁹¹

⁷⁸⁷ See Andrew R. Pigniolo, Jackson Underwood & James H. Cleland, KEA Environmental, Inc., *Where Trails Cross: Cultural Resources Inventory and Evaluation for the Imperial Project, Imperial County, California* (Dec. 1997) ("*Where Trails Cross*"), at 284 (9 FA tab 83); see also Memorandum from Kimberly Johnston-Dodds, Policy Analyst, to Senator John Burton, at 2 (Apr. 22, 2002) (7 FA tab 35).

⁷⁸⁸ *Where Trails Cross* at 284 (9 FA tab 83); see Letter from Ed Hastey, State Director, BLM, to Cheryllyn Widell, State Historic Preservation Officer, at 4 (Feb. 26, 1998) (3 FA tab 106).

⁷⁸⁹ Counter-Mem. at 236-37.

⁷⁹⁰ Reply ¶¶ 284-85.

⁷⁹¹ For example, in *Hodel v. Indiana*, 452 U.S. 314 (1981), the Supreme Court reversed a district court's conclusion that a recontouring provision of the Surface Mining Act would not achieve its goals because it applied uniformity to mines in regions with different topography, and therefore concluded that it violated due process. See *id.* at 331-32. The court concluded that it was sufficient that "Congress acted rationally,"

Furthermore, as also discussed above, Glamis's argument rests on its own erroneous calculation of the Imperial Project's swell factor. On at least three separate occasions Glamis estimated a 23% average swell factor.⁷⁹² Norwest agreed with Glamis's contemporaneous calculations, as had the BLM.⁷⁹³ Glamis's valuation expert, Behre Dolbear, by contrast, estimates a 35% swell factor, which is 66% greater than Glamis's contemporaneous estimates.⁷⁹⁴ Behre Dolbear rests its conclusion on a single document that, on its face, reports the loose density of material for purposes of calculating "equipment production capacity," not the swell factor for reclamation.⁷⁹⁵ By vastly overestimating the volume of waste material to be reclaimed, Behre Dolbear has overestimated the surface disturbance at the Imperial Project site.⁷⁹⁶

With SB 22, the California Legislature acted as legislatures often do; that is, it balanced the interests of various constituencies and enacted legislation that addressed the issue about which they were concerned without fully satisfying the various constituencies. The Quechan Tribe, for instance, consistently maintained that no mitigation measures short of "complete avoidance" were acceptable to them,⁷⁹⁷ and,

id. at 333, in determining that geographical variances were "not necessarily desirable," *id.* at 332, and chided the district court for "substitut[ing] its policy judgment for that of Congress," *id.* at 331, and "act[ing] as a superlegislature," *id.* at 331, 333. *See also, e.g., W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-72 (1981) ("[W]hether *in fact* the provision will accomplish its objectives is not the question: the Equal Protection Clause is satisfied if we conclude that the California Legislature *rationally could have believed* that the [measure] would promote its objective." (emphases in original)).

⁷⁹² Norwest Rep. Table 3 (citing contemporaneous Glamis documents).

⁷⁹³ *Id.*

⁷⁹⁴ Behre Dolbear Supp. Rep. at 27-29.

⁷⁹⁵ *Id.* at 27.

⁷⁹⁶ Norwest Supp. Rep. ¶ 56. In any event, regardless of the swell factor for the material at the Imperial Project site, the swell factor at other potential mining projects may be low enough that SB 22's backfilling and recontouring requirements would result in no greater surface disturbance. *See* Reply ¶ 284 (recognizing the different swell factors that would apply to different types of mined material).

⁷⁹⁷ *Where Trails Cross* at 309 (9 FA tab 83). Indeed, in the case of the Imperial Project, had a California public agency taken any action that the NAHC could have sought to enjoin under the Sacred Sites Act, the

therefore, would have preferred that the California Legislature acted to prevent all mining in the Imperial Project area. Mining companies, such as Glamis, on the other hand, would have preferred to mine without incurring the cost of complying with the additional reclamation measures. The California Legislature made a reasoned decision to balance the interests of various groups by enacting legislation tailored to ensure only that mined lands within the CDCA were reclaimed to a condition so as to permit future Native American uses and mitigate harm to Native American sacred sites. While this may appear to some to be an “imperfect” solution, it in no way renders California’s actions arbitrary.

Glamis has provided no evidence that SB 22 would be deemed an impermissible legislative act under U.S. law. *A fortiori*, its arguments that the enactment of SB 22 violates the international law minimum standard of treatment also fall short and must be rejected.

2. The Federal Government Did Not Breach Article 1105 By Allegedly Acting Arbitrarily In Processing Glamis’s Plan Of Operations

Glamis’s assertion that the federal government violated Article 1105 by acting arbitrarily in processing its plan of operations is without merit. Glamis concedes that “mere arbitrariness” in a State’s administration of its laws is insufficient to generate international responsibility.⁷⁹⁸ Moreover, as set forth in the Counter-Memorial, it is well-established that a violation of domestic law in an administrative procedure – even if

more drastic mitigation measure of complete avoidance that the Tribe preferred might have been obtained. *See supra* Sec. I.A.2.b.

⁷⁹⁸ Reply ¶ 239.

proven – does not constitute a violation of customary international law.⁷⁹⁹ In interpreting a treaty with a specific article prohibiting arbitrary conduct, the International Court of Justice observed:

[I]t must be borne in mind that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness. It would be absurd if measures later quashed by higher authority or a superior court could, for that reason, be said to have been arbitrary in the sense of international law. To identify arbitrariness with mere unlawfulness would be to deprive it of any useful meaning in its own right. Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification⁸⁰⁰ given to the impugned act by a municipal authority may be a valuable indication.

Nevertheless, Glamis’s claim boils down to a complaint that the BLM and the DOI made determinations that Glamis contends were either wrong, in its view, or contrary to U.S. law. Glamis’s contention that these determinations were therefore arbitrary is both meritless and woefully insufficient to support a finding of a violation of the customary international law minimum standard of treatment.

The manner in which governments administer their laws differs among States, and it is not the role of an international tribunal applying international law to either decide whether administrative agencies acted in compliance with all domestic procedures or whether the procedures employed conformed to some international standard. As the *Thunderbird* tribunal observed:

⁷⁹⁹ Counter-Mem. at 248 (citing *ADF Group, Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award ¶ 190 (Jan. 9, 2003) (concluding that “something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1)”; JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 5 (2005) (same)).

⁸⁰⁰ *Elettronica Sicula S.P.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. 15, ¶ 124 (Judgment of July 20).

it is not up to the Tribunal to determine how [the state regulatory authority] should have interpreted or responded to the [the claimant's proposed business operation], as by doing so, the Tribunal would interfere with issues of purely domestic law and the manner in which governments should resolve administrative matters (which may vary from country to country).⁸⁰¹

International law, rather, accords a strong presumption of regularity to “[administrative] decisions rendered by the official authorities of a State acting in the sphere of their duties and in matters over which they have internal jurisdictional power.”⁸⁰² In this regard, the *Saluka* tribunal recently stated that, “In the absence of clear and compelling evidence that the [Czech banking regulator] erred or acted otherwise improperly in reaching its decision . . . the Tribunal must in the circumstances accept the justification given by the Czech banking regulator for its decision.”⁸⁰³

International tribunals likewise recognize that “[t]he administrative due process requirement is lower than that of a judicial process.”⁸⁰⁴ In accordance with this principle, the *Thunderbird* tribunal found that “administrative irregularities” did “not attain the minimum level of gravity required under Article 1105 of the NAFTA under the circumstances.”⁸⁰⁵

The *Genin v. Estonia* case illustrates how deficient a state's administrative treatment must be in order to be actionable under international law.⁸⁰⁶ In that case, the

⁸⁰¹ *Thunderbird* Award ¶ 160.

⁸⁰² *Flegenheimer Claim*, Italian-United States Conciliation Commission, Decision, 14 R.I.A.A. 327, 344 (1958) (holding that the commission “could not disregard the scope of the presumption of truth *omnia rite acta praesumantur*” in evaluating the administrative decisions at issue); see also *Methanex Corp. v. United States*, NAFTA/UNCITRAL, Partial Award ¶ 45 (Aug. 7, 2002) (citing the “legal presumptions of innocence and the legal doctrine *omnia praesumuntur rite esse acta*”).

⁸⁰³ *Saluka* Partial Award ¶ 273 (emphasis added).

⁸⁰⁴ *Thunderbird* Award ¶ 200.

⁸⁰⁵ *Id.*

⁸⁰⁶ *Genin v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award ¶¶ 363-64 (June 25, 2001).

Bank of Estonia (the State's central bank) revoked the banking license of EIB, a commercial bank principally owned by the claimant. The Bank of Estonia provided no formal notice to EIB that its license was being revoked, no invitation to EIB to attend the session at which its license was revoked, and no opportunity for EIB to challenge its license revocation before the revocation became final. Although the *Genin* tribunal "censured" the Bank of Estonia for according EIB woeful administrative due process,⁸⁰⁷ and although the tribunal urged the Bank to "exercise its regulatory and supervisory functions with greater caution,"⁸⁰⁸ the tribunal nevertheless deferred to the Bank's "statutory discretion" and declined to find any treaty violation in its actions.⁸⁰⁹ The tribunal concluded that "any procedural irregularity that may have been present would have to amount to bad faith, a willful disregard of due process of law or an extreme insufficiency of action" to violate international law.⁸¹⁰

When reviewing administrative agency actions, U.S. courts likewise afford regulators wide discretion. As a general rule, U.S. courts must uphold a challenged agency action unless the petitioner shows that the action is "arbitrary and capricious."⁸¹¹ "The scope of review under the 'arbitrary and capricious' standard is narrow and *a court*

⁸⁰⁷ *Id.* ¶ 381 (concluding that "the awkward manner by which the Bank of Estonia revoked EIB's license, and in particular the lack of prior notice of its intention to revoke EIB's license and of any means for EIB or its shareholders to challenge that decision prior to its being formalized, cannot escape censure").

⁸⁰⁸ *Id.* ¶ 372 ("It is to be hoped, however, that Bank of Estonia will exercise its regulatory and supervisory functions with greater caution regarding procedure in the future.").

⁸⁰⁹ *Id.* ¶ 363 ("In sum, the Tribunal finds that the Bank of Estonia acted within its statutory discretion when it took the steps that it did, for the reasons that it did, to revoke EIB's license.").

⁸¹⁰ *Id.* ¶ 371.

⁸¹¹ 5 U.S.C. § 706(2)(A) (1966). For certain adjudications "on the record," findings of fact are reviewed under the "substantial evidence" standard. *See* 5 U.S.C. § 706(2)(E) (1966); *see also generally Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474 (1951). It is not clear, however, whether this standard is meaningfully more or less stringent than ordinary "arbitrary and capricious" review. *See, e.g., Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 683-84 (D.C. Cir. 1984) (finding no difference between the two standards and collecting cases).

is not to substitute its judgment for that of the agency.”⁸¹² Indeed, the U.S. Supreme Court has held that it would be “Kafkaesque” to hold that minor oversights or logical flaws violate this deferent standard.⁸¹³ Furthermore, courts give particularly broad deference to decisions within the agency’s specific area of technical expertise: “We must look at the decision not as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality.”⁸¹⁴

Canadian courts also “give considerable respect” to administrators’ discretionary decision-making, restricting their review to “limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations[.]”⁸¹⁵ Canadian courts, moreover, do “not interfere with the exercise of a discretion by a statutory authority merely because the court might have

⁸¹² *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”) (emphasis added) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 555 (1978) (“Neither the [NEPA] nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions.” (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976))).

⁸¹³ *Id.* at 557; see also *id.* at 558 (“[A] single alleged oversight on a peripheral issue, urged by parties who never fully cooperated or indeed raised the issue below, must not be made the basis for overturning a decision properly made after an otherwise exhaustive proceeding.”); *id.* at 551 (“Time and resources are simply too limited to hold that an [environmental] impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved.”).

⁸¹⁴ *City of Shoreacres v. Waterworth*, 420 F.3d 440, 445 (5th Cir. 2005) (internal quotation marks omitted); see also *Hüls Am., Inc. v. Browner*, 83 F.3d 445, 452 (D.C. Cir.1996) (“[W]e will give an extreme degree of deference to the agency when it ‘is evaluating scientific data within its technical expertise.’” (quoting *Int’l Fabricare Inst. v. Envtl. Prot. Agency*, 972 F.2d 384, 389 (D.C. Cir.1992))); *Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 101 (2d Cir. 2001) (“In the face of conflicting evidence at the frontiers of science, courts’ deference to expert determinations should be at its greatest.” (internal quotation marks omitted)); cf. *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 169-70 (1982) (“As judges, it is neither our function, nor within our expertise, to evaluate the economic soundness of the [Federal Home Loan Bank] Board’s approach.”).

⁸¹⁵ *Baker v. Minister of Citizenship and Immigration*, [1999] S.C.R. 817, 853 (Can.) (citations omitted).

exercised the discretion in a different manner had it been charged with that responsibility.”⁸¹⁶

States, including the United States and Canada, accord a high degree of deference to administrative actions. Glamis has not, and cannot, demonstrate that customary international law accords a lesser degree of deference to administrative actions than these domestic systems. Moreover, as the *Genin* and *Thunderbird* decisions indicate,⁸¹⁷ the international minimum standard governing administrative action is indisputably far weaker than the domestic standard required under the United States’ Administrative Procedure Act (“APA”).⁸¹⁸

Professor Wälde also accepts “that governments are credited with a substantial margin of appreciation, both in understanding the factual situation and in making an instrumental forecast linking the policy measure with the desired outcome.”⁸¹⁹ He recognizes that “a high measure of deference to the facts and factual conclusions seems the only way to prevent investment tribunals from becoming science courts and from frustrating democratically adopted preferences of risk in matters of fundamental importance such as public health.”⁸²⁰

Despite this acknowledgement, Glamis and its experts ask this Tribunal to accord no deference to the federal measures Glamis challenges. To the contrary, they seek to

⁸¹⁶ *Maple Lodge Farms v. Gov’t of Canada*, [1982] 2 S.C.R. 2, 7-8 (Can.).

⁸¹⁷ See also sources cited *supra* n. 799.

⁸¹⁸ 5 U.S.C. §§ 551-59 (1976). California, like the other states, has a closely parallel state statute. See California Administrative Procedure Act, CAL. GOVT. CODE §§ 11340-365 (1980).

⁸¹⁹ Wälde Rep. at IV-27.

⁸²⁰ *Id.* at IV-27 n.474 (quoting with approval M. Orellana, *Science, Risk and Uncertainty: Public Health Measures and Investment Disciplines* (forthcoming 2007)) (internal quotations omitted).

impose upon the United States the burden of proving that the DOI's Record of Decision for the Imperial Project was "factually correct," and that the various federal agencies:

- correctly determined that the proposed site of the Imperial Project contained unique cultural resources;
- correctly determined that the Imperial Project, as planned, would have irreparably damaged those unique cultural resources; and
- correctly interpreted the 3809 regulations' "undue impairment" standard as requiring mitigation measures to protect those unique cultural resources.⁸²¹

This is not an appropriate role for the Tribunal. This Tribunal should reject Glamis's invitation to second-guess these decisions and findings made by United States administrative agencies and should deny Glamis's Article 1105 claim.

a. The Government Agencies' Determination That The Proposed Imperial Project Site Had Cultural And Religious Importance To The Quechan Was Not Arbitrary

After an extensive environmental review process during which the BLM, the ACHP, the DOI and the California State Historic Preservation Office (SHPO) took a hard look at the potential environmental impacts of the Imperial Project, they concluded that it would adversely affect significant cultural resources and recommended the no-action alternative.⁸²² Glamis continues to challenge the voluminous archaeological and ethnographic record on which these agencies relied in an effort to establish that this determination was arbitrary or based on something other than reasoned expert opinion.

⁸²¹ Mem. at 124-81; Wälde Rep. at III-99 (questioning "asserted need to protect very ill-defined, ambiguous and contradictory references to archaeological sites located in vast tracts of land which are asserted to be in some form or other essential for the current religious practices of the Quechan tribe[.]")

⁸²² See *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 373-74 (1989) (recognizing that NEPA requires that federal agencies take a hard look at the environmental effects of any contemplating undertaking (internal quotations omitted)); see also *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (same).

As an initial matter, Glamis cannot challenge these agency determinations because they are time-barred.⁸²³ Thus, these determinations cannot serve as the basis for any finding of liability.

These agency determinations could not give rise to a finding of international responsibility in any event. Whatever the international minimum standard of treatment under Article 1105, it is satisfied by agency action in compliance with the APA. And, under the APA, a domestic court charged with reviewing the adequacy of this determination would look upon it with great deference, applying the familiar “arbitrary and capricious” standard to determine only “whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”⁸²⁴ “The scope of review under the ‘arbitrary and capricious’ standard is narrow and *a court is not to substitute its judgment for that of the agency.*”⁸²⁵ And U.S. courts defer further to agency expertise when examining complex agency factual determinations.⁸²⁶

⁸²³ As the United States explained in its Counter-Memorial, NAFTA Article 1117(2) establishes a three-year limitations period for an investor to submit a claim to arbitration on behalf of an enterprise. As Glamis filed its Notice of Arbitration on December 9, 2003, any claims for an alleged breach of the NAFTA for which Glamis first acquired, or should have first acquired, knowledge before December 9, 2000 are time-barred. See Counter-Mem. at 104-05. All of the cultural resource determinations about which Glamis complains were made prior to this date.

⁸²⁴ *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)) (internal quotations omitted).

⁸²⁵ *State Farm*, 463 U.S. at 43 (1983) (emphasis added); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 555 (1978) (“Neither the [NEPA] nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions.”) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

⁸²⁶ *City of Shoreacres v. Waterworth*, 420 F.3d 440, 445 (5th Cir. 2005) (citing *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 904 (5th Cir. 1983)); see, e.g., *Hüls Am., Inc. v. Browner*, 83 F.3d 445, 452 (D.C. Cir. 1996) (“[W]e will give an extreme degree of deference to the agency when it ‘is evaluating scientific data within its technical expertise.’”) (citing *Int’l Fabricare Inst. v. Envtl. Prot. Agency*, 972 F.2d 384, 389 (D.C. Cir. 1992)).

Given that the question of the proposed Imperial Project's impacts on cultural properties so obviously implicates the substantial expertise of the federal and state agencies charged with administering the United States' cultural preservation statutes, reviewing those determinations would not be the proper role for a domestic court, and is certainly not the proper role for an international tribunal. The federal and state agencies' conclusions with respect to the cultural impacts of the proposed Imperial Project were amply supported by an extensive and technical administrative record. Furthermore, Glamis has provided no evidence that these agencies acted arbitrarily when assessing the record on which their determinations were based. Glamis nonetheless invites the Tribunal to cast aside these agencies' reasoned determinations. The Tribunal should reject Glamis's attempt to re-open the administrative record. Instead, the Tribunal should conclude that the agencies' determinations that the Imperial Project would adversely impact significant cultural resources did not violate Article 1105.

In its Reply, Glamis focuses its criticisms on the archaeological and ethnographic conclusions reached by KEA Environmental, Inc. ("KEA"), the environmental consulting firm that conducted the 1997 and 1998 cultural resource inventories and evaluations of the Imperial Project APE, and on whose findings the relevant agencies' determinations were based. Glamis prefers the conclusions of earlier cultural resource surveys it commissioned, which it incorrectly characterizes as making no findings that Native Americans considered the proposed mining area to be sacred.

One of the central conclusions of the exhaustive cultural resource inventory conducted by KEA in conjunction with the 1997 DEIS/DEIR was that:

The Quechan have stated, and the archaeological evidence confirms, that traditional practitioners came physically to the ATCC in order to pursue spiritual

knowledge. The sense of solitude and panoramic views offered by the ATCC in its present condition are considered essential to this function. The Quechan believe that the presence of a mine operation and, later, abandoned waste rock stockpiles, would destroy their ability to undertake traditional religious practice. They have said that traditional practitioners came to this location as recently as the 1940s and that they plan to do so in the future.⁸²⁷

KEA also found that the project area contained a confluence of pre-historic trails, one of the most significant of which was “known to modern Quechan as the Trail of Dreams (or the *Keruk* Trail)” which passed “through the Project area”⁸²⁸ The 1997 cultural resource surveyors concluded that the Quechan regarded the project area as spiritually significant in part because it intersected with this trail, which members of the Tribe described as facilitating dream travel by knowledgeable religious practitioners.⁸²⁹

Although Glamis attacks both the archaeological and the ethnographic evidence which KEA compiled to arrive at these conclusions, its criticisms are without merit. Moreover, these criticisms do not come close to demonstrating the federal and state agencies which relied on KEA’s conclusions acted arbitrarily when recommending against approval of the Imperial Project.

First, Glamis places undue emphasis on isolated, non-Native American, modern use of the Imperial Project area and argues that this use undermines the Quechan’s claims

⁸²⁷ *Where Trails Cross* at 308-09 (9 FA tab 83).

⁸²⁸ *Id.* at 283.

⁸²⁹ *Id.* at 283, 293. In her Supplemental Report on Cultural Resource Issues, Dr. Sebastian takes issue with the United States’ characterization of the earlier 1996 cultural resource inventory prepared by ASM Affiliates, Inc. (“ASM”) as acknowledging that earlier surveys of the Imperial Project site revealed the “substantial spiritual significance” of the trail segments within the proposed mine and process area. See Lynn Sebastian, Supplemental Report: Cultural Resources Issues, Compliance, and Decisions Relative to the Glamis Imperial Project (Dec. 2006) (“Sebastian Supp. Rep.”), at 11. The 1996 cultural resource inventory, however, plainly states that the trail network in the project area “has substantial Native American significance” and that “[p]ortions of the Indian Pass route . . . have been investigated by Von Welhof (1984) and Schaefer and Pallette (1991).” Jerry Schaefer & Carol Schultz, ASM, *Cultural Resources of Indian Pass: An Inventory and Evaluation for the Imperial Project, Imperial County, California* (June 1996) (“ASM 1996”), at 61 (9 FA tab 81).

– and the government agencies’ findings – that the area had special significance to the Tribe. The isolated modern uses of the area, however, were known to each team of archaeologists that surveyed the Imperial Project area.⁸³⁰ The modern use of the project area by the U.S. military, rockhounds and mineral prospectors, however, did not detract from the area’s archaeological significance or diminish the substantial archaeological evidence that Native Americans used the site for religious and ceremonial activities during both the pre-historic and historic periods.⁸³¹ Thus, it was not arbitrary for the BLM California State Director to describe the area as possessing “integrity of relationship and condition” after noting that its “viewshed is expansive and includes no prominent modern features, and auditory conditions are almost pristine” or for the federal and state agencies reviewing the Imperial Project proposal to accept this conclusion.⁸³²

⁸³⁰ See Dennis Quillen, WESTEC Services, Inc., *Cultural Resource Inventory of Gold Fields Mining Corporation’s Indian Rose Mining Prospect, Imperial County, California* (June 1982) (“Quillen 1982”), at 6 (9 FA tab 69); Jay von Werlhof, IVC Barker Museum, *Archaeological Investigations of Gold Fields Indian Pass Project Area* (Mar. 1, 1988) (“Von Werlhof 1988”), at 24-25 (9 FA tab 76); Dennis Gallegos & Andrew Pigniolo, WESTEC Services, Inc., *Cultural Resource Inventory and Avoidance Program for Fifteen Drill Sites Within the AMIR Indian Rose Lease* (July 1987) (“Gallegos & Pigniolo 1987”), at 4, 17 (9 FA tab 74); Dennis Gallegos & Andrew Pigniolo, WESTEC Services, Inc., *Cultural Resource Inventory Number 2 for Twenty-Seven Drill Sites Within the AMIR Indian Rose Area Lease* (Mar. 1988) (“WESTEC 1988”), at 1-4, i (9 FA tab 75); Jerry Schaefer & Drew Palette, Brian F. Mooney Associates, *Cultural Resource Survey and Assessment of the BEMA Indian Rose Project Area* (June 1991), at 11-12 (9 FA tab 78); Jerry Schaefer & Carol Schultze, ASM, *Cultural Resources of Indian Pass: An Inventory and Evaluation for the Imperial Mine Project, Imperial County, California* (June 1996), at 66-69 (9 FA tab 81); *Where Trails Cross* at 304-05 (9 FA tab 83). In its Counter Memorial, the United States described the initial cultural resource survey conducted by ASM as taking place over two days in the summer of 1995. In fact, ASM’s initial survey of the project mine and process area was conducted between June 16-July 11, 1995, but in response to comments from the BLM on that draft survey report, ASM performed a subsequent study between February 13-15, 1996. See ASM 1996, at 1 (9 FA tab 81).

⁸³¹ See, e.g., Von Werlhof 1988 at 23, 46-53 (9 FA tab 76); ASM 1996, at 61-69 (9 FA tab 81); *Where Trails Cross* at 294-305 (9 FA tab 83). While KEA identified fifty-one sites within the APE of the Imperial Project as National Register eligible because of what they revealed about Native American religious and cultural traditions, it determined that only one of the historic WWII era sites that it identified was National Register eligible. Letter from Ed Hastey, State Director, BLM, to Cheryl E. Widell, State Historic Preservation Officer (Feb. 26, 1998), at 5-11 (3 FA tab 106).

⁸³² See *id.* at 4; see also Letter from Cathryn Buford Slater, Chairman, ACHP, to Bruce Babbitt, Secretary of the Interior (Oct. 19, 1999) (“ACHP Determination Letter”), at 2 (5 FA tab 201) (noting that “[t]he only significant intrusion into the area is the unpaved Indian Pass Road,” and that “[e]xisting highways, power

Second, Glamis's criticism that the ACHP relied, in part, on the cultural importance of sites outside the immediate vicinity of the project area in finding that the proposed Imperial Project would effect a "serious and irreparable degradation of the sacred and historic values of the ATCC that sustain the tribe" is also misplaced.⁸³³ In its 1997 inventory, KEA described the project area as containing "a high concentration of distinctive Native American built objects" intrinsically significant to the Quechan, but also significant because of their relationship with the Running Man complex and the scratched petroglyphs at ⁸³⁴ Thus, Glamis's complaint that the federal agencies' reliance on this finding was arbitrary because no inventory of the project area before the 1996 DEIS/EIR suggested any relationship between the features inside the project area and those outside of it is contradicted by the evidence.

Even the earliest cultural resource inventories that Glamis funded suggested that the project area might be of greater significance than its surveyors were able to document at that time, if its relationship to areas of known significance, *i.e.*, and the Running Man geoglyph, were studied in greater detail.⁸³⁵ This suggestion was later

lines, mining operations and other types of development that may compromise setting are not readily visible from the project area.").

⁸³³ ACHP Determination Letter at 3 (5 FA tab 201).

⁸³⁴ *Where Trails Cross* at 292 (9 FA tab 83).

⁸³⁵ Quillen 1982, at 6-7 (9 FA tab 69); Gallegos & Pignuolo 1987, at 18 (9 FA tab 74); WESTEC 1988, at 4-1 (9 FA tab 75). While Dr. Sebastian takes issue with the United States' description of the Quillen 1982 survey as identifying "significant historical resources" in the project area, (Sebastian Supp. Rep. at 5-6), the Quillen 1982 survey plainly says as much. See Quillen 1982, at 9 (9 FA tab 69) ("The significance of these sites is enhanced by the links to extensive sites recorded approximately 1 mile to the north in the Indian Pass region."); *id.* at 10 ("Unrestricted use and alteration of the project area could result in the loss or destruction of *significant* prehistoric resources.") (emphasis added). With regard to the WESTEC study, Dr. Sebastian complains that it cannot be read as advising complete avoidance of the trail later determined to be the Trail of Dreams until its eligibility for the National Register could be determined. See Sebastian Supp. Rep. at 5-6. This criticism is unfounded. See WESTEC 1988, at 4-2 (recommending "that be avoided of direct impacts" until a determination of NRHP eligibility could be made). Although the report was inconclusive on the type of mitigation plan that would be required if the site were determined to

confirmed by the cultural resource inventory conducted in association with the 1996 DEIS/EIR which found that the proposed mine and process area was itself significant to the Quechan, in part, because of its relationship to areas of known cultural significance outside of the project area.⁸³⁶ Thus, the various government agencies' subsequent determination that the cultural resources identified within the project area were of significance, in part, because of their relationship to known cultural resources outside of it was not arbitrary.

Third, Glamis spends much time arguing that the agencies arbitrarily concluded that a portion of the Trail of Dreams traversed the project area.⁸³⁷ But the 1997 KEA inventory established that Quechan representatives had identified segments of the Trail of Dreams within the project mine and process area,⁸³⁸ and the surveyors documented

be NRHP eligible, it signaled to Glamis's predecessor in interest that its plan of operations might need to be altered to avoid impacts to it.

⁸³⁶ Glamis's characterization of the earlier 1988 Von Werlhof study as presenting "no exceptional Native American cultural features" within the project area is inaccurate. Reply ¶ 120. That study recorded the archaeological site that was later identified by the Quechan as part of the Trail of Dreams, and noted that the features associated with that trail evidenced its use for ceremonial purposes. See Counter Mem. ¶¶ 56-57; Von Werlhof 1988 at 46-53 (9 FA tab 76). Furthermore, that study identified numerous "ceremonial or ritualistic sites" within the project area which it identified as similar in type to features recorded "in the . . . Von Werlhof 1988 at 68 (9 FA tab 76).

Even Glamis recognizes these areas as of documented spiritual significance to the Quechan. See Mem. ¶ 107; Lynn Sebastian, Cultural Resources Issues, Compliance, and Decisions Relative to the Glamis Imperial Project (Apr. 2006) ("Sebastian Rep."), at 22. In any event, regardless of how Glamis chooses to interpret the 1988 IVCDM study's conclusion, by the time the BLM released the Draft EIS/EIR for the Imperial Project, its author clearly had concluded that the Imperial Project site was of spiritual and sacred significance to the Tribe. See Letter from Jay von Werlhof, Director/Archaeologist, IVC Desert Museum, to Jesse Soriano, Planner, Imperial County Planning/Building Department (Dec. 30, 1996) (7 FA tab 9).

⁸³⁷ Reply ¶¶ 127-35; Sebastian Supp. Rep. 19-26. Although Glamis expresses doubt about whether the Trail of Dreams or *Xam Kwatcan* trail are physical trails, the ethnographic study conducted in conjunction with the 1997 DEIS/EIR concluded that the Quechan associated dream travel with a particular, physical trail. See Michael Baksh, Tierra Environmental Services, *Native American Consultation for the Glamis Imperial Project* (Sept. 22, 1997) ("Baksh 1997"), at 20-21 (9 FA tab 82). This conclusion accords with that of earlier Quechan ethnographers who explained that personal dreams parallel cultural myths and are linked to particular physical localities. See, e.g., ALFRED L. KROEBER, *HANDBOOK OF THE INDIANS OF CALIFORNIA*, Smithsonian Institution, 754-55 (1925).

⁸³⁸ See *Where Trails Cross* at 293 (9 FA tab 83); *Where Trails Cross*, Confidential Appendices (California Department of Parks and Recreation, Primary Record,) (9 FA tab 84); Cleland Declaration ¶ 24. Dr. Sebastian argues that Dr. Cleland's Declaration on this point is inconsistent with a preliminary

considerable archaeological evidence that suggested the trail's use for religious and ceremonial purposes.⁸³⁹ As detailed in the Counter-Memorial and Declaration of Dr. Cleland (principal author of the 1997 KEA survey), Glamis funded an additional archaeological survey to resolve lingering uncertainties regarding the relationship between the trail segments within, as well as north and south, of the project area that the Quechan identified as components of the Trail of Dreams.⁸⁴⁰ That survey – also conducted by KEA and Dr. Cleland – conclusively established that at one time, these trail segments connected and constituted one trail that traversed the project area.⁸⁴¹ Given this evidence, it was not arbitrary for the BLM to conclude that the Imperial Project would adversely impact the Quechan's Trail of Dreams.⁸⁴²

Glamis's attempt to challenge that finding now is both flawed and irrelevant. The primary basis for Glamis's criticism of this finding is that because the trail that KEA concluded was the Trail of Dreams was sometimes described as part of an east/west, rather than a north/south trail network, it cannot be a part of the Tribe's sacred *Xam Kwatcan* trail network that they describe as connecting their territory with points north.⁸⁴³

draft of KEA's survey and asserts that the Quechan had not definitively identified the trail segment within the project area as the Trail of Dreams. *See* Sebastian Supp. Rep. at 21-22. Contrary to Dr. Sebastian's assertion, the final version of KEA's inventory, the site records which KEA filed with the IVCDM, and Dr. Cleland's Declaration each indicate that the Quechan positively identified the trail segment within the project area as the Trail of Dreams before KEA completed its fieldwork in 1997

⁸³⁹ *See Where Trails Cross* at 195-211 (9 FA tab 83); Cleland Declaration ¶ 21.

⁸⁴⁰ *See id.* ¶ 34.

⁸⁴¹ *See* Jackson Underwood & James H. Cleland, KEA Environmental, Inc., *Trails of the Indian Pass Area, Imperial County, California*, at 33-34, 48 (July 1998) (10 FA tab 85); *see also* Cleland Declaration ¶¶ 35-36.

⁸⁴² *See* Letter from Ed Haste, State Director, BLM, to John Fowler, Executive Director, ACHP, at 3 (Aug. 25, 1998) (4 FA tab 139) (describing the findings of Jackson Underwood & James H. Cleland, KEA Environmental, Inc., *Trails of the Indian Pass Area, Imperial County, California* (July 1998) (10 FA tab 85)).

⁸⁴³ Reply ¶¶ 130-32.

This argument is specious. While several studies do describe the trails within the project mine and process area as part of an east/west trail network,⁸⁴⁴ as many or more describe them as associated with a north/south trail system as well.⁸⁴⁵ Furthermore, Glamis's reliance on a 1986 map of one segment of the *Xam Kwatcan* network is misplaced.

Glamis erroneously characterizes that map as the only existing map locating the *Xam Kwatcan* trail at the time it made its initial investment in the Imperial Project.⁸⁴⁶

However, as detailed in Dr. Cleland's Supplemental Declaration, the KEA survey team reviewed the map on which Glamis relies at the time they conducted their 1997 and 1998 archaeological surveys, but concluded that it documented one – but not all – of the trail network's principal segments.⁸⁴⁷ Furthermore, based on its review of other existing archaeological survey maps, KEA concluded that the already documented trail segments in the vicinity of the Imperial Project area could be part of the sacred *Xam Kwatcan* trail system as the Quechan suggested.⁸⁴⁸

⁸⁴⁴ Jerry Schaefer & Carol Schultze, ASM, *Cultural Resources of Indian Pass: An Inventory and Evaluation for the Imperial Mine Project, Imperial County, California* (Sept. 1995), at 35 (9 FA tab 80) (describing "trails in the project area" as "part of one of the more important east-west networks that remains only partially known from ethnohistoric sources but that contains substantial archaeological confirmation as a major transportation route" to Indian Pass); *but see id.* at 36 (describing Indian Pass as connecting to a "major north-south trail system" which "was part of a major ceremonial route between Pilot Knob and Newberry Mountain near Needles").

⁸⁴⁵ Quillen 1982, at 6-7 (9 FA tab 69) (describing _____, the site within the project area later identified as containing the Trail of Dreams (*see* Counter Mem. at 53-71), as containing a "segment of prehistoric trail trending north-south"); Von Werilhof 1988, at 66 (9 FA tab 76) ("In sum, the project area is situated along a major north-south trail system that connected with the Colorado River, the Indian Pass site, and the Mohave Trail . . ."); ASM 1996, at 41 (9 FA tab 81) (describing both _____ and _____ as running north-east/south-west and north-west/south-east respectively); *Where Trails Cross* at 168, 188, 193 (9 FA tab 83) (describing each segment of what would later be identified as the Trail of Dreams within the project area as northeast-southwest trending).

⁸⁴⁶ Reply ¶ 117; *see* Lora L. Cline, *The Kwaaymii Reflections on a Lost Culture* 19 (1979) (map entitled "Tom Lucas' trail system for Imperial County"); *see also* Cleland Supp. Declaration ¶¶ 5-7.

⁸⁴⁷ *See id.* ¶ 14.

⁸⁴⁸ *See id.* ¶¶ 4-15.

Glamis also argues that subsequent cultural resource investigations conducted in association with the North Baja Pipeline Project somehow demonstrate that the Imperial Project determinations were arbitrary. This argument is nonsensical. Even if the North Baja Pipeline Project cultural resource surveys included statements regarding the location of the *Xam Kwatcan* trail network that are at odds with KEA's conclusions in 1997 and 1998, they cannot make arbitrary the agencies' reliance on KEA's conclusions regarding the cultural resource impact of the Imperial Project, for the simple reason that those surveys *post-dated* the agencies' determinations at issue in this proceeding.⁸⁴⁹ In any event, as detailed in Dr. Cleland's Supplemental Declaration, the cultural resource evaluations made by his firm in connection with the North Baja Pipeline project do not cast doubt on the accuracy of the firm's conclusions regarding the cultural impact of the Imperial Project.⁸⁵⁰

In short, the BLM, the SHPO and the ACHP's determination that the Imperial Project would adversely impact the Trail of Dreams was not arbitrary. Indeed, all Glamis can assert is its belief that "the preponderance of the evidence" indicates that the Quechan Tribe's sacred *Xam Kwatcam* trail network would not be impacted by the Imperial Project.⁸⁵¹ By doing so, Glamis concedes that the agencies did rely on evidence in making their determination; it is not this Tribunal's role to weigh that evidence and decide whether the "preponderance" of the evidence supported that finding.

⁸⁴⁹ See *North Baja Pipeline Project Draft Environmental Impact Statement / Environmental Impact Report and Draft Land Use Plan Amendment*, at 4-55 (July 2001) (noting that the initial cultural resource surveys of the pipeline's proposed route were conducted between June and October 2000).

⁸⁵⁰ Cleland Supp. Declaration ¶¶ 16-21.

⁸⁵¹ Sebastian Supp. Rep. at 32.

Fourth, Glamis has no grounds to challenge the BLM, the SHPO and the ACHP's decision to give credence to the Quechan Tribe's testimony that the area of the proposed mine site was of cultural and religious significance to them.⁸⁵² The NHPA Section 106 implementing regulations plainly require the consideration of a Native American tribe's contention that a proposed undertaking would have an adverse effect on properties of cultural and religious significance.⁸⁵³ The 1997 ethnographic study, on which the agencies relied, clearly documented the significance of the site to the Quechan.⁸⁵⁴

Although Glamis attempts to cast doubt on the authenticity of the Quechan's claims by arguing that the Tribe had not made its concerns about the area known earlier, Glamis ignores the fact that the Quechan had no opportunity to comment on the proposed project's potential impact on their cultural and religious sites until the Tribe requested government-to-government consultations with the BLM during the preparation of the 1996 EIS/EIR.⁸⁵⁵ Moreover, Glamis fails to acknowledge that a Quechan tribal historian

⁸⁵² Reply ¶¶ 109, 116-18, 134-35.

⁸⁵³ See 36 C.F.R. § 800.5(a) (2004).

⁸⁵⁴ See Baksh 1997, at 3 (9 FA tab 82); see also *id.* at 11, 18, 20-21 & 32-33. This study set forth the specific reasons why the Tribe, which while concerned about development throughout its traditional territory, was particularly concerned about development of the Imperial Project area. *Id.* at 20.

⁸⁵⁵ See Memorandum regarding Government to Government Meeting on Imperial Project (Apr. 11, 1996) (3 FA tab 71). Glamis's reliance on Dr. King's report attached to the Quechan Nation's Supplemental Submission dated October 16, 2007 for support for its assertion is misplaced. As an initial matter, the United States objects to the admissibility of that report on the grounds that it fails to comply with the page limitations ordered by the Tribunal. See Letter of the United States on Non-Disputing Party Submissions, at 1 n.3 (Jan. 18, 2007). In any event, in that report Dr. King complains that the Tribe was not consulted during the process to the extent it could have been. He assumes, for the sake of argument, that the Tribe "missed opportunities" to reveal the importance of the site to the BLM and the surveyors and speculates why this might have been the case. See Thomas F. King, Analysis of Sebastian and Cushman Paper for Quechan Indian Nation (Oct. 13, 2006), at 9-13. As soon as the Tribe was formally consulted by the BLM regarding the project's potential impacts on its traditional territory, it requested a re-survey of the proposed mine site to evaluate evidence of its pre-historic use for religious and other purposes. See Counter Mem. at 62. Dr. King, an anthropologist with particular expertise in Section 106 compliance, does not purport to analyze the *archaeological* evidence of the site's pre-historic use by Native American tribes for ceremonial purposes contained within each of the Imperial Project cultural resource inventories. See King, Analysis of Sebastian and Cushman Paper, at 9-13.

who assisted with the 1991 cultural resource survey before the Tribe was notified formally of the proposed project, in fact indicated that the project area contained an trail segment of cultural significance because of its association with the dreaming process.⁸⁵⁶

Glamis also argues that the Quechan claims should have been disregarded because the Tribe had not used the area for a generation.⁸⁵⁷ Professional ethnographers, however, have rejected arguments of similar effect made in connection with other projects; for example, in connection with the Southwest Power Link Project, the cultural surveyors found that Pilot Knob was culturally important to the Quechan and other Native American tribes, notwithstanding their inability to demonstrate recent use of the area.⁸⁵⁸ It simply was not arbitrary for the agencies to give credence to the Tribe's statements regarding its own cultural and religious tradition.

Fifth and finally, it is both incorrect and irrelevant for Glamis to argue that the Quechan's claims should have been discredited because the Tribe conducted its own explorations for gold on its reservation in the late 1980s.⁸⁵⁹ With this, Glamis implies, in essence, that the Quechan neglect areas of cultural significance when it is expedient for

⁸⁵⁶ See Counter-Mem. at 58-59; Jerry Schaefer & Drew Palette, Brian F. Mooney Associates, *Cultural Resource Survey and Assessment of the BEMA Indian Rose* (June 1991), at 25 (9 FA tab 78).

⁸⁵⁷ See Reply ¶ 112. Curiously, Glamis also suggests that travel along the four stopping points of the Keruk Trail would not have intersected with the project area. See *id.* ¶ 117 n.210. The majority of ethnographic evidence suggests that journey along the Keruk Trail included stops at

See Clyde M. Woods, Shelly Raven & Christopher Raven, Wirth Environmental, *The Archaeology of Creation: Native American Ethnology and the Cultural Resource of Pilot Knob*, Table 3, "Myth-Related Cultural Resources Identified," at 3 (1986) (11 FA tab 315); see also Counter Mem. at 44-45, 16 (citing Eric Ritter, California Desert Ethnographic Notes #1 (Mar. 1, 1978) (8 FA tab 64)). The journey from the to plainly could have intersected the project area.

⁸⁵⁸ See Clyde M. Woods, Shelly Raven & Christopher Raven, Wirth Environmental, *The Archaeology of Creation: Native American Ethnology and the Cultural Resource of Pilot Knob*, at 49 (1986) (11 FA tab 315).

⁸⁵⁹ Reply ¶ 139; see also Quechan Indian Tribe, PL 93-638 Grant Application for Gold Resource Evaluation on the Fort Yuma Indian Reservation (Feb. 18, 1988) (1 FA tab 21).

them to do so and, therefore, their claims with respect to the Imperial Project are untrustworthy. As an initial factual matter, the only place where the Quechan conducted exploratory drill testing was on the Stone Face prospect at the base of the Cargo Muchacho Mountains, an area that had been mined in the past.⁸⁶⁰ There is no inconsistency between the Tribe's decision to conduct limited drill-testing in an area that had already been disturbed, and its desire to protect cultural resources in the Imperial Project area. Moreover, Glamis has provided no evidence whatsoever to support the necessary implication of this argument: that the Quechan lied regarding the Imperial Project's significance – or that the government agencies reviewing the undertaking's potential impacts had any reason to suspect that the Tribe was not being truthful regarding the project area's significance to it.⁸⁶¹ In short, Glamis has provided no basis for the Tribunal to conclude that the government agencies acted arbitrarily by accepting the ethnographers' findings that the proposed mine would adversely impact areas of cultural and religious significance to the Quechan.

* * * * *

This Tribunal need not – and ought not – make a determination whether the land on which the Imperial Project was proposed to be sited has historical, cultural or religious significance to the Quechan Tribe. Based on findings made in extensive archaeological

⁸⁶⁰ See Memorandum from Dan Purvance, Project Geologist, Glamis Gold Ltd., to Steve Baumann, General Manager, Glamis Gold Ltd. (Feb. 12, 1998) (3 FA tab 104) (noting discovery of three drill hole collars near an old mining prospect); Thomas M. Sweeney & Robin Bradley, Status of Mineral Resource Information for the Fort Yuma and Cocopah Indian Reservations, Arizona and California (Administrative Report BIA-85), at 34 (1981) (10 FA tab 118) (noting that area had been mined as early as the 18th century).

⁸⁶¹ Glamis and Dr. Sebastian take umbrage at any suggestion that this is the implication of their argument. But Glamis's repeated assertions that the Quechan articulated only generalized concerns about impacts to their traditional territory, and that the Tribe's testimony regarding the Imperial Project area's cultural resources is inconsistent with positions they have taken elsewhere necessarily implies that the Tribe's claims regarding the Imperial Project area are inauthentic.

and ethnographic studies, the federal and state government agencies concluded that it did. While Glamis would prefer that the agencies had reached different conclusions, this preference is of no import for these proceedings. It is immaterial whether Glamis's criticisms with the expert studies submitted to these agencies are valid – and, for the reasons stated herein and in the Counter-Memorial, the United States submits they are not. The agency determinations were based on the extensive archeological and ethnographic record made available to them. Those determinations, therefore, cannot be said to be “arbitrary” under any standard. Glamis has not come close to meeting its burden of demonstrating otherwise.

b. The ACHP Did Not Act Arbitrarily

The United States demonstrated in its Counter-Memorial that the process employed by the ACHP in connection with its review of the Imperial Project was similar to that followed in other controversial undertakings.⁸⁶² It also showed that the determinations made by the ACHP were not arbitrary, but were supported by substantial

⁸⁶² Counter-Mem. at 78-81. The United States also noted in its Counter-Memorial, any direct challenge to the ACHP process or comments as a measure is time barred. *Id.* at 104-107. Thus, the Tribunal should only consider the ACHP process as background facts. *Id.* Glamis does not challenge this point. *See* Reply ¶¶ 287- 288. Notably, however, Glamis has attempted to rely on federal actions occurring outside the NAFTA limitations period as more than mere “context” or “factual predicates” for its claim. *See, e.g.,* Mem. ¶ 548 (alleging that the 1999 M-Opinion “reinterpre[t] years of mining and public land law to fashion [a new] denial authority,” and by “preventing Glamis from knowing beforehand any and all rules and regulations that will govern its investments,” the United States “acted in an arbitrary and non-transparent manner” which denied Glamis fair and equitable treatment) (internal quotations omitted); *id.* ¶ 568 (observing, in its damages section, that “[t]he Tribunal should also consider that the injury of Respondents arbitrary and discriminatory treatment began long before the ultimate expropriation in December 2002 . . . by mid-1998, but for the unlawful and arbitrary acts, the Glamis Imperial Project should have been approved and Glamis would have begun earning a return” on its investment); *id.* ¶ 570 (characterizing 1998 as “the year when the Imperial Project should have been approved by the U.S. Interior Department absent the admitted illegal and arbitrary conduct by that agency”). Such attempts to circumvent the NAFTA time-bar should be rejected by the Tribunal. *See, e.g., Grand River Enters. Six Nations, Ltd. v. United States*, NAFTA/UNCITRAL, Decision on Jurisdiction ¶ 83 (July 20, 2006) (barring claims to the extent they were based on measures adopted outside the NAFTA’s limitations period); *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award ¶ 199 (Dec. 16, 2002) (barring consideration of damages to the extent damages were incurred outside the NAFTA’s limitations period).

evidence.⁸⁶³ Thus, there is absolutely no basis for the Tribunal to find that by virtue of the ACHP's actions, the United States violated Article 1105.

Nonetheless, without adequately addressing any of these points, Glamis in its Reply continues to make the blanket charge that the ACHP process was impermissibly biased.⁸⁶⁴ Glamis claims that the ACHP was biased because it followed procedures and reached an outcome advocated in a letter by Dr. Tom King, one of the commenters to the review process.⁸⁶⁵ In particular, Glamis complains that, in accordance with Dr. King's recommendation, the ACHP appointed a working group of the ACHP members to review the project, held a public information meeting and conducted a site visit, and terminated consultations and issued comments directly to the Secretary of the Interior.⁸⁶⁶

Even under U.S. law, however, in order to show that an agency was impermissibly biased, the claimant must show that "the minds of its members were *irrevocably closed*."⁸⁶⁷ Glamis does not come close to meeting this standard, which is undeniably more stringent than that which is required under international law. Indeed, the challenged actions hardly show bias: Each of these actions taken by the ACHP conformed with pre-existing ACHP regulations and practices. As noted in Mr. Fowler's Declaration submitted with the Counter-Memorial, the ACHP has a history of appointing a working group of members to directly participate in a project review when the project is

⁸⁶³ Counter-Mem. at 50-71 (describing the numerous cultural resources inventories and ethnographic survey, which supported the conclusions of the ACHP); *id.* at 78-81 (describing the consultations and public comments that were part of the ACHP process).

⁸⁶⁴ Reply ¶ 255 (citing Sebastian Supp. Rep. at 25-26).

⁸⁶⁵ *Id.* ¶¶ 254-55.

⁸⁶⁶ *Id.*

⁸⁶⁷ *Fed. Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 702 (1948) (emphasis added); *see also, e.g., C & W Fish Co., Inc. v. Fox*, 931 F.2d 1556, 1564 (D.C. Cir. 1991) (agency action invalidated on bias grounds "only when there has been a clear and convincing showing that the [agency] member has an unalterably closed mind on matters critical to the disposition of the proceeding" (internal quotation marks omitted)).

particularly controversial.⁸⁶⁸ The relevant Part 800 regulations governing the ACHP review specifically provide for public information meetings.⁸⁶⁹ And the Part 800 regulations authorize the ACHP to terminate consultations and issue comments directly to the head of the relevant government agency.⁸⁷⁰ Glamis does not – and cannot – explain how proper government actions show “irrevocably closed” minds simply by virtue of the fact that a commenter to the process urged the agency to follow its own procedures.

Furthermore, Dr. King was not the only commenter who urged the ACHP to conclude that the harm caused by Imperial Project to the Quechan sacred sites could not be mitigated. Indeed, the vast majority of commenters “voiced their strong opposition to the mine.”⁸⁷¹ Most notably, Jay von Werlhof – one of the foremost archaeological authorities regarding the CDCA, who prepared the IVCDM surveys of the Imperial Project site and who participated in the 1997 ethnographic study – stated: “[t]he area of

⁸⁶⁸ Declaration of John M. Fowler (Sept. 18, 2006) (“Fowler Declaration”), ¶ 17; Counter-Mem. at 78 n.374 (noting other cases where the ACHP has appointed a working group of members to directly participate in project review).

⁸⁶⁹ 36 C.F.R. § 800.5(e)(3) (1998). *See also* Fowler Declaration ¶ 14 (noting that the BLM requested that the ACHP hold a public meeting). Glamis’s continued reliance on Mr. Fowler’s statement that the meeting was “unusual” is of no avail: as explained by Mr. Fowler at both the meeting itself and in his Declaration, the meeting was unusual because such meetings are typically held only in controversial cases and because the meeting was the first to be held after the California Protocol between the BLM and the State of California had gone into effect. *See* Transcript of Advisory Council on Historic Preservation Public Hearing (Holtsville, CA) (Mar. 11, 1999) (10 FA tab 115), at 7-8; Fowler Declaration ¶¶ 17-18; *see also id.* ¶¶ 15-16 (noting that the BLM Programmatic Agreement, the California Protocol, and amendments to the ACHP regulations were promulgated and finalized around the time that the ACHP became involved in the Imperial Project review).

⁸⁷⁰ 36 C.F.R. § 800 5(e)(6) (1998). Glamis asserts that the decision to terminate was contrary to normal procedures, but offers no support for this assertion other than citing its cultural resources expert, Dr. Sebastian. Reply ¶ 255 (citing Sebastian Supp. Rep. at 30). Dr. Sebastian does not assert that the decision to terminate violated any regulations, but rather suggests, without any supporting authority, that such decisions to terminate are only made after more significant consultations have occurred. Sebastian Supp. Rep. at 30.

⁸⁷¹ Letter from Cathryn Buford Slater, Chairman, ACHP, to Bruce Babbitt, Secretary of the Interior, at 3 (Oct. 19, 1999) (5 FA tab 201).

the proposed Imperial Project is the core, the heart, of one of the most intensively evolved sacred areas of Southern California Deserts.”⁸⁷² Mr. von Werlhof continued to note that the sacred geography extended beyond the area of the Imperial Project, but emphasized that “it is the center of this sacred area, the area of the [Imperial] project, that contains the greatest concentration and most diverse of the religious sites.”⁸⁷³ Mr. von Werlhof concluded by stating that approving the project would not just destroy the cultural resources contained in the area, but would also “destroy the Quechan Tribe itself.”⁸⁷⁴

Glamis’s allegation that the ACHP’s site visit was a “sham” because the ACHP did not visit the project site similarly lacks merit.⁸⁷⁵ As Glamis’s own map demonstrates, the ACHP working group visited two sites in the area of the Imperial Project, one trail segment in the southwest corner of the project site, and traveled through the western portion of the Project area on Indian Pass Road.⁸⁷⁶ From this visit, the working group could assess first hand that previous development in the general area did not impact the integrity of the Imperial Project area. As the ACHP stated in its comment letter to Secretary Babbitt, “[e]xisting highways, power lines, mining operations and other types of development that may compromise the setting are not readily visible from the project area.”⁸⁷⁷

⁸⁷² Transcript of Advisory Council on Historic Preservation Public Hearing (Holtsville, CA), at 123 (Mar. 11, 1999) (14 FA tab 163).

⁸⁷³ *Id.* at 124.

⁸⁷⁴ *Id.* at 127.

⁸⁷⁵ Reply ¶ 255.

⁸⁷⁶ Mem. ¶ 316, Figure 8.

⁸⁷⁷ Letter from Cathryn Buford Slater, Chairman, ACHP, to Bruce Babbitt, Secretary of the Interior, at 2 (Oct. 19, 1999) (5 FA tab 201).

Moreover, the ACHP is not charged with conducting field-survey work, or evaluating the integrity and importance of sites for possible eligibility of the NRHP.⁸⁷⁸ Rather, the ACHP's role is to comment and consult regarding the effect of any federal undertaking on historic resources that have already been identified as NRHP-eligible by the relevant federal agency and the SHPO.⁸⁷⁹ In this case, the BLM consulted the ACHP to determine the impact of the proposed Imperial Project on the Quechan cultural resources both in and around the project site.⁸⁸⁰ The ACHP working group visited the project site and mine area to give its members first-hand knowledge of the broad impacts the proposed Imperial Project might have on the area, so that they could better assess the documents to which they had access and the testimony they heard during the public meeting. Their decision to do so can hardly be deemed "arbitrary and capricious."

The ACHP's comments emphasized the importance not only of the integrity of the archaeological sites in the project area, but also of the "unmarked landscape and unobstructed viewshed,"⁸⁸¹ the "scenic landscapes along trails" that provided landmarks to enable travelers to find their way,⁸⁸² and the Tribe's assertions that "impacts from the proposed mine would essentially destroy the tribe's ability to practice and transmit to

⁸⁷⁸ National Historic Preservation Act § 106. *See also* National Historic Preservation Act §§ 101(a)(7), 101(b)(3); Programmatic Agreement among the Bureau of Land Management, the Advisory Council on Historic Preservation, and the National Conference of State Historic Preservation Officers, at 2 (Mar. 26, 1997) (10 FA tab 111). The conclusion of the BLM and the SHPO that the Imperial Project would adversely impact significant cultural resources led to the ACHP consultation. Letter from Ed Hastey, State Director, BLM, to John Fowler, Executive Director, ACHP, at 2 (Aug. 25, 1998) (4 FA tab 139).

⁸⁷⁹ Fowler Declaration ¶¶ 5-7; *see* National Historic Preservation Act § 106.

⁸⁸⁰ Letter from Ed Hastey, State Director, BLM, to John Fowler, Executive Director, ACHP, at 1-2 (Aug. 25, 1998) (4 FA tab 139).

⁸⁸¹ Letter from Cathryn Buford Slater, Chairman, ACHP, to Bruce Babbitt, Secretary of the Interior, at 1 (Oct. 19, 1999) (5 FA tab 201).

⁸⁸² *Id.*

future generations the ceremonies and values that sustain their cultural existence.”⁸⁸³ The ACHP’s site visit provided the decision-makers with significant insight into weighing these considerations, and can in no way be deemed a “sham.”

c. DOI Did Not Act Arbitrarily In Issuing the 1999 M-Opinion Or The Record Of Decision

Glamis also continues to allege that the DOI acted arbitrarily by initially denying its plan of operations in 2001, and by failing to approve that plan after the denial was rescinded.⁸⁸⁴ In issuing the ROD, the DOI relied on the legal reasoning contained in the 1999 M-Opinion, namely, its interpretation of FLPMA’s “undue impairment” standard. As the United States established in its Counter-Memorial, that 1999 M-Opinion was generated in accordance with the DOI Solicitor’s authority to conduct all legal work of the DOI, and was neither an arbitrary interpretation of the “undue impairment” standard, nor an arbitrary extension of the DOI’s already extant authority to deny a plan of operations. Nor did the DOI act arbitrarily in failing to approve the Imperial Project after the rescission; the Department continued to process Glamis’s plan of operations until Glamis indicated it was filing this arbitration to “pursue other avenues” to resolve the issues surrounding the Imperial Project.

i. DOI Did Not Act Arbitrarily In Opining On The Scope Of Its Authority

Glamis’s argument that the DOI acted arbitrarily – and somehow violated international law – because the scope of the 1999 M-Opinion exceeded the scope of the

⁸⁸³ *Id.*

⁸⁸⁴ Reply ¶¶ 243-60. Glamis focuses many of its arguments on the development of the 1999 M-Opinion. As the United States noted in its Counter-Memorial, any direct challenge to the 1999 M-Opinion as a measure is time barred. Counter-Mem. at 104-07. *See also* n. 862, *supra*. Moreover, a Solicitor’s opinion regarding the agency’s authority is not itself a final agency action subject to review under the APA. *Glamis Imperial Corp. v. Babbitt*, Case No. 00-CV-1934 W (S.D. Cal. 2000), Order (Oct. 31, 2000).

request for legal guidance from the BLM California State Director is baseless.⁸⁸⁵ Glamis selectively quotes the one specific question the BLM had itself identified – regarding the competing interests of the Quechan First Amendment rights and Glamis’s rights in its mining claims – and ignores the general request that the regional Solicitor “in consultation with Solicitor Leshy, review the legal issues involved and provide us as soon as possible with a clear legal opinion on our decision-making parameters and legal responsibilities in this case.”⁸⁸⁶ The 1999 M-Opinion responds to this request.

Glamis’s allegation that the BLM’s question had been answered in May 1998 and that the M-Opinion was meant only to “kill” the Imperial Project⁸⁸⁷ is similarly without foundation. The May 1998 document to which Glamis refers reflects the informal conclusions of the Solicitor’s office regarding the First Amendment issue that the BLM had identified.⁸⁸⁸ That informal conclusion did not address the BLM’s general request regarding the parameters of its decision-making authority in the Imperial Project review, nor did it address the additional legal questions that the Solicitor’s office had identified.

In any event, the DOI Solicitor has the authority to address legal issues that are not specifically identified by clients within the agency. Indeed, the Solicitor has the authority to identify legal issues, and generate M-Opinions regarding those issues, without any request at all. All attorneys acting in an advisory capacity have a professional and ethical obligation to exercise their best independent legal judgment to

⁸⁸⁵ Reply ¶¶ 249-51.

⁸⁸⁶ Memorandum from Ed Haste, State Director, BLM, to John Leshy, Solicitor, DOI (Jan. 5, 1998) (3 FA tab 98).

⁸⁸⁷ Reply ¶ 251.

⁸⁸⁸ Email from David Nawi, DOI, to Karen Hawbecker, DOI (June 2, 1998) (3 FA tab 122) (noting that Solicitor Leshy had informally communicated to the BLM the office’s conclusion regarding the First Amendment issue).

advise their clients of potential liabilities and legal errors.⁸⁸⁹ This obligation is even greater for a government attorney: “in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances.”⁸⁹⁰ The Solicitor is vested with such additional authority not only to advise the officials within the agency, but also to issue opinions interpreting the DOI’s statutes and regulations.⁸⁹¹ The Solicitor recognized that the Imperial Project would end up in litigation regardless of whether the DOI approved or denied Glamis’s plan of operations.⁸⁹² Consequently, the Solicitor had the authority – and, indeed, the obligation – to advise the BLM regarding all legal questions raised by the Imperial Project review. And it is hardly arbitrary and capricious for an official to choose to exercise authority within his lawful discretion.

ii. DOI Did Not Act Arbitrarily In Interpreting the “Undue Impairment” Standard

Glamis also challenges the 1999 M-Opinion on the merits, asserting that it was arbitrary because it provided that the standards “undue impairment” and “unnecessary or

⁸⁸⁹ See American Bar Association, Model Rules of Professional Conduct, Rule 2.1, *Adviser* (1983) (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”). The comments to Rule 2.1 note: “In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer’s duty to the client under Rule 1.4 may require that the lawyer offer advice if the client’s course of action is related to the representation.”

⁸⁹⁰ American Bar Association, Model Rules of Professional Conduct, Rule 1.13, *Organization as a Client*, comment 9 (1983).

⁸⁹¹ 43 U.S.C. § 1455 (1994); 209 Department of Interior Manual §§ 3.1 & 3.2A(11) (1992) (granting the Solicitor “all the authority of the Secretary” over “[a]ll legal work of the Department”).

⁸⁹² Email from John Leshy, Solicitor, DOI, to Joel Yudson, et al., DOI (May 25, 1998) (4 FA tab 119) (noting, after describing many of the issues to be addressed in the opinion, that “this will likely end up in litigation no matter how what (sic) we do”).

undue degradation” that appear in FLPMA were different and it did this without first conducting a formal notice-and-comment rulemaking.⁸⁹³

Glamis’s claim should be denied. As demonstrated above, international law does not require that regulations be promulgated with notice and comment.⁸⁹⁴ Regardless, the DOI did not even violate domestic administrative law, which is obviously more stringent than customary international law in this area. Under U.S. law, when an administrative agency “simply states what the administrative agency thinks the statute means, and only reminds affected parties of existing duties,”⁸⁹⁵ or “advise[s] the public prospectively of the manner in which [it] proposes to exercise a discretionary power,”⁸⁹⁶ the rule is not legislative, and there is ordinarily no notice-and-comment requirement.⁸⁹⁷ The 1999 M-Opinion interpreted FLPMA’s “undue impairment” to be different from the “unnecessary or undue degradation” standard, and announced that the Department could apply that standard on a case-by-case basis.⁸⁹⁸ This act of interpreting the agency’s statute and informing the public of the manner in which the agency intended to exercise its discretion in reviewing plans of operations is properly accomplished through agency opinions.

⁸⁹³ Reply ¶¶ 246-47.

⁸⁹⁴ See *supra* Sec. II.B.3.

⁸⁹⁵ *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc) (internal quotation marks omitted); see also *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 99 (1995) (interpretative rules “advise the public of the agency’s construction of the statutes and rules which it administers”) (internal quotation marks omitted); *Hemp Indus. Ass’n v. Drug Enforcement Agency*, 333 F.3d 1082, 1087 (9th Cir. 2003) (“[I]nterpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule.”).

⁸⁹⁶ *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979)).

⁸⁹⁷ 5 U.S.C. § 553(b)(A) (1976); *Lincoln*, 508 U.S. at 196 (“The notice-and-comment requirements apply, moreover, only to so-called ‘legislative’ or ‘substantive’ rules; they do not apply to ‘interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.’”) (quoting § 553(b)); *Shalala*, 514 U.S. at 99 (“Interpretive rules do not require notice and comment . . .”).

⁸⁹⁸ See *Surface Management of Public Lands Under U.S. Mining Laws*, 45 Fed. Reg. 78,902, 78,909 (Nov. 26, 1980).

While an otherwise interpretative rule nonetheless requires notice and comment if it is redefining a term that has already been given a “definitive interpretation,”⁸⁹⁹ prior to issuing the 1999 M-Opinion, the DOI had not given the “undue impairment” standard a “definitive interpretation.” Thus, the DOI was fully within its rights to interpret that standard in an opinion. Although Glamis argues to the contrary, its contention cannot withstand scrutiny. Indeed, the preamble to the section 3809 regulations, enacted in 1980, specifically provide that those regulations were *not* meant to define the “undue impairment” standard, but were leaving that standard to be applied on a case-by-case basis.⁹⁰⁰ The 2001 M-Opinion confirms that the “undue impairment” standard had not been definitively interpreted, stating that the 1980 regulations evidenced the Department’s intent to apply the “undue impairment” standard “on a case-by-case basis *without defining* the pertinent terms of the provision.”⁹⁰¹

Glamis nonetheless asserts that the DOI’s determination that the “undue impairment” standard could be applied to deny a plan of operations without the DOI first conducting a formal rulemaking constitutes a “new discretionary denial authority” that “indisputably changed the legal standards” governing review of the Imperial Project.⁹⁰² Not only does this ignore the 2001 M-Opinion, but also Glamis ignores that the DOI had

⁸⁹⁹ *Cf. Air Transp. Ass’n of Am., Inc. v. Fed. Aviation Admin.*, 291 F.3d 49, 56 (D.C. Cir. 2002) (“[W]hen an agency has given its regulation a *definitive* interpretation, and later *significantly* revises that interpretation, the agency has in effect amended its rule, which requires notice and comment.”) (emphases in original) (internal quotation marks omitted).

⁹⁰⁰ Surface Management of Public Lands Under U.S. Mining Laws, 45 Fed. Reg. at 78,909.

⁹⁰¹ 2001 M-Opinion, at 18 n.8 (5 FA tab 216) (emphasis added). The 2001 M-Opinion concluded that before being applied to a specific plan of operations, the “undue impairment” standard should nevertheless be subject to a formal rulemaking. *Id.* at 19-20.

⁹⁰² Reply ¶ 245.

previously denied a plan of operations under the “undue impairment” standard.⁹⁰³ The 1999 M-Opinion, in fact, cited the IBLA’s previous conclusion that the “undue impairment” standard could be applied to deny a plan of operations without the need for any further rulemaking.⁹⁰⁴

Moreover, the only court to have considered the BLM’s authority to deny a plan of operations under FLPMA has concluded that the BLM has such authority. In *Mineral Policy Center v. Norton*, the court found that the DOI had authority to evaluate “unnecessary or undue degradation” on a case-by-case basis, and that the Department retained the statutory authority to deny a plan of operations if that plan caused undue degradation to public lands.⁹⁰⁵ Although the court in *Mineral Policy Center* did not decide the scope of the “undue impairment” standard, its decision confirms that the DOI has discretionary denial authority under FLPMA. If, as the *Mineral Policy Center* court concluded, the DOI has the authority pursuant to FLPMA to deny a plan of operations applying the “unnecessary or undue degradation” standard, it cannot be arbitrary for the

⁹⁰³ See *Eric L. Price; James C. Thomas* (I.B.L.A. 88-373), 116 I.B.L.A. 210, 220 (Oct. 4, 1990). The fact that the DOI had invoked the “undue impairment” standard to deny a plan only once before the issuance of the 1999 M-Opinion hardly establishes that the agency had definitively interpreted that standard to be meaningless. Cf. *Air Transp. Ass’n*, 291 F.3d at 57 (concluding that an interpretation consistently followed for 15 years was not “definitive”).

⁹⁰⁴ See 1999 M-Opinion at 12 (5 FA tab 216) (citing *Eric L. Price*, 116 I.B.L.A. at 218-19). Glamis incorrectly asserts that the *Eric L. Price* decision is distinguishable because there the proposed mine was located on Class C lands, and consequently the mine was considered under a more restrictive standard, as dictated by the CDCA Plan. Reply ¶ 158 n.310. In upholding the denial of the plan in *Eric L. Price*, however, the IBLA did not base its decision on the CDCA Plan land classifications. Rather, it stated that “the regulations require that the Class C lands involved in this appeal are to be managed under 43 CFR Subpart 3809,” which includes the same unnecessary or undue degradation standard applicable to the Class L lands on which the Imperial Project rests. *Eric L. Price*, 116 I.B.L.A. at 217. Thus, the BLM denied the plan of operations in *Eric L. Price* under the same “unnecessary or undue degradation” standard that applied to the Imperial Project. *Id.* at 211-12. The IBLA upheld that denial based upon the independent “undue impairment” standard in FLPMA. *Id.* at 217.

⁹⁰⁵ *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 42 (D.D.C. 2003) (“FLPMA, by its plain terms, vests the Secretary of the Interior with the authority – and indeed the obligation – to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land.”).

DOI to have concluded in 1999 that it had the authority to deny a plan of operations pursuant to FLPMA under the “undue impairment” standard. Indeed, the DOI’s determination made in the 1999 M-Opinion is the type of governmental rulemaking and legal interpretation that is accorded great deference under international law.

Nor was Solicitor Leshy’s interpretation of the “undue impairment” standard as independent of the “unnecessary or undue degradation” arbitrary. Under U.S. law, courts grant “substantial deference to an agency’s interpretation of its own regulations.”⁹⁰⁶ Indeed, “the agency’s interpretation must be given ‘controlling weight unless it is plainly erroneous or inconsistent with the regulation.’”⁹⁰⁷ Solicitor Leshy’s interpretation is not “plainly erroneous” or “inconsistent with the regulation.”⁹⁰⁸ As noted in the Counter-Memorial, Glamis cannot cite any statute, regulation, or Department rule that equates “undue impairment” with “unnecessary or undue degradation.”⁹⁰⁹ In fact, the 3809 regulations themselves indicate that the “undue impairment” standard is different than the generally applicable “unnecessary or undue degradation” standard.⁹¹⁰ Given these facts, Solicitor Leshy certainly did not violate the customary international law minimum standard of treatment by determining that the two standards were different from one another.

⁹⁰⁶ See *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

⁹⁰⁷ *Id.* (quoting *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965)); see also *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988) (“[W]e are properly hesitant to substitute an alternative reading for the Secretary’s unless that alternative reading is compelled by the regulation’s plain language or by other indications of the Secretary’s intent at the time of the regulation’s promulgation.”).

⁹⁰⁸ *Thomas Jefferson Univ.*, 512 U.S. at 512.

⁹⁰⁹ Counter-Mem. at 251; see also Reply ¶ 248 (“[I]n reality, BLM still has never promulgated a regulatory definition for [the undue impairment standard].”).

⁹¹⁰ 43 C.F.R. § 3809.0-5(k) (1981) (“Where specific statutory authority requires the attainment of a stated level of protection or reclamation, such as in the California Desert Conservation Area [*i.e.*, the ‘undue impairment’ standard] . . . that level of protection shall be met.”).

Finally, Glamis cannot overcome the fact that the 1999 M-Opinion was reversed in 2001, and that the ROD, which relied on the 1999 M-Opinion's conclusions as the legal basis for denying Glamis's plan of operations, was rescinded a mere ten months after it was issued. Faced with a somewhat analogous situation, the *Thunderbird* tribunal refused to even consider arguments that certain actions taken by the Mexican administrative authorities were arbitrary when those actions were later "corrected" by the government.⁹¹¹ And, indeed, Glamis's challenge to the 1999 M-Opinion would almost certainly be moot under United States law.⁹¹²

iii. DOI Did Not Act Arbitrarily In Issuing The Record Of Decision Denying The Imperial Project

DOI did not act arbitrarily when it denied Glamis's plan of operations for the Imperial Project. The ROD denying the Imperial Project – which was rescinded ten months after it was issued – was based on the factual determinations made by the various state and federal agencies that the Imperial Project would irreparably damage sites of cultural and religious significance to the Quechan and the 1999 M-Opinion's legal

⁹¹¹ *Thunderbird* Award ¶ 199 (rejecting claimant's assertion that the manner in which the government closed its facilities was arbitrary, and noting that where the closures were conducted in contravention of domestic law, the government corrected its actions).

⁹¹² See, e.g., *Env'tl. Prot. Agency v. Brown*, 431 U.S. 99, 103 (1977) (concession that challenged interpretation is invalid moots the challenge); *Johnson v. Gühl*, 357 F.3d 403, 410-411 (3d Cir. 2004) (abandonment of the challenged interpretation of regulations mooted the challenge); *Free v. Landrieu*, 666 F.2d 698, 704 (1st Cir. 1981) (new interpretation of regulation moots challenge to prior interpretation); *Salyers v. Sec'y of Health & Human Servs.*, 798 F.2d 897, 901 (6th Cir. 1986) (same); see also, e.g., *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (amendment of challenged university regulations moots controversy); *Coalition of Airline Pilots Ass'ns v. Fed. Aviation Admin.*, 370 F.3d 1184, 1190 (D.C. Cir. 2004) (following amendment of challenged regulations, "any opinion regarding [the] rules would be merely advisory." (quoting *Nat'l Mining Ass'n v. U.S. Dep't of the Interior*, 251 F.3d 1007, 1011 (D.C. Cir. 2001))); *Schering Corp. v. Shalala*, 995 F.2d 1103, 1105 (D.C. Cir.1993) (adoption of regulations moots challenge to previous opinion letter); *W. Radio Servs. Co., Inc. v. Glickman*, 113 F.3d 966, 974 (9th Cir. 1997) (same); see also generally 13A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3533.6 (2006) (collecting cases). Cf. *Natural Res. Def. Council, Inc. v. U.S. Nuclear Regulatory Comm'n*, 680 F.2d 810, 814 (D.C. Cir. 1982) ("Corrective action by an agency is one type of subsequent development that can moot a previously justiciable issue.").

conclusion that, under such circumstances, the DOI could deny a plan of operations under FLPMA's "undue impairment" standard. Glamis complains that this action was arbitrary, in part, because the DOI had approved other projects in the CDCA.

But, as explained in the Counter-Memorial, the Imperial Project was different than the other CDCA mines that had been approved because it was the only proposed project that would have caused significant adverse effects – even after mitigation measures were implemented – to prehistoric and Native American cultural resources.⁹¹³ There are two principal reasons that the adverse effects on cultural resources at the Imperial Project would remain significant even after mitigation. First, the greater number and proximity of NRHP-eligible cultural resources at the Imperial Project meant that – unlike many other CDCA projects – damage to the cultural resources could not be avoided. As the United States noted in its Counter-Memorial, the Imperial Project would have adversely impacted thirty-five NRHP-eligible prehistoric sites.⁹¹⁴ The Mesquite Mine impacted only thirteen.⁹¹⁵ The Castle Mountain mine impacted seven.⁹¹⁶ The Briggs Mine

⁹¹³ See Counter-Mem. at 71-73; compare *Imperial Project Final Environmental Impact Statement / Environmental Impact Report*, Vol. I, Abstract, at 2 (Sept. 2000) (8 FA tab 61) ("even with the application of additional proposed mitigation measures, mine construction . . . would result in significant adverse effects to prehistoric cultural resources, Native American traditional cultural uses and values, and visual resources"), with *Mesquite Gold Project Final Environmental Impact Report/Environmental Assessment*, at 2-11 (Sept. 1984) (7 FA tab 51) (finding no significant adverse impact after mitigation); *Final Supplemental Environmental Impact Report for the Proposed Chemgold Inc. Picacho Mine Dulcinea Pit Phase 2*, at 4-9 to -10 (Oct. 1991) (7 FA tab 54) (noting that there were "no recorded pre-mining sites on the property or in the immediate vicinity of the Picacho Mine site"); *Rand Final Environmental Impact Statement / Environmental Impact Report*, at ES-16 (Apr. 1995) (8 FA tab 56) (noting that "[n]o prehistoric sites have been found" in the project area); *Final Environmental Assessment / Environmental Impact Report for the Proposed American Girl Mining Project*, at 4-34 to -35 (Nov. 1988) (7 FA tab 52) (finding no prehistoric cultural resources); *Castle Mountain Project Final EIS/EIR Master Summary and Response to Comments*, at S-20 (Aug. 1990) (7 FA tab 53) (finding no unavoidable adverse impacts and no significant adverse impacts after mitigation); *Soledad Mountain Project DEIS/EIR*, ¶¶ 317-20 (June 1997) (8 FA tab 59) (finding no significant impact to any cultural resources after mitigation).

⁹¹⁴ Counter-Mem. at 71.

⁹¹⁵ *Mesquite Gold Project Final Environmental Impact Report/Environmental Assessment*, at 2-11 (Sept. 1984) (7 FA tab 51) (cataloging five NRHP-eligible sites in the project area, and eight potentially eligible sites).

impacted two.⁹¹⁷ The remainder – the Rand Mine,⁹¹⁸ the Picacho Mine,⁹¹⁹ Soledad Mountain Mine,⁹²⁰ and American Girl Mine⁹²¹ – impacted none.⁹²²

Second, the Imperial Project was the only mine in the CDCA where the particular significance of the area was established by the convergence of both archaeological evidence in and around the site and ethnographic information supplied by a Native American tribe. Glamis, for example, asserts that the Mesquite Mine was approved despite the fact that damage to many cultural resources, including trail segments, could not be avoided.⁹²³ When the Mesquite Mine was approved in 1984, however, the BLM had no information before it demonstrating that those cultural resources were of particular importance to any Native American tribes.⁹²⁴ Glamis likewise asserts that the Picacho Mine was approved despite the fact that it destroyed a portion of the Medicine

⁹¹⁶ *Castle Mountain Project, Draft Environmental Impact Statement / Environmental Impact Report*, at 5.9.1–5.9.2.3 (Feb. 1989).

⁹¹⁷ *Briggs Project Final EIS/EIR* (May 1995), at 4-45 (8 FA tab 57).

⁹¹⁸ The various Rand project areas did not contain or impact any NRHP- eligible historic sites. *See Rand Project Final Environmental Impact Statement / Environmental Impact Report*, at ES-16 (Apr. 1995) (8 FA tab 56); *Baltic Mine Project Final Environmental Impact Statement / Environmental Impact Report*, at 4-15 (Oct. 1992) (8 FA tab 55).

⁹¹⁹ *Final Supplemental Environmental Impact Report for the Proposed Chemgold Inc. Picacho Mine Dulcinea Pit Phase 2*, at 4-9 (Oct. 1991) (7 FA tab 54).

⁹²⁰ *Soledad Mountain Project DEIS/EIR*, ¶¶ 282-306 (June 1997) (8 FA tab 59) (“No sites located on federal property were determined to be eligible for the [NRHP].”).

⁹²¹ Susan M. Hector, *Archaeological Survey and Resource Assessment of the American Girl Mine Project, American Girl Canyon Project Area, Imperial County, California*, at 1 (Feb. 5, 1988) (13 FA tab 138). The only evidence of any Native American cultural resources in the general vicinity of the American Girl mine were several sites discovered in an earlier survey (conducted by Jay von Werlhof) approximately one mile from the mine site. Susan M. Hector & Stephen R. Van Wormer, *Report on the Archaeological Survey and Resource Assessment of the American Girl Mine Project, Phase I: Padre Madre Area, Imperial County California*, at 4 (June 26, 1987) (13 FA tab 137).

⁹²² Dr. Sebastian asserts, without citing any support, that the Soledad Mountain Project and the American Girl Mine were determined to have adverse effects on NRHP-eligible prehistoric sites. *See* Sebastian Supp. Rep. at 27. This assertion is directly contradicted by the contemporaneous documents for the Soledad Mountain and American Girl Projects cited above. *See supra* nn. 921-22.

⁹²³ Reply ¶ 137.

⁹²⁴ Counter-Mem. at 73; Jay von Werlhof, *Archaeological Examinations of the Gold Fields Project Area, Mesquite District, Imperial County*, at 46 (Nov. 2, 1983) (9 FA tab 72).

Trail.⁹²⁵ But when the BLM approved the Picacho Mine in 1980, it was not aware of any prehistoric and/or Native American cultural sites, including trails, in the mine area.⁹²⁶

Similarly, although Glamis's expert asserts that the Mesquite Landfill was approved despite its impacts on ten NRHP-eligible prehistoric trails,⁹²⁷ there was no ethnographic evidence presented to the BLM that showed that those trails and resources were of any particular significance. Specifically, when the BLM consulted with the Quechan about the Mesquite Landfill cultural resources, the Quechan's main expressed concern was whether the archaeological evidence in the area indicated that an ancient Indian settlement had existed on the site.⁹²⁸ The Quechan did not present the BLM with any evidence similar to that which it presented regarding the cultural resources in connection the Imperial Project review.⁹²⁹ Moreover, the Quechan did not contend that the Mesquite Landfill would irreparably harm important cultural resources or their ability to practice their religion as they did with the Imperial Project.⁹³⁰

⁹²⁵ Reply ¶ 137.

⁹²⁶ *Final Supplemental Environmental Impact Report for the Proposed Chemgold Inc. Picacho Mine Dulcinea Pit Phase 2*, at 4-9 (Oct. 1991) (7 FA tab 54) (concluding, after a review of the records at the IVC Desert Museum, that "there are no recorded pre-mining sites on the property or in the immediate vicinity of the Picacho Mine site"). The only prehistoric site in the immediate vicinity of the Picacho mine – a trail system without any additional artifacts – was not discovered until 1984, and was not projected to be affected by the then-planned mine expansion. Vickie L. Clay & Bertrand T. Young, *Cultural Resources Inventory of Pad #5 (106.9 acres) at the Picacho Peak Mine, Imperial County, California*, at 4 (Mar. 7, 1991) (9 FA tab 77).

⁹²⁷ Sebastian Supp. Rep. at 27.

⁹²⁸ Letter from Mike Jackson, Sr., President, Quechan Indian Tribe, to Terry A. Reed, Area Manager, BLM, at 2 (Apr. 15, 1996) (13 FA tab 119) (arguing that the proximity of water, food, an intersection of major trails, and tool-making materials "all give realistic justification for the existence of an ancient Indian settlement"). The BLM disagreed that the archaeological evidence supported a finding that there had been a settlement on the landfill site, and denied the Quechan's protest against the project approval. Letter from Ed Hastey, State Director, BLM, to Mike Jackson, Sr., President, Quechan Indian Tribe (June 25, 1996) (13 FA tab 119); Comments on Quechan Protest Letter: Mesquite Regional Landfill (13 FA tab 148).

⁹²⁹ Letter from Mike Jackson, Sr., President, Quechan Indian Tribe, to Terry A. Reed, Area Manager, BLM, at 3 (Apr. 15, 1996) (13 FA tab 119).

⁹³⁰ Rather, the Tribe requested a delay in its approval so it could work with the BLM to "develop a suitable plan to preserve and study the settlement left by our ancestors." *Id.* at 3.

Likewise, the North Baja Pipeline Project did not have as significant an impact on cultural resources as did the Imperial Project. The North Baja Pipeline was reconfigured in response to the findings of the cultural resource inventories so that most major trail segments were “either avoided or [were] affected in areas at or adjacent to previous disturbance.”⁹³¹ Most significantly, the pipeline was rerouted “so as to avoid all petroglyphs, geoglyphs, and bedrock milling features and [to] reduce impacts” in an area where trails converged, which was an area about which the Quechan had expressed particular concern.⁹³² By contrast, the Imperial Project would have destroyed most of the cultural resources in the project site, including the segment of the Trail of Dreams that ran through the site, seven multi-component archaeological sites, and twelve prehistoric trail sites, none of which could be avoided.⁹³³

Moreover, the North Baja Pipeline is located primarily underground, and after construction would leave no significant changes to the landscape. The Imperial Project, by contrast, would have left a pit 800 feet deep and more than one mile wide adjacent to waste piles up to 300 feet high and one mile long. As documented in the archaeological and ethnographic surveys presented to the BLM, this would have obstructed the view to Indian Pass from the Running Man site, which the Quechan described as one of the most important resources in the area.⁹³⁴

⁹³¹ James H. Cleland, Rebecca McCorkle Apple & Andrew York, EDAW, Inc., *Historic Properties Treatment Plan for the North Baja Gas Pipeline* (Mar. 2002) at 14 (13 FA tab 144).

⁹³² *Id.* at 44 (13 FA tab 144).

⁹³³ *Imperial Project Final Environmental Impact Statement / Environmental Impact Report*, Vol. I, at 4-98 (Sept. 2000) (8 FA tab 61).

⁹³⁴ *Where Trails Cross* at 310 (13 FA tab 143); Memorandum regarding Nov. 6, 1997 meeting between the Quechan Tribe, the California State Historic Preservation Office and BLM (Dec. 16, 1997) (3 FA tab 95).

Glamis's expert also points to the fact that the Briggs Mine was permitted despite objections of the Timbisha Shoshone Tribe that it would destroy a sacred area.⁹³⁵ But unlike the Quechan's claims concerning the Imperial Project site, the Timbisha Shoshone Tribe's claims did not appear to be corroborated by the cultural resource surveys. The Briggs Mine area contained "few, if any, prehistoric cultural resources . . .,"⁹³⁶ and the only sites that were found in the 670-acre project – two rock alignments – were completely avoided.⁹³⁷

In sum, it was not arbitrary for the DOI to issue the ROD, which temporarily denied the Imperial Project plan of operations. Although the DOI had approved other projects affecting prehistoric and Native American cultural resources, those projects did not have as significant an impact on those resources. Give the convergence of both the extensive archaeological evidence and direct testimony from the Tribe here, the denial cannot be said to have been arbitrary.

d. DOI Did Not Act Arbitrarily In Failing To Approve Glamis's Plan Of Operations After The ROD Was Rescinded

In addressing Glamis's claim that the Federal Government's actions expropriated its investment, the United States explained in detail how the DOI and the BLM diligently

⁹³⁵ Sebastian Supp. Rep. at 27.

⁹³⁶ Mary Rusco, et al., *A Class III Cultural Resource Inventory of the Briggs Project, Inyo County, California*, Vol. I Report, at 11 (Oct. 28, 1992) (13 FA tab 141).

⁹³⁷ *Id.* at 17-19, 31. The Timbisha Shoshone Tribe appealed the approval of the Briggs project to the IBLA, alleging in part that the project would endanger the Tribe's cultural resources and that the BLM overlooked Tribal cultural issues. *See Timbisha Shoshone Tribe of Death Valley* (I.B.L.A. 95-620), 136 I.B.L.A. 35 (June 18, 1996). The IBLA rejected this challenge, noting that the Tribe had failed to identify any sites that the BLM had overlooked and/or protect. *See id.* at 35, 42. Although Glamis does not discuss the Castle Mountain Project in this regard, the BLM received comments from the Fort Mojave Tribe expressing its concern about the project's impact on the Tribe's sacred area, Castle Peaks. *Castle Mountain Project, Final Environmental Impact Statement / Environmental Impact Report*, at 4-355 (Aug. 1990) (13 FA tab 140). Because the mine was located in the Southern Castle Mountains – seven miles from the Castle Peaks area – the BLM concluded that the mine would not impact the Tribe's sacred area. *See id.*

processed Glamis's plan of operations at all relevant times.⁹³⁸ The DOI continued to diligently process Glamis's plan of operations after the ROD was rescinded until Glamis requested that the DOI suspend its processing.⁹³⁹ Three months later, Glamis declined to renew its request for suspension, and the DOI began again to process Glamis's plan.⁹⁴⁰ Once Glamis signaled its intent to file this claim and told the DOI that it was pursuing "new avenues," the DOI acted reasonably in ceasing to devote resources to the continued processing of Glamis's plan.⁹⁴¹ According to Glamis, it would have been "futile for [it] to participate in further administrative processing of the Imperial Project Plan of Operations." Under such circumstances, it would have been a "tremendous waste of time and money" for the DOI to have continued its processing, and it is hardly arbitrary for an agency to decide not to engage in wasteful proceedings.⁹⁴² In short, the DOI's decision not to continue processing Glamis's application cannot serve as the basis for a finding of a violation of the customary international law minimum standard of treatment.

In conclusion, the Tribunal should deny Glamis's claim that the United States breached Article 1105 by granting Glamis something less than the customary international law minimum standard of treatment. Not only has Glamis broadly failed to meet its burden of showing the content of the international minimum standard of treatment, but also Glamis has specifically failed to show that the United States breached Article 1105 by (1) adopting legislation without first engaging in notice-and-comment

⁹³⁸ See *supra* I.B.; Counter-Mem. 258-62.

⁹³⁹ *Id.*

⁹⁴⁰ *Id.*

⁹⁴¹ *Id.*

⁹⁴² Cf. *Heckler v. Chaney*, 470 U.S. 821, 838 (1985) (holding that agency inaction is "not subject to judicial review under the APA. . . unless Congress has indicated otherwise").

rulemaking, (2) frustrating Glamis's subjective expectations, or (3) acting arbitrarily in issuing SB 22 and the SMGB regulations or in processing its plan of operations. To the contrary, the United States' actions were consistent with its own stringent domestic legal regime, and the Tribunal should not conclude that due process and the APA fall short of the customary international law minimum standard of treatment. Instead, the Tribunal should simply deny Glamis's claim that the United States breached the customary international law minimum standard of treatment.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Tribunal dismiss Glamis's claims in their entirety and with prejudice and order that Glamis bear the costs of this arbitration, including the United States' costs for legal representation and assistance.

Respectfully submitted,

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