INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
Washington, D.C.

In accordance with the
United Nations Commission on International Trade Law (UNCITRAL)
Arbitration Rules

Glamis Gold, Ltd.
(Claimant)

- AND -

United States of America
(Respondent)

AWARD

Before the Arbitral Tribunal constituted under Chapter 11
of the North American Free Trade Agreement, and comprised of:

Michael K. Young
Professor David D. Caron
Kenneth D. Hubbard

Secretary of the Tribunal
Ms. Eloïse Obadia

Legal Assistant to the Tribunal
Ms. Leah D. Harhay

Date of dispatch to the parties: June 8, 2009

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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

ACEC	Area of Critical Environmental Concern
ACHP	Advisory Council on Historic Preservation
APA	Administrative Procedures Act
APE	Area of Potential Effect
ARPA	Archaeological Protection Act of 1979
ATCC	Area of Traditional Cultural Concern
att.	Attachment
BLM	Bureau of Land Management
CAPM	Capital Asset Pricing Model
CDCA	California Desert Conservation Area
CDPA	California Desert Protection Act of 1994
CEQA	California Environmental Quality Act
CMA	California Mining Association
CRB	California Research Bureau
DOC	Department of Conservation
DCF	Discounted Cash Flow
DEIR	Draft Environmental Impact Report
DEIS	Draft Environmental Impact Statement
DOI	Department of the Interior
EA	Environmental Analysis
EIR	Environmental Impact Report
EIS	Environmental Impact Statement
Ex.	Exhibits submitted by Claimant
FA	Factual Appendices submitted by Respondent
FEIR	Final Environmental Impact Report
FEIS	Final Environmental Impact Statement
FLPMA	Federal Land Policy and Management Act of 1976
FTC	Federal Trade Commission
IBA	International Bar Association
ICPBD	Imperial County Planning and Building Department
ICSID	International Centre for Settlement of Investment Disputes

IVCDM	Imperial Valley College Desert Museum
LA	Legal Authorities submitted by Respondent
LAO	California Legislative Analyst's Office
MMPA	Mining and Minerals Policy Act of 1970
MOA	Memorandum of Agreement
NAFTA	North American Free Trade Agreement
NAGPRA	Native American Graves Protection and Repatriation Act of 1990
NAHC	Native American Heritage Commission
NAS	National Academy of Science
NHPA	National Historic Preservation Act of 1966
NEPA	National Environmental Policy Act of 1970
NOI	Notice of Intent
NOP	Notice of Preparation
NRC	National Research Council
NRHP	National Register of Historic Places
OHP	Office of Historic Preservation
OMR	Office of Mine Reclamation, Department of Conservation
POO	Plan of Operations
ROD	Record of Decision
SB	Senate Bill
SHPO	State Historic Preservation Officer
SIH	Substantial Irreparable Harm
SMARA	Surface Mining and Reclamation Act of 1975
SMGB	State Mining and Geology Board
Tbl.	Table
TCP	Traditional Cultural Property
Tr.	Transcripts of the Hearing on the Merits
THPO	Tribal Historic Preservation Officer
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNCITRAL	United Nations Commission on International Trade
VE	Validity Examination
VER	Valid Existing Right

REPRESENTATION OF THE PARTIES

Representing Claimant:

Mr. Alan W. H. Gourley
Mr. R. Timothy McCrum
Mr. Alexander H. Schaefer
Mr. David P. Ross
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Representing Respondent:

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Mr. Jeremy K. Sharpe
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Office of International Claims and
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United States Department of State

The Tribunal notes that Respondent has always been represented by the Office of International Claims and Investment Disputes of the United States Department of State. However, the composition of this Office has evolved throughout the proceeding. The Tribunal wishes to mention the names of the persons who were involved in this case through the hearing on the merits: Mr. Ronald J. Bettauer, as Deputy Legal Adviser; Mr. Mark A. Clodfelter, as Assistant Legal Adviser for International Claims and Investment Disputes; Ms. Andrea J. Menaker as Chief, NAFTA Arbitration Division; Mr. Keith Benes and Ms. Heather van Slooten as Attorney-Advisers in addition to Mr. Feldman, Mr. Sharpe, and Ms. Thornton.

I. INTRODUCTION AND SUMMARY

1. Glamis Gold, Ltd. ("Glamis"), a Canadian mining company, brings this proceeding against the United States of America, claiming that the United States breached obligations owed to it under Chapter 11 of the North American Free Trade Agreement ("NAFTA"). In particular, Glamis claims that the United States expropriated rights possessed by Glamis to mine gold in southeastern California and that the United States denied Glamis fair and equitable treatment in its attempts to utilize those rights.

2. In this section, the Tribunal articulates its understanding of its task in this proceeding initiated under the NAFTA Chapter 11 structure and provides a summary of its decision.

A. THE TRIBUNAL'S UNDERSTANDING OF ITS TASK: UNDERTAKING A CASE-SPECIFIC ARBITRATION WITH AWARENESS OF THE NAFTA CHAPTER 11 SYSTEM

3. This Tribunal was constituted to address a particular dispute between Glamis and the United States of America. In this sense, the Tribunal sees its mandate under Chapter 11 of the NAFTA as similar to the case-specific mandate ordinarily found in international commercial arbitration. In the normal contractual setting, a tribunal is a creature of contract, tasked with resolving a particular dispute arising under a particular contract. In all likelihood, a particular contract gives rises to only one arbitration. If there is a second dispute under a contract resolved by arbitration, the second panel likely will involve different arbitrators and it may or may not have knowledge of, or access to, the previous arbitration. Unlike a standing adjudicative body which addresses multiple disputes (for example, the Iran-United States Claims Tribunal which addressed several thousand disputes arising out of the 1979 Iranian Revolution), an arbitral panel that is focused on a particular dispute is not confronted with the possibility that it will need to apply an earlier decision in a later proceeding. Likewise, an arbitral tribunal is not confronted with the task of reconciling its later decisions with its earlier ones. Notwithstanding the likelihood that numerous arbitrations would arise under Chapter 11 of the NAFTA, the three states of North America did not establish a standing adjudicative body but rather chose to have arbitrations resolved by distinct arbitral panels. In this sense, it is clear that this Tribunal

is asked to have a case-specific focus as it proceeds to address this dispute.

4. Simultaneously, as this NAFTA Tribunal addresses the particular case before it, it necessarily does so aware of the larger context in which it operates. Tribunals are not only aware of the objectives and experience of the NAFTA; they are aware that the NAFTA State Parties: decided to allow the two non-disputing States in any particular arbitration to submit observations,[1] established procedures for the possible consolidation of arbitrations involving the same questions of fact or law,[2] more recently decided to make the record and awards of all arbitrations publicly available,[3] and—in response to the requests of interested parts of civil society—made possible limited submissions by such non-parties.[4]

5. The reality is that Chapter 11 of the NAFTA contains a significant public system of private investment protection. The ultimate integrity of the protections given to the many individual investments made under Chapter 11 is ensured by reference to a multitude of arbitral panels occupied by persons who are only occasionally reappointed. The ultimate integrity of the Chapter 11 system as a whole requires a modicum of awareness of each of these tribunals for each other and the system as a whole.

6. The fact that any particular tribunal need not live with the challenge of applying its reasoning in the case before it to a host of different future disputes (the challenge faced by standing adjudicative bodies) does not mean such a tribunal can ignore that challenge. A case-specific mandate is not license to ignore systemic implications. To the contrary, it arguably makes it all the more important that each tribunal renders its case-specific decision with sensitivity to the position of future tribunals and an awareness of other systemic implications.

7. Therefore, this Tribunal, in undertaking its primary mandate of resolving this particular dispute, does so with an awareness of the context within which it operates. The

[1] NAFTA Article 1128: Participation by a Party ("On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.").

[2] NAFTA Article 1126: Consolidation.

[3] Notes of Interpretation of Certain Chapter 11 Provisions, Free Trade Commission (Aug. 1, 2001), Section A, Access to Documents.

[4] Statement of the Free Trade Commission on non-disputing party participation (Oct. 7, 2003).

Tribunal emphasizes that it in no way views its awareness of the context in which it operates as justifying (or indeed requiring) a departure from its duty to focus on the specific case before it. Rather it views its awareness of operating in this context as a discipline upon its reasoning that does not alter the Tribunal's decision, but rather guides and aids the Tribunal in simultaneously supporting the system of which it is only a temporary part.

8. In this proceeding, the Tribunal's awareness of the context in which it operates may be summarized as aiding its case-specific task in terms of five principles:

- First, a tribunal should confine its decision to the issues presented by the dispute before it. The Tribunal is aware that the decision in this proceeding has been awaited by private and public entities concerned with environmental regulation, the interests of indigenous peoples, and the tension sometimes seen between private rights in property and the need of the State to regulate the use of property. These issues were extensively argued in this case and considered by the Tribunal. However, given the Tribunal's holdings, the Tribunal is not required to decide many of the most controversial issues raised in this proceeding. The Tribunal observes that a few awards have made statements not required by the case before it. The Tribunal does not agree with this tendency; it believes that its case-specific mandate and the respect demanded for the difficult task faced squarely by some future tribunal instead argues for it to confine its decision to the issues presented.

- Second, inasmuch as the State Parties to the NAFTA have agreed to allow *amicus* filings in certain circumstances, it is the Tribunal's view that it should address those filings explicitly in its Award to the degree that they bear on decisions that must be taken. In this case, the Tribunal appreciates the thoughtful submissions made by a varied group of interested non-parties who, in all circumstances, acted with the utmost respect for the proceedings and Parties. Given the Tribunal's holdings, however, the Tribunal does not reach the particular issues addressed by these submissions.

- Third, it is important that a NAFTA tribunal provide particularly detailed reasons for its decisions. All tribunals are to provide reasons for their awards and this requirement is owed to private and public authorities alike. In the Tribunal's view, however, it is particularly important that the State Parties receive reasons that are detailed and persuasive for three reasons. First, States are complex organizations composed of multiple branches of government that interact with the people of the State. An award adverse to a State requires compliance with the particular award and such compliance politically may require both governmental and public faith in the integrity of the process of arbitration. Second, while a corporate participant in arbitration may withdraw from utilizing arbitration in the future or from doing business in a particular country, the three NAFTA State Parties have made an indefinite commitment to the deepening of their economic relations. In this sense, not only compliance with a particular award, but the long-term maintenance of this commitment requires both governmental and public faith in the integrity of the process of arbitration. Third, a minimum level of faith in the system is maintained by the mechanism for the possible annulment of awards. However, the time and expense of such annulments are to be avoided. The detailing of reasons may not avoid the initiation of an annulment procedure, but it is hoped that such reasons will aid the reviewing body in a prompt resolution of such motions.[5]

[5] The Tribunal is aware that awards have been criticized for being lengthy and that the present award is long by comparison to others. This criticism takes two forms. First, the criticism is usually that the awards are long yet nonetheless lack detailed reasons, particularly in the area of damages. As indicated in the text, it is the Tribunal's view that detailed reasons should be provided. Second, the criticism is often directed at the lengthy recitation of the facts and contentions of the parties. This point we feel is misplaced for three reasons. First, NAFTA arbitrations are, in essence, trial level proceedings and detailed examinations of facts are to be expected. Second, the facts and contentions are recited in some detail because the parties often do not speak to one another in their filings. Third and most importantly, the facts and contentions portions of the award serve the additional function of providing a basis for discussion within the panel. The facts and contentions are often written quite early; substantial sections of the contentions are sometimes drafted by the time of the hearing. Given that the parties often do not respond to each other, that the members of a panel in all likelihood have not worked together before and that the facts and argumentation in a NAFTA investment proceeding can be quite detailed and complex, the organization and recitation of the facts and contentions play a very important part in structuring and disciplining the deliberative process of the panel. It is possible for the panel to simply not include the facts and contentions in its final award. But having prepared the document, and given that the Parties desire to know that their arguments were fully considered, the Tribunal chooses to include them as a part of the Award.

- Fourth, a NAFTA tribunal need communicate its holding not only clearly, but also succinctly. The previous principle's call for detailed reasons, however, likely leads to a lengthy award that does not necessarily communicate its conclusions succinctly to the various branches of government or public involved. For this reason, the Tribunal provides an executive summary of the Award in what we hope is direct yet still legally precise language, with references to the details within. This summary is to be fully understood in terms of the more detailed exposition contained in the Award.

- Fifth, a NAFTA tribunal, while recognizing that there is no precedential effect given to previous decisions, should communicate its reasons for departing from major trends present in previous decisions, if it chooses to do so. As our recently departed colleague, Thomas Wälde, stated in his separate opinion to *International Thunderbird Gaming Corp. v. Mexico*:

> In international and international economic law – to which investment arbitration properly belongs – there may not be a formal 'stare decisis' rule as in common law countries, but precedent plays an important role. Tribunals and courts may disagree and are at full liberty to deviate from specific awards, but it is hard to maintain that they can and should not respect well-established jurisprudence. WTO, ICJ and in particular investment treaty jurisprudence shows the importance to tribunals of not 'confronting' established case law by divergent opinion – except if it is possible to clearly distinguish and justify in-depth such divergence. The role of precedent has been recognised de facto in the reasoning style of tribunals, but can also be formally inferred from Art. 1131 (1) of the NAFTA – which calls for application of the 'applicable rules of international law' ....[6]

  In terms of its case-specific mandate, a tribunal should decide the matter before it on the basis of the authorities submitted to it, and to the degree that the parties to the dispute do not raise what the tribunal regards to be a particularly relevant authority, the tribunal should bring such an authority to the attention of the parties and provide them an opportunity to comment. But, regardless of whether the

[6] International Thunderbird Gaming Corp. v. United Mexican States ("*International Thunderbird*"), NAFTA/UNCITRAL, Separate Opinion, ¶ 129 (Jan. 26, 2006). Similar reasoning may be found in Duke Energy v. Ecuador, Award, ¶¶ 116-17 (Aug. 18, 2008) (Kaufmann-Kohler (Chair), Gómez Pinzón, and van den Berg); Saipem v. Bangladesh, Decision on Jurisdiction, ¶¶ 66-67 (Mar. 21, 2007) (Kaufmann-Kohler (Chair), Schreuer, and Otton); Noble Energy v. Ecuador, Decision on Jurisdiction, ¶¶ 49-50 (Mar. 5, 2008) (Kaufmann-Kohler (Chair), Cremades, and H. Alvarez).

particular line of reasoning was argued to the tribunal, it is our view that the tribunal should indicate its reasons for departing from a major trend of previous reasoning.[7] This reasoning is partially apparent in this Award's evidentiary approach to the requirement of fair and equitable treatment under Article 1105.

9. The Tribunal reiterates that it in no way views its awareness of the context in which it operates as justifying (or indeed requiring) a departure from its duty to focus on the specific case before it.

B. A SUMMARY STATEMENT OF THE TRIBUNAL'S AWARD

10. Glamis, a Canadian company, undertook from 1994 to 2002 to mine gold at the Imperial Project, on federal land in southeastern California, utilizing mining rights it owns. The federal mining laws of the United States generally, and the open pit leach pad mining process that Glamis intended to employ specifically, are the subject of some public attention. The fact that the federal public lands on which Glamis possesses mining rights is near to—but not a part of—designated Native American lands and areas of special cultural concern added to the attention given to the mining project.

11. Glamis brings this proceeding against the United States of America claiming that the United States breached obligations owed to it under Chapter 11 of the NAFTA. Glamis argues: (1) that the federal government, through various acts, wrongfully delayed consideration of its proposed project, and (2) that, when there appeared to be possible approval at the federal level, the State of California adopted both legislation and regulations concerning the proposed project that rendered the project economically infeasible. In particular, Glamis claims that the United States, through both the federal and state actions, expropriated the mining rights possessed by Glamis in violation of Article 1110 of the NAFTA and that the United States, through both the federal and state actions, denied Glamis the fair and equitable treatment required by Article 1105 of the

[7] Given that there is no precedent, a tribunal may depart from even major previous trends. Unlike institutions with a closed docket of cases where consistency between the various claimants is often of paramount importance, the NAFTA regime's effort at consistency is one that both looks backward to major trends in past decided disputes and forward toward disputes that have not yet arisen. The appeal process (in the sense that it corrects a statement of the law) in arbitration runs forward in time over several cases rather than upwards in one particular case until a supreme judicial authority settles a question for a time. It is for these reasons that as a tribunal departs from past major trends, it should indicate the reasons for doing so.

NAFTA.

12. This arbitration is procedurally noteworthy in that it involved the exchange and production of a significant number of documents, raising both questions of the scope of a party's right to seek production of documents held by the other party and, if such a right existed with regard to a particular document, the scope of privileges to withhold such documents nonetheless.[8] The Tribunal adopted an iterative process whereby it provided layers of guidance to the Parties that structured the elements of their document requests and responses to one another and aided them in their negotiations as to document exchange. Ultimately, the good faith efforts of the Parties in implementing the guidance provided by the Tribunal meant that only a small number of documents required individual production decisions by the Tribunal. The Tribunal's decision on a yet smaller number of the documents requested but covered by a conditional privilege was deferred to the consideration of the merits out of respect for the purposes of the privilege and until such time as the materiality of those documents became clear.[9] The extensive Party-driven document production aspect of this proceeding required time, but it is the Tribunal's view that the active involvement of the Tribunal in providing guidance to the Parties both expedited and limited the extent of the effort.[10]

13. There were two preliminary objections by the United States. With respect to the assertion that Glamis relied upon actions more than three years preceding its knowledge of the asserted breach and damages, the Tribunal finds that such events were raised merely as "factual predicates" and were not in fact relied upon for Glamis' claim under Article 1105.[11] With respect to the challenge of ripeness, the Tribunal determines that, to the extent Claimant argues that its claim is that the California measures rendered the Imperial Project worthless upon their passage, the claim is ripe for review. Secondarily, however, to the extent Claimant argues that the Imperial Project would *never* be approved

[8] *See infra*, ¶¶ 201-56 (referencing Procedural Orders 1, 3-8, and 13 and three Decisions).

[9] *See infra* ¶¶ 231-32, 237-38, 241-42, 244-46.

[10] Other procedural matters of note include: (1) articulation of a standard of review governing a motion for bifurcation, *see infra* ¶¶ 196-98; (2) significant involvement by non-disputing parties and civil society, in general, resulting in several non-party submissions, public viewing of the hearing and the helpful involvement of the Quechan Nation in assisting both the Tribunal and the Parties in ensuring the confidentially of information concerning tribal lands. *See infra* ¶¶ 267-86, 290.

[11] *See infra* ¶¶ 345-50.

by the State of California, its claim is not ripe.[12]

14. The Tribunal denies Glamis' Article 1110 claim that its federally granted mining right was expropriated on the ground that the right was never rendered substantially without value by the actions of the U.S federal and State of California governments for the reasons elaborated below.[13]

15. It is not contested in this proceeding that Glamis still formally possesses its federally granted mining right. Glamis claims that, although it is still in possession of the right as a formal matter, the value of that right was so diminished by governmental action that it was expropriated in fact. A substantial portion of the argumentation in this Arbitration was devoted to the value of the right that allegedly was taken from Glamis. For Glamis, this argument was an assertion of the compensation due to it. For the United States, this argument was an assertion that Glamis in fact still possesses a valuable right and that in fact no expropriation has occurred.[14]

16. In making its own evaluation of whether the Imperial Project retained value following the California backfilling measures, for reasons discussed extensively in the Award, the Tribunal starts with the values and methodologies offered by Claimant for the several elements of its valuation, reviews them one-by-one with Respondent's objections to each, and makes adjustments that the *Tribunal* considers appropriate in light of the facts presented. This approach—namely, the Tribunal's acceptance of Claimant's assumptions as a starting point—is a best case scenario for Claimant. In essence, this approach asks: "Even if the Tribunal accepts Claimant's pre-backfill measures valuation as correct and further accepts Claimant's characterization of the factors resulting in a reduced value, does a review of the claimed reduction, and the resulting adjustments by the Tribunal, result in a radical diminution in the value of the Imperial Project?"[15]

17. Glamis argues in this proceeding that the Imperial Project, at the time of the alleged expropriation, had a value of $49.1 million. The Tribunal concludes that, when

[12] *See infra* ¶¶ 328-42.
[13] *See infra* ¶¶ 534-36.
[14] *See infra* ¶¶ 370-411, 441-53. 461-72, 485-506, 520-26.
[15] *See infra* ¶¶ 412-36, 454-59, 473-79, 507-14, 527-35.

its adjustments are applied to Glamis' valuation methodology, the post-backfilling valuation of the Imperial Project should be in excess of $20 million. In light of this significantly positive valuation, the Tribunal holds that the first factor in any expropriation analysis is not met: the complained of measures did not cause a sufficient economic impact to the Imperial Project to effect an expropriation of Glamis' investment. The Tribunal thus holds that Glamis' claim under Article 1110 fails.[16]

18. The Tribunal denies Glamis' Article 1105 claim that it did not receive fair and equitable treatment from both the US federal government and the State of California during its efforts to utilize its federally granted mining right, on the ground that Glamis Gold has not established that any of the cited actions, whether viewed individually or together as a whole, violate the obligation of the United States to provide fair and equitable treatment for the reasons elaborated below.[17]

19. In some bilateral investment treaties, the phrase "fair and equitable treatment" is viewed as autonomous treaty language. It is not contested at this point in time that the reference in Article 1105 to "fair and equitable treatment" is to be understood not as autonomous treaty language but in terms of customary international law. The content of that rule, however, remains unsettled.[18] The Tribunal therefore devotes substantial analysis to this question.[19]

20. Approaching the task of ascertaining the customary international law standard of "fair and equitable treatment," the Tribunal employs a mode of reasoning that differs from some of the awards it has reviewed. The Tribunal emphasizes that the task of seeking the meaning of "fair and equitable treatment" by way of treaty interpretation is fundamentally different from the task of ascertaining the content of custom. A tribunal confronted with a question of treaty interpretation can, with little input from the parties, provide a legal answer. It has the two necessary elements to do so, namely the language at issue and rules of interpretation. A tribunal confronted with the task of ascertaining custom, on the other hand, has a quite different task because ascertainment of the content

[16] *See infra* ¶¶ 534-36.
[17] *See infra* ¶¶ 756-830.
[18] *See infra* ¶¶ 559-62, 600.
[19] *See infra* ¶¶ 598-627.

of custom involves not only questions of law but also questions of fact, where custom is found in the practice of States regarded as legally required by them.[20] The content of a particular custom may be clear; but where a custom is not clear, or is disputed, then it is for the party asserting the custom to establish the content of that custom.[21]

21. In the case of the customary international law standard of "fair and equitable treatment," the Parties in this case and the other two NAFTA State Parties agree that the customary international law standard is at least that set forth in the 1926 *Neer* arbitration.[22] The Parties disagree, however, as to how that customary standard has in fact, if at all, evolved since that time. As an evidentiary matter, the evolution of a custom is a proposition to be established. The Tribunal acknowledges that the proof of change in a custom is not an easy matter to establish. In some cases, the evolution of custom may be so clear as to be found by the tribunal itself. In most cases, however, the burden of doing so falls clearly on the party asserting the change.[23]

22. In the instant case, the Tribunal finds that Glamis fails to establish the evolution in custom it asserts to have occurred. It thus appears that, although situations presented to tribunals are more varied and complicated today than in the 1920s, the level of scrutiny required under *Neer* is the same. Given the absence of sufficient evidence to establish a change in the custom, the fundamentals of the *Neer* standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105(1). Such a breach may be exhibited by a "gross denial of justice or manifest arbitrariness falling below acceptable international standards;" or the creation by the State of objective expectations *in order to induce* investment and the subsequent repudiation of those

[20] *See infra* ¶¶ 607-11.
[21] *See infra* ¶¶ 601-05.
[22] *See infra* ¶ 612.
[23] *See infra* ¶¶ 601-05.

expectations.[24] The Tribunal emphasizes that, although bad faith may often be present in such a determination and its presence will certainly be determinative of a violation, a finding of bad faith is not a requirement for a breach of Article 1105(1).[25] The Tribunal further finds that although the standard for finding a breach of the customary international law minimum standard of treatment therefore remains as stringent as it was under *Neer*; it is entirely possible that, as an international community, we may be shocked by State actions now that did not offend us previously.[26]

23. Respondent additionally argues that, in reviewing State agency or departmental decisions and actions, international tribunals, as well as domestic judiciaries, should defer to the agency so as not to second guess the primary decision-makers. The Tribunal disagrees that domestic deference in national court systems is necessarily applicable to international tribunals particularly where a measure of deference is already present in the standard to be applied.[27]

24. With this standard (as elaborated in this Award) in mind, the Tribunal finds that the acts of the federal government and the State of California complained of by Glamis do not, either individually or collectively, violate the Article 1105 obligations of the United States. Specifically, the Tribunal finds the following measures did not violate Respondent's international obligations under Article 1105:

- A legal opinion by the Department of the Interior did not breach Respondent's obligations under Article 1105, because it was not arbitrary or manifestly without reasons; was not blatantly unfair or evidently discriminatory; nor did it repudiate expectations formed by a quasi-contractual relationship or evidence a complete lack of due process.[28]

[24] *See infra* ¶¶ 616, 627. The Tribunal takes no position on the type or nature of repudiation measures that would be necessary to violate international obligations. As the Tribunal holds below, Claimant has not proved governmental actions that would have legitimately created such expectations; the Tribunal therefore need not and does not reach the latter half of the inquiry. *See infra*, ¶ 622.
[25] *Id.*
[26] *Id.*
[27] *See infra* ¶ 617.
[28] *See infra* ¶¶ 758-72.

- The Record of Decision denying Claimant's Plan of Operations did not breach international obligations as it was based upon the above-mentioned legal opinion which was in compliance with Respondent's international obligations.[29]

- With respect to the asserted delay in the federal government's review of Claimant's Plan of Operations, the Tribunal finds that, prior to Claimant's submission to arbitration, there was no delay in the processing; and Respondent's subsequent failure to diligently pursue administrative review while also defending an arbitration with respect to the same review is not manifestly arbitrary, completely lacking in due process, exhibiting evident discrimination, or manifestly lacking in reasons.[30]

- The cultural review of Claimant's Plan of Operations did not breach Article 1105, as it was undertaken by qualified professionals who provided their reasoned and substantiated opinions upon which Respondent was justified in relying, and was not harmed by bias or prejudice. In addition, the conclusion of the cultural review culminating in direct recommendation to the secretary of Interior was not manifestly arbitrary, a gross denial of justice, or exhibiting a manifest lack of reasons.[31]

- The complained of California legislation was of general application and did not target Claimant's investment, though it is likely that the investment served as a triggering event.[32] The legislation also did not breach Respondent's obligations to protect investor expectations, as such expectations were not created by specific assurances;[33] nor was it arbitrary in that it is clear from the record that the legislation addressed some, if not all, of the harms at issue.[34]

- The California regulations, and the emergency regulations that preceded them, did not upset reasonable investor expectations as such expectations were not created

[29] *See infra* ¶ 772.
[30] *See infra* ¶¶ 773-77.
[31] *See infra* ¶¶ 778-88.
[32] *See infra* ¶¶ 791-97.
[33] *See infra* ¶¶ 798-802.
[34] *See infra* ¶¶ 803-06.

by specific assurances.[35] The Tribunal also finds that there was a rational relationship between the regulations and their purpose and sufficient scientific study to support the Board's conclusions.[36]

- With respect to Claimant's contention that the California measures were closely related acts with the same goal of halting its investment, the Tribunal holds that, even if it were to view the measures as "working together," Claimant has not met its burden of proving to the Tribunal that either measure unfairly targeted its investment.[37]

25. Finally, the Tribunal views the measures of both the federal and state governments together, to see whether the entirety of the conduct breaches international obligations when the individual events do not. The Tribunal determines that, for acts that do not individually violate Article 1105 to nonetheless breach that Article when taken together, there must be some additional quality that exists only when the acts are viewed as a whole, as opposed to individually. It is not clear, in general terms, what such quality would be in all circumstances though, in this factual situation, the Tribunal holds that it cannot see that the conduct as a whole is a violation of the fair and equitable treatment standard.[38]

26. The Tribunal thus dismisses both of the claims by Glamis Gold against the United States. The Tribunal holds that, with respect to the costs of this proceeding, Glamis shall bear two-thirds of the costs and the United States one-third, and each Party should bear its own individual costs of representation.

[35] *See infra* ¶¶ 809-15.
[36] *See infra* ¶¶ 816-18.
[37] *See infra* ¶¶ 819-23.
[38] *See infra* ¶¶ 824-29.

II. FACTUAL SUMMARY

A. DISPUTING PARTIES

1. GLAMIS GOLD, LTD.

27. "Glamis Gold, Ltd. was a publicly held Canadian corporation engaged in the exploration, development and extraction of precious metals in the United States and Latin America."[39] Incorporated in 1972, under the laws of the Province of British Columbia, Canada, a majority of Glamis' directors are Canadian citizens.[40] Claimant is an investor of Canada, a Party to the NAFTA. On November 4, 2006, Glamis Gold, Ltd. and Goldcorp, Inc., also a Canadian company, merged.[41] For purposes of this Arbitration and simplicity in the proceeding and this Award, the Parties and the Tribunal will continue to refer to Claimant as "Glamis" or "Claimant."

28. Claimant's headquarters, including its management, mine development staff and administrative personnel, was located in Reno, Nevada, U.S.A., and had been since 1998.[42] Claimant states that it chose this location because its early success as a company was based primarily on gold exploration and development activities in the United States.[43] In particular, Claimant successfully developed and operated two large open-pit gold mines in the California desert throughout the 1980s and 1990s: the Rand Mine in Kern County and the Picacho Mine in Imperial County.[44]

29. Through wholly owned subsidiaries, Claimant operates open-pit gold and silver mines in the State of Nevada, elsewhere in the United States and in Latin America. In Claimant's view of the success of the nearby Rand and Picacho Mines, Claimant formed the Glamis Imperial Corporation to develop and operate the Imperial Mine, less than 10

[39] Memorial of Claimant Glamis Gold, Ltd. ("Claimant's Memorial"), ¶ 19.
[40] *See* Claimant's Memorial, ¶ 19.
[41] Rejoinder of Respondent United States of America ("Respondent's Rejoinder") at 1; Counsel for Claimant, Transcripts of the hearing on the merits, ("Tr.") 13:21-22.
[42] *See* Claimant's Memorial, ¶ 21.
[43] *See Id.*
[44] *See Id.*

miles from the Picacho Mine.[45]

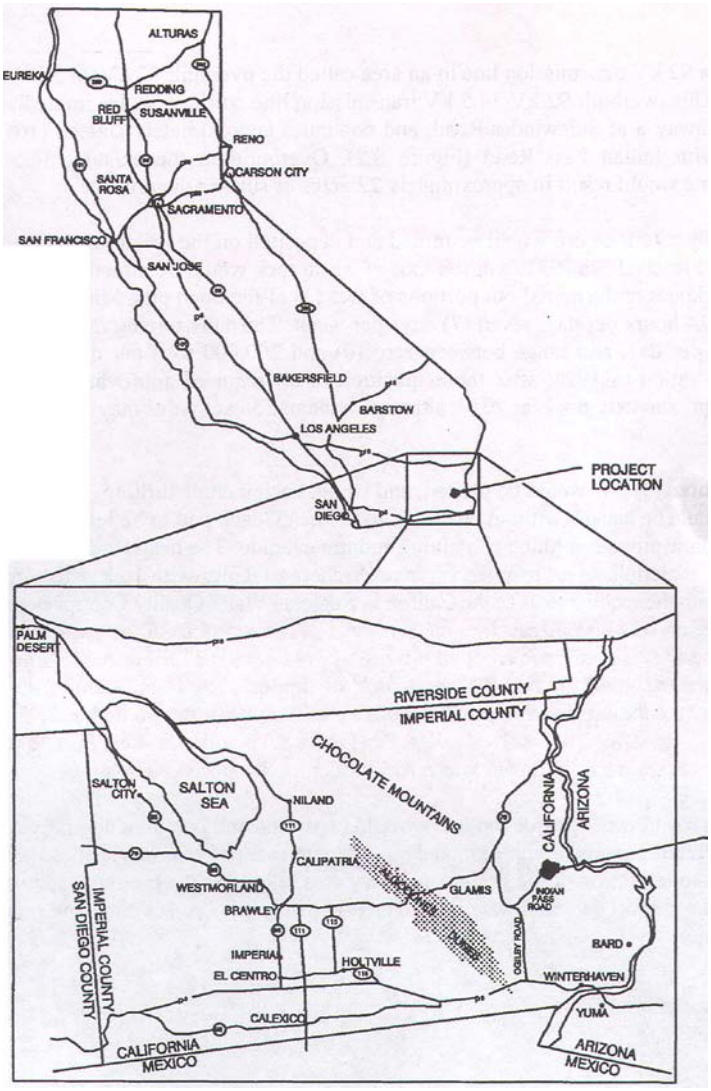
2. UNITED STATES OF AMERICA

30. The United States of America ("Respondent") is a party to the NAFTA. Actions of Respondent, at the levels of both the federal and California state governments, were challenged by Claimant. As stated by the *Metalclad* tribunal, "parties to [the NAFTA] must 'ensure that all necessary measures are taken in order to give effect to the provisions of the [NAFTA], including their observance … by state and provincial governments.'"[46] Therefore, the complained of measures, at both the federal and state levels of government, are considered as acts of State by Respondent and are thus both defended by Respondent.

[45] *See Id.* Claimant states that it used staff from Chemgold, Inc., its wholly owned subsidiary operating the Picacho Mine, to complete much of the early planning and development activities for the Imperial Project.

[46] Metalclad Corp. v. United Mexican States ("Metalclad"), NAFTA/ICSID Case No. ARB(AF)/97/1, Award, ¶ 73 (Aug. 30, 2000), quoting NAFTA Article 105. The *Metalclad* tribunal added that a "reference to a state or province includes local governments of that state or province." *Id*., citing NAFTA Article 201(2).

3. THE IMPERIAL PROJECT[47]



IMPERIAL PROJECT MINE AND PROCESS AREA

31. The Imperial Project is located in eastern Imperial County, east of San Diego, California near the Arizona and Mexico borders. It occupies 1,631 acres of federal public lands, in the southern portion of the California Desert Conservation Area ("CDCA") on Class L lands.[48] Claimant planned to construct the mine on a south- and west-facing

[47] IMPERIAL PROJECT GENERAL LOCATION MAP, IMPERIAL PROJECT FINAL ENVIRONMENTAL IMPACT STATEMENT/ ENVIRONMENTAL IMPACT REPORT, Vol. I, Abstract (Sept. 2000) ("2000 FEIS"), at S-4 [Exhibit from Claimant ("Ex.") 210; Factual Appendices from Respondent ("FA") 8 tab 61].

[48] *See* Claimant's Memorial, ¶ 31; *see also* Counter-Memorial of Respondent United States of America ("Respondent's Counter-Memorial"), at 36. Under subchapter VI of Federal Land Policy and Management Act, Congress established the California Desert Conservation Area—25 million acres in Southern California designated for their historic scenic and environmental resources and sensitivity, to be studied and governed by the principles of multiple use and sustained yield. For further discussion of

alluvial plain to the south of the Indian Pass Area of Critical Environmental Concern ("ACEC")[49] in the Chocolate Mountains, between the Cargo Muchacho Mountains (approximately four miles south) and Peter Kane Mountain (approximately six miles north).[50] The proposed mine and processing area would lay near the center of the mining district formed by the active Picacho, Mesquite and American Girl mines.[51]

32. Around 1987, Claimant began to acquire interests in the approximately 187 Imperial County unpatented lode mining claims and 277 mill sites that form the basis of the Imperial Project.[52] Over several years, through business partnerships, joint ventures and acquisitions, Claimant secured sole ownership of these claims.[53] According to Claimant, between 1987 and 1994, Claimant conducted "an extensive exploration drilling program in the Imperial Project area with multiple [Bureau of Land Management ('BLM')] approvals" to locate, if any, valuable mineral deposits such as gold and silver.[54]

33. Through open-pit mining techniques, Claimant planned to mine gold and silver with the expectation of removing 150 million tons of ore, and 300 million tons of waste rock,[55] from three large open pits during the Project's projected 19-year life (from 1998 to 2017).[56] The ore would have been processed on-site through conventional cyanide

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CDCA, *see infra* ¶¶ 44-50. The CDCA Plan divides the CDCA into four multiple-use classes. The CDCA Plan defines Multiple-Use Class L lands as "protect[ing] sensitive, natural, scenic, ecological, and cultural resource values. Public lands designated as Class L are managed to provide for generally lower-intensity, carefully controlled multiple use of resources, while ensuring that sensitive values are not significantly diminished." BLM CALIFORNIA DESERT CONSERVATION AREA PLAN ("CDCA PLAN"), at 13 [Ex. 12]. For additional discussion of Class L lands, *see infra* ¶ 47.

[49] An ACEC is defined as an area "within the public lands where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources, or other natural systems …." CDCA PLAN, at 123. *See also infra*, ¶¶ 51-52.

[50] 2000 FEIS, at 1.2 [Ex. 210; FA 8 tab 61].

[51] 2000 FEIS, at 1.2.

[52] *See* Claimant's Memorial, ¶¶ 29, 32, citing 30 U.S.C. § 22 (Claimant explains that "[v]alid, unpatented mining claims provide the statutory right, consistent with other laws and BLM regulations, to go upon open public lands for the purpose of prospecting, exploring and extracting valuable minerals."); *see also* Respondent's Counter-Memorial, at 35.

[53] *See* Respondent's Counter-Memorial, at 35.

[54] *See* Claimant's Memorial, add. A, titled "Imperial Project Timeline"; *see infra* ¶¶ 85-88, 97. Drilling programs are submitted to and reviewed by the BLM for similar consideration as to other mining operations to determine whether the program will cause unnecessary or undue degradation. *See* Letter from G. Ben Koski, BLM Area Manager, to David Hamre, Chemgold (Nov. 10, 1988) [Ex. 25].

[55] 2000 FEIS, at S-3.

[56] 2000 FEIS, at 1.1.

heap-leach processing,[57] yielding an estimated 1.17 million ounces of gold and possibly another 0.5 million ounces through continued exploration.[58] This process was to require three open pits, a heap leach facility (including a heap leach pad and process ponds), two waste rock stockpiles, and ancillary facilities.[59]

34. The proposed Plan of Operations for the Imperial Project provided for the sequential mining and backfilling of two of the three pits through a practice known as sequential backfilling.[60] Through this process, waste rock would be initially placed adjacent to the first mined pit, but in subsequent pits, waste rock would be placed directly in the previously mined pits. Due to the costs inherent in this process, Claimant had not planned to completely backfill the third pit.[61] Instead, the third pit would be partially backfilled and reclaimed with waste rock. Claimant also proposed various reclamation techniques, including grading, capping and re-vegetation, though the third pit, at approximately 4,700 feet in length, 2,700 feet in width and over 800 feet deep,[62] would remain open for potential future mining.[63]

35. Claimant projected that the three mines would require initial capital expenditures of approximately $48 million and additional annual expenditures of $27.7 million for costs associated with operations and maintenance.[64]

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[57] The cyanide heap leach process entails the piling of extracted ore into piles, located on top of a pad and impervious liner positioned at a slight slope to promote drainage. Cyanide solution is sprayed over the heaps, which dissolves gold in the rock as it percolates down through the ore. This "pregnant" solution is then channeled through the pad into a holding pond, from which the gold is separated using carbon adsorption or metallic zinc dust precipitation (the Imperial Project proposed to use carbon adsorption). The cyanide is then recovered and sprayed onto the heap again. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, NATIONAL HARDROCK MINING FRAMEWORK, app. A, at A-14 (1997) [Legal Authority from Respondent ("LA") 6 tab 193]; U.S. ENVIRONMENTAL PROTECTION AGENCY, TECHNICAL RESOURCE DOCUMENT, EXTRACTION AND BENEFICIATION OF ORES AND MINERALS 1-23 to 1-25, and 1-28 to 1-36 (vol. 2, Gold, 1994) [LA 6 tab 192]; 2000 FEIS, at 2.1.8; IMPERIAL PROJECT PLAN OF OPERATIONS, at 20 (Nov. 1994) [Ex. 55].

[58] *See* Claimant's Memorial, ¶ 33, citing Behre Dolbear Expert Report (Apr. 2006), at 1.

[59] *See* 2000 FEIS, at S-2 [Ex. 210; FA 8 tab 61].

[60] *See* IMPERIAL PROJECT PLAN OF OPERATIONS, at 9, 17 (Nov. 1994) [Ex. 55].

[61] *See* Claimant's Memorial, ¶ 34.

[62] *See* STATE MINING AND GEOLOGY BOARD, EXECUTIVE OFFICER'S REPORT, Agenda Item 2, at 4 (Dec. 12, 2002) [Ex. 267].

[63] *See* Claimant's Memorial, ¶ 34.

[64] *See* Claimant's Memorial, ¶ 35; 2000 FEIS, at S-6.

B. THE DOMESTIC REGULATORY LANDSCAPE

1. FEDERAL MINING AND RELATED LAW

a. The Mining Law of 1872

36. The primary federal law governing the establishment of mining rights on federal land in the United States is the Mining Law of 1872 ("Mining Law").[65] The Mining Law states that all valuable mineral deposits located on and belonging to the United States on its federal lands "shall be free and open to exploration and purchase" by any citizen of the United States (and individuals who have declared their intention to become such) "under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."[66] The Mining Law also allows for the obtaining of a patent[67] to the "land claimed and located for valuable deposits," as well as nonmineral land not contiguous to the vein but used by the proprietor for mining or milling purposes.[68]

37. "Mining claim means any unpatented mining claim, millsite, or tunnel site authorized by the U.S. mining laws."[69] In 1999, the U.S. Court of Appeals for the Ninth Circuit provided a further definition of a "mining claim," as per the Mining Law. It stated that "the word 'claim' in connection with the phrase 'mining claim' represents a federally recognized right in real property." It noted that the Supreme Court had established that an unpatented mining claim was "not a claim in the ordinary sense of a word—a mere assertion of a right—but rather is a property interest, which is itself real property in every sense, and not merely an assertion of a right to property."[70]

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[65] Mining Law of 1872, Rev. Stat § 2319 (1878), ch. 152, § 10, 17 Stat. 91 (codified at 30 U.S.C. §§ 22, *et seq*.).

[66] 30 U.S.C.A. § 22 (1872) [Ex. 133].

[67] The Ninth Circuit Court of Appeals defines "patent" as "the term for a government conveyance of title to an individual of public land." United States v. Shumway ("*Shumway*"), 199 F.3d 1093, 1099 (9th Cir. 1999). Compare to footnote 52, *supra* (unpatented claims provide the statutory right to go upon open public lands for the purpose of prospecting, exploring and extracting valuable minerals, but do not provide title to that land). Application for a patent is an optional procedure (30 U.S.C.A. § 29 [Ex. 135]) and is not required for mineral operations to commence on a valid, unpatented mining claim.

[68] 30 U.S.C.A. § 29 (1946) [Ex. 135], 30 U.S.C.A. § 42 [Ex. 136].

[69] 43 C.F.R. § 3802.0-5(e) (1980).

[70] *Shumway*, at 1099-1100, citing Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U.S. 428 (1892).

38. The Supreme Court also has addressed the definition of the "discovery" of valuable mineral deposits, which is a requirement for the establishment of a valid mineral location.[71] To perfect a mineral discovery and prove its validity, the operator must satisfy one of two tests. The "prudent-man test" has been employed since 1894 and requires proof that "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." The "marketability test" has been utilized more recently (recognized in 1968 by the U.S. Supreme Court) and states that "it must be shown that the mineral can be 'extracted, removed and marketed at a profit.'" [72]

39. A mining operator must perfect its discovery, thus creating a "valid existing right" ("VER"), prior to any purported intervention (such as a withdrawal) in order to defend against such adverse action.[73] Only if the BLM prepares a mineral examination report to determine that a mining claim was valid prior to withdrawal and remains valid, will it potentially approve a plan of operations or allow notice-level operations after the date on which the lands are withdrawn from development.[74]

b. Mining and Minerals Policy Act

40. In 1970, Congress passed the Mining and Minerals Policy Act ("MMPA"), which reaffirmed the Nation's encouragement of mining on federal lands, but also added language designed to protect the environment and conserve resources. The MMPA states:

> [I]t is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security, and environmental needs, (3) mining, mineral, and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of our natural and reclaimable mineral resources, and (4) the study and development of methods for the

[71] "Location" is the act of appropriating a federal land parcel, usually by the posting of notice on the ground, as well as public recording. *See Shumway*, at 1099.

[72] United States v. Coleman ("*Coleman*") 390 U.S. 599, 600-02, quoting Castle v. Womble, 19 Land Dec. 455, 457 (1894) (internal citations omitted).

[73] 43 C.F.R. § 3809.100 (2005) [Ex. 124]. For further discussion of how the Imperial Project was affected by such a land withdrawal, *see infra* ¶¶ 128-30.

[74] 43 C.F.R. § 3809.100 (2005).

> disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, so as to lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities.[75]

c. Federal Land Policy and Management Act

41. In 1976, Congress adopted the Federal Land Policy and Management Act ("FLPMA"),[76] in which it declared the standards for the use of federal lands and attempted to balance the various interests in these lands. In recognition of the numerous uses of public lands, Congress declared that it was its policy that "the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values," but also that "the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 …."[77]

42. To balance these often disparate needs, Congress established the management objective of "multiple use,"[78] which is defined as:

> [T]he management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.[79]

[75] 30 U.S.C.A. § 21(a) (1996) [Ex. 132].
[76] 43 U.S.C.A. §§ 1701-1784 [Ex. 140].
[77] 43 U.S.C.A. §§ 1701(a)(8), (12).
[78] 43 U.S.C.A. § 1701(a)(7).
[79] 43 U.S.C.A. § 1702(c).

In other words, "'[m]ultiple use management' is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put …."[80]

43. With respect to balancing mining interests and other potential uses of federal lands, the secretary of Interior's broad discretion to "manage the public lands under principles of multiple use and sustained yield"[81] was limited by the fact that FLPMA states that "no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act …."[82] Congress, however, provided an exception to this limitation in stating that the secretary could amend the Mining Law when, "[i]n managing the public lands the Secretary … by, regulation or otherwise, take[s] any action necessary to prevent unnecessary or undue degradation of the lands."[83]

i. *California Desert Conservation Area*

44. Under subchapter VI of FLPMA, Congress established the California Desert Conservation Area, a large area in Southern California covering over 25 million acres. Congress created the CDCA because it found that:

> (1) the California desert contains historical, scenic, archeological, environmental, biological, cultural, scientific, educational, recreational, and economic resources that are uniquely adjacent to an area of large population;
>
> (2) the California desert environment is a total ecosystem that is extremely fragile, easily scarred, and slowly healed;
>
> (3) the California desert environment and its resources, including certain rare and endangered species of wildlife, plants, and fishes, and numerous archeological and historic sites, are seriously threatened by air pollution, inadequate Federal management authority, and pressures of increased use ….[84]

45. In the designation of the CDCA, Congress directed the secretary to "prepare and implement" a long-range plan for the "management, use, development, and protection of

[80] Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 58 (2004).
[81] 43 U.S.C.A. § 1732(a) [Ex. 142].
[82] 43 U.S.C.A. § 1732(b).
[83] *Id.*
[84] 43 U.S.C.A. §§ 1781(a)(1)-(3) [Ex. 143].

the public lands within the [CDCA]," on or before September 30, 1980.[85] This CDCA Plan was to take into account "the principles of multiple use and sustained yield in providing for resource use and development, including, but not limited to, maintenance of environmental quality, rights-of-way, and mineral development."[86]

46. Recognizing the numerous conflicts that would arise from the co-existence of the different uses for the lands in the CDCA, the secretary used the principles defined by FLPMA—*multiple use, sustained yield,* and *the maintenance of environmental quality*—to craft four "approaches" to resolve these conflicts in the CDCA Plan. The first two address the seeking of simplicity of the Plan to foster management and public understanding and the development of decision-making processes to provide for public review and understanding. The fourth recognizes the interplay between natural and human use patterns. The third directly addresses resource development:

> Responding to national priority needs for resource use and development, both today and in the future, including such paramount priorities as energy development and transmission, without compromising the basic desert resources of soils, air, water, and vegetation, or public values such as wildlife, cultural resources, or magnificent desert scenery. This means, in the face of unknowns, erring on the side of conservation in order not to risk today what we cannot replace tomorrow.[87]

47. The CDCA Plan divides the CDCA into four multiple-use classes: (1) Class C, the most restrictive class, is limited to lands with potential suitability for congressional wilderness designation; (2) Class L (Limited Use); (3) Class M (Moderate Use); and (4) Class I (Intensive Use).[88] Claimant's mining claims are located on Class L land.[89] The CDCA Plan defines Multiple-Use Class L lands as "protect[ing] sensitive, natural, scenic, ecological, and cultural resource values. Public lands designated as Class L are managed to provide for generally lower-intensity, carefully controlled multiple use of resources, while ensuring that sensitive values are not significantly diminished."[90] The CDCA Plan acknowledges the special difficulty in resolving conflicts between the numerous options

[85] 43 U.S.C.A. § 1781(d) [Ex. 143]. Nearly half of the CDCA is BLM-administered public lands. *See* CDCA PLAN, at 5 [Ex. 12].
[86] 43 U.S.C.A. §1781(d).
[87] CDCA PLAN, at 6.
[88] *Id.* at 13.
[89] 2000 FEIS, at 1-15 [Ex. 210; FA 8 tab 61].
[90] CDCA PLAN, at 13 [Ex. 12].

for Class L lands (as opposed to other more or less restrictive classes), explaining that "judgment is called for in allowing consumptive uses only up to the point that sensitive natural and cultural values might be degraded."[91]

48. In the designation of the CDCA, Congress again indicated its continued respect for mining claims but also attempted to balance these interests with the other potential uses for the land and the need to protect federal resources. It stated that "[s]ubject to valid existing rights, nothing in this Act shall affect the applicability of the United States mining laws on the public lands within the California Desert Conservation Area."[92] Even these laws, however, Congress made subject to "[s]uch regulations … as may be reasonable to protect the scenic, scientific, and environmental values of the public lands of the [CDCA] against undue impairment, and to assure against pollution of the streams and waters within the [CDCA]."[93]

49. In general, the CDCA Plan recognizes one of its goals under its geology, energy and mineral (G-E-M) resources element as continuing "to recognize access to and availability of as much public land as possible for mineral exploration and development."[94] With respect to Class L lands specifically, the CDCA Plan states that the location of mining claims on Class L lands is nondiscretionary, though operations are subject to the BLM-promulgated Surface Management of Public Lands Under U.S. Mining Laws, 45 Fed. Reg. 78,902-78,915 (Nov. 26 1980) ("3809 Regulations") (including the above-stated standard of "undue impairment") and applicable state and local law.[95] BLM approval of mineral operations is nondiscretionary in that, if a corporation satisfies all the appropriate regulations, the BLM must recognize the corporation's ability to explore, develop, and extract minerals from federal lands

[91] *Id.* at 21.

[92] 43 U.S.C.A. § 1781(f) [Ex. 143]. This is echoed in the CDCA Plan which states that "[a]ll official action taken under this Plan shall be subject to valid existing rights." CDCA PLAN, at 11.

[93] 43 U.S.C.A. § 1781(f).

[94] CDCA PLAN, at 95.

[95] CDCA PLAN, at 18, tbl. 1, Multiple-Use Class Guidelines, § 13, Mineral Exploration and Development [Ex. 12]. The regulations require BLM review for potential impacts on sensitive resources (rare, threatened, or endangered species and cultural resources), an environmental analysis ("EA") with a 60-day public review period, "[m]itigation, subject to technical and economic feasibility," reclamation, and compliance with Section 106 procedures for cultural resources. *See also id.*, at 101-102. There are additional requirements with respect to the protection of rare, threatened, or endangered species.

governed by the Mining Law of 1872.[96] In the absence of the receipt of a jeopardy opinion from the U.S. Fish and Wildlife Service on a federally listed species, the CDCA Plan states that "no mining operation under these regulations may be denied unless a proven case of noncompliance with these regulations is demonstrated."[97]

50. The CDCA Plan provides that cultural resources are to "be given the same consideration as other resource values" when included in activity plans,[98] but the creation of an accurate and complete inventory of these resources has proven difficult. Only approximately 5% of the CDCA had been inventoried for cultural resources at the Plan's creation[99] and only approximately 10% today;[100] the secretary has thus requested continuing efforts "to identify the full array of the CDCA's cultural resources."[101] At least five elders of the Quechan Tribe were interviewed in the late 1970s during the CDCA planning process at the BLM's request to "aid the cultural resource program by identifying sacred areas of concern to the Quechan within the California Desert."[102] [redacted] The desert planning staff instead drafted a composite map, titled "Native American Areas of Concern," which depicts areas of concentrated sacred sites, listing "very high" and "high" areas of tribal concern, and designating the vast remainder of the CDCA as "moderate" areas of concern.[104] As

[96] *See* 43 C.F.R. § 3809.0-6 (1980) [Ex. 121].

[97] CDCA PLAN, at 102.

[98] CDCA PLAN (as amended, 1999), at 25 [FA 10 tab 96]. Other activity plans include, e.g., Wilderness Management Plans and Recreation Management Plans.

[99] CDCA PLAN (as amended, 1999), at 24.

[100] *See* Declaration of Russell Kaldenberg ("Kaldenberg Declaration"), ¶ 8. Mr. Kaldenberg, at the time of the first survey of the CDCA, was a ranger in the BLM Barstow, California field office performing surveys of cultural resources and assisting with the formulation of the cultural resource plan for the CDCA. He continued to work for the BLM and United States Forest Service for 25 years in various archaeological positions. *Id.* ¶¶ 1, 4.

[101] CDCA PLAN (as amended, 1999), at 22.

[102] Memorandum from Eric Ritter to Neil Pfulb re: Coordination Meeting with Chairman Brown of the Quechan Tribe (Mar. 3, 1978) [Ex. 6]. *See also* Ethnographic Interview Notes No. 1 from March 1, 1978 [Ex. 4], No. 2 from March 1, 1978 [Ex. 5], No. 3 from March 12, 1978 [Ex. 9], No. 4 from March 9, 1978 [Ex. 7], and No. 8 from March 10, 1978 [Ex. 8].

[103] Ethnographic Interview Notes No. 3 from March 12, 1978 [Ex. 9].

[104] Respondent's Counter-Memorial, at 17, citing California Desert Conservation Area Map, "Native American Areas of Concern" (May 1977) [Ex. 309]; LYNNE SEBASTIAN, CULTURAL RESOURCE ISSUES, COMPLIANCE, AND DECISIONS RELATIVE TO THE GLAMIS IMPERIAL PROJECT (Apr. 4, 2006) ("SEBASTIAN REPORT"), at 22 (discussing CDCA maps, "Native American Areas of Concern" and "Ethnography Element"); Kaldenberg Declaration, ¶¶ 6-7.

this map, and other confidential planning maps produced, focused on concentrations of sacred sites and were thus meant to be "predictive models of important cultural resources," the desert planning staff did not regard them to be comprehensive.[105]

ii. *Areas of Critical Environmental Concern*

51. In an additional attempt to preserve areas of unusual plant or animal diversity, unique geologic features, or rare concentrations of the remains of historic or prehistoric use, the CDCA Plan established Areas of Critical Environmental Concern.[106] An ACEC is defined as an area "within the public lands where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources, or other natural systems …."[107] Although the primary management focus for ACECs is the protection of important cultural and natural resources, "every effort" is made to accomplish this protection while not unreasonably or unnecessarily restricting other uses of these lands that are compatible with that protection.[108]

52. There are 75 such special management areas designated in the CDCA Plan.[109] One such area, the "Indian Pass" ACEC, lies within one mile of the Imperial Project site. It was designated in 1980, after an informal inventory resulted in the "description of desert trails, inscribed cobbles, ceramic scatters, cleared circles, and lithic scatters."[110]

d. The 3809 Regulations

53. In 1980, under the statutory authority given to it by FLPMA and in furtherance of FLPMA's goals, the BLM promulgated the "3809 Regulations."[111] The stated purposes of the 3809 Regulations are to "[p]revent unnecessary or undue degradation of public

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[105] Kaldenberg Declaration, ¶¶ 6-7.
[106] CDCA PLAN, at 123 [Ex. 12].
[107] *Id*.
[108] *Id.* at 124.
[109] *Id.* at 123.
[110] INDIAN PASS AREA OF CRITICAL ENVIRONMENTAL CONCERN MANAGEMENT PLAN, U.S. DOI, BLM, CALIFORNIA DESERT DISTRICT, EL CENTRO RESOURCE AREA, at 1 [Ex. 17].
[111] The regulations are officially called the Surface Management of Public Lands Under U.S. Mining Laws, 45 Fed. Reg. 78,902-78,915 (Nov. 26 1980). As they are codified at 43 C.F.R. § 3809 *et seq*., however, they are known familiarly as the "3809 Regulations" [Ex. 151].

lands by operations authorized by the mining laws … and establish[] procedures and standards to ensure that operators and mining claimants meet this responsibility."[112] Additionally, the regulations sought to "[p]rovide for maximum possible coordination" with state agencies to prevent duplication and ensure operators were held to the above standard.[113]

54. In accordance with the MMPA and FLPMA, the 3809 Regulations acknowledged that "[u]nder the mining laws a person has a statutory right … to go upon the open … federal lands for the purpose of mineral prospecting, exploration, development, extraction and other uses reasonably incident thereto."[114] As required by FLPMA, however, "[t]his statutory right carries with it the responsibility to assure that operations include adequate and responsible measures to prevent unnecessary or undue degradation of the federal lands and to provide for reasonable reclamation."[115]

55. The 3809 Regulations provide the basic regulatory framework for the submission and review of mining plans of operation to ensure that unnecessary or undue degradation is avoided and reclamation is required. For a "plan-level operation" like that of the Imperial Project, in which more than five acres is disturbed or there is work in wilderness or areas of critical environmental concern (including CDCA Class C and L lands), a plan of operations must be submitted and BLM's approval acquired prior to the commencement of mining activities.[116] This plan of operations must describe the type of operations and how they will be conducted, as well as measures to be taken to prevent unnecessary and undue degradation and measures to reclaim disturbed areas.[117]

56. Following the filing of a plan of operations, an authorized official must make an environmental assessment to "identify the impacts of the proposed operations on the

[112] 43 C.F.R. § 3809.1(a) 2004) [LA 4 tab 124].
[113] 43 C.F.R. § 3809.1(b) 2004) [LA 4 tab 124].
[114] 43 C.F.R. § 3809.0-6 (1980) [Ex. 121].
[115] *Id*. Effective January 20, 2001, the BLM amended its regulations governing mining operations involving metallic and some other minerals on public lands. As part of these amendments, this section, as well as 3809.0-5, 0-6, 1-4, 1-5, 2-1, and 2-2 cited below, were removed at 65 FR 69998, 70112. As the plan of operations for the Imperial Project was submitted in December of 1994, however, the regulations immediately preceding January 20, 2001—those cited here and below—govern the review process. *See* 43 C.F.R. § 3809.400(b) 2004) [LA 4 tab 124].
[116] 43 C.F.R. § 3809.1-4 (1980) [LA 4 tab 125], 43 C.F.R. § 3809.11 (2004) [LA 4 tab 124].
[117] 43 C.F.R. § 3809.1-5 (1980) [LA 4 tab 125].

lands and to determine whether an environmental impact statement [under the National Environmental Policy Act of 1970 ('NEPA')] is required."[118] The authorized official will then work with the operator to assess the environmental impact and the adequacy of mitigating measures and reclamation procedures to "insure the prevention of unnecessary or undue degradation of the land."[119] If the operator is unable to prepare mitigating measures, the official will work with the operator to use the environmental assessment as a basis for assisting the operator in developing such measures.[120]

57. In defining "unnecessary and undue degradation" for use in these regulations, BLM adopted a "prudent operator" standard:

> 'Unnecessary or undue degradation' means surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations. Failure to initiate and complete reasonable mitigation measures, including reclamation of disturbed areas or creation of a nuisance may constitute unnecessary or undue degradation. Failure to comply with applicable environmental protection statutes and regulations thereunder will constitute unnecessary or undue degradation. Where specific statutory authority requires the attainment of a stated level of protection or reclamation, such as in the California Desert Conservation Area …, that level of protection shall be met.[121]

58. The level of reclamation necessary, in both the plans and operations, is that which "will prevent unnecessary or undue degradation of the federal lands."[122] These include "reasonable measures," such as reshaping disturbed land to "an appropriate contour," and revegetating, where necessary, "to provide a diverse vegetative cover."[123] Reclamation is not required, however, where the retention of a stable highwall or other mine workings is necessary to preserve evidence of mineralization.[124]

59. In addition to preventing unnecessary or undue degradation and requiring reclamation, all operations also must "comply with all pertinent Federal and State

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[118] 43 C.F.R. § 3809.2-1(a) (1980) [LA 4 tab 125].
[119] 43 C.F.R. § 3809.2-1(b) (1980).
[120] *Id.*
[121] 43 C.F.R. § 3809.0-5(k) (1980) [Ex. 120].
[122] 43 C.F.R. § 3809.0-5(j) (1980).
[123] *Id.*
[124] *Id.*

laws."[125] These laws include, but are not limited to, those relating to air and water quality, solid wastes, fisheries, wildlife and plant habitat, and cultural and paleontological resources.[126] If the 3809 Regulations conflict with state laws or regulations, the operator is to follow the 3809 Regulations, except if the state laws or regulations "require[] a higher standard of protection for public lands" than the 3809 Regulations.[127]

i. *3809 Regulations – 2001 Revisions*

60. On November 21, 2000, the Department of the Interior ("DOI") promulgated revisions to the 3809 Regulations that became effective on January 20, 2001, enforceable as to all new plans of operations submitted after that date.[128] The significant change in these revisions with respect to this Arbitration is that they added a further definition of "unnecessary or undue degradation": "[a]voiding substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be effectively mitigated,"[129] known as the "SIH Standard." Therefore, as the BLM could deny, or withhold, approval of a mining plan of operations that would result in unnecessary or undue degradation of federal lands, that criterion could now be met by, among other violations, failing to avoid "substantial irreparable harm."[130]

61. In the fall of 2001, however, the recently appointed Interior Secretary Gale A. Norton eliminated this new interpretation of the definition of "unnecessary or undue degradation" because of both its projected economic impacts and the failure, during its passage, to include affected entities in discussions:

> The final rule amends the definition of the term 'unnecessary or undue degradation' by removing … the 'SIH' standard[]. This paragraph, which was included in the final rule without first appearing in either of BLM's proposals which preceded the November 2000 final rules, gave BLM authority to deny plans of operation even if all of the other standards could be satisfied. … BLM has concluded that, as a matter of basic fairness, we should not have adopted this truly significant provision without first providing affected entities an opportunity to comment both as to its substance

[125] 43 C.F.R. § 3809.2-2 (1980) [Ex. 122].
[126] *Id.*
[127] 43 C.F.R. § 3809.3 (2004) [LA 4 tab 124].
[128] Unapproved plans pending on January 20, 2001, remained under the governance of the plan content requirements and performance standards that were in effect immediately prior to January 20, 2001. *See* 43 C.F.R. § 3809.400(b) (2004) [LA 4 tab 124].
[129] 65 Fed. Reg. 69,998, 70,122 (codified at 43 C.F.R. § 3809.415(d)) (Nov. 21, 2000).
[130] 65 Fed. Reg. 69,998, 70,121-2 (codified at 43 C.F.R. § 3809.411(d)(3)(iii)) (Nov. 21, 2000).

> and as to its potential impacts. Because the potential impacts of the SIH standard are so dramatic, BLM is reluctant to continue to include such a provision at all. BLM is also concerned that it would be very difficult to implement the standard fairly as it relates to significant cultural resource values.[131]

62. The revisions contain one further item that pertains to this Arbitration. They recognize that the past two congressional appropriations acts contained a requirement that any final 3809 Regulations must be "not inconsistent with" the recommendations in the National Academy of Science/National Research Council ("NAS/NRC") *Report on Hardrock Mining on Federal Lands* ("NRC Report").[132] Under a section titled, "Consistency With the NRC Report," the regulations note that the use of mandatory pit backfilling would be "inconsistent with the NRC recommendation that BLM use performance-based standards."[133]

e. National Environmental Policy Act

63. The National Environmental Policy Act, which took effect in 1970, requires the preparation of an Environmental Impact Statement ("EIS") whenever a federal action has the potential to "significantly affect[] the quality of the human environment …."[134] This statute applies, in practice, any time a federal agency grants a permit, agrees to fund, or otherwise authorizes any entity to undertake an action that has the potential to affect environmental resources. The EIS must contain a detailed statement by the responsible official on: (1) the environmental impact of the proposed action; (2) any adverse environmental effects which cannot be avoided should the proposal be implemented; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

[131] 66 Fed. Reg. 54,834, 54,837 (Oct. 30, 2001) [Ex. 149].

[132] 65 Fed. Reg. 69,998, 70,003 (Nov. 21, 2000) [Ex. 148].

[133] 65 Fed. Reg. 69,998, 70,004 (Nov. 21, 2000). The NRC Report was unable to establish a presumption either for or against backfilling in all cases. It quoted a NAS/NRC report by the Committee on Surface Mining and Reclamation which found that, with respect to large open pits, backfilling is "generally not technically feasible for non-coal minerals, or has limited value because it is impractical, inappropriate, or economically unsound …." The NRC stated that it had no basis to contradict this conclusion, but it did believe that partial or complete backfilling could be environmentally and economically desirable in some circumstances. It therefore turned the consideration over to the NEPA process to weigh "the costs and benefits of backfilling in a site-specific context." NAS/NRC, HARDROCK MINING ON FEDERAL LANDS 82 (1999), quoting NAS/NRC, SURFACE MINING OF NON-COAL MINERALS xxviii (1979) [Ex. 169].

[134] 42 U.S.C. § 4332(C) (2005) [Ex. 129].

(5) any "irreversible and irretrievable commitments of resources" that would be involved.[135]

64. To complete an EIS, the purpose and need for the proposed action must be determined, "reasonable alternatives"[136] identified, and the environmental impacts of the proposed action and each alternative analyzed.[137] After this analysis, the BLM selects its "preferred alternative," based on both the environmental analysis and consideration "of other factors which influence the decision or are required under another statutory authority."[138] This "preferred alternative" is that alternative which will "fulfill [the agency's] statutory mission and responsibilities, while giving consideration to economic, environmental, technical, and other factors."[139]

f. FLPMA and the California Desert Protection Act

65. FLPMA requires the review of roadless public lands of 5,000 or more acres that were identified during the inventory under 43 U.S.C. § 1711(a) as having wilderness characteristics as described in the Wilderness Act of September 3, 1964.[140] In addition, FLPMA requires periodic reporting to the president of the United States as to the suitability or nonsuitability of these areas for preservation as wilderness.[141]

66. In response to this mandate, BLM proposed a three-step Wilderness Policy and Review Procedure, involving: (1) inventory of all public areas meeting the above characteristics; (2) study of each of these areas to determine suitability or nonsuitability for possible designation as wilderness; and (3) reporting to Congress.[142] As a result of this study, two areas north of the Imperial Project were identified for possible

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[135] *Id*.

[136] "Reasonable alternatives" are defined as those alternatives that "are technically and economically practical or feasible and that meet the purpose and need of the proposed action." DEPARTMENT OF INTERIOR MANUAL PART 516, ch. 4, pt. 4.10 A(2) (May 27, 2004) [Ex. 165].

[137] NEPA HANDBOOK H-1790-1, ch. V(B)(1)(e) (Oct. 25, 1998) [Ex. 167].

[138] *Id*.

[139] DEPARTMENT OF INTERIOR MANUAL PART 516, ch. 4, pt. 4.10 A(4) (May 27, 2004) [Ex. 165].

[140] 43 U.S.C. § 1782(a) (2006) [Ex. 131], citing 78 Stat. 890; 16 U.S.C. § 1131, *et seq.* (explaining that, "[w]ithin 15 years after October 21, 1976, the Secretary shall review those roadless areas … identified during the inventory required by section 1711 (a) of this title as having wilderness characteristics described in the Wilderness Act ….).

[141] *Id*.

[142] BLM CALIFORNIA DESERT CONSERVATION AREA WILDERNESS: INVENTORY AND STUDY PROGRAM 1 (Apr. 19, 1978) [Ex. 10].

recommendation to Congress for permanent wilderness designation.[143] Following further study, these areas, along with 43 others, were included in the 1980 CDCA Plan for preliminary recommendation to the federal government for permanent protection.[144]

67. This study resulted in the passage of the California Desert Protection Act ("CDPA") in October 1994.[145] The act designated 69 wilderness areas which, subject to valid existing mining rights, would be protected as components of the National Wilderness Preservation System.[146] Indian Pass and Picacho Peak were included in the designated wilderness areas.[147]

68. With the designation of the protected areas, Congress made clear that although the land within the wilderness area would be protected, areas immediately adjacent to such wilderness would not be withdrawn from development.[148] The CDPA includes a provision that establishes "no buffer zones."[149] In other words, the Act did not create protective perimeters around any wilderness area, so that non-wilderness activity can be seen and heard from protected areas and such activities would not be precluded up to the boundary with the wilderness area,[150] though they still would be subject to any other regulation, if any, "flowing … from the application of other law."[151]

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[143] BLM DRAFT WILDERNESS INVENTORY PHASE: DESCRIPTIVE NARRATIVES – CALIFORNIA DESERT CONSERVATION AREA 180-81 (Nov. 1, 1978) [Ex. 11].

[144] CDCA PLAN, at 53-54 (1980) [Ex. 12]. A formal recommendation of a total of 62 wilderness study areas for permanent protection, including the Indian Pass and Picacho Peak areas, was made to Congress in 1991. BLM RECORD OF DECISION: CALIFORNIA STATEWIDE WILDERNESS STUDY REPORT, pt. I (June 12, 1991) [Ex. 35].

[145] *See generally*, California Desert Protection Act of 1994, Pub. L. No. 103-433, 108 Stat. 4471 (1994) [Ex. 144].

[146] California Desert Protection Act of 1994, Pub. L. No. 103-433, 108 Stat. 4471, § 102 (1994).

[147] California Desert Protection Act of 1994, Pub. L. No. 103-433, 108 Stat. 4471, §§ 102(27), (49) (1994).

[148] California Desert Protection Act of 1994, Pub. L. No. 103-433, 108 Stat. 4471, § 103(d) (1994).

[149] *Id.*

[150] *Id.*

[151] H.R. REP. NO. 103-498, at 62 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3598 [Ex. 186].

2. CALIFORNIA MINING AND RELATED LAW

a. California Environmental Quality Act

69. Similarly to NEPA, the California Environmental Quality Act ("CEQA") requires the completion of an Environmental Impact Report ("EIR") with respect to "discretionary projects proposed to be carried out or approved by public agencies"[152] whenever "the public agency finds substantial evidence that the project may have a significant effect on the environment."[153]

70. Like NEPA, CEQA requires the responsible agency to consider feasible alternatives or mitigation measures to lessen significant environmental impacts.[154] The policy of the State, as declared by the legislature, is that "public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effect of such projects."[155] It added, however, that "in the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof."[156]

71. With respect to the Imperial Project, as in most cases, the CEQA review proceeded in conjunction with the federal NEPA review, to avoid duplication of efforts. Pursuant to a state-federal Memorandum of Understanding, the federal and local agencies prepared a joint EIS/EIR, defining and analyzing the environmental impacts of the Project.[157]

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[152] CAL. PUB. RES. CODE § 21080(a) (1996) [Ex. 156].
[153] CAL. CODE REGS. tit. 14, § 15002(f)(1) (2005) (citations omitted).
[154] CAL. PUB. RES. CODE § 21002 (1996) [Ex. 155].
[155] *Id.*
[156] *Id.*
[157] Memorandum of Understanding between BLM, County of Imperial, and Chemgold, Inc. (Mar. 20, 1995) [FA 10 tab 107].

b. California Surface Mining and Reclamation Act

72. The California Legislature passed the Surface Mining and Reclamation Act of 1975 ("SMARA")[158] with the finding and declaration that "the extraction of minerals is essential to the continued economic well-being of the state and to the needs of the society, and that the reclamation of mined lands is necessary to prevent or minimize adverse effects on the environment and to protect the public health and safety."[159]

73. With the enactment of SMARA, California, like the federal government before it, attempted to encourage mining activities while putting in place regulations to protect the environment and other resources from the possible ill effects of these activities. The stated intent of the legislature in enacting SMARA describes this goal:

> It is the intent of the Legislature to create and maintain an effective and comprehensive surface mining and reclamation policy with regulation of surface mining operations so as to assure that:
>
> (a) Adverse environmental impacts are prevented or minimized and mined lands are reclaimed to a usable condition which is readily adaptable for alternative land uses.
>
> (b) The production and conservation of minerals are encouraged, while giving consideration to values relating to recreation, watershed, wildlife, range and forage, and aesthetic enjoyment.
>
> (c) Residual hazards to the public health and safety are eliminated.[160]

74. Under SMARA, a permit is required from the "lead agency"[161] in order to conduct surface mining operations.[162] In order to receive such a permit, a prospective operator must submit a reclamation plan and financial assurances for reclamation.[163]

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[158] CAL. PUB. RES. CODE §§ 2700-2797 (2001) [LA 4 tab 135].

[159] CAL. PUB. RES. CODE § 2711 (2001) [LA 4 tab 135].

[160] CAL. PUB. RES. CODE § 2712 (2001) [LA 4 tab 135].

[161] The "lead agency" is the city, county, development commission or board that has primary responsibility for approving a surface mining operation or a reclamation plan. CAL. PUB. RES. CODE § 2728 (2001) [LA 4 tab 135]. Imperial County acted as the lead agency with respect to review of the Imperial Project.

[162] CAL. PUB. RES. CODE § 2770(a) (2001) [LA 4 tab 135].

[163] CAL. PUB. RES. CODE §§ 2770(a), 2772(a), 2773.1(a) (2001) [LA 4 tab 135]; 43 C.F.R. §§ 3809.550-3809.556 (2000) [Ex. 148]. The federal, state and local regulations require the posting of financial assurances by mine operators to ensure reclamation is performed in accordance with the surface mining operation's approved reclamation plan. A mine operator is required to post sufficient funds to provide for the complete reclamation of any mine site on federal land by a third party. For significant discussion of financial assurances, *see infra* ¶ 485, *et seq*.

Reclamation is thus an important aspect of SMARA and integral to this Arbitration. It is defined in SMARA as:

> [T]he combined process of land treatment that minimizes water degradation, air pollution, damage to aquatic or wildlife habitat, flooding, erosion, and other adverse effects from surface mining operations, including adverse surface effects incidental to underground mines, so that mined lands are reclaimed to a usable condition which is readily adaptable for alternate land uses and create no danger to public health or safety. The process may extend to affected lands surrounding mined lands, and may require backfilling, grading, resoiling, revegetation, soil compaction, stabilization, or other measures.[164]

75. The lead agency researches and produces an EIR when reviewing surface mining permits for open-pit mining operations which utilize a cyanide heap-leaching process, like the Imperial Project.[165] After analyzing this EIR, the lead agency then decides whether or not and how to approve the project.[166] Although the reclamation requirements are then implemented at the county level, certain policies for surface mining operations, including guidelines describing the exact types of reclamation required, are handed down by the State Mining and Geology Board ("SMGB") which, at the direction of SMARA, adopts State measures to be utilized by the lead agencies.[167]

3. HISTORIC AND CULTURAL PRESERVATION LAW

a. The National Historic Preservation Act

76. In 1966, Congress enacted the National Historic Preservation Act ("NHPA"), declaring that "the spirit and direction of the Nation are founded upon and reflected in its historic heritage," and that it is "necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities."[168] To achieve this goal, the NHPA authorized the secretary of the Interior "to expand and maintain a National

[164] CAL. PUB. RES. CODE § 2733 (2001) [LA 4 tab 135]. The ordinances of Imperial County utilize the identical definition of "reclamation" for its purposes. *See* Imperial County, CA., Code § 92001.01 (1998) [Ex. 157].

[165] CAL. CODE REGS. tit. 14, § 15081.5(a)(4) (West 2009).

[166] CAL. CODE REGS. tit. 14, § 15092(a) (West 2009).

[167] Cal. Pub. Res. Code § 2755-56 (2001) [LA 4 tab 135].

[168] 16 U.S.C. §§ 470(b)(1), 470(b)(7) (2000) [LA 4 tab 104]. This is not the first federal legislation to protect cultural resources, though it is the most relevant to this Arbitration. The NHPA follows the Antiquities Act, enacted in 1906 and enhanced in 1935 as the Historic Sites, Buildings and Antiquities Act, and the chartering of the National Trust for Historic Preservation in the United States, in 1949.

Register of Historic Places," ("National Register").[169] In addition, it established the Advisory Council on Historic Preservation ("ACHP"), an independent federal 20-member agency tasked with the advisement of the president and Congress on historic preservation policy and the promotion of historic preservation through the encouragement of public awareness, study, training, policy review and legislative assistance.[170]

77. Pursuant to Section 106 of the NHPA, federal agencies must consider, prior to the authorization of any federal fund expenditure or license issuance, the effects of such undertaking on historic properties included in or eligible for inclusion in the National Register.[171] In addition, the agency must afford the ACHP a reasonable opportunity to comment on such activities[172] and "consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance" to the historic property.[173]

78. To ensure compliance with Section 106, the ACHP promulgated regulations, which outline a series of procedures known as the Section 106 Process.[174] First, upon the determination that a federal undertaking has the potential to affect a historic property, the agency must invite to be consulting parties the appropriate State and/or Tribal Historic Preservation Officer ("SHPO" or "THPO") and any Native American tribe that might "attach religious and cultural significance to historic properties in the area of potential effects" of an undertaking.[175] Second, the agency, in conjunction with the appropriate

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[169] 16 U.S.C. § 470a(a)(1)(A) (2000) [LA 4 tab 104].

[170] 16 U.S.C. §§ 470i, 470j (2000) [LA 4 tab 104]. The council is made up of a chairman appointed by the president from the general public; the secretary of the Interior; the architect of the capitol; the secretary of agriculture; the heads of four other agencies, the activities of which affect historic preservation (other than the DOI); one governor and one mayor appointed by the president; the president of the National Conference of State Historic Preservation Officers; the chairman of the National Trust for Historic Preservation; "four experts in the field of historic preservation appointed by the President from the disciplines of architecture, history, archeology, and other appropriate disciplines;" three members of the general public appointed by the president; and one member, appointed by the president, of a Native American tribe or Native Hawaiian organization who represents the interests of the tribe or organization of which he or she is a member. *See id.* § 470i.

[171] 16 U.S.C. § 470(f) (2000) [LA 4 tab 104]

[172] *Id*.

[173] 16 U.S.C. § 470a(d)(6)(B) (2000) [LA 4 tab 104].

[174] 36 C.F.R. § 800 *et seq.* (2004) [LA 4 tab 120].

[175] 36 C.F.R. §§ 800.2(c), 800.3(f)(2) (2004). The Section 106 regulations also state that federal agencies must coordinate their Section 106 process with any other reviews required by NEPA, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and other legislation specific to particular agencies. 36 C.F.R. § 800.3(b) (2004).

entities, must determine the "Area of Potential Effect" ("APE"), identify any historic properties in the APE, and determine whether such properties are eligible for listing in the National Register.[176] Third, again in consultation with the appropriate entities, the agency must determine whether the historic property would be adversely affected in that the undertaking would alter any of the property's historic characteristics.[177] Fourth, if an adverse effect is determined, the agency must notify the ACHP and consult with the SHPO and other consulting parties, including Native American tribes, "to seek ways to avoid, minimize or mitigate the adverse effects" on the historic properties; then, if the agency and SHPO agree upon how to address the effects, a memorandum of agreement will be executed.[178] Finally, if the agency official, the SHPO/THPO or the ACHP determines that further discussions will not result in an agreement that will resolve the adverse effects, it may terminate the consultation and request the ACHP to comment to the head of the agency who shall then consider such comments and respond to them prior to any final decision on the undertaking.[179]

b. Federal Legislation to Protect Native American Culture

79. In 1979, the Archaeological Protection Act ("ARPA") was passed by Congress to ensure that "any material remains of past human life or activities which are of archaeological interest" to the Nation are protected for "the present and future benefit of the American people."[180] ARPA establishes a permitting process for the excavation or removal of any archaeological resource on public or Native American land and imposes criminal and civil penalties for the unauthorized excavation and removal of such culturally significant objects.[181]

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[176] 36 C.F.R. § 800.4(a) (2004). "Area of Potential Effect" is defined as "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist." 36 C.F.R. § 800.16(d) (2004).

[177] 36 C.F.R. § 800.5(a) (2004).

[178] 36 C.F.R. § 800.6(b) (2004). If the ACHP participates in the consultation, it will automatically become a party to the memorandum of agreement. Otherwise, the memorandum is submitted to the ACHP for comment. The ACHP may also enter the Section 106 process at any point that it determines that its involvement is required. *See* 36 C.F.R. § 800.2(b)(1) (2004).

[179] 36 C.F.R. § 800.7 (2004).

[180] 16 U.S.C. §§ 470aa(b), 470bb(1) (2000) [LA 4 tab 105].

[181] 16 U.S.C. §§ 470cc-470ff (2000).

80. Eleven years later, in 1990, Congress enacted the Native American Graves Protection and Repatriation Act ("NAGPRA") to protect Native American cultural items discovered on federal or tribal lands.[182] This law established a process for the repatriation from all federal agencies and museums of Native American (and Native Hawaiian) human remains, funerary objects, sacred objects, and "cultural patrimony."[183]

81. Finally, in 1996, President Clinton issued Executive Order No. 13007, directing each executive branch agency with statutory or administrative responsibility for the management of federal lands to "accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners" and to "avoid adversely affecting the physical integrity of such sacred sites" when making land use decisions.[184] Where practicable, the agencies also were directed to maintain the confidentiality of such sites.[185]

c. California Legislation to Protect Native American Culture

82. In 1976, the California legislature enacted the Native American Historical, Cultural and Sacred Sites Act ("Sacred Sites Act").[186] This legislation prohibits both state agencies and private parties operating on public property under a public grant to use or occupy such land in a manner that would "cause severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine," except on clear and convincing evidence demonstrating that such destruction is necessary for the public interest.[187] The Sacred Sites Act also created the Native American Heritage Commission ("NAHC") and empowered it to, among other tasks, preserve sacred sites on both public and private lands, and bring actions "to prevent

[182] 25 U.S.C. §§ 3001-3013 (1992) [LA 4 tab 108].

[183] 25 U.S.C. § 3001(3)(d) (1992). "Cultural patrimony" is defined as "an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself."

[184] Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 29, 1996), *reprinted in* 42 U.S.C. § 1996 (2000) [Ex. 147].

[185] *Id.*

[186] Claimant argues that the Sacred Sites Act (which it refers to as the "Sacred Shrines Act") is not applicable to the Imperial Project as it applies only to state-owned lands. Claimant's Reply Memorial, ¶¶ 65-69.

[187] CAL. PUB. RES. CODE § 5097.9 (1976) [LA 4 tab 136].

severe and irreparable damage to, or assure appropriate access for Native Americans to," any of the above-mentioned sacred places.[188]

d. International Instruments Protecting Historic and Cultural Properties

83. The United Nations Educational, Scientific and Cultural Organization ("UNESCO") has adopted several conventions and declarations regarding the protection and preservation of cultural property, since the 1960s. Its 1968 *Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works*, for instance, recommends member States to take whatever legislative or other steps are necessary, as well as bringing the recommendation to the attention of authorities responsible for public and private works and conservation, in order to preserve, salvage, or rescue cultural property.[189] Any measures for preservation or salvage enacted are to be both preventive and corrective, per the recommendation.[190] The recommendation additionally instructs that, "[a]t the preliminary survey stage of any project involving construction in a locality recognized as being of cultural interest … several variants of the project should be prepared" and considered.[191]

84. The World Heritage Convention, adopted by UNESCO in 1972, ratified by the United States and incorporated into the NHPA, recognized that the destruction of any cultural site impoverishes "the heritage of all the nations of the world."[192] Member States to the convention commit "to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes," and also to enact "appropriate legal, scientific, technical, administrative and financial measures necessary

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[188] CAL. PUB. RES. CODE §§ 5097.91-5097.97 (1976). The NAHC's powers to mediate and make recommendations with respect to sacred sites on private lands were bestowed by the legislature in revisions to the Act in 1991. Also at this time, the legislature made it state policy to repatriate Native American remains and associated grave artifacts. *See* CAL. PUB. RES. CODE § 5097.991 [LA 4 tab 136].

[189] *Recommendation concerning the Preservation of Cultural Property endangered by Public or Private Works*, General Conference of the U.N. Educational, Scientific and Cultural Organization, 15th Sess., Preamble and ¶¶ 5, 14 (Nov. 19, 1968) ("UNESCO 1968 Cultural Recommendation") [LA 5 tab 166].

[190] *Id.*, ¶¶ 7, 8.

[191] *Id.*, ¶ 21.

[192] *Convention concerning the Protection of the World Cultural Property and Natural Heritage*, General Conference of the U.N. Educational, Scientific and Cultural Organization, 17th Sess., Preamble (Nov. 16, 1972) ("UNESCO 1972 Convention") [LA 5 tab 168].

for the identification, protection, conservation, presentation and rehabilitation of this heritage."[193] The convention additionally calls for the establishment of a World Heritage Committee to maintain an international register of sites of cultural heritage.[194]

C. ESTABLISHMENT AND REVIEW OF THE IMPERIAL PROJECT

1. INITIAL EXPLORATION AND DEVELOPMENT OF MINING CLAIMS AND MILL SITES

85. Claimant acquired its initial mining claims in the Imperial Project from the Gold Fields Mining Corporation ("Gold Fields Mining") in 1987. Gold Fields Mining had been exploring the area since 1980.[195] In 1987, Gold Fields Mining joined with Glamis Imperial (then Glamis Gold Exploration, Inc.), a wholly owned subsidiary of Glamis Gold, Inc., to form a joint venture, the Imperial County Joint Venture.[196] Shortly thereafter, in 1988, Claimant, through the Imperial County Joint Venture, began mineral exploration activities in the area.[197]

86. The gold in this area is greatly disbursed among the waste rock; Claimant thus projects that it would need to excavate 150 million tons of ore and 300 million tons of waste rock[198] to yield an estimated 1.17 million ounces of gold and possibly another 0.5 million ounces through continued exploration. [199] In such circumstances, the drilling of core samples throughout the target region is used to survey the field. Therefore, the exploration program of the Imperial County Joint Venture included the submission and

[193] *Id.* art. 5.

[194] *See id.* arts. 8-11. The Convention makes special note that the fact of a site's non-inclusion on the register does not signify its failure to possess "outstanding universal value." *Id.*, art. 12. The definition of cultural heritage, as provided by the Convention, includes "elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value … from the historical, aesthetic, ethnological or anthropological point of view." *Id.*, art. 1.

[195] *See Exploration Agreement and Option to Purchase Between Gold Fields Mining Corporation and Glamis Gold Inc.*, at 14 (June 5, 1987) [Ex. 18]; IMPERIAL COUNTY JOINT VENTURE, INDIAN PASS AREA SUMMARY REPORT, at 1 (June 1988) [Ex. 23].

[196] Statement of C.K. McArthur, ¶ 4. In 1994, Claimant, who held a majority interest in the Imperial County Joint Venture, bought out the remaining interests of its partner and has since been the sole owner of the mining interests and mill sites known as the Imperial Project. *See id.* at ¶ 5.

[197] *See* Statement of C.K. McArthur, ¶ 4; LESHENDOK REPORT, ¶ 35; IMPERIAL COUNTY JOINT VENTURE, INDIAN PASS AREA SUMMARY REPORT 4-8 (June 1988) [Ex. 23].

[198] *See* 2000 FEIS, at S-3 [FA 8 tab 61].

[199] *See* Claimant's Memorial, ¶ 33, citing Behre Dolbear Expert Report (Apr. 2006), at 1.

approval of several exploration drilling plans of operation, including one BLM-approved plan for small-scale drilling along Indian Pass Road in November 1988.[200]

87. In the summer of 1991, Claimant undertook a more extensive drilling program based upon the favorable results of its early exploration activities.[201] Claimant submitted a drilling plan of operation for this program and received letters of approval from BLM in July and September 1991.[202] BLM also prepared an environmental assessment of the drilling program which returned a "Finding of No Significant Impact" so that a full EIS was not warranted under the NEPA.[203] This finding determined that the proposed action, with the described mitigation measures, would "not have any significant impacts on the human environment."[204]

88. Between 1987 and 1993, Claimant states that it spent nearly $2 million on the Imperial Project, with most of these costs incurred on the acquisition of the mining claims and the early exploration drilling program.[205]

2. INITIAL CULTURAL AND ARCHEOLOGICAL SURVEYS AND INVENTORIES OF THE REGION

89. At the outset of this section, the Tribunal notes that there is much disagreement between the Parties as to the appropriate methodologies and reasonable conclusions of the various cultural studies and inventories of the region. In addition, they dispute each other's interpretations of the conclusions of these surveys. For instance, in its description of the studies and their findings, Respondent touts the tranquility and pristine quality of the Imperial Project site as well as the uniqueness of the cultural findings in the area; while Claimant argues that the site has been marred by military, rockhound and recreational activity and lacks unique cultural findings when compared to other areas and mine sites.[206] With this in mind, the Tribunal has attempted to describe only the cultural

[200] *See* Letter from G. Ben Koski, BLM Area Manager, to David Hamre, Chemgold (Nov. 10, 1988) [Ex. 25].
[201] Claimant's Memorial, ¶ 160.
[202] *See id.*
[203] *See* ENVIRONMENTAL ASSESSMENT NO. CA-067-EA91-041, at 4 (July 1, 1991) [Ex. 36].
[204] *Id.*
[205] *See* Statement of J. Utley, attachment ("att.") A.
[206] *See* Reply Memorial of Claimant Glamis Gold Ltd. ("Claimant's Reply Memorial"), ¶¶ 109-14;

studies and inventories and their findings, without delving into the Parties' disparate interpretations of the significance of these conclusions and their criticisms of the methodologies.

90. Archaeologist Malcolm Rogers conducted the earliest surveys of the Indian Pass Area in 1925, 1939, 1941 and 1942.[207] He surveyed the area to the south of the Imperial Project at what is now the site of the Running Man geoglyph and identified the two major prehistoric Native American trails of the region and a spirit break, but not the geoglyph itself.[208] In the vicinity of these trails, he located trail markers and shrines, pot drops, and shattered quartz.[209]

91. When Gold Fields Mining Corporation and AMIR Mines Ltd. ("AMIR Mines"), Glamis' predecessors in interest, first proposed exploratory mining in the area to the BLM, they funded several archaeological surveys to determine if any historic properties could be harmed by the undertaking, consistent with Section 106 of the NHPA. The first cultural resource inventory on the "Indian Rose prospect"—a 200-acre property that would become part of the Imperial Project area—was also funded by Gold Fields Mining in 1982.[210] WESTEC Services, Inc. ("WESTEC") conducted the inventory and found "[c]ryptocrystalline lithic resources … in abundance throughout the project property" and "7 previously unrecorded archaeological locales."[211] [redacted]

Respondent's Rejoinder, at 214-17.

[207] *See* WHERE TRAILS CROSS: CULTURAL RESOURCES INVENTORY AND EVALUATION FOR THE IMPERIAL PROJECT, IMPERIAL PROJECT, IMPERIAL COUNTY, CALIFORNIA, KEA ENVIRONMENTAL (Dec. 1997) 284 [FA 9 tab 83].

[208] *See id.* at 283-284. A spirit break is thought to stop spiritual beings that may attempt to follow someone along the trail. *See id.* at 150.

[209] *See id.* Trail shrines are thought to have been created by travelers depositing an offering in hopes of assuring against sickness, injury or fatigue. A pot drop is merely ceramic shards from one vessel. Native Americans broke quartz to release its spiritual power. *See id.* at 150.

[210] DENNIS QUILLEN, WESTEC SERVICES, INC., CULTURAL RESOURCE INVENTORY OF GOLD FIELDS MINING CORPORATION'S INDIAN ROSE MINING PROSPECT, IMPERIAL COUNTY, CALIFORNIA 1, 3 (June 1982) ("QUILLEN 1982") [FA 9 tab 69].

[211] *Id.*, at 1, 4. The study recognized, however, the difficulty in distinguishing prehistoric flaking debris from that created by contemporary rock hounds; though differentiation often was possible by examining patination, desert varnish, and manufacture method. *See id.* at 7-8.

[redacted] WESTEC recommended mitigation measures to avoid adversely affecting these sites.[212]

92. In compliance with federal laws concerning cultural resources on public lands, AMIR Mines contracted again with WESTEC to survey 15 additional drill sites in 1987, in an area that would become part of the Imperial Project.[213] When this survey resulted in the discovery of 10 sites and six isolates,[214] AMIR Mines modified its development plan to avoid these sites.[215] WESTEC completed a third inventory for AMIR Mines in 1988, in which it recorded eight sites, 16 isolates, and one site update, and [redacted].[216] Because of the potential eligibility of the site for inclusion in the National Register of Historic Places ("NRHP"), [redacted].[217]

93. In the fall of 1983 and spring of 1987, the Imperial Valley College Desert Museum ("IVCDM") also conducted two independent surveys of what it called the Gold Fields Indian Pass Project Area, a 3,168-acre area.[218] The 1983 survey discovered 25 sites and 84 isolated archaeological occurrences that were not large enough for recognition as viable sites.[219] The 1987 survey identified approximately 30 archaeological sites, mostly "trails and lithic stations … typical of the Indian Pass Project Area."[220] [redacted]

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[212] *See id*. at 9-10.

[213] DENNIS GALLEGOS & ANDREW PIGNIOLO, WESTEC SERVICES, INC., CULTURAL RESOURCE INVENTORY AND AVOIDANCE PROGRAM FOR FIFTEEN DRILL SITES WITHIN THE AMIR INDIAN ROSE AREA LEASE 1 (July 1987) ("GALLEGOS & PIGNIOLO 1987") [FA 9 tab 74].

[214] An "isolate" is described as an "an area having one to three artifacts." Respondent's Counter-Memorial, at 55, footnote 240.

[215] *See* GALLEGOS & PIGNIOLO 1987, at 1, 18.

[216] DENNIS GALLEGOS & ANDREW PIGNIOLO, WESTEC SERVICES, INC., CULTURAL RESOURCE INVENTORY NUMBER 2 FOR TWENTY-SEVEN DRILL SITES WITHIN THE AMIR INDIAN ROSE AREA LEASE, at i, 3-1 (Mar. 1988) ("GALLEGOS & PIGNIOLO 1988") [FA 9 tab 75].

[217] *Id.*, at 4-1, 4-2.

[218] *See* JAY VON WERLHOF, IVC BARKER MUSEUM, PHASE I CLASS III ARCHAEOLOGICAL INVESTIGATIONS OF GOLD FIELDS INDIAN PASS PROJECT AREA (Jan. 7, 1984) ("VON WERLHOF 1983") [9 FA tab 73]; JAY VON WERLHOF, IVC BARKER MUSEUM, ARCHEOLOGICAL INVESTIGATIONS OF GOLD FIELDS INDIAN PASS PROJECT AREA 27-28 (Mar. 1, 1988) ("VON WERLHOF 1988") [FA 9 tab 76, Ex. 316].

[219] *See* VON WERLHOF 1983, at 45. Two of the sites identified were beyond the project boundaries and three were recorded prior.

[220] *See* VON WERLHOF 1988, at 68.

[redacted] The researchers in both studies noted, however, that the artifacts found were unlikely to be culturally centered in the Project area, but instead pointed elsewhere for meaning. "In other words, the importance of the Indian Pass Project Area is archaeologically related to other areas and the Native group they served. The Project Area itself was minor in use and purpose, serving as one of the outreach areas …."[222] The 1987 surveyors did, however, also discover another pre-ceramic trail and, based on these and previous discoveries, concluded that the area was located on "a major north-south trail system that connected with the Colorado River, the Indian Pass site, and the Mojave Trail …."[223]

94. In addition to and as part of its expanded drilling and exploration program, Imperial Gold, another predecessor in interest to Claimant, conducted its own cultural resource investigation of the area in June 1991.[224] Quechan Nation Tribal Historian, Lorey Cachora, participated as a member of the survey team in the investigation.[225] The investigation found that "no sites eligible for the National Register of Historic Places were previously recorded in the study area. Cultural resources [found] consist of lithic procurement sites … [s]everal trails, pot drops, and one historic rock structure complex."[226] This finding was based in part on the earlier cultural resource studies from 1982, 1983, 1987 and 1988.[227] The survey did identify the trail complex recorded by the 1987 IVCDM and 1988 WESTEC inventories and noted a large number of lithic and ceramic scatters that the archaeologists believed were associated with a tributary trail.[228]

[221] *See id.* at 46, 51.

[222] *Id.* at 13. *See also* VON WERLHOF 1983, at 16.

[223] *Id.* at 66.

[224] *See* BRIAN F. MOONEY ASSOCIATES, CULTURAL RESOURCE SURVEY AND ASSESSMENT OF THE BEMA INDIAN ROSE PROJECT AREA (June 1991) ("MOONEY 1991 SURVEY") [Ex. 34]. At the time of this survey, the inspected "Indian Rose Project Area" encompassed 355 acres of the 1,631 acres forecasted for the Imperial Project. *See id.* at 1-2.

[225] *See id.* at 14.

[226] *See id*. The study determined that most of the chipping stations and lithic scatter were not National Register eligible because they offered "no opportunities to add to our knowledge of the local prehistory." *Id.* at 30.

[227] *See id.* at 13-14.

[228] *See id.* at 25.

[redacted]

3. SUBMISSION AND REVIEW OF THE PLAN OF OPERATIONS

95. On December 6, 1994, Claimant submitted its Imperial Project Plan of Operations and Reclamation Plan to the Imperial County Planning and Building Department of the State of California ("ICPBD") (the appropriate lead agency).[230] The operations and reclamation plans followed and fulfilled the requirements established by the 3809 Regulations.[231]

96. As is customary, BLM coordinated with the ICPBD in the review of Claimant's Plan of Operations ("POO") and the completion of a joint EIS/EIR.[232] Claimant met with these officials on December 6, 1994, to discuss the POO. At this meeting, Claimant was informed that the greatest expected Project opposition would be received from the wildlife and hunting sectors, though "BLM [was] also considering requiring compensation for the irreparable damage left by un-backfilled pits."[233]

4. CONTINUING SITE EXPLORATION

97. Throughout the review of these and subsequent submissions, Claimant continued its exploration drilling program. Between March 5, 1993 and August 2, 1996, Claimant received eight exploration and drilling program approval decisions from BLM which resulted in the drilling of approximately 400 mineral exploration holes in the Imperial Project vicinity by Claimant and its predecessors.[234] As part of this continued

[229] *See id.* at 25. [redacted]

[230] *See* Imperial Project Plan of Operations (Nov. 1994) [Ex. 55]; Imperial Project Reclamation Plan (Nov. 1994) [Ex. 55]. This submission followed a preliminary Plan of Operations submitted on April 14, 1994, and was followed by revised plans submitted in October 1996, August 1997 and September 1997. *See* LESHENDOK REPORT, ¶ 44.

[231] *See* LESHENDOK REPORT, ¶¶ 44-48, 55-60.

[232] *See* Memorandum of Understanding between BLM, County of Imperial Planning and Building Dept. and Chemgold (Mar. 20, 1995) [Ex. 63].

[233] Memorandum to File from C. Kevin McArthur (Chemgold), at 2 (Dec. 7, 1994) [Ex. 58].

[234] Letter from G. Ben Koski (BLM) to Tom Garagan (Imperial Gold) (Mar. 5, 1993) [Ex. 45]; Letters from G. Ben Koski (BLM) to C. Kevin McArthur (Chemgold) (June 29, 1994) [Ex. 52], (Oct. 7, 1994) [Ex. 54], (Dec. 20, 1994) [Ex. 59], (Feb. 8, 1995) [Ex. 62], and (Aug. 8, 1995) [Ex. 69]; Letters from Terry A. Reed (BLM) to Dan Purvance (Chemgold) (May 31, 1996) [Ex. 73], and (Aug. 2, 1996) [Ex. 75];

exploration, Claimant completed its first Internal Feasibility Study on April 6, 1995, which concluded that the Imperial Project would return positive economic returns and further investigation and expenditures were warranted to complete a final feasibility report.[235] A Final Feasibility Study was completed in April 1996, confirming the Project's economic viability.[236]

98. According to Claimant, this exploration, as well as environmental permitting, required capital expenditures from Claimant of over $3 million in 1995, as well as further funds for cultural resources studies as detailed below.[237] In 1996, Claimant invested an additional $2.78 million for environmental permitting, studies and equipment.[238] One million dollars were spent in 1997 on environmental permitting, and Claimant invested an additional $7.55 million in a mining shovel acquired in 1996, which also required $15,480 per month in storage costs.[239] The total of all expenditures amounted to an investment of more than $18.6 million in the Imperial Project through 1997.[240]

5. INITIAL ENVIRONMENTAL IMPACT STUDY

99. Following Claimant's submission of its Plan of Operations on March 24, 1995, BLM published notice of its intent to prepare an environmental impact study for the Imperial Project in the *Federal Register*, as required by statute.[241] BLM issued the first draft environmental impact study/draft environmental impact report ("DEIS/DEIR") in November 1996, after 16 months of study.[242] This study chose the proposed Project as the preferred alternative with some additional mitigation and environmental conditions,[243] though it stated that construction of project facilities could destroy the

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Statement of Dan Purvance, ¶ 8.

[235] *See* Imperial Project Internal Feasibility Study, at Executive Summary – 1 (Apr. 6, 1995) [Ex. 65].

[236] *See* Imperial Project, Final Feasibility Study, at Executive Summary – 1 (Apr. 1996) [Ex. 70].

[237] *See* Statement of J. Utley, Controller of Glamis Gold, Ltd., att. A.

[238] *See id.*

[239] *See id.*; Memorandum from Steve Baumann to C. Kevin McArthur re: Equipment Commitments (Nov. 4, 1997) [Ex. 91].

[240] *See* Statement of J. Utley, att. A.

[241] *See* 2000 FEIS, at 1-5 [FA 8 tab 61]; 40 C.F.R. § 1501.7 (1978) [LA 4 tab 121].

[242] *See* IMPERIAL PROJECT DRAFT EIS/EIR (Nov. 1996) ("1996 DEIS/DEIR") [Ex. 78].

[243] *See id.* at 2-57.

identified, and possibly still undiscovered, potentially significant cultural and paleontological resources.[244]

100. In 1995, as part of this first DEIS/DEIR for the Project, Chemgold, Inc. (Claimant's predecessor) retained ASM Affiliates, Inc. ("ASM") to survey and inventory the proposed Imperial Project area for cultural and archeological resources.[245] ASM identified 49 sites in this and its subsequent 1996 survey—[redacted].[246] Based on its investigation, ASM stated that there "can be no doubt that the area in and around the Imperial Mine Project was heavily utilized by pre-contact Native Americans as a travel route and as a source for tool-grade lithics."[247] ASM thus concluded, based on preliminary evaluation, that the trail segments were significant and eligible for the NRHP.[248] [redacted]

101. In response to initial BLM comments on the draft report from the 1995 survey, an additional extended Phase II survey was conducted by ASM in February 1996.[250] As mentioned, ASM recorded 49 sites and [redacted].[251] It also identified the "Running Man" geoglyph, though it concluded that it was likely a "very recent historic addition."[252] ASM stated that "the trails and associated features in the project area are

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[244] *See id.* at S-29.

[245] *See* JERRY SCHAEFER & CAROL SCHULTZE, ASM AFFILIATES, INC., CULTURAL RESOURCES OF INDIAN PASS: AN INVENTORY AND EVALUATION FOR THE IMPERIAL PROJECT, IMPERIAL COUNTY, CALIFORNIA 1 (June 1996) ("SCHAEFER & SCHULTZE 1996") [FA 9 tab 81]; JERRY SCHAEFER & CAROL SCHULTZE, ASM AFFILIATES, INC., CULTURAL RESOURCES OF INDIAN PASS: AN INVENTORY AND EVALUATION FOR THE IMPERIAL MINE PROJECT, IMPERIAL COUNTY, CALIFORNIA iv (Sept. 1995) ("1995 ASM CULTURAL INVENTORY") [FA 9 tab 80]. This survey covered 1,877 acres of the 2,212-acre Project area (335 acres had previously been surveyed).

[246] 1995 ASM CULTURAL INVENTORY, at iv, 26.

[247] *See id.* at 15.

[248] *See id.* at 36.

[249] *See id.*

[250] *See* SCHAEFER & SCHULTZE 1996, at 1.

[251] *Id.* at 1, 27. [redacted]

[252] *Id.* at 44. The recent origination of the "Running Man" geoglyph is apparently uncontested. Lorey Cachora, Quechan Cultural Adviser, stated that, "[a]lthough I have said that the Running Man is

part of one of the most important east-west and north-south prehistoric transportation networks in the region."[253]

102. The issuance of the 1996 DEIS/DEIR was followed by a comment period, also required by statute.[254] Two public hearings were held in El Centro and La Mesa, California, at which 49 people spoke, and 425 comment letters were received.[255] The comments raised issues concerning the effect on the Quechan and other Native American tribes, visual resources, wildlife and wildlife habitats, groundwater, and other issues.[256] In addition, it prompted a request from the Quechan Tribe Cultural Committee that BLM address issues related to ground water and air quality, and conduct a more extensive re-survey of the area not as a "single event," but in the context of its relationship with other artifact groupings in the area.[257] These concerns prompted BLM to request a new "Class III (intensive) cultural resource inventory of the entire project area … to verify that all cultural resources within the [Area of Potential Effect were] properly identified and evaluated."[258] BLM also withdrew the 1996 DEIS/DEIR on August 1, 1997, and decided to issue a new DEIS using the comments made thus far as "scoping comments."[259]

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recent, there is a reason for its importance." [redacted] Comparison with the earlier archeological surveys of Rogers confirms this belief, in that this geoglyph was not present at his 1939 surveys. *See id.* at 197.

[253] *See* SCHAEFER & SCHULTZE 1996, at 61. ASM suggested that further consultation with the Quechan about these trails could reveal oral traditions that might enhance the trails' importance. *Id.* at 63.

[254] 40 C.F.R. § 1503 (1978) [LA 4 tab 121]. The comment period was extended twice, lasting from November 1996 to March 24, 1997. *See* 2000 FEIS, at 1-5, 7-1 [FA 8 tab 61].

[255] 2000 FEIS, at 7-1.

[256] *Id.* at 1-11.

[257] *See* Letter from Earl E. Hawes, Program Manager, Quechan Environmental Programs, to Terry A. Reed, Area Manager, BLM (May 14, 1996) [Ex. 72]. In addition to this concern, the director of the IVCDM, notified the BLM that he believed the DEIS/DEIR misidentified several archaeological sites. *See* Letter from Jay von Werlhof, Director/Archaeologist, IVC Desert Museum, to M. Jesse Soriano, Planner, Imperial County Planning/Building Department (Dec. 30, 1996) [FA 7 tab 9].

[258] *See* Letter from Terry A. Reed, Area Manager, BLM, to Michael Jackson, President, Quechan Tribe (May 30, 1997) [Ex. 85]. Mr. Reed invited the Quechan to designate representatives to participate in this effort to "identify and evaluate all cultural resources potentially affected …."

[259] *See* 2000 FEIS, at 1-6, 7-2; Memorandum from Ed Hastey, State Director, BLM, to John Leshy, Solicitor (Jan. 5, 1998) ("Jan. 5, 1998 Hastey Memo") [FA 7 tab 13; Ex. 98] (explaining that the BLM requested a second DEIS/DEIR to "respond to a high level of public concern" about cultural resources). Scoping comments determine the scope of the issues to be addressed in an EIS. Unlike regular comments received during the comment period, scoping comments do not require a specific response. *See* 40 C.F.R. § 1503.4 (1978) [LA 4 tab 121].

6. CULTURAL STUDIES FOLLOWING THE 1996 DEIS/DEIR

103. In preparation for the completion of the revised EIS/EIR, and as a first step in agreeing to the Quechan's request for additional surveys of the Imperial Project area, BLM hired Dr. Michael Baksh, an ethnographer, to consult with the Quechan Tribe to help learn about and evaluate site significance and initiate discussions regarding mitigation measures.[260] The Tribe informed Dr. Baksh that the Project vicinity was a component of a larger region important to the Quechan Tribe,[261] and that the whole area along the Colorado River was sacred.[262] Dr. Baksh noted that "specific explanations relating to the extreme cultural significance of many cultural resources in the area were often hard to come by."[263] Attempts to discuss mitigation with the Quechan Cultural Committee failed, as the Tribe viewed complete avoidance of development in the region as the only acceptable alternative.[264] According to Dr. Baksh, however, Mr. Cachora and Mr. Antone believed that mitigation including the designation of [redacted] as traditional cultural sites, the creation of a video documentary, improvements to the Quechan Museum, acquisition and protection of sensitive sites, and additional studies could help, as part of an overall package, to offset significant impacts to cultural resources should the Project proceed.[265]

104. In addition to the interviews, KEA Environmental, Inc. ("KEA") was retained to conduct the required Class III pedestrian resurvey and cultural resources inventory.[266] KEA expanded the area of potential effect ("APE") beyond the Project boundaries, per instructions from the BLM, to identify any cultural resources within the buffer zones and also to allow for possible plan reconfiguration to avoid archaeological sites.[267] BLM

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[260] *See* DR. MICHAEL BAKSH, NATIVE AMERICAN CONSULTATION FOR THE GLAMIS IMPERIAL PROJECT 14, 17 (Sept. 22, 1997) ("BAKSH REPORT") [Ex. 90, at app. C] [Note: Respondent also provided a copy of this report at FA 9 tab 82, that appears to be a different version of the report, though virtually the same in content. For consistency, only Claimant's provided report is cited.].

[261] *See id.* at 17.

[262] *See id.* at 19-20; WHERE TRAILS CROSS, at 119.

[263] *See* BAKSH REPORT, at 33.

[264] *See id.* at 18, 35.

[265] *See id.* at 29-30. These and other mitigation measures were included in a letter to the cultural committee and tribal office. No response is recorded from either group.

[266] *See* Cleland Declaration, ¶ 4. Dr. James Cleland submitted this declaration to correct factual errors he believes were made in Dr. Sebastian's report (as submitted to him by Respondent), though he claims to have never taken a position for or against the Imperial Project. *Id*. at ¶¶ 4-5.

[267] *See id.* at ¶9.

instructed KEA to determine the existence, if any, of one or more "traditional cultural properties" ("TCPs") in the Project vicinity.[268] Due to the vast area of concern articulated by the Quechan and the difficulty of confining it into one or more TCPs, however, BLM later instructed KEA to leave the boundaries of the TCPs open and instead evaluate the total "area of traditional cultural concern" ("ATCC").[269] [redacted]

105. The Trail of Dreams allegedly runs [redacted] The trail's importance comes from its membership in a

[268] *See* WHERE TRAILS CROSS, at 281; Kaldenberg Declaration, ¶¶ 16-17. Examples of TCPs are sites "associated with the traditional beliefs of a Native American group about its origins, cultural history, or the nature of the world" and sites "where Native American religious practitioners have historically gone, and are known or thought to go today, to perform ceremonial activities in accordance with traditional cultural rules of practice." WHERE TRAILS CROSS, at 281 (citations omitted).

[269] *See* Letter from Ed Hastey, California BLM State Director, to Cherilyn Widell, State Historic Preservation Officer, at 4 (Feb. 26, 1998) ("Feb. 26, 1998 Hastey Letter") [Ex. 106]; Cleland Declaration, ¶ 27. The Quechan originally indicated to the BLM that the entire Indian Pass area was part of a trans-regional TCP extending from [redacted] *See* SEBASTIAN REPORT, at 7, 8, 46, and 60. The Quechan later articulated specific concerns about the network of trails running through the Project area and told the KEA surveyors that the area did have a distinct name, though they would not reveal it for confidentiality reasons. *See* WHERE TRAILS CROSS, at 285; Cleland Declaration, ¶¶ 28, 37. The ATCC concept was allegedly a new one designed to meet the Quechan's concern for a much larger area, having no precedent in BLM or NHPA procedures or guidelines. *See* SEBASTIAN REPORT, at 8, 47.

[270] *See* WHERE TRAILS CROSS, at 169.

[271] *See id.* at 188; Cleland Declaration, ¶ 19; WHERE TRAILS CROSS, Confidential Appendices (California Department of Parks and Recreation, Primary Record, [redacted]) [FA 9 tab 84].

[272] *See* WHERE TRAILS CROSS, at 293; Cleland Declaration, ¶¶ 19, 24.

[273] *See* Aug. 25, 1998 Hastey Letter, at 3 [Ex. 139]. Dreaming is a major source of power for the Quechan. "Dreams figure prominently in legend and song, in the pursuit of knowledge, and in the acquisition of good and bad luck." Dreams are tied closely to the natural landscape in Yuman tradition, with "[e]xact places and moments in time … related in dreams." JAMES CLELAND & REBECCA APPLE, A VIEW ACROSS THE CULTURAL LANDSCAPE OF THE LOWER COLORADO DESERT ("CLELAND & APPLE 2003"), at 21 (citations omitted) [FA 9 tab 82]. Tribal leaders were determined by their dreams, "dreams gave shamans the power to cure, warriors the power to be victorious ….". BAKSH REPORT, at 11 (citations omitted) [FA 9 tab 82].

complex trail network known as *Xam Kwatcan*, which also encompasses the Medicine Trail, the Mojave Salt Song Trail and the Keruk Trail.[274] The Quechan believe that *Kumastamxo*, the God-son of their creator, *Kukumat*,[275] led them down this sacred trail upon *Kukumat's* death as a completion of the creation cycle because the creator had told the people that, upon his death, he would "return to where he came from."[276] *Xam Kwatcan* means literally "another going down" and the Quechan believe that it was laid down for them by their creator to connect Avi Kwame Mountain (a sacred mountain where, according to Pan-Yuman myth, *Kukumat* created the Yuman tribes and still resides in spirit form)[277] with their tribal lands along the river.[278] This journey was reenacted by the Quechan people at irregular intervals, sometimes several times a year and at other times only once every few years, in the form of the *Keruk* creation ceremony to celebrate the creation of the world, the spirit world, the natural world, and *Kukumat's* cremation. It was also a memorial service for those recently departed.[279] The ceremony lasted four days and also was an occasion for families, friends and even other tribes to come together to establish and maintain personal and economic relationships, conduct courtship and arrange marriages, and settle disputes.[280] It was performed by the Quechan until approximately 1947 or 1948.[281]

106. Despite the cultural importance of *Xam Kwatcan* and the Trail of Dreams, determination of the Trail of Dreams' eligibility for the NRHP was delayed by confusion

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[274] *See* CLYDE M. WOODS, NORTH BAJA PIPELINE PROJECT NATIVE AMERICAN STUDIES 9-10 (Sept. 2001) [FA 10 tab 87].

[275] The Tribunal notes that throughout the record Quechan names are spelled in a number of different ways. For consistency, this Award has chosen to use one such spelling throughout.

[276] *See* JAY VON WERLHOF, THAT THEY MAY KNOW AND REMEMBER: SPIRITS OF THE EARTH, at 12, 19 (2004) ("VON WERLHOF 2004") [FA 10 tab 90]; CLELAND & APPLE 2003, at 22.

[277] *See* WHERE TRAILS CROSS, at 62 [FA 9 tab 83]. *Avikwaame*, [redacted] The Quechan believe that, not only were they created on this mountain, but also that it was the site where their creator's son, *Kumastamxo*, taught the men of the Tribe to recede into the dream state of *sru ma* in order to access power for the curing of illness and relief of anxiety. *See* VON WERLHOF 2004, at 9-10, 15.

[278] *See* VON WERLHOF 2004, at 19 [FA 10 tab 90]. Pilot Knob (*Avikwalal*) was the starting point for this journey. CLELAND & APPLE 2003, at 22, 39.

[279] *See* WHERE TRAILS CROSS, at 62-63.

[280] *See id.* at 63; CLELAND & APPLE 2003, at 22.

[281] *See* California Desert Ethnographic Notes No. 2 re: Ethnographic Interview – Mohave Tribe member (Mar. 1, 1978) [Ex. 5].

as to the precise location of the Trail.[282] Claimant asserts that much of the early literature failed to mention *Xam Kwatcan* or even mention a physical trail in connection with the Creation myth, [283] thus determining the trail's locations proved difficult. Claimant points to a 1986 study of the Pilot Knob ACEC by Clyde M. Woods, for instance, that places *Xam Kwatcan* outside of the Imperial Project APE,[284] while a 2001 study describes only a non-physical "Dream Trail" above the actual physical *Xam Kwatcan*.[285] Claimant asserts that even the 1997 KEA study exhibited confusion about the exact location of the Trail of Dreams (which Dr. Cleland attributed to editing errors),[286] [redacted] Much of the later confusion stemmed from the allegedly different directions of the trails: [redacted]

[282] *See* WHERE TRAILS CROSS, at 292-94; Cleland Declaration, ¶¶ 32-33.

[283] *See* SEBASTIAN SUPPLEMENTAL REPORT, at 16-18 (discussing at length the works of Trippel (1889), Harrington (1908), Kroeber (1925), Forde (1931), Spier (1933), and Forbes (1965)).

[284] CLYDE M. WOODS, SHELLY RAVEN & CHRISTOPHER RAVEN, THE ARCHAEOLOGY OF CREATION: NATIVE AMERICAN ETHNOLOGY AND THE CULTURAL RESOURCES OF PILOT KNOB, REPORT PREPARED BY WIRTH ENVIRONMENTAL SERVICES FOR U.S. DEPARTMENT OF INTERIOR BUREAU OF LAND MANAGEMENT, EL CENTRO RESOURCE AREA, Map 3 (March 1986) [Ex. 315].

[285] BOMA JOHNSON, CULTURAL RESOURCES OVERVIEW OF THE NORTH BAJA PIPELINE PROJECT 36 (Aug. 27, 2001) (att. A to CLYDE M. WOODS, NORTH BAJA PIPELINE PROJECT – NATIVE AMERICAN STUDIES (Sept. 2001)) [Ex. 326].

[286] *See* Cleland Declaration, ¶ 23.

[287] *See* JACKSON UNDERWOOD & JAMES H. CLELAND, KEA ENVIRONMENTAL, INC., TRAILS OF THE INDIAN PASS AREA, IMPERIAL COUNTY, CALIFORNIA 33 (July 1998) ("UNDERWOOD & CLELAND 1998") [FA 10 tab 85; Ex. 323].

[288] *See id.* at 47.

[289] *See* SEBASTIAN SUPPLEMENTAL REPORT, at 19-20, citing WHERE TRAILS CROSS, at 93, 197, 211 & 293 (1997). [redacted]

[290] State of California – The Resources Agency, Department of Parks and Recreation, Primary Record for Trinomial [redacted] (Cleland Declaration, Ex. G).

[291] *See* WHERE TRAILS CROSS, at 188.

[292] State of California – The Resources Agency, Department of Parks and Recreation, Primary Record for Trinomial [redacted] (Cleland Declaration, Ex. F).

[redacted]

107. As the heart of the Quechan's opposition to the Imperial Project rested on their belief that it would destroy the Trail of Dreams, Claimant funded a trails reconnaissance survey in 1998.[296] [redacted] Thus, it opined that all the prehistoric trail sites in the Project area, including those associated with the Trail of Dreams, were eligible for registration with the NRHP.[300]

108. In the "ancillary area" to the Project, KEA also noted the Running Man site whose significance, the survey noted, [redacted]

[293] 1995 ASM CULTURAL INVENTORY, at 35 [FA 9 tab 80]. Respondent, however, points to other research that describes the trails within the Project area as "trending north-south" (QUILLEN 1982, at 6-7 [FA 9 tab 69]) and "situated along a major north-south trail system" (VON WERLHOF 1988, at 66 [FA 9 tab 76]).

[294] *See* Sebastian Supplement Declaration, at 24-25.

[295] *See* Cleland Supplemental Declaration, ¶ 15.

[296] *See* UNDERWOOD & CLELAND 1998 [FA 10 tab 85; Ex. 323]; Cleland Declaration, ¶ 34.

[297] *See* UNDERWOOD & CLELAND 1998, at 4, 47, 49.

[298] *See id.* at 49; Cleland Declaration, ¶¶ 35-36.

[299] *See* UNDERWOOD & CLELAND 1998, at 33-34, 47-48; Cleland Declaration, ¶¶ 24, 34-36.

[300] *See* WHERE TRAILS CROSS, at 299 [FA 9 tab 83]; UNDERWOOD & CLELAND 1998, at 49.

[redacted] Based on these findings, the "high frequency of cultural features of religious or symbolic significance" within the vicinity of the Project mine and process area, and the Quechan's expressions of "strong cultural concerns for the vicinity of the Project," KEA concluded that a cultural resource district had been defined that "encompass[ed] the Project mine and process area but also extend[ed] as far north as Indian Pass and south into the Project ancillary area."[302] KEA also stated its opinion that this Indian Pass-Running Man ATCC was eligible for National Register consideration as a district.[303]

7. 1997 DRAFT ENVIRONMENTAL IMPACT STUDY/ENVIRONMENTAL IMPACT REPORT

109. The revised DEIS/DEIR was released in November 1997, shortly after the first draft of KEA's *Where the Trails Cross* report.[304] In response to the questions raised concerning the 1996 DEIS/DEIR, Claimant made substantial revisions to its Plan of Operations and mitigation plan to better protect the religious and cultural sites identified.[305]

110. The 1997 DEIS/DEIR, as detailed above, found that the Imperial Project (including an alternative that required complete backfilling of all open pits) would have "significant unavoidable" impact (after mitigation) on the "ability of the Quechan to travel physically and spiritually along the Trail of Dreams …, conduct traditional religious activities …, [and] use the Indian Pass-Running Man ATCC for traditional

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[301] *See* WHERE TRAILS CROSS, at 195-206; Cleland Declaration, ¶ 21. The Running Man site includes not only the well known Running Man geoglyphs, but also includes a "low density lithic scatter connecting numerous features" and quartz flaking stations, and [redacted] WHERE TRAILS CROSS, at 195 [FA 9 tab 83].

[302] *See* WHERE TRAILS CROSS, at 194.

[303] *See id.* at 287-292; Cleland Declaration ¶ 31.

[304] *See* DRAFT EIS/EIR FOR GLAMIS IMPERIAL PROJECT, at S-1 (Nov. 1997) ("1997 DEIS/DEIR") [Ex. 90].

[305] *See id.* The Project's design was reworked to eliminate several original features, adjust the boundaries, and redesign other elements to avoid impacts to many artifacts. In addition, the following measures were added to the mitigation proposal: (1) a "detailed mitigation plan" for cultural resources developed through the NEPA process, (2) funding for a baseline study of the geoglyphs and other features in the Indian Pass area, and (3) funding for a three-year endowment for the Quechan tribal historian to study the Indian Pass area and surrounding lands. *See* Letter from Steve Baumann, Glamis Imperial Corp., to Pauline Owl, Quechan Cultural Committee Chairman (Sept. 5, 1997) [Ex. 88]; Letter from Steve Baumann, Glamis Imperial Corp., to Mike Jackson, President, Quechan Tribe (Sept. 5, 1997) [Ex. 87].

cultural education programs."[306] The 1997 DEIS/DEIR stated, however, that with the addition of the mitigation measures, "the Proposed Action [was] the BLM's Preferred Alternative."[307] The comment period following the 1997 DEIS/DEIR was extended to 135 days, during which BLM received 541 written and oral comments.[308]

8. GOVERNMENT TO GOVERNMENT CONSULTATIONS WITH THE QUECHAN

111. On December 16, 1997, representatives of the Quechan Indian Tribe met with the BLM in government to government discussions regarding the Imperial Project.[309] At this meeting, Mr. Cachora, Quechan Tribal Historian, described the importance of the area to the Quechan people's cultural resources and religious values;[310] he likened the religious significance of the area to "Jerusalem or Mecca."[311] Mr. Cachora argued that the First Amendment protected the Quechan's freedom to exercise their religion and thus required protection of this holy site.[312] Mr. Cachora explained that, although the Tribe had allowed other mining operations to "go by" in the area because they "understood people needed jobs," this was done "partly because [they] knew [they] had an area in reserve … owned by the public ... but little did [they] know [BLM] had another operation in mind."[313] Thus the Imperial Project area became the Tribe's "last stand."[314]

112. BLM State Director Hastey reassured the Tribe that he and the solicitor's office had already begun addressing the issue of how religious issues would be treated under the

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[306] 1997 DEIS/DEIR, at S-46 to S-49.

[307] *Id.* at 2-63 [FA 8 tab 60; Ex. 90]. In coming to this conclusion, the BLM restated the definition of "the BLM Preferred Alternative" as "the alternative that best fulfills the agency's statutory mission and responsibilities … giving consideration to economic, environmental, technical and other factors."

[308] 2000 FEIS, at 1-6, 7-3 [FA 8 tab 61].

[309] *See* Notes from Government to Government meeting (Dec.16, 1997) ("Dec. 16, 1997 Meeting Notes") [Ex. 96]. The meeting included several members of the Quechan Indian Tribe, Ed Hastey of the BLM, Field Manager Terry A. Reed, Archaeologist Russ Kaldenberg, Public Affairs Specialist Jan Bedrosian, Edie Harmon of the Sierra Club, Jay von Werlhoff of the IVCDM, Dan Hammer of Senator Boxer's office and Michelle Cohen of the Yuma Daily Sun. Claimant was not invited to the meeting. This was actually the second government to government meeting with the Quechan with regards to the Imperial Project. Members of the Quechan Tribe met with representatives of the BLM on April 11, 1996 at which the Quechan were first informed of the Imperial Project. *See* Memorandum re Meeting with Quechan – Government to Government, Imperial Project (Indian Pass) (Apr. 11, 1996) [Ex. 71].

[310] Dec. 16, 1997 Meeting Notes, at 2.

[311] *Id.* at 4.

[312] *Id.* at 2.

[313] *Id.* at 2, 5.

[314] *Id.* at 5.

Mining Law.[315] He explained that, in the event of a conflict between religious concerns and mining rights on federal lands, the Mining Law tended to take precedence.[316] Director Hastey also explained the issue of an operation's validity to the Tribe, stating that "the only criterion for BLM is whether the proposed project is a valid operation."[317] He added that, although BLM was performing preliminary validity reviews of the Imperial Project and further intensive examination might be required, it was "'kind of hamstrung' when it comes to 1872 mining law rights …."[318] Director Hastey added, however, that this is "an unusual area," as most desert mining was found in "old mining districts" and that this area is "fairly unique" in that it has had no previous mining.[319]

113. Senator Boxer's representative questioned Mr. Hastey about backfilling with respect to the Imperial Project to which Mr. Hastey replied that the BLM indeed had required backfilling at other projects and would evaluate it with respect to this Project, but that BLM must justify it in economic terms and that "mitigation has to be 'reasonable under prevailing standards.'"[320]

114. Following the December government to government meeting, Director Hastey contacted the solicitor's office on January 5, 1998, with a formal request for a legal opinion from the regional solicitor "regarding the conflict between Quechan religious beliefs and the Glamis Imperial Project."[321] Director Hastey, referring to the government to government meeting, posed the First Amendment issue raised by the Quechan, requesting guidance:

> The Quechan believe that this is a conflict between their protected right to practice religion under the First Amendment to the Constitution and the 1872 Mining Law; that by allowing the mining to occur the government will have violated their rights under the First Amendment and destroyed their ability to practice their religion where it must be practiced. What are our responsibilities to ensure that we do not violate

[315] *Id.* at 3.
[316] *Id*.
[317] *Id.* (explaining that an operation is valid "if a prudent man under current conditions could make money on the mine.").
[318] *Id.*
[319] *Id.*
[320] *Id.* at 4.
[321] Memorandum from Ed Hastey, State Director, BLM, to John Leshy, Solicitor (Jan. 5, 1998) ("Jan. 5, 1998 Hastey Memo"), at 1 [FA 7 tab 13; Ex. 98].

> the First Amendment? What are our responsibilities to the mining claimant to ensure that his proprietary rights are protected?[322]

9. PRELIMINARY FEASIBILITY STUDY

115. In addition to looking into the legal responsibilities and issues raised by the Imperial Project, BLM also began to assess the Imperial Project from a validity standpoint in early 2008.[323] A decline in gold prices during the time the DEIS/DEIR was pending led to an eight-year low of $300 per ounce in the early months of 1998, which prompted concern among "interest groups" that the Imperial Project might not be financially viable.[324] BLM's California state office therefore sought a "preliminary market analysis of the public financial data for the Project."[325] The purpose of the review was to "examine Glamis-Imperial's published financial information on the project within the confines of the current and forecast gold market environment," and was not to determine the validity of the mining claims.[326] The California desert district manager of the BLM appointed Mr. Waiwood to conduct the analysis.[327]

116. In February, following a preliminary feasibility study of the mine, Mr. Waiwood reported that "[a]s a result of [his] review of the project, [he] found that within the current economic market for gold, the Imperial Project will be profitable within the publicly stated technical and financial criteria available."[328] As the feasibility study made the mine look, at least preliminarily, feasible, BLM did not plan to conduct "a full-blown mineral examination that could lead to a contest."[329]

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[322] *Id.* at 3.

[323] *See* ROBERT WAIWOOD, REVIEW OF GLAMIS-IMPERIAL'S IMPERIAL PROJECT POSITION IN THE GOLD MARKET (June 19, 1998) ("1998 WAIWOOD REVIEW") [FA 7 tab 19; Ex. 125].

[324] *Id.* at 14, 17.

[325] *Id.* at 1. Mr. Waiwood noted that, in performing the review, no field examination of the property or samples were taken to verify drill sample data. This is, he added, a requisite for a "proper field examination under BLM's protocols at BLM Manual 3893 and Handbook H-3890." *Id.*

[326] *Id.* at 1-2.

[327] *Id.* at 1.

[328] Memorandum from Robert Waiwood to Richard B. Grabowski & James R. Hamilton re: Imperial Project and Criteria for Verification of Operations Data, at 1 (Feb. 20, 1998) [Ex. 105]. Mr. Waiwood stressed that no field or other investigation of the bona fides of the mining claims was performed during the review. In addition, he stated that he did have some "serious concerns and questions" with respect to some of the stated technical parameters of the Project that were not satisfied during the review and that he felt would require further review and verification.

[329] Email from Joel Yudson, DOI, to John Leshy re: Response to Francis Wheat on

117. Relying upon an examination of the recovery rate[330] based on information requested from Steve Baumann, vice president of Glamis-Imperial, on March 31, 1998,[331] Mr. Waiwood concluded that the Project would be marginally profitable over the life of the mine at the average gold price over the past decade and a half ($375 per ounce), but could face problems at the then current price of $300 per ounce.[332] Therefore, Mr. Waiwood explained that the Imperial Project would not be profitable at the present time, but slight changes in the price of gold or cost of production could shift that:

> Glamis-Imperial appears to have conducted the necessary work within the scope of the regulations, and of a 'prudent operator in usual, customary, and proficient operations of similar character …' (43 CFR 3809.0-5(k)). Within the scope and limitations of this review, I feel that the Imperial Project as proposed is the next logical and prudent step in the development of the Imperial deposits; however, with the performance of gold in the past 18 months yielding an uncertain forecast, under the assumptions provided, a present, positive value to the project, and hence a profit within a reasonable rate of return will not be realized.
>
> In the conduct of any mineral investigation of the mining claims at the Imperial Project, a formal forecast of the gold price must be conducted by a qualified mineral economist. The margin of loss under my analysis is so low that small changes in the forecast gold price would render the property, under a formal mineral investigation, and all other facts being regular, profitable and valid.[333]

118. This conclusion alerted BLM to the possibility that denying the Project could result in a taking of rights under the Mining Law of 1872.[334] As the mining claims were properly recorded and a "practical" Plan of Operations was submitted per the 3809 Regulations, BLM stated that the mining proposal appeared to have merit.[335] The BLM also noted that, if such a finding were in fact made, compensation would be required

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Glamis/Chemgold Mine, at 1 (Feb. 4, 1998) [Ex. 103].

[330] Mr. Waiwood explained that the feasibility of the Project was dependant on the critical recovery rate more than any other cost item and, as this was his only concern under the review, his investigation was limited to this one issue. *See* 1998 WAIWOOD REVIEW, at 2 [FA 7 tab 19; Ex. 125].

[331] *Id.* at 2.

[332] Email from John Payne to David Nawi re: Glamis Imperial Mine Project, at 1 (June 1, 1998) [Ex. 121].

[333] 1998 WAIWOOD REVIEW, at 34.

[334] *See* Draft Option Paper, Imperial Project (Chemgold) – Glamis Corp., at 3 (May 7, 1998) ("Draft Option Paper") [Ex. 112].

[335] *Id*.

under the No Project Option.[336] BLM did not know the precise estimate of the mineral value, but expected that reasonable compensation would be substantial.[337]

10. COMMENTS FROM THE ADVISORY COMMITTEE ON HISTORIC PROPERTIES

119. Concurrently with the feasibility and legal examinations, in February 2008, BLM initiated consultation with the State Historic Preservation Officer ("SHPO") regarding potential effects to historic properties pursuant to Section 106.[338] In a letter to the SHPO, BLM presented KEA's recommendations for registration of prehistoric sites in the National Register and sought concurrence in the determination from the SHPO.[339] In addition, the BLM sought the SHPO's concurrence on its determinations of the adverse effects of the Imperial Project on the various properties.[340] Finally, the BLM presented the different mitigation measures proposed by KEA and the interested parties, and invited discussion from the SHPO on ways to avoid or reduce the effects on historic properties.[341]

120. BLM formally requested comments from the Advisory Committee on Historic Properties ("ACHP") on the Imperial Project's Plan of Operations on August 25, 1998,[342] pursuant to paragraph 4.b.3 of the Nationwide Programmatic Agreement, which instructs the BLM to request ACHP's review in "highly controversial undertakings."[343] Noting that the Quechan had "expressed strong cultural concerns for properties in the APE,"[344] the request detailed the potential effects of the Imperial Project on historic properties within the APE—including the Indian Pass-Running Man ATCC, the Trail of Dreams,

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[336] *Id.*

[337] *Id.* BLM also noted, however, that approval of the Plan of Operations also was likely to trigger legal action by Native American or environmental groups as "[r]esulting impacts from project development would cause significant harm to cultural and religious values," and it was "unclear whether the religious aspects of the case would take precedent over the mining law." *Id.*

[338] *See* Letter from Ed Hastey, State Director, BLM, to Cherilyn E. Widell, SHPO, at 1 (Feb. 26, 1998) ("Feb. 26, 1998 Hastey Letter") [Ex. 106].

[339] *See id.* at 7.

[340] *See id.* at 8-9.

[341] *See id.* at 9.

[342] *See* Letter from Ed Hastey, State Director, BLM, to John M. Fowler, Executive Director, ACHP (Aug. 25, 1998) ("Aug. 25, 1998 Hastey Letter") [FA 4 tab 139; Ex. 139].

[343] Programmatic Agreement among the Bureau of Land Management, the Advisory Council on Historic Preservation, and the National Conference of State Historic Preservation Officers Regarding the Manner in Which BLM Will Meet Its Responsibilities Under the National Historic Preservation Act, at 7 (Mar. 26, 1997) ("1997 Programmatic Agreement") [FA 10 tab 111].

[344] Aug. 25, 1998 Hastey Letter, at 1.

and other trail segments and sites—and also those within the Project's ancillary area and transmission line.[345] The letter also described possible mitigation measures, as well as the Quechan belief that no mitigation, short of full avoidance, would be sufficient.[346]

121. The ACHP responded by appointing a working group of three ACHP members to manage the ground-level review of the Imperial Project.[347] This task force, in light of the numerous public comments in response to the environmental impact studies and at the request of the BLM,[348] held an additional public hearing on March 11, 1999. The hearing was held in order to "listen to what [the speakers] have to say and to learn about the impacts of the project, possible options for minimizing those impacts, and generally concerns about historic preservation issues surrounding this project."[349] Claimant's representatives spoke, as did 46 other speakers, including members of the Quechan Indian Tribe, public officials, private citizens, BLM officials, and members of the cultural survey teams.[350]

122. John Fowler, executive director of the ACHP, explained at the start of the hearing that "we're in an unusual circumstance for two reasons."[351] First, he explained that the Nationwide Agreement modified the usual ACHP review process so that aspects of the usual process were largely conducted internally within the BLM. Thus, he explained, "we're not playing by the normal rules of the section 106 process."[352] He continued,

> [W]e are at a phase where it has been acknowledged that the proposed mining development will have adverse effects on properties of historic significance, so we're really at the phase of looking at whether there are ways to allow that project to go

[345] *Id.* at 2-5.

[346] *Id.* at 5-10.

[347] *See* Fowler Declaration, ¶ 18. This group included Ray Soon (the ACHP's Native Hawaiian organization member), Richard Sanderson (representing the administrator of the EPA), and Elizabeth Merritt (representing the chairman of the National Trust for Historic Preservation).

[348] Aug. 25, 1998 Hastey Letter, at 11.

[349] Transcript of Advisory Council on Historic Preservation Public Hearing (Holtville, CA), at 8 (Mar. 11, 1999) ("Mar. 11, 1999 Transcript") [FA 10 tab 115; Ex. 185].

[350] *Id.* at 1, 14-36, 123-127.

[351] *Id.* at 7.

[352] *Id*. *See* 1997 Programmatic Agreement [FA 10 tab 111]. As the BLM Programmatic Agreement was executed on March 26, 1997, and the California Protocol on April 6, 1998, the Imperial Project was the first case BLM processed under these new procedures that went to the ACHP for review. *See* Fowler Declaration, ¶ 15.

> forward and minimize the impacts on historic properties, or whether there should be some other action taken by the Federal Agency.[353]

123. The other unusual aspect of the hearing, Mr. Fowler stated, was the ACHP's involvement in these discussions which normally are handled at the staff level.[354] Mr. Fowler explained that the chairwoman of the ACHP, Katherine Slater, had designated the task force of council members because of the "complexity of the issues and the significance of the issues and the impact."[355] This group was tasked with advising Ms. Slater and the staff on how to proceed in this particular case.[356]

124. Finally, Mr. Fowler described the three possible paths the evaluation of the Imperial Project could take following these consultations. First, the task force could work with the BLM as the consulting party to arrive at an agreed-upon solution that could contain specific mitigation measures and result in the Project moving forward "generally as planned." Second, the task force could recommend that the ACHP issue formal comments to the secretary of Interior, in which case, Mr. Fowler made special note, the comments would be purely advisory and it would be up to the secretary of Interior and the director of the BLM to make a final decision. Third, the task force could decide that further steps were necessary for the BLM to take with the mining company to "assess alternatives or to investigate mitigation measures."[357]

125. On the same day as the public hearing, the ACHP task force also conducted a site visit of the area.[358] In addition to the task force, representatives of the Quechan Indian Tribe and Claimant attended the tour.[359] The ACHP visited the Running Man site, the Indian Pass ACEC and the Indian Pass Wilderness, as well as examined at least one trail

[353] Mar. 11, 1999 Transcript, at 7.
[354] *Id.* at 7-8. In this case, Mr. Stanfill would be the staff member who normally would coordinate such consultations.
[355] *Id.* at 8.
[356] *Id.*
[357] *Id.* at 9.
[358] Statement of Daniel Purvance, ¶ 12.
[359] *Id.*

segment on the edge of the Project area.[360] At least one report, however, states that further exploration of the actual proposed disturbance area was minimal.[361]

126. The ACHP task force also engaged in direct meetings and correspondence with Claimant, the Quechan Indian Tribe and officials at the BLM.[362] The ACHP task force met with members of the Quechan Indian Tribe on May 8, 1999, and with Claimant's representatives on July 14, 1999.[363] In addition, Claimant, in letters to John M. Fowler on May 18, 1999, August 13, 1999, and August 18, 1999, described its position and summarized the proposed mitigation measures for the ACHP to use during its review of the Imperial Project.[364] Claimant explained how much of the harm could be avoided or reduced through its proposed mitigation measures, though it acknowledged that some harm would come to the Quechan's trail system.[365] Counsel for the Quechan Tribe also corresponded with the BLM on April 12, 1998, and with Director Fowler of the ACHP on July 13, 1999, explaining the religious significance of the area and the Quechan's concerns regarding its loss, disputing some of Claimant's factual positions and requesting the ACHP's "strenuous opposition to the proposed mine."[366]

127. Following these consultations and its own analysis of the Imperial Project, the ACHP followed the second possible path of evaluation described above, determining that further consultations would not be productive and, pursuant to its statutory authority,

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[360] *Id.*

[361] *Id.*

[362] *See* Fowler Declaration, ¶¶ 19, 22, and attached correspondence from the counsel of Glamis Imperial Corp. and counsel for the Quechan Indian Tribe.

[363] Fowler Declaration, ¶ 19. Director Fowler noted that the Section 106 regulations have no requirement that all interested parties must be present at any given meeting for that meeting to be considered "consultations" under Section 106.

[364] *See* Letter from Walter E. Stern, Counsel, Glamis Gold, Inc., to John M. Fowler, Executive Director, ACHP and Alan L. Stanfill, Program Analyst, ACHP (May 18, 1999) (discussing the legal process and review, the sites at risk and those avoided, and proposed mitigation) [Fowler Declaration, att. 1]; Letter from Charles A. Jeannes, Counsel, Glamis Gold, Inc., and Gary C. Boyle, Project Manager, Glamis Imperial Corp., to John M. Fowler, Executive Director and General Counsel, ACHP (Aug. 13, 1999) ("Aug. 13, 1999 Jeannes Letter") (explaining the various mitigation measures proposed and enclosing several cultural studies) [Ex. 198]; Letter from Walter E. Stern, Counsel, Glamis Gold, Inc., to John M. Fowler, Executive Director, ACHP (August 18, 1999) (responding to the statements of Ms. Coyle) [Fowler Declaration, att. 3].

[365] Aug. 13, 1999 Jeannes Letter, at 4.

[366] Letter from Courtney Ann Coyle, Counsel, Quechan Indian Tribe, to Douglas Romoli, BLM (April 12, 1998) [FA 7 tab 17]; Letter from Courtney Ann Coyle, Counsel, Quechan Indian Tribe, to John M. Fowler, Executive Director, ACHP (July 13, 1999) [Fowler Declaration, att. 2].

issued its comments to the secretary of Interior on October 19, 1999.[367] The ACHP informed Secretary Babbitt of the "religious, cultural and educational values of the Indian Pass-Running Man … ATCC" that are of "premier importance to the Quechan Tribe for sustaining their traditional religion and culture."[368] The ACHP also cited that the site, despite the region's rather extensive development projects, had "retained sufficient integrity of setting, feeling, and association to remain a critically important area for traditional uses."[369] The ACHP explained its view that the Imperial Project would "unduly degrade" the area and that no mitigation measure proposed would avoid the "serious and irreparable degradation of the sacred and historic values of the ATCC that sustain the tribe."[370] The ACHP also cited the consistent and overwhelming opposition from both the Tribe and the public to the Project. Based on these findings, the Council concluded that "the Glamis Imperial Project would effectively destroy the historic resources in the project area, and recommend[ed] that Interior take whatever legal means available to deny approval for the project."[371]

11. BLM WITHDRAWAL OF THE ATCC FROM FUTURE MINING CLAIMS

128. During the time that the ACHP was reviewing and evaluating the Imperial Project, BLM also was considering withdrawing the affected land from future mineral entry.[372] On June 24, 1998, the BLM field office made a formal recommendation to BLM State Director Hastey that BLM consider withdrawing the land encompassed in the KEA-identified ATCC.[373] The stated purpose for such a withdrawal was to set aside:

> [a]pproximately 9,360.74 acres in Eastern Imperial County … from further entry to protect the archaeological and Native American religious values. … The withdrawal would segregate the lands from nondiscretionary uses, i.e., mining, which could

[367] *See* Letter from Cathryn Buford Slater, ACHP, to Bruce Babbitt, Secretary of the Interior (Oct. 19, 1999) ("Oct. 19, 1999 Slater Letter") [Ex. 201].

[368] *Id.* at 1.

[369] *Id.* at 2.

[370] *Id.* at 2-3.

[371] *Id.* at 3.

[372] *See* Memorandum from Terry A. Reed, BLM to BLM State Director (June 24, 1998) ("June 24, 1998 Reed Memo") [Ex. 126]. The idea may already have been discussed between U.S. Senator Boxer and Interior Deputy Secretary Garamendi prior to April 1, 1998. *See* Memorandum from Steve Baumann to C. Kevin McArthur (Apr. 1, 1998) [Ex. 108].

[373] *See* June 24, 1998 Reed Memo; ENVIRONMENTAL ASSESSMENT FOR THE INDIAN PASS WITHDRAWAL, at 4 (Apr. 25, 2000) ("2000 WITHDRAWAL ANALYSIS") (describes the boundaries of the proposed withdrawal) [Ex. 208].

> irrevocably destroy and/or negatively impact the archaeological and Native American religious values of the property. The withdrawal would be subject to valid existing rights, but would segregate from any new mineral entry to prevent additional claims from being filed.[374]

In addition, as discussed in the proposed Indian Pass withdrawal application, "[w]ithout a withdrawal, BLM would not have the discretion to deny authorization of a mining plan of operation if the claimant complies with applicable regulations."[375]

129. Claimant's representatives were assured in a meeting on July 17, 1998 that "the Glamis claims and mine plan would have defacto [sic] valid existing rights (VER) as of the date of the withdrawal pending the outcome of a formal VER" and that "[t]he BLM review of their mine plan and EIS would continue as scheduled prior to the withdrawal."[376]

130. The BLM petition/application to withdraw the designated lands was filed in June 1998,[377] and approved by the assistant secretary on October 26, 1998.[378] A notice of the proposed withdrawal was subsequently published in the *Federal Register* on November 2, 1998.[379] The lands were temporarily segregated for two years upon publication in the *Federal Register*; this was to allow BLM sufficient time to prepare the studies and analyses it required to make its final decision.[380]

12. MINERAL VALIDITY DETERMINATION

131. On September 15, 1998, BLM formally initiated a mineral validity examination ("VE") of the Imperial Project mining claims.[381] The reason for the examination was that the initial review of the proposal had confirmed conflicts with significant non-mineral resource values that resulted in the consideration of withdrawal of the area to protect

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[374] *Id.*

[375] Withdrawal Petition/Application for Indian Pass Area of Critical Environmental Concern and Extended Management Area, at 3 (June 1998) ("1998 Withdrawal Petition") [Ex. 120].

[376] BLM Notes of July 17, 1998 Meeting with Glamis, at 1 [Ex. 131].

[377] *See* 1998 Withdrawal Petition.

[378] 2000 WITHDRAWAL ANALYSIS, at 3 [Ex. 208].

[379] *Id.*

[380] *Id.*

[381] *See* Memorandum from Deputy State Director, BLM, to Field Manager, Bakersfield, BLM (Sept. 15, 1998) [Ex. 141].

these resources.[382] If such a subsequent right intervened, Claimant "must have perfected (as supported by subsequent mineral investigation by the BLM) [its] discovery prior to that date to create a valid existing right ('VER')."[383] The work plan for the mineral examination further explained BLM's duty in such a situation: "BLM has a responsibility … to ensure that valid mining claims are recognized, invalid ones eliminated, and ensure that the rights of the public are preserved. BLM conducts an investigation of mining claims to verify that a discovery of a valuable mineral exist [sic] on each mining claim."[384]

132. To complete the mineral validity examination, the BLM did not "duplicate what is claimed as a discovery by the claimants," but sought to verify that the data provided by Claimant to support its discovery was "acquired in compliance with professional standards of practice and ethics."[385] This verification required reviewing the data through "geologic mapping of the project area, sampling of discovery locations, the completion of a market analysis of the gold price over the life of the operation, [and verification] that mine engineering and planning [was] supported by the mineralization on the subject mining claims through an economic analysis of the project and alternatives."[386]

133. This process determines if discovery is supported, thus creating a valid existing right that can stand up to a subsequent intervening right, such as withdrawal.[387] If withdrawal did segregate the area, mill sites policy dictated that an additional examination of alternative sites be undertaken. This, the work plan explained, cannot be completed until a Record of Decision ("ROD") is completed for the Plan of Operations

[382] Work Plan and Schedule for the Mineral Investigation of Mining Claims Comprising the Imperial Project, at 1 (Sept. 1998) ("VER Work Plan") [Ex. 141].

[383] *Id.*

[384] *Id.* (In the case of large, low grade ores spread over a large area, BLM will evaluate the group of claims and a "large deposit of reasonable quality with an appropriate quantity of material is clearly necessary to successfully develop such a mine.").

[385] VER Work Plan, at 1.

[386] *Id.* at 2.

[387] *Id.* at 3 ("Discovery is supported for a mining claim when a block of mineralization exists within it's [sic] boundaries that is above the minimum cut-off grade and within the pit design.").

("POO") and, thus, "[n]o approval to the project [would] be made until the VER and ROD agree regarding allowable operating parameters and limitations."[388]

134. The greatest concern with respect to the completion of the VE was examination of the regional geology "to develop attributes to the property that will assist in the deposit modeling."[389] Discussed at greater length among BLM staff and the solicitor's office, however, was the determination of what gold price to use in the analysis.[390] Historically, an average of gold prices over the previous 10 years was utilized but, in light of the market at that time, with the dumping of gold reserves by the central banks of Eastern Europe and basic oversupply, many experts tried to predict instead what the future price of gold would be.[391]

135. The examination began in September 1998 on an expedited schedule with completion expected on December 31, 1998.[392] In November and December 1998, the BLM examiner requested additional metallurgic tests on ore samples from the Imperial Project.[393] As of December 15, 1998, however, completion of the mineral examination was not expected until between mid-January and mid-March 1999, around the same time as the ROD's anticipated completion.[394] This adjustment was apparently caused, at least in part, by the fact that the solicitor's M-Opinion (discussed below) was still in the drafting stages and Solicitor Leshy requested that the validity examination (and the final EIS) be delayed until this M-Opinion was closer to completion.[395] In February 1999, BLM twice contacted Claimant requesting further information.[396] In April and June of

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[388] *Id.*

[389] *Id.* at 4.

[390] *See supra* ¶ 115. The declining price of gold was the primary impetus for the previous informal preliminary feasibility study.

[391] *See* Draft Memorandum from Robert M. Anderson to Peter Schaumberg re: Glamis, at 2 (July 31, 1998) [Ex. 138]; Email from John Leshy to Kay Henry; Peter Schaumberg; Karen Hawbecker; Joel Yudson; David Nawi; John R. Payne (Sept. 3, 1998) (stating the reasons why a mineral economist would be part of the team conducting the mineral examination) [Ex. 142].

[392] *See* Memorandum from Richard B. Grabowski to Field Manager, at 2 (Sept. 15, 1998) [Ex. 143]; VER Work Plan, at 7.

[393] *See* Letter from Robert Waiwood, BLM, to Jerry Eykelbosh, ITS-Bondar-Clegg (Nov. 25, 1998) [FA 7 tab 20]; Letter from Robert Waiwood, BLM, to Jerry Eykelbosh, ITS-Bondar-Clegg (Dec. 17, 1998) [FA 7 tab 21].

[394] *See* Facsimile from James R. Hamilton to Robert M. Anderson (Dec. 15, 1998) [Ex. 167].

[395] *See* Memorandum from John Leshy to Ed Hastey (Oct. 30, 1998) ("Oct. 30, 1998 Leshy Memo") [Ex. 152].

[396] *See* Letter from Robert Waiwood, Mineral Examiner, BLM, to Daniel Purvance, Glamis-

1999, Claimant notified BLM that it wished to use a higher gold recovery rate.[397] In November 1999, however, in anticipation of the solicitor's M-Opinion, BLM directed that work on the VE be halted, even though the examination was substantially complete by this point.[398]

13. DOI SOLICITOR'S 1999 M-OPINION

136. John Payne of the Interior regional solicitor's office was initially tasked with analyzing some of the issues raised by Director Hastey in January 1998, regarding the BLM's responsibility with respect to the First Amendment and Claimant's proprietary rights. In the summer following the initial request, Mr. Payne completed an initial analysis of the First Amendment question. In that informal opinion, Mr. Payne cited *Lyng v. Northwest Indian Cemetery Protective Association*, in which the U.S. Supreme Court held that the First Amendment's free exercise clause would not prohibit the U.S. Forest Service from permitting timber harvesting on federal lands that historically had been used by Native Americans for religious purposes.[399] Following this decision, Mr. Payne concluded that it would be "hard to imagine a federal land management decision which would be considered a violation of [N]ative [A]merican first amendment rights by the courts. BLM seems to have met its obligations to consult."[400]

137. A formal opinion with respect to both questions took longer for the solicitor's office to formulate. After inquiries by the BLM in October of 1998, as to the expected

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Imperial Gold Corp. (Feb. 3, 1999) [FA 7 tab 24]; Letter from Robert Waiwood, Mineral Examiner, BLM, to Steve Baumann, General Manager, Glamis-Imperial Gold Corp. (Feb. 4, 1999) [FA 7 tab 25].

[397] *See* BLM, MINERAL VALIDITY EXAMINATION OF THE GLAMIS IMPERIAL PROJECT 33 (Sept. 27, 2002) ("2002 BLM MINERAL REPORT") [Ex. 255]; Letter from Gary C. Boyle, General Manager, Glamis Imperial Corp., to Robert Waiwood, BLM (June 25, 1999) [FA 7 tab 27].

[398] Letter from Earl E. Davaney, Inspector General, U.S. Department of Interior, to Senator Barbara Boxer, att. 1-2 (Mar. 11, 2003) ("Inspector General Letter") ("In late 1999, through internal DOI discussions and meetings, BLM learned that the [solicitor] intended to issue a legal opinion that would effectively put a stop to the Imperial Project. Therefore, in November 1999, BLM directed that work on the VE be stopped, even though by this point the VE was substantially complete.") [FA 7 tab 45].

[399] 485 U.S. 439 (1988). The court held that the First Amendment must apply to all citizens and one group could not have veto power over public programs that do not prohibit the free exercise of religion. It found that, "[w]hatever rights the Indians may have to the use of the area … those rights do not divest the Government of its right to use what is, after all, its land …." *Id.* at 451-54 [Ex. 85].

[400] Email from John R. Payne to Joel Yudson & Janie Sheppard (May 18, 1998) [Ex. 115]. *See also* Email from John R. Payne to David Nawi, at 2 (June 1, 1998) [Ex. 121]; Email from David Nawi (June 2, 1998) [Ex. 122].

completion of the memorandum,[401] Solicitor Leshy wrote directly to BLM State Director Hastey stating his understanding that BLM was getting a "hard time" about the delay, but that the legal issues were "complicated and precedent-setting."[402] At this time, he did give some information concerning the content of the future opinion, explaining that the "'first amendment' issue [was] not really the important one; instead, the fundamental question [was] how should the legal standard of preventing 'unnecessary or undue degradation' be applied to this mining proposal …."[403] As regarding when the BLM could expect the formal opinion, he wrote, "I expect to review a draft memo on these issues when I get back in the country in a couple of weeks. Rest assured this is a high priority with me, and our folks are working hard on it. In the meantime your folks should delay completion of the validity examination and the final EIS."[404]

138. Solicitor Leshy visited the Imperial Project and met with BLM officials on February 22 and 23, 1999.[405] The visit's intent, as described by BLM official Glen Miller, was to examine the religious and cultural values of the site itself, the potential visual impacts to the Running Man Trail, the possible marginal nature of the mining operation, and the possibilities for and expenses of mitigation.[406] During this visit, BLM held a meeting with the visiting members of the solicitor's office, at which several issues were discussed, ranging from the adequacy of the draft EIS and the "Advisory Council role in defining alternatives" to attempting to attain agreement on the method for determining the price of gold to be used.[407] The main objective of the meeting, however, as expressed in its title, was the need to establish a "threshold for undue impairment."[408]

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[401] *See* Email from Brenda Aird to Karen Hawbecker (Oct. 16, 1998) [Ex. 150]; Email from Karen Hawbecker to John Leshy (Oct. 30, 1998) (stating, "I sat in on a BLM conference call today regarding the Glamis project. They are still very interested in a memo from us dealing with the '1st amendment' issue. In fact, they seemed angry that we have not produced such a memo yet.") [Ex. 151].

[402] Oct. 30, 1998 Leshy Memo, at 1 [Ex. 152].

[403] *Id*.

[404] *Id*.

[405] *See* Email from John Leshy, Solicitor, DOI, to Ed Hastey, California BLM Director (Jan. 28, 1999) [Ex. 178]; Draft Itinerary SOL John Leshy's Trip to Glamis/El Centro Feb. 22-23, 1999 [Ex. 182].

[406] *See* Handwritten Notes of Glen Miller, BLM (Feb. 10, 1999) [Ex. 180]. A final goal, as included by Mr. Miller in his notes, was to determine: "How far can we take this project legally to deny it?"

[407] BLM Follow-Up Notes from Imperial Project Meeting of February 22 and 23, 1999 at 1 (Feb. 25, 1999) [Ex. 183].

[408] *See* BLM Notes from Imperial Project Meeting of February 22 and 23, at 1 (Feb. 25, 1999) [Ex. 183]. The notes state: "Meeting Objective: Prepare draft ROD identifying cultural values and view shed

139. In addition, during the legal review necessary for the drafting of the M-Opinion, public input was received and reviewed by the solicitor's office. Prior to the M-Opinion's completion, for instance, Claimant submitted written comments to be addressed by the M-Opinion and met with Solicitor Leshy concerning the M-Opinion.[409] Consequently, the M-Opinion addressed three of Claimant's arguments directly in its text.[410]

140. Solicitor Leshy issued the 1999 opinion, known as the "M-Opinion," on December 27, 1999; it was approved by the secretary of the Interior on January 3, 2000.[411] At the start, the M-Opinion established that the measures that might result from the legal authority provided by the M-Opinion could result in the Project becoming uneconomical:

> Because the ore body is of somewhat lower grade than that found at most operating mines, the ratio of metal recovered to material disturbed is lower than found in many other operations, particularly for a start-up operation .... The low grade of the ore may so affect the profit margin that the imposition of reasonable environmentally protective restrictions or mitigation measures may make the venture unprofitable.[412]

141. Next, the M-Opinion cited the ACHP's recommendation that advised on the "'religious, cultural and educational values' in the area 'of premier importance to the Quechan Tribe for sustaining their traditional religion and culture' that the proposed mine would unduly degrade" and for the loss of which no available mitigation measures would be adequate to compensate.[413] Because of these findings, the ACHP had recommended "that Interior take whatever legal means available to deny approval for the project."[414] Claimant's representative responded to the ACHP's recommendation with a 14-page

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which may result in a strong argument for undue impairment."

[409] *See* Letter from Charles A. Jeannes, Senior Vice President and General Counsel, Glamis Gold, Inc., and Gary C. Boyle, General Manager, Glamis Imperial Corp., to Bruce Babbitt, Secretary of the Interior (Nov. 10, 1999) [FA 7 tab 31].

[410] *See* Memorandum from John Leshy, Solicitor, DOI, to Acting Director, BLM, at 17 (Dec. 27, 1999) ("M-Opinion") [Ex. 205, FA 7 tab 31].

[411] *See id.* at 1, 19.

[412] *Id.* at 1 (internal citations omitted). The M-Opinion explained that the mine would retrieve, on average, one ounce of gold for every 422 tons of earth core and waste material disturbed, a ratio by weight of 1 to 13.5 million. The M-Opinion also explained that a lower grade ore may be more cost-effective for an established mine, "with the necessary infrastructure and other capital investment already in place," than for an initial investment.

[413] *Id.* at 2.

[414] *Id.* at 3.

letter dated November 10, 1999.[415] The M-Opinion explained that it was responding to the ACHP's recommendations and Claimant's letter and, in particular, answering two questions:

> What limits or obligations does the First Amendment to the U.S. Constitution place on the BLM in this context?
>
> To what extent does the Federal Land Policy and Management Act authorize or oblige the BLM to protect the cultural and historic resources of the ATCC in connection with the Glamis proposed plan of operations?[416]

142. With respect to the first issue regarding possible First Amendment protection of Native American religious rights, the M-Opinion was consistent with the early information provided by John R. Payne, an attorney at the solicitor's office.[417] Stating that the *Lyng* decision controlled application of the First Amendment to the Glamis proposal, the M-Opinion explained that "[t]he Constitution does not compel rejection of the proposed mining plan on the basis of its potential impact on tribal religious practices. But, like the Forest Service in *Lyng*, the BLM here could make efforts to accommodate tribal interests through exercise of its regulatory authority."[418] The M-Opinion elaborated briefly on the accommodations that the BLM could make, especially in light of the passage of the Executive Order on Sacred Sites, E.O. 13007, after the holding in *Lyng*. The M-Opinion advised that the Executive Order, when combined with the efforts to accommodate required by *Lyng*, would direct the BLM "to a policy choice in favor of preserving the physical integrity of the sites unless such a choice [was] impracticable, forbidden by law, or clearly inconsistent with essential agency functions."[419]

143. With respect to the second question regarding the obligations under FLPMA to protect cultural and historic resources, the M-Opinion first reviewed the various statutory protections. To begin, it reviewed the "unnecessary or undue degradation" standard of Section 302(b), explaining that the BLM's current regulations codified a "prudent operator" standard under which a disturbance was not generally allowed when it was

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[415] *Id.*
[416] *Id.*
[417] *See infra* ¶ 136.
[418] M-Opinion, at 6.
[419] *Id.*

greater than the disturbance that would normally result from a prudent operator.[420] Citing the preamble to the BLM's regulations, the M-Opinion explained that, in addition to ensuring compliance with the prudent operator standard, BLM also had to ensure that "reasonable and practical" mitigation was chosen that would best protect "other resources."[421] Under this portion of the regulations, however, "while BLM [could] mitigate harm to 'other resources,' it [could] not simply prohibit mining altogether in order to protect them."[422] The M-Opinion therefore summarized: "The 'unnecessary or undue degradation' standard does not by itself give BLM authority to prohibit mining altogether on all public lands, because Congress clearly contemplated that some mining could take place on some public lands."[423] The question, therefore, with respect to this Project, was "not whether the proposed gold mine cause[d] any degradation or harmful impacts, but rather, how much and of what character in this specific location."[424]

144. Next, the M-Opinion explored the "undue impairment" standard that is included within discussions of the CDCA: BLM shall "protect the scenic, scientific, and environmental values of the public lands of the [CDCA] against undue impairment …."[425] The M-Opinion stated that this authority was "separate and apart" from that which allows BLM to prevent unnecessary or undue degradation and was, in fact, stronger than the prudent operator standard.[426] Therefore, according to the M-Opinion, the BLM was "not confined to restrictions that may be imposed on a 'prudent operator in usual, customary and proficient operations of similar character' in carrying out its duty to prevent 'undue impairment.'"[427] After discussing the extra protection afforded to Class L (Limited Use) lands within the CDCA,[428] the M-Opinion summarized its findings:

> 'Undue impairment,' as explained above, must mean something more than the prudent operator standard currently in the BLM definition of 'unnecessary or undue

[420] *Id.* at 8 (citations omitted).
[421] *Id.* at 9, citing 45 Fed. Reg. 78906 (Nov. 26, 1980).
[422] *Id.*
[423] *Id.*, citing 43 U.S.C.A. § 1701(12).
[424] *Id.* at 10.
[425] *Id.*, citing 43 U.S.C.A. § 1781(f). The M-Opinion stated that the three values named in this subsection "are fairly read to include 'archeological,' 'cultural' or 'educational' resources of the type threatened by the Glamis proposal." *Id.*
[426] *Id.* at 12-13 [Ex. 205].
[427] *Id.* at 13, citing 43 C.F.R. § 3809.0-5(k).
[428] *See* M-Opinion, at 14-17.

> degradation,' but it cannot mean so much as vesting the Secretary with authority to prohibit all hardrock mining in the CDCA. Plainly the 'undue impairment' standard would permit BLM to impose reasonable mitigation measures on a proposed plan of operations that threatens 'undue' harm to cultural, historic or other important resources in the CDCA. Moreover, the reasonableness of those mitigation measures ought not to be judged by whether they make the particular operation uneconomic at current market prices for the mineral commodity proposed to be mined. Beyond that, the 'undue impairment' standard might also permit denial of a plan of operations if the impairment of other resources is particularly 'undue,' and no reasonable measures are available to mitigate that harm. As stated above, the CDCA Plan clearly appears to contemplate such a result.[429]

145. The M-Opinion then explained that "[t]he ultimate responsibility for making the decision on 'undue impairment' is the BLM's."[430] It closed with the conclusion that, "[i]n the end, what is determined to be 'undue' is founded on the nature of the particular resources at stake and the individual project proposal. If the BLM agrees with the Advisory Council, it has, in our view, the authority to deny approval of the plan of operations."[431]

146. Claimant responded to the issuance of the M-Opinion by filing suit in federal court in Nevada challenging the M-Opinion on April 13, 2000.[432] Arguing that the M-Opinion "arbitrarily and capriciously create[d] a new decisionmaking structure for evaluating the Glamis plan of operations that exceeds the statutory authority and intent of the [FLPMA], … its implementing administrative regulations and directives, and the California Desert Protection Act of 1994, … and is contrary to prior, consistent Interior Department interpretations of law," Claimant requested that the court declare invalid and enjoin implementation of the M-Opinion.[433] Pending resolution of this suit, Claimant requested that BLM suspend the preparation of the Final Environmental Impact Statement, the processing of its Plan of Operations and the issuance of its Record of Decision to save money and resources.[434] The BLM, however, decided to complete the FEIS and continue the review of the Plan of Operations throughout the legal challenge.[435]

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[429] *Id.* at 17-18.
[430] *Id.* at 18.
[431] *Id.* 18-19.
[432] *See* Glamis Imperial Corp. v. Babbitt, CV-N-00-0196W (D. Nev.), Complaint for Declaratory and Injunctive Relief (Apr. 13, 2000) [LA 3 tab 54].
[433] *Id.* at 2 (citations omitted).
[434] *See* Letter from C. Kevin McArthur, President, Glamis Imperial Corp., to Al Wright, Director,

147. On October 31, 2000, the federal court in Nevada dismissed the suit finding that it lacked subject matter jurisdiction as Plaintiff did not appeal a "final agency action," in that: (1) the action did not "mark the consummation of the agency's decision making process," and (2) was not "one by which rights or obligations [had] been determined, or from which legal consequences [would] flow."[436] The court added that "[a]lthough the Glamis Opinion Letter [might] harm the Imperial Project's chances of ultimate approval, it [did] not mandate the BLM's final decision."[437] Therefore, the court found that "[b]y bringing this suit, Glamis did not seek judicial review of an agency's decision, but rather, impermissible judicial interference in an ongoing administrative process."[438]

14. FINAL ENVIRONMENTAL IMPACT STUDY

148. The Final Environmental Impact Statement/Report was issued in September 2000.[439] It was arguably delayed by BLM's need for various information that was to be provided by the solicitor's office, and thus for the issuance of the M-Opinion. On October 30, 1998, Solicitor Leshy requested State Director Hastey to delay completion of the validity examination and final EIS.[440] This was followed by a November 12, 1998 BLM "Glamis Schedule" which stated that the schedule for completing the EIS, ROD and VER "may be slipping."[441] The revised Imperial Project EIS schedule, as of December 4, 1998, also reflected the delays caused by four steps in the EIS process awaiting the solicitor's M-Opinion.[442] Apparently in light of the uncertainty as to completion date of that M-Opinion, the December 1998 schedule was marked, "[t]here is

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BLM California State Office (Apr. 14, 2000) [FA 7 tab 32].

[435] *See* Letter from Al Wright, Director, BLM California State Office, to C. Kevin McArthur, President, Glamis Imperial Corp. (May 19, 2000) [FA 7 tab 33].

[436] Glamis v. Babbitt, Order Granting Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, at 4 (Oct. 31, 2000) [LA 3 tab 59]. The venue of the case had been moved to California from Nevada. *See id.* at 2.

[437] *Id*. at 4-5 (Oct. 31, 2000).

[438] *Id*. at 7 (Oct. 31, 2000).

[439] *See* 2000 FEIS [Ex. 210; FA 8 tab 61].

[440] Memorandum from John Leshy to Ed Hastey re: Glamis Imperial Mining Project (Oct. 30, 1998) [Ex. 152]. Claimant argues that Solicitor Leshy was requesting delay until the completion of the M-Opinion. Respondent argues that such delay was requested only until Mr. Leshy's return to the country "in a couple of weeks." The BLM apparently thought the delay was requested until Leshy's office had "developed policy (no date given)." *See* Email from James R. Hamilton to Richard B. Grabowski and L. Mohoric (Nov. 12, 1998) [Ex. 155].

[441] Email from James R. Hamilton to R Grabowski and L. Mohoric (Nov. 12, 1998).

[442] *See* Imperial Project EIS Schedule (Dec. 4, 1998) [Ex. 163].

no schedule."[443] A subsequent schedule again described delays in the review of the Imperial Project; it attributed half of the delay to waiting on involvement from the solicitor's office.[444]

149. In a reversal from the prior draft environmental impact studies, the 2000 FEIS chose as its preferred alternative that of "No Action."[445] This determination meant that:

> [T]he Project area would remain as is, and present uses in the area, including opportunities for dispersed recreational activities, would continue. The Project area would remain available for future commercial gold processing proposals or for other proposals as permitted by BLM policy or land use designations.[446]

BLM came to this conclusion "[b]ased upon findings in [the] EIS/EIR, agency and public comments, the Solicitor's Opinion on the regulation of Hardrock Mining …, and extensive consultation with the Advisory Council on Historic Preservation."[447] With respect to cultural resources, the 2000 FEIS found that "[t]he Indian Pass-Running Man ATCC, including the Trail of Dreams; seven (7) multi-component archaeological sites; and twelve (12) prehistoric trail sites in the Project mine and process area, each of which are evaluated as eligible for the NRHP … would not be avoided under the Proposed Action."[448]

150. The 2000 FEIS also cited Solicitor Leshy's M-Opinion in its discussion of the requirements demanded by the "unnecessary or undue degradation" and "undue impairment" standards. It explained:

> This opinion found that the unnecessary or undue degradation standard … allowed BLM to require reasonable mitigation measures to protect resources, but did not by itself give BLM the authority to prohibit mining altogether on public lands. Because the Proposed Action would be located within the … (CDCA), the opinion went on to analyze the 'undue impairment' standard …. The opinion found that the 'undue impairment' standard would permit BLM to impose reasonable mitigation measures to prevent undue impairment, and that the standard might also permit denial of a plan

[443] *See id*.

[444] *See* BLM Briefing Document for Acting State Director re: Glamis Imperial Mine (June 18, 1999) [Ex. 194]; Draft Imperial Project Status Memorandum (June 30, 1999) [Ex. 195]. Among the six unresolved issues noted, three required the solicitor's involvement, including receiving from the solicitor: (1) an opinion on gold pricing and VER finalization, (2) guidance on "undue impairment," and (3) review of the final EIS/EIR.

[445] 2000 FEIS, at 2-70 [Ex. 210; FA 8 tab 61].

[446] *Id*. at S-17.

[447] *Id*. at 2-70.

[448] *Id*. at 4-98.

> of operations if the impairment of other resources is particularly 'undue,' and no reasonable measures are available to mitigate that harm.[449]

151. The CEQA lead agency, Imperial County, was required to pick an "Environmentally Superior Alternative" from the other project alternatives if a No Project (No Action) alternative was chosen as the Environmentally Superior Alternative.[450] In other words, the lead agency is requested, when it decides that the alternative that "would result in the fewest significant environmental action" is no action, to also determine which of the action alternatives that allows for development is the next best option for the environment.[451] Imperial County chose the "Proposed Action, as amended by the measures identified to reduce the adverse effects of the Project provided in [the] Final EIS/EIR."[452]

15. COMPLETION OF WITHDRAWAL FROM MINERAL ENTRY

152. On October 27, 2000, the Department of the Interior issued a final withdrawal of 9,360 acres, including the Imperial Project area and surrounding public lands, from further mineral entry for 20 years.[453] The withdrawal was enacted to protect historic properties, Native American values, and the visual quality of the ATCC.[454] The withdrawal also was designed to protect portions of the Indian Pass ACEC, and of the Indian Pass and Picacho Peak wilderness areas.[455] The withdrawal included approximately 6,000 acres of mining claims held by Claimant.[456] The withdrawal was subject to valid existing rights, but it still resulted in the prohibition of Claimant, or others, locating new mining claims or mill sites in the area to respond to changing conditions in project development and mining.[457] The withdrawal also triggered the need

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[449] *Id.* at 1-15.
[450] *Id*. at 2-70.
[451] *Id*. at 2-70 [Ex. 210; FA 8 tab 61].
[452] *Id*. at 2-70.
[453] 2001 Record of Decision for the Imperial Project Gold Mine Proposal (Jan. 17, 2001) ("2001 ROD"), at 13 [Ex. 212].
[454] *Id*. at 13.
[455] *Id*.
[456] *See* Glamis Imperial Corp. v. United States Dep't of Interior, No. 1-01CV00530 (D.D.C.), Complaint For Declaratory and Injunctive Relief, at 16 (Mar. 12, 2001) [LA 3 tab 60].
[457] *Id.*; Solicitor's Opinion, M-37007, at 6 (Oct. 23, 2001) ("2001 Myers Opinion") [Ex. 216].

for the preparation of validity determinations to analyze if mining claims were "valid existing rights" at the time of the withdrawal.[458]

16. ISSUANCE AND RESCISSION OF THE RECORD OF DECISION FOR THE IMPERIAL PROJECT

153. On January 17, 2001, Secretary of the Interior Bruce Babbitt signed a Record of Decision ("ROD") that denied the Imperial Project's Plan of Operations.[459] In this decision, Secretary Babbitt wrote:

> After extensive analysis, public review and comment, and application of pertinent Federal laws and policies, it is the decision of the Department of the Interior, based upon the recommendation of the BLM, not to approve the plan of operations for the Imperial Project. This represents the No Action alternative as specified in the FEIS/EIR published jointly by BLM and Imperial County on November 17, 2000.[460]

154. Secretary Babbitt explained that the ROD was based on several "key factors determined to be unique to this particular proposal." These included that: (1) "the proposed project [was] located in an area determined to have nationally significant Native American values and historic properties and would cause unavoidable adverse impacts to these resources;" (2) "the impacts of the proposed project [could not] be mitigated to the point of meeting the statutory requirement in FLPMA that BLM must prevent 'undue impairment' of the public lands in the CDCA;" and (3) "the proposed project fail[ed] to meet the overall statutory requirement in FLPMA that BLM must prevent 'unnecessary or undue degradation' of the public land resources."[461]

155. In making the factual determinations of the existence of nationally significant Native American values and the inability of mitigation measures to protect these resources, the ROD "relie[d] heavily upon the advice of the Advisory Council on Historic Preservation."[462] In "interpreting the legal authorities pertaining to this particular

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[458] *See* REBECCA W. WATSON, ASSISTANT SECRETARY FOR LAND AND MINERALS MANAGEMENT, BRIEFING FOR THE SECRETARY RE: GLAMIS IMPERIAL GOLD MINE, CALIFORNIA 2 (DEC. 6, 2002) [Ex. 264].

[459] 2001 ROD [Ex. 212]. The ROD had originally been expected much earlier than this date. The original EIS/EIR contractor estimated that the ROD would be issued by July 11, 1998. *See* Imperial Project EIS/EIR Schedule, at 5 (Jan. 14, 1998) [Ex. 102]. A subsequent internal schedule prepared by BLM in July of 1998, estimated that the final EIS/EIR would be complete by September 18, 1998 and the ROD would be issued by October 18, 1998. *See* Imperial Project EIS Schedule (July 27, 1998) [Ex. 135].

[460] 2001 ROD, at 9.

[461] *Id*.

[462] *Id*. at 4.

project," the ROD relied upon the solicitor's December 27, 1999 M-Opinion, and in particular, its description of the nature of "BLM's discretionary authority under the statutory standards of 'undue impairment' and 'unnecessary or undue degradation.'"[463]

156. Claimant responded to this decision by writing off its $14.3 million investment in the Imperial Project and eliminating its reserves.[464] Claimant told its shareholders, however, that it intended to appeal the decision,[465] which it did in federal District Court in the District of Columbia on March 12, 2001, challenging both the ROD and the October 27, 2000 withdrawal.[466] Following the November 23, 2001 rescission of the ROD (discussed below), however, Claimant withdrew this suit.[467]

157. On October 23, 2001, the new Interior Solicitor Myers, with the concurrence of the new Secretary of the Interior Norton, rescinded Leshy's 1999 M-Opinion[468] and recommended the "rescission and reconsideration of any decisions made by the Department to deny a plan of operations based on the [undue impairment] phrase … includ[ing] Secretary Babbitt's decision denying Glamis's plan of operations."[469] Solicitor Myers explained that "[t]he Department's adoption of the 'substantial irreparable harm' criterion [had] generated considerable controversy and litigation because the criterion authorizes the Department to entirely prevent mining activity, even

[463] *Id*.

[464] Claimant's Memorial, ¶ 340; *See* GLAMIS GOLD LTD. ANNUAL REPORT FOR 2000, at 29 (Mar. 6, 2001) [Ex. 311] (explaining that, "[d]ue to the U.S. Department of Interior decision to formally deny the operating permit for the Imperial Project on January 16, 2001, the $14.3 million of deferred costs on the project were written down at December 31, 2000.). *See also supra* ¶ 438. With respect to the recharacterization of reserves to resources, both parties agree that the U.S. Security and Exchange Commission and Canadian accounting rules require that mineral operators re-examine their reserves and resources annually and, if there is no "reasonable expectation of having the legal right to mine and remove those minerals," they must be recharacterized from "proven and probable reserves" to the "lesser category of mineral resources."

[465] *See* GLAMIS GOLD LTD. ANNUAL REPORT FOR 2000, at 29 (Mar. 6, 2001); Statement of C. Kevin McArthur, ¶ 20.

[466] *See* Glamis Imperial Corp. v. United States Dep't of Interior, No. 1-01CV00530 (D.D.C.), Complaint for Declaratory and Injunctive Relief (Mar. 12, 2001) [LA 3 tab 60].

[467] Respondent's Counter-Memorial, at 86.

[468] 2001 Myers Opinion, at 20 [Ex. 216].

[469] *Id*. at 19.

when the mine operator has otherwise complied with all other relevant statutory and regulatory requirements."[470]

158. Because of this controversy, including the litigation engendered from the 2000 regulations and the denial of Claimant's POO, Solicitor Myers reviewed the legal bases for both actions and rejected some of the conclusions of the 1999 M-Opinion.[471] He concluded that "relevant legal authorities" required the removal of the "substantial irreparable harm" criterion from the definition of "unnecessary or undue degradation," and that the Interior should not apply the "undue impairment" provision until it completed rulemaking to establish standards defining the term.[472] Because regulations had not yet been promulgated defining the term, he recommended the rescission and reconsideration of any decisions made to deny plans of operations based on application of the "undue impairment" provision, including the denial of Claimant's proposal.[473]

159. On November 23, 2001, the ROD was formally rescinded, based on the legal analysis of the 2001 Myers Opinion, so that the Imperial Project gold mine proposal could be reconsidered.[474]

17. RESUMPTION OF VALIDITY DETERMINATION

160. On February 13, 2002, BLM resumed work on the validity examination of Claimant's Imperial Project mining claims,[475] after it was placed in suspension awaiting the M-Opinion and pending completion of review of the Plan of Operations.[476] BLM State Director Mike Pool stated that he decided to conduct the validity examination because the area under consideration had been withdrawn from mineral entry, subject to

[470] *Id*. at 2.
[471] *Id*. at 1.
[472] *Id*. at 20.
[473] *Id*.
[474] *See* Secretary Gale A. Norton, Rescission of Record of Decision for the Imperial Project Gold Mine Proposal (Nov. 23, 2001) [Ex. 219].
[475] BLM News Release, *BLM Initiates Validity Examination on Glamis Imperial Mining Claims* (Feb. 13, 2002) [Ex. 223].
[476] Short Note Transmittal from Robert Waiwood, BLM, to Daniel Purvance, Chemgold (Oct. 17, 2001) [Ex. 215]. *See also* Inspector General Letter, at 2 ("In fact, BLM simply resumed work on the VE that had been initiated in 1998") [Ex. 277; FA 7 tab 45].

valid existing rights.[477] He also explained that the validity determination was the first step in the reconsideration process of the Project's Plan of Operations.[478]

161. During the mineral examination, Claimant's representatives met with various representatives of the Department of the Interior to discuss the validity examination and other issues confronting the Imperial Project. In nine face-to-face meetings with DOI officials, as well as other correspondence and telephone conversations, between January 2001 and September 2002, Claimant's representatives expressed their frustration with the many delays in the mine approval process, and in particular the delays in the conduct of the VE, and encouraged the officials to expedite the VE process.[479] Representatives of the Quechan Indian Tribe also met twice with DOI officials during this period.[480]

162. In its September 27, 2002 Mineral Report, BLM officially determined that Claimant's mining claims were valid:

> Glamis has found minerals within the boundaries of the 187 lode mining claims and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of labor and means, with a reasonable prospect of success, in developing a valuable mine. The requirements of the mining laws of the United States have been satisfied for these mining claims on the critical dates of November 1998 [the date of segregation and withdrawal] and April 2002 [the date of the completion of the examination].[481]

Using average gold prices ranging between $325 (1998) and $296 (2002), the report determined that the Imperial Project claims "contain[ed] a gold deposit that can be mined and processed … at a profit."[482] The report also concluded, after analyzing the backfilling of the East Pit, that such backfilling was not economically feasible.[483]

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[477] BLM News Release, *BLM Initiates Validity Examination on Glamis Imperial Mining Claims* (Feb. 13, 2002) [Ex. 223].

[478] *Id*.

[479] *See* Inspector General Letter, att., pp. 1-13 [Ex. 277; FA 7 tab 45]. In addition, Claimant also discussed the possibility of a buyout of its mining claims.

[480] *Id*. at 4. The inspector general noted that the Tribe made seven attempts to meet with Secretary Norton, but made no effort to meet with Watson, Morrison or Myers.

[481] BLM, MINERAL VALIDITY EXAMINATION OF THE GLAMIS IMPERIAL PROJECT 3 (Sept. 27, 2002) ("MINERAL REPORT") [Ex. 255].

[482] *Id*. at 2, 47-8.

[483] *Id*. at 3.

18. RE-EXAMINATION OF IMPERIAL PROJECT PLAN OF OPERATIONS

163. Prior to resumption of the validity examination, Claimant requested BLM to review the Plan of Operations for the Imperial Project and issue a new Record of Decision.[484] An internal Interior briefing document of October 24, 2002, shows that, prior to issuing a new ROD, Interior thought it necessary to review the 2000 FEIS to determine if it was still an adequate basis for approval or denial decision with respect to the proposed Plan of Operations.[485] This document explains that the process was ongoing as of that date, and would take an estimated three months to complete.[486]

164. Soon after the issuance of the Mineral Report, however, Nevada's U.S. senators and one congressman requested Secretary Norton to conduct an appraisal of Claimant's mining claims and attempt to reach a negotiated agreement for the government's acquisition of Claimant's property interests.[487] While this settlement process was

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[484] *See* Letter from C. Kevin McArthur, Glamis Gold, to Mike Pool, BLM California State Director (Dec. 13, 2001) [Ex. 220].

[485] REBECCA W. WATSON, ASSISTANT SECRETARY FOR LAND AND MINERALS MANAGEMENT, BRIEFING FOR THE SECRETARY RE: GLAMIS IMPERIAL GOLD MINE, CALIFORNIA 2 (Oct. 24, 2002) [Ex. 260].

[486] *Id.* This schedule proved untenable, however, as Interior was still reviewing the 2000 FEIS as of April 2003, and had no target date set for its completion. *See* BRIEFING FROM MIKE POOL FOR THE DIRECTOR RE: GLAMIS IMPERIAL GOLD MINE, CA (Apr. 8, 2003) [Ex. 286].

[487] *See* Letter from C. Kevin McArthur, President and CEO, Glamis Gold Ltd., to Mike Pool, BLM State Director, re: The Imperial Project Plan of Operations (Dec. 9, 2002) [Ex. 265]. Claimant originally raised the issue of a possible buy-out of its interests with Solicitor Leshy when it learned that the 2000 FEIS would choose the "No Action" alternative. *See* Inspector General Letter, at 3-4 [Ex. 277]. Claimant renewed the issue in December 2002, when it learned that California was considering complete backfilling regulations. *See* Letter from C. Kevin McArthur to Mike Pool (Dec. 9, 2002) [Ex. 265]. On November 22, 2002, U.S. Senators John Ensign and Harry Reid and U.S. Representative Jim Gibbons of Nevada also raised the issue of acquisition, requesting Solicitor Norton to conduct an appraisal of Claimant's property interests and discuss a "reasonable purchase price." Letter from Senator John Ensign, Senator Harry Reid & U.S. Representative Jim Gibbons to Secretary of the Interior Gale Norton, at 1 (Nov. 22, 2002) [Ex. 262]. *See also* Charles A. Jeannes, Comments Before the State Mining and Geology Board, at 2 (Dec. 12, 2002) [Ex. 268]. In addition, on March 17, 2002, the ACHP contacted BLM encouraging it to "actively pursue further investigation" of the acquisition option. Letter from John Nau III, ACHP Chairman, to Kathleen Clarke, BLM Director (Mar. 17, 2002) [Ex. 226]. Consideration of this option was made difficult by the fact that the appraisal was estimated to cost as much as $300,000, which Interior did not have in its budget, and the actual acquisition was likely to require separate congressional appropriation to provide the funds. *See* Letter from Department of the Interior Assistant Secretary Rebecca W. Watson to Representative Jim Gibbons (Jan. 8, 2003) [Ex. 272]; Letter from Charles A. Jeannes, Senior VP, Glamis Gold, to Mike Pool, BLM State Director, at 2 (Mar. 31, 2003) [Ex. 280]. Claimant was willing to continue negotiations, and pay for the appraisal, if Interior would either assume the California backfilling regulations would not apply to Claimant or appraise the project prior to these regulations, and agree not to oppose congressional appropriation for the acquisition. *See* Interior Handwritten Meeting Notes (May 12, 2003) [Ex. 290]; Interior Handwritten Meeting Teleconference Notes (May 6, 2003) [Ex. 289]. Although internal Interior documents show that discussions were still continuing with respect to the possibility of acquisition through July 29, 2003, on July 26, 2003, Claimant determined that the prospects for success were "not

pending, Claimant, on December 9, 2002, requested BLM to suspend its ongoing review of the Imperial Project Plan of Operations.[488] BLM responded on January 7, 2002, stating that it was willing to suspend processing of the POO, but only if Claimant submitted its request again, "not conditioned on preparation of an appraisal and relieving BLM of any legal liability … for the suspension."[489] Claimant responded on March 31, 2003, that it would not reconfirm its suspension request, as it had "no reasonable expectation that an alternative resolution for the Imperial Project [was] likely."[490]

165. BLM thus continued its review of the Imperial Project Plan of Operations, as well as discussing options for a buyout and whether Senate Bill 22 and the California SMGB amendments applied to Claimant (the latter two measures are discussed below).[491] Any review of the Imperial Project Plan of Operations ceased on July 21, 2003, however, when Claimant filed its Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of the NAFTA, and made no further request that DOI continue the processing of its Plan of Operations.[492]

D. CALIFORNIA MEASURES

1. CALIFORNIA LEGISLATION

a. Senate Bill 483

166. Senate Bill 22 ("SB 22"), enacted in April 2003,[493] put into effect the mandatory backfilling requirements regarding which Claimant complains. Its foundations, however, began earlier with a series of California legislation that evolved into SB 22. The first

high," and filed an advance notice of this NAFTA claim. *See* Draft – Working Document re: Determining the Next Step to Be Taken Regarding the Glamis Gold Mining Proposal (June 26, 2003) [Ex. 292]; Memorandum from Department of the Interior Assistant Secretary Rebecca W. Watson to Deputy Assistant Secretary Patty Morrison re: Glamis (July 29, 2003) [Ex. 293]; Claimant's Memorial, ¶¶ 354-55.

[488] *See* Letter from C. Kevin McArthur, President and CEO, Glamis Gold Ltd., to Mike Pool, BLM State Director, re: The Imperial Project Plan of Operations (Dec. 9, 2002) [Ex. 265].

[489] *See* Letter from Mike Pool, BLM State Director to C. Kevin McArthur, President and CEO, Glamis Gold Ltd. (Jan. 7, 2003) [Memorial, Ex. 271].

[490] Letter from Charles A. Jeannes, Senior VP, Glamis Gold, to Mike Pool, BLM State Director, re: the Imperial Project Plan of Operations (Mar. 31, 2003).

[491] *See* Draft – Working Document re: Determining the Next Step to Be Taken Regarding the Glamis Gold Mining Proposal, at 1 (June 26, 2003) [Ex. 292].

[492] *See* Letter from Timothy R. McCrum, Counsel for Glamis Gold Ltd., to Patricia Morrison, Deputy Assistant Secretary for Land and Minerals, DOI, at 1, 3 (July 21, 2003) [FA 7 tab 47].

[493] Talking Points – SB 22 Bill Signing (Apr. 7, 2003) [Ex. 285].

legislation was California Senator Byron D. Sher's introduction of Senate Bill 483 ("SB 483") on February 22, 2001.[494] This bill, which would have amended SMARA to allow the director of Conservation additional time to remediate or reclaim abandoned mined lands,[495] was amended several times in mid-2001 and again in August 2002, to add language to include the protection of Native American sacred sites.[496] The amended SB 483 prohibited lead agencies from approving any reclamation plan and financial assurances for the surface mining of gold, silver, copper or other metallic materials on, or within one mile of, any Native American sacred site in an area of special concern, unless the reclamation plan provided that "all excavation [would] be backfilled and graded to achieve the approximate original contours of the mined lands prior to mining, and the financial assurances [were] sufficient in amount to provide for the backfilling and grading."[497]

167. The "program background" provided by the Governor's Office of Planning and Research on SB 483 explained the legislation's focus on the Imperial Project:

> SB 483 contains narrowly-crafted language intended to prevent approval of a specific mining project proposed for an Imperial Valley location by Glamis Gold, Inc. The proposed project would impact an area known as Indian Pass, where a system of sacred trails is an important part of the Quechan Tribe's spiritual and cultural base. The provisions in SB 483 [as amended] are identical to the SMARA provisions in SB 1828, and are intended to affect only this particular project.[498]

b. Senate Bill 1828

168. Next, California Senate President pro Tempore John L. Burton introduced Senate Bill 1828 ("SB 1828") on February 22, 2002.[499] The bill declared that it was state policy "to protect the ability of Native Americans to freely practice their religion in a traditional and meaningful way, in natural areas, and at sacred sites associated with those religious

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[494] *See* California Senate, *Senate Bill No. 483* (introduced Feb. 22, 2001) [Ex. 213].

[495] *See id*.

[496] *See* California Senate, *Senate Bill No. 483* (amended Aug. 26, 2002) [Ex. 245].

[497] *Id*. An area of special concern is defined as an ACEC, or Class C or L lands within the CDCA. *See id.* at 3. The bill exempted from these provisions any operation that had received final approval for its reclamation plan and financial assurances from a lead agency prior to September 1, 2002. *See id.* at 2.

[498] CALIFORNIA GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, ENROLLED BILL REPORT FOR SB 483, at 5 [Ex. 253]. In addition, the only "con" listed for the bill was that the bill "target[ed] a specific project that would otherwise be allowed to go forward under current law." *Id.* at 6.

[499] Senator Burton, *Senate Bill No. 1828* (introduced Feb. 22, 2002) [Ex. 224].

practices."[500] In its initial form, SB 1828 merely stated that it was the "intent of the Legislature that the California State Government support Native American tribal religious rights, and take action to ensure that Native Americans have the opportunity to practice their religion freely … and examine and study the use of Native American sacred sites, and related lands and facilities within the state to determine the best ways of ensuring the continued protection and preservation of those sites."[501]

169. Possibly in promotion of the latter half of this objective, State Senator Burton commissioned a study by the California Research Bureau ("CRB") to identify "a few examples of disputes or conflicts related to sacred places in California."[502] The CRB reported on four disputes that had been previously discussed in public forums or which tribes had given their permission to disclose publicly,[503] one of which was the Imperial Project, the only mining project identified.[504]

170. One week after the CRB memorandum, on April 1, 2002, State Senator Burton proposed amendments to SB 1828 to prohibit the issuance of a permit by a state agency if: (1) an affected Native American tribe declared that a project would adversely impact a sacred site, or (2) the site was certified as a sacred site, unless the tribe accepted proposed mitigation measures.[505]

171. The legislative history to SB 1828 explains that the impetus for the bill was "a particular situation in which a proposed capital project in Imperial County would cause adverse impacts to a Native American sacred site.… The proposed Glamis gold mining project would be located in the middle of the Quechan's most sacred trail systems,

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[500] *Id.*

[501] *Id.*

[502] Memorandum from Kimberly Johnston-Dodds, Policy Analyst, to State Senator John L. Burton (Mar. 22, 2002) ("CRB Memo") [Ex. 228].

[503] *Id.* at 1. The CRB explained that it had found "a number of examples," but many of them were "of a confidential nature to the tribal communities involved."

[504] *Id.* The CRB explained that it had described the Imperial Project and the Quechan in greater detail than the other three, but that additional information would be provided on the other three examples as its research progressed.

[505] State Senator Burton, Senate Bill No. 1828 (amended Apr. 1, 2002) [Ex. 230]. *See also* Senate Commission on Environmental Quality, *Summary of SB 1828* (Apr. 22, 2002 Hearing) [Ex. 231] (Participants at the hearing discussed the benefits and consequences of and possible changes to the amendments. Both Claimant and the California Mining Association were present; representatives of the Quechan were not, though two other tribes were).

including the Trail of Dreams."[506] The history also states that "there are potentially thousands of sites in California that are sacred to one or more of the many federally-recognized tribes … in California."[507]

c. SMARA Native American Sacred Sites Bill

172. On August 26, 2002, the California legislature introduced the "SMARA Native American Sacred Sites Act," which amended both Senate bills 483 and 1828 to require the complete backfilling and re-contouring of all surface hardrock mining operations.[508] Specifically, both legislation would now:

> [P]rohibit a lead agency from approving a reclamation plan and financial assurance for a surface mining operation for gold, silver, copper, or other metallic minerals that [was] located on, or within one mile of any Native American sacred site, as defined, and in an area of special concern, as defined, unless the reclamation plan require[d] that all excavation be backfilled and graded to achieve the approximate original contours of the mined lands prior to mining, and the financial assurance [was] sufficient in amount to provide for that backfilling and grading.[509]

173. Senate Bill 483 was a "trailer bill" to SB 1828, meaning that "none of the provisions of SB 483 would become operative unless SB 1828 … [was] also signed into law."[510] On September 30, 2002, Governor Davis vetoed SB 1828, in part because it made key changes to the CEQA process that were highly controversial, including giving Native Americans an unparalleled influence over the CEQA process.[511]

174. On the same day however, the governor did sign SB 483, though this was largely symbolic as the bill could not become operative without the signing of SB 1828.[512] In his

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[506] California Assembly Commission on Appropriations, *Summary of SB 1828*, at 3 (Aug. 14, 2002 Hearing, Natural Resources Policy Commission) [Ex. 241].

[507] *Id.*

[508] Memorandum from Robert Jeohnck, Department of Conservation, Staff Counsel, to Affected Parties re: Draft of SMARA Native American Sacred Sites Bill (Aug. 20, 2002) [Ex. 242].

[509] State Senators Burton and Chesbro, *Senate Bill No. 1828*, at 2 (amended Aug. 26, 2002) [Ex. 244]; State Senator Sher, Senate Bill No. 483, at 1-2 (amended Aug. 26, 2002) [Ex. 245]. A "Native American sacred site" is defined as "a specific area that is identified by a federally recognized Indian Tribe … as sacred by virtue of its established historical or cultural significance, or ceremonial use …." *Id.* at 3. An "area of special concern" is defined as "any area in the California desert that is designated as Class C or Class L lands" or as an ACEC under the CDCA Plan of 1980 (as amended). *Id.*

[510] *See* Letter from State Senator Byron D. Sher to Governor Gray Davis re: SB 483 (Sept. 5, 2002) [Ex. 247].

[511] Governor Gray Davis, *Veto Message for SB 1828* (Sept. 30, 2002) [Ex. 256].

[512] Governor Gray Davis, *Signature Message for SB 483* (Sept. 30, 2002) ("SB 483 Signature Message") [Ex. 257]. As the bill would not become operative with his signature, Governor Davis directed

Signature Message, Governor Davis explained his support for SB 483, in that it would "protect[] Native American sacred sites from the adverse environmental effects of proposed mining operations."[513] He also highlighted 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. [He] strongly oppose[d] the Glamis gold mine because it would irreparably damage sites sacred to the Quechan Indian Tribe."[514] With his signature, he further explained that he also was directing the secretary of Resources "to pursue all possible legal and administrative remedies that will assist in stopping the development of the Glamis gold mine."[515]

d. Senate Bill 22

175. The California legislature enacted Senate Bill 22 on April 7, 2003, decoupling Senate bills 1828 and 483, thereby enabling the previously passed language of SB 483 to become law,[516] providing that a lead agency could not approve a reclamation plan for a hardrock surface mining operation if it was "located on, or within one mile of, any Native American sacred site and [was] located in an area of special concern," unless: (1) the reclamation plan provided for all excavations to be backfilled and graded to the approximate original contours of the land and excess materials graded over the project site to achieve the approximate original contours, and (2) financial assurances were sufficient to provide for this backfilling and grading.[517] These provisions do not apply to any mining operation for which the lead agency had issued a final approval of a reclamation plan and financial assurances prior to September 1, 2002.[518]

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the Resources Agency "to seek urgency clean-up legislation when the Legislature convene[d] in December …."

[513] *Id*.

[514] *Id.*

[515] *Id.*

[516] *See* CAL. PUB. RES. CODE § 2773.3 (2003) [LA 4 tab 145]. The bill was originally introduced by State Senators Sher and Burton on December 2, 2002. *See* California Senators Sher and Burton, *Senate Bill No. 22* (introduced Dec. 2, 2002) ("SB 22") [Ex. 263].

[517] SB 22, CAL. PUB. RES. CODE § 2773.3 (2003). SB 22 also made operative certain unrelated provisions of SB 483 extending the statutory authority of the Department of Conservation to reclaim and remediate abandoned mines. *See* California State Natural Resources Wildlife Commission, *Summary of SB 22*, at 5 (Jan. 14, 2002 [sic] Committee Hearing) [Ex. 273].

[518] CAL. PUB. RES. CODE § 2773.3 (2003).

176. The bill also included an urgency measure, so that it would be enacted immediately.[519] The background provided by the bill's authors explained the rationale behind this clause:

> SB 483 needs to be made operative immediately because of provisions that establish new reclamation requirements for strip mining operations for gold, silver and other precious metals that affect Native American sacred sites in portions of the Southern California desert. These changes to statute are urgently needed to stop the Glamis Imperial mining project in Imperial county proposed by Glamis Gold, Ltd, a Canadian-based company. The project is a massive, open-pit, cyanide heap-leach gold mine on 1,500 acres of public land that would destroy sacred sites of critical religious and cultural importance to the Quechan Indian tribe ….
>
> The mining site would irreparably harm both ends of the Quechan's spiritual trail, the 'Trail of Dreams.' … The tribe has not only historically used this site, but currently continues to use the site for religious, cultural and educational purposes.
>
> … The author believes the back-filling requirements established by SB 483 make the Glamis Imperial project infeasible. [520]

177. Analyses of the bill recognized that the measure would "permanently prevent the approval of the Glamis Gold Mine project and any other metallic mineral projects that presented an immediate threat to sacred sites located in areas of special concern."[521] They also recognized that, with respect to the Imperial Project, the Project would have otherwise been allowed to "go forward" under the then current law.[522]

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[519] California State Natural Resources Wildlife Commission, *Summary of SB 22*, at 2 (Jan. 14, 2002 [sic] Committee Hearing) [Ex. 273].

[520] *Id.* The Assembly Committee on Natural Resources, and other state committees and the governor, also recognized the effect on the Imperial Project: "In particular, the provisions of SB 483 will not allow a reclamation plan for a metallic mineral mining site to be approved if that site is within one mile of a Native American sacred site. In California, one site would qualify, Glamis Imperial Mining Project (Glamis)." California State Natural Resources Wildlife Commission, *Summary of SB 22*, at 3 (Mar. 3, 2003 Hearing) [Ex. 276]. *See also* California Office of the Governor, Press Release (Apr. 7, 2003) [Ex. 284] (titled, "Governor Davis Signs Legislation to Stop Proposed Gold Mine near 'Trail of Dreams' Sacred Site"). An additional reason for urgency, as identified by the California Assembly Committee on Appropriations, was that the emergency regulations enacted to provide temporary protections to Native American sacred sites were set to lapse on April 23, 2003. Although these regulations could be renewed, the author preferred statutory protections replace regulatory ones as soon as possible. *See* California Assembly Commission On Appropriations, *SB 22 Analysis*, at 2 (Apr. 2, 2003 Hearing) [Ex. 282].

[521] Governor's Office of Planning & Research, *Enrolled Bill Report of SB 22*, at 4 [Ex. 279].

[522] *Id.*

2. STATE MINING AND GEOLOGY BOARD REGULATIONS

178. As discussed previously,[523] the State Mining and Geology Board is mandated by the 1975 Surface Mining and Reclamation Act ("SMARA") to "adopt regulations that establish state policy for the reclamation of mined lands in accordance with [SMARA]."[524] Such state policy was to include, but not be limited to: "measures to be employed by lead agencies in specifying grading, backfilling, resoiling, revegetation, soil compactation, and other reclamation requirements …."[525] SMARA requires mined lands to be reclaimed "to a usable condition which is readily adaptable for alternate land uses and creates no danger to public health or safety."[526]

179. Although SMARA requires mining lands to be restored to a "usable condition," the California Resources Agency of the Davis administration had become "increasingly concerned" by 2002, "with the impact that large metallic mining projects, particularly those involving the cyanide heap leach extraction process, have on the environment of California."[527] Local lead agencies were interpreting "usable condition" to include "open space," resulting in open pits remaining on the landscape.[528] The California Legislative Analyst's Office ("LAO"), in its 2001-02 budget bill analysis, found that provisions of SMARA were not being enforced at a "potentially significant" number of mines.[529] It also found that the Department of Conservation had "seldom determined whether reclamation plans and financial assurances substantively compl[ied] with SMARA."[530] The LOA therefore recommended the legislature to direct the Department of Conservation to submit a plan for the monitoring of the adequacy of reclamation plans and financial assurances.[531]

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[523] *See supra* ¶ 75.

[524] CAL. PUB. RES. CODE §§ 2755-56 (2001) [LA 4 tab 135].

[525] CAL. PUB. RES. CODE § 2756 (2001) [LA 4 tab 135].

[526] CAL. PUB. RES. CODE § 2733 (2001) [LA 4 tab 135].

[527] Letter from Mary D. Nichols, Secretary of Resources, to Allen M. Jones, Chairman, State Mining & Geology Board (Oct. 17, 2002) [Ex. 259].

[528] Dec. 12, 2002 SMGB REPORT, at 3. *See also* Recording of July 13, 2006 SMGB Meeting, Testimony of Dr. Parrish (at approx. minute 20) [FA 10 tab 112].

[529] California Legislative Analyst's Office, analysis of the 2001-02 Budget Bill, Department of Conservation, *available at* http://www.lao.ca.gov/analysis_2001/resources/res_6_3480.htm.

[530] *Id.*

[531] *Id.*

180. On October 17, 2002, the California secretary of Resources contacted the chairman of the SMGB, asking the board to consider "adopting state regulations which would alter the current state reclamation policies" at its next meeting.[532]

181. The SMGB considered the request, as asked, at its November 14, 2002 meeting.[533] At this meeting, four alternatives were considered: (1) make no regulatory change, (2) adopt regulatory language through the standard, non-emergency process, (3) consider a workshop prior to the adoption of regulations, and (4) include exemptions for some open pit metallic mines from the requirements of backfilling and recontouring.[534] Subsequently, at its December 12, 2002 meeting, after review of the applicable regulations with respect to reclamation requirements and the specific reclamation issues facing very large excavations, the SMGB found that "the adoption of the proposed regulation requiring backfilling and site recontouring of open pit surface mine excavations for metallic minerals [was] necessary for the immediate preservation of the public general welfare."[535]

182. The factual basis for this finding was that there was currently pending with the BLM "an application for approval of a plan of operations for a large open pit gold mine (the Glamis Imperial Project), along with a requested approval of a joint EIS/EIR for the operation."[536] The SMGB found that:

> If this mining operation and the attendant reclamation plan are approved, and the joint EIS/EIR certified and approved for the operation and reclamation plan, without the requirement to backfill and recontour the lands disturbed by the mining activities, then an open pit with a length of approximately 4,700 feet, a width of approximately 2,700 feet, and a depth in excess of 800 feet, permanently will be left as a scar on the California landscape and an endangerment to the natural environment. At the same time, the surrounding landscape will be additionally marred and the environment threatened by a waste rock pile or piles which will contain residual harmful solutions and be up to a mile or more in total length and up to 300 feet in height above the natural grades.

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[532] Letter from Mary D. Nichols, Secretary for Resources, to Allen M. Jones, Chairman of the State Mining and Geology Board (Oct. 21, 2002) [Ex. 259].

[533] STATE MINING & GEOL. BOARD, EXECUTIVE OFFICER'S REPORT 5 (Dec. 12, 2002) ("Dec. 12, 2002 SMGB REPORT") [Ex. 267].

[534] Dec. 12, 2002 SMGB REPORT, at 5-6.

[535] *Id.* at 4.

[536] *Id.*

> In order to protect the California landscape and environment by requiring the reclamation plan for the pending mining operation to comply with the standards set forth in this emergency regulation, and to establish an environmental protection standard for this and other mine operation and reclamation plan approvals which may be pending at this time, but of which the SMGB is unaware, and which might receive approvals before a permanent regulation establishing the reclamation and environmental protection standards set forth in this regulation can be established, this regulation is required to be adopted and placed into effect on an emergency basis.[537]

183. The emergency regulations, effective on December 18, 2002, required that "the reclamation plan for an open-pit metallic mining operation … comply with the requirements set forth in Public Resources Code Sections 2711, 2712, 2733 and 2773" and, specifically, that all metallic minerals be "backfilled to achieve not less than the original surface elevation" and shall not "exceed in height the pre-mining surface contour elevations by more than 25 feet."[538] The regulations, unlike SB 22, apply to all metallic mines, regardless of their proximity or lack of proximity to Native American sacred sites.[539] The backfilling requirements did not apply to mines with an insufficient volume of materials remaining to completely backfill the open-pit excavation to the surface.[540] In addition, the regulations did not apply to those surface mining operations for which the

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[537] *Id.*

[538] Final Statement of Reasons for CAL. CODE REGS. Tit. 14 § 3704.1, at 4 [Ex. 304]; CAL. CODE REGS. Tit. § 3704.1(a)(3) (2003). The SMGB had previously required backfilling for "resource conservation" in CAL. CODE REGS. Tit. 14 § 3704(b), enacted in 1993. *See* CAL. CODE REGS. Tit. 14 § 3704(b) (2000) [LA 4 tab 142]. These new regulations were intended to augment this previous regulation, and thus were given the numbering of § 3704.1. *See* Recording of July 13, 2006 SMGB Meeting, Testimony of Dr. Parrish (at approx. minutes 8 to 28) [FA 10 tab 112]; CAL. CODE REGS. Tit. 14 § 3704.1 (2003) [LA 4 tab 143].

[539] CAL. CODE REGS. Tit. 14 § 3704.1(f) (2003) [LA 4 tab 143]. Other mines, in addition to the Imperial Project, were affected by the SMGB Regulations, including the Soledad Mountain gold mine, owned by Golden Queen Mining Company, which was required to submit an amended reclamation plan including complete backfilling because, although it had an approved reclamation plan and mining permit as of December 18, 2002, it did not have approved financial assurances. Golden Queen requested and received a hearing with the SMGB to appeal this decision, but its request for an exemption was denied, as the Board found the rules to be of general applicability. *See* Results of the State Mining and Geology Board Public Meeting/Hearing, at 3 (July 13, 2006), *available at* http://www.conservation.ca.gov/smgb/agendas/2006/0713b.pdf; Recording of July 13, 2006 SMGB Meeting [FA 10 tab 112]; Letter from Douglas W. Craig, Assistant Director, Office of Mine Reclamation, to Richard E. Lloyd, Resource Management Agency (Jan. 15, 2004) [FA 7 tab 48] (requesting an amended reclamation plan that included complete backfilling); Letter from Douglas W. Craig, Assistant Director, Office of Mine Reclamation, to Ted James, Kern County Planning Director (Jan. 5, 2006) [FA 7 tab 50] (explaining that a 1997 approval of a financial assurance cost estimate, as opposed to an actual financial assurance, was insufficient within the meaning of § 3704.1 for the grandfathering clause); Craig Declaration, ¶¶ 11-13; Parrish Declaration, ¶ 21.

[540] CAL. CODE REGS. Tit. 14 § 3704.1(h) (2003) [LA 4 tab 143]. In such a situation, the pit is to be backfilled to an elevation that utilizes all of the available material remaining.

lead agency had issued a final approval of a reclamation plan and financial assurances prior to December 18, 2002.[541]

184. The emergency regulations were set to expire on April 17, 2003, 120 days after their entry into force.[542] They were re-adopted by the SMGB and re-filed on April 15, 2003, to last another 120 days to August 13, 2003.[543] The SMGB filed the final, permanent regulations on April 18, 2003 and, on May 30, 2003, they were approved by the Office of Administrative Law and took effect.[544] This followed a comment period in which the SMGB received more than 2,500 comments supporting the regulations, and four in opposition.[545]

E. NOTICE OF ARBITRATION

185. Following and in response to the federal and state actions detailed above, Claimant filed its Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of the NAFTA on July 21, 2003.[546] On December 9, 2003, Claimant filed its Notice of Arbitration, asserting that:

> Through the measures identified above, the United States has denied Glamis Imperial the minimum standard of treatment under international law (including full protection and security and fair and equitable treatment of its investment) guaranteed by Article 1105 and has expropriated Glamis Imperial's valuable

[541] CAL. CODE REGS. Tit. 14 § 3704.1(i) (2003) [LA 4 tab 143].
[542] *Id.*, history, point 1.
[543] *Id.*, history, point 2.
[544] *Id.*, history, point 3. *See also* Parrish Declaration, ¶ 17.
[545] *See* Parrish Declaration, ¶ 19. These included letters from Claimant to the SMGB and Department of Conservation, and oral comments by both the Claimant and representative of the Quechan Indian Tribe at SMGB meetings. *See* Comments of Glamis Chief Operating Officer James S. Voorhees before the State Mining and Geology Board (Nov. 14, 2002) [FA 10 tab 104]; Charles A. Jeannes, Senior Vice President, Glamis Gold Ltd. before the State Mining and Geology Board (Dec. 12, 2002) [Ex. 268]; State Mining and Geology Board, Executive Officer's Report (Dec. 12, 2002) [Ex. 267]; State Mining and Geology Board, Executive Officer's Report, Agenda Item 7 (Jan. 16, 2003) [FA 10 tab 113]. During this comment period, the Imperial County Planning and Building Department also registered its opposition to the regulations, questioning "what's the problem" if there was "no scientific analysis to show that cyanide leaching causes significant, adverse environmental impacts …?" The planning department also stated that, "It [was] unfortunate that the full development of the potential mineral resources of Imperial County [could not] be developed due to the legislative proposals by the State Mining & Geology Board and its staff." Letter from Jurg Heuberger, Planning Director, Imperial County Planning and Building Department, to John G. Parrish, Executive Officer, State Mining and Geology Board (Mar. 17, 2003) [Ex. 278].
[546] *See* Letter from Timothy McCrum, Counsel for Glamis Gold Ltd., to Patricia Morrison, Deputy Assistant Secretary of Land and Minerals, DOI, at 1, 3 (July 21, 2003) [FA 7 tab 47].

mining property interests without providing prompt and effective compensation as guaranteed by Article 1110.[547]

III. PROCEDURAL HISTORY

A. THE REQUEST FOR ARBITRATION

186. This Arbitration was commenced by Notice of Arbitration, issued by Claimant, Glamis Gold, Ltd., on December 9, 2003, and served on Respondent, the United States of America, pursuant to Article 3 of the United Nations Commission on International Trade Law ("UNCITRAL") and referencing Articles 1117 and 1120 of the North American Free Trade Agreement ("NAFTA"). The notice detailed various actions taken at the federal and state levels of the United States government that Claimant alleged breached the obligations of the United States under Section A of Chapter 11 of the NAFTA, including: (i) Article 1105 – Minimum Standard of Treatment; and (ii) Article 1110 – Expropriation and Compensation.

187. In an Agreement of Certain Procedural Matters executed between the Parties on January 20, 2004, the Parties agreed that the place of Arbitration would be Washington, D.C., that the language of the Arbitration would be English, that "[c]ompensation for the arbitration tribunal [would] be at the rates specified in the International Centre for Settlement of Investment Disputes (ICSID) Schedule of Fees, and administered as provided in ICSID's Administrative and Financial Regulation 14," (a modification of Article 39 of the UNCITRAL Arbitration Rules), and that ICSID would administer the Arbitration.

B. THE APPOINTMENT OF ARBITRATORS

188. Pursuant to Article 1123 of the NAFTA, the Tribunal was comprised of three individuals, with one arbitrator appointed by each of the disputing parties and the third, the presiding arbitrator, appointed by agreement of the disputing parties. Each Party appointed an arbitrator: Mr. Donald L. Morgan, Esq. by Claimant, and Professor David

[547] Notice of Arbitration under the United Nations Commission on International Trade Law and the North American Free Trade Agreement, Glamis Gold, Ltd., at 10 (Dec. 9, 2003), *available at* http://www.state.gov/s/l/c10986.htm.

D. Caron, by Respondent. President Michael K. Young was appointed as presiding arbitrator by the agreement of the two Parties on November 12, 2004. Mr. Morgan resigned his post without prejudice on November 28, 2005.[548] Claimant subsequently appointed Mr. Kenneth D. Hubbard, Esq. to the Tribunal on December 14, 2005. On January 3, 2006, Respondent accepted Mr. Hubbard's appointment.

C. FIRST PROCEDURAL MEETING

189. On February 25, 2005, the first procedural meeting was held before the Tribunal in Washington, D.C. At this first meeting, the Parties agreed, among other points, that:

a. the arbitral Tribunal was established without objection;

b. the president of the Tribunal could employ a legal assistant to aid the Tribunal in its work;

c. a verbatim transcript of all subsequent hearings and oral arguments would be produced and made available to the Parties and the Tribunal and such transcripts would be produced using Live Notes or some other simultaneous transcription procedure;

d. the hearings might be made available for public viewing via closed circuit television broadcast into some room other than the room in which the hearings are held (subject to confidentiality considerations); and

e. documents on which a Party relied would be submitted with the Party's respective Memorial or Counter-Memorial, and all such documents would be submitted in complete form and numbered consecutively, starting from the last number of the previous submission, if any.

190. At this meeting, the Tribunal ordered Respondent to submit its Statement of Defense by April 8, 2005.

191. In addition to these matters, Ms. Eloïse Obadia, ICSID, was introduced as the Secretary to the Tribunal. After this point and until the appointment of the Legal

[548] Mr. Morgan's appointment was challenged by Respondent on August 10, 2005, due to his allegedly undisclosed involvement as an attorney in a concurrent litigation adverse to the United States Department of the Interior. Respondent requested Mr. Roberto Dañino, Secretary-General of ICSID, to decide its challenge to Mr. Morgan's appointment pursuant to Article 12(1) of the UNCITRAL Arbitration Rules and Article 1124(1) of the NAFTA. On November 28, 2005, Mr. Morgan resigned from the Tribunal without prejudice.

Assistant to the Tribunal, all communications between the Tribunal and the Parties took place through Ms. Obadia.

192. These agreements and orders were memorialized in *Procedural Order No. 1*, issued by the Tribunal on March 3, 2005. In this order, the Tribunal also established two separate schedules of the proceedings in the event that Respondent did request a bifurcation of the proceedings based upon pleas as to jurisdiction or preliminary objections, and in the event that it did not. The Tribunal stated that it would establish the exact dates of the final arbitral hearing as soon as practicable and, at an appropriate time, would establish the time limits for the various stages of the hearing. Finally, the Tribunal promised to decide on any issues regarding bifurcation expeditiously and notify the Parties of any changes to the schedule of proceedings.

193. With respect to document requests and objections to such requests, the Tribunal, in *Procedural Order No. 1,* directed the Parties to serve their requests for documents ("requests") to each other on May 10, 2005, and any objections to such requests for documents ("objections") on May 24, 2005.[549] The Tribunal promised to rule on any objections expeditiously and schedule a hearing on such objections if necessary. In addition, the Tribunal explained that the Parties would have the opportunity to request additional documents for good cause shown after the Memorial and Counter-Memorial had been filed. This opportunity was intended to allow the Parties to address new areas raised by the other Party's filings; the scope of the opportunity therefore was to be correspondingly limited. Any such request was to be made within one week of receipt of such Memorials or Counter-Memorials.

D. RESPONDENT'S STATEMENT OF DEFENSE

194. In accordance with *Procedural Order No. 1,* and Articles 19 and 21(3) of the UNCITRAL Arbitration Rules, Respondent United States of America submitted its Statement of Defense on April 8, 2005. In this statement, Respondent highlighted the regulatory context for mining on federal lands and described the Glamis Gold Imperial

[549] Per the request of the Parties, the deadline for the submission of objections to document requests was subsequently extended to June 7, 2005, by the Tribunal in its May 23, 2005 letter to the Parties and in *Procedural Order No. 2*.

Project. Respondent also set forth the reasons why the Tribunal allegedly lacked jurisdiction over Claimant's 1105(1) claims with respect to certain U.S. federal measures and over the entirety of Claimant's NAFTA Article 1110 expropriation claim with respect to California state measures. In addition, Respondent established its merits defenses and argued that Claimant's losses were without support. Finally, Respondent presented its prayer for relief.

E. REQUEST FOR BIFURCATION

195. Also on April 8, 2005, Respondent submitted its Request for Bifurcation in accordance with *Procedural Order No.1*. In this request, Respondent advanced two preliminary objections to the jurisdiction of the Tribunal: (1) that Claimant's claims under NAFTA Article 1105(1), based upon three federal actions taking place in October 1999, December 1999 and November 2000, were time-barred under the limitation set forth in NAFTA Article 1117(2); and (2) that Claimant's claims under NAFTA Article 1110 were not ripe because Claimant could not assert that it "ha[d] incurred" a loss as a result of California state measures as required by NAFTA Article 1117(1). Claimant timely submitted its Response to Request for Bifurcation of United States on April 21, 2005, arguing that bifurcation would result in unwarranted delay as Claimant's claims arose from a common set of facts that eventually would need to be addressed at a merits phase. In Claimant's view, the Tribunal would have to perform "the same comprehensive review of the federal and state mining approval process that [would] decide the merits of this dispute."[550] Respondent was given the opportunity for further reply and Claimant was permitted a final rejoinder; both were timely filed in accordance with *Procedural Order No. 1*.

196. On May 31, 2005, the Tribunal issued *Procedural Order No. 2* addressing Respondent's request for bifurcation. In *Procedural Order No. 2*, the Tribunal held that the applicable procedural rules were the UNCITRAL Arbitration Rules. Specifically, Article 21(4) of the UNCITRAL Arbitration Rules provides: "In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question.

[550] Response of Claimant Glamis Gold LTD To Request for Bifurcation of Respondent United States of America, at 4.

However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award." Article 21(4), the Tribunal found, establishes a presumption in favor of the tribunal preliminarily considering objections to jurisdiction. Simultaneously, however, Article 21(4) does not require that pleas as to jurisdiction be ruled on as preliminary questions. The choice not to do so is therefore left to the Tribunal's discretion.

197. The Tribunal wrote that Article 21(4) contained a three-part test:

> 12.a. First, in considering a request for the preliminary consideration of an objection to jurisdiction, the tribunal should take the claim as it is alleged by Claimant.
>
> b. Second, the 'plea' must be one that goes to the 'jurisdiction' of the tribunal over the claim….
>
> c. Third, if an objection is raised to the jurisdiction of the tribunal and a request is made by either party that the objection be considered as a preliminary matter, the tribunal should do so. The tribunal may decline to do so when doing so is unlikely to bring about increased efficiency in the proceedings. Considerations relevant to this analysis include, *inter alia*, (1) whether the objection is substantial inasmuch as the preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding; (2) whether the objection to jurisdiction if granted results in a material reduction of the proceedings at the next phase (in other words, the tribunal should consider whether the costs and time required of a preliminary proceedings, even if the objecting party is successful, will be justified in terms of the reduction in costs at the subsequent phase of proceedings); and (3) whether bifurcation is impractical in that the jurisdictional issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost. (citations omitted).

198. After evaluation of these numerous considerations, the Tribunal explained that it was "not persuaded that the proceedings should be bifurcated, at this time. To do so would not ultimately avoid expense for the Parties, contribute to Tribunal efficiency, or be practical."

199. Specifically, with respect to Respondent's argument that Claimant's claims based under NAFTA Article 1105(1) predicated upon three federal actions were time barred, the Tribunal wrote:

> 21. The Tribunal notes that even if it were to find the three mentioned federal actions to be time barred, such a finding does not eliminate the Article 1105 claim inasmuch as other federal actions are alleged by Claimant to be a basis for its

> claim. The potential exclusion of certain events at the merits stage to serve as independent bases of the claim will not in the circumstances of this proceeding exclude the claim in its entirety. Inasmuch as there is no jurisdictional objection to the NAFTA Article 1105 claim as based on the Record of Decision and subsequent acts, the Tribunal does not find the request for preliminary consideration of the objection to the Article 1105 to be justified in that even if the Tribunal were to grant respondent's objection, the cost and time of that proceeding would not be justified in terms of the reduction in costs at the subsequent phase of these proceedings.

200. With respect to Respondent's assertion that Claimant's claims under NAFTA Article 1110 were not ripe, the Tribunal held:

> 25. Considering Respondent's request for bifurcation and preliminary consideration of the 1117(1) under Article 15(1), the Tribunal does not find the request justified and therefore denies Respondent's request. In particular, the Tribunal finds that if it were to bifurcate its consideration of the issue identified, the Tribunal would be immediately confronted with the issue of whether California's laws and policies resulted in an expropriation under Chapter 11 of NAFTA. Since the facts presented to answer the Article 1117(1) issue are likely to be the same facts presented on the expropriation issue, the Tribunal finds the proposed bifurcation to be impractical in that the Article 1117(1) issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost. The question, therefore, of identifying 'the point when the damage was sufficiently concrete and permanent to result in breaches' is to be considered as a part of the merits.[551]

F. DOCUMENT PRODUCTION

201. In accordance with the schedule of proceedings outlined in *Procedural Order No. 1*, the Parties timely filed their requests for documents on May 10, 2005, and objections to such requests for documents on June 7, 2005.[552]

202. The Tribunal found, in reviewing the objections, that they were stated in general terms and it was thus unclear to the Tribunal whether they represented production concerns to particular documents with respect to which the Parties were seeking further guidance from the Tribunal in the form of a ruling.[553] The Tribunal therefore issued *Procedural Order No. 3* on June 21, 2005, in which it requested that, where there were

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[551] Quoting Rejoinder of Claimant Glamis Gold LTD. to Reply in Further Support of Request for Bifurcation of Respondent United States of America, at 5.

[552] The original deadline of May 24, 2005 for the submission of objections, as dictated by *Procedural Order No. 1*, was extended to June 7, 2005, per the Parties' request by a Tribunal letter on May 23, 2005 and *Procedural Order No. 2*.

[553] *See Procedural Order No. 3*¸ ¶ 7.

particular objections regarding which a Party sought a Tribunal ruling, the Party should request such a ruling providing "as a part of that request specificity as to the grounds for upholding or overturning a given request or objection for a category of documents or a particular document." The Party not requesting review was then given the opportunity to file a reply to each request.

203. After the receipt of the objections and replies, it was the intent of the Tribunal to rule upon any such specified request expeditiously and, if at all possible, on the basis of the papers filed with the Tribunal. Recognizing, however, that the consequences of the objections for the production of documents might not be apparent until after the final scheduled date for exchange of documents, the Tribunal also reserved August 19, 2005 for a hearing on such objections.[554]

204. Following *Procedural Order No. 3*, both Parties expressed interest in receiving further guidance from the Tribunal with respect to their objections, and timely submitted requests for such guidance on June 30, 2005 and replies to these requests on July 7, 2005.[555]

1. DECISION ON OBJECTIONS TO DOCUMENT PRODUCTION

205. In response to these Party inquiries, the Tribunal issued its *Decision on Objections to Document Production* ("Decision on Objections") on July 20, 2005.

206. In the Decision on Objections, the Tribunal first sought to identify and analyze the applicable law. It wrote:

> 7. This arbitration is conducted under the UNCITRAL Arbitration Rules.
>
> 8. The UNCITRAL Rules in Article 24 provide:
>
> > 1. Each party shall have the burden of proving the facts relied on to support his claim or defence.
> > 2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time

[554] This date was later changed to August 26, 2005. *See* Decision on Objections to Document Production, ¶ 13.

[555] The deadline for raising specific objections and renewing requests denied by the Decision on Objections to Document Production was later extended to August 23, 2005, given the postponement of the hearing. *See* Decision on Objections to Document Production, ¶ 14.

as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.

3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

Article 24 is general in its terms, making clear the authority of the Tribunal to order the production of 'documents, exhibits or other evidence' but providing only skeletal guidance as to the exercise of that authority. Under Article 15(1) of the Rules, 'the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.'

9. The International Bar Associations Rules on the Taking of Evidence in International Commercial Arbitration ('IBA Rules on Evidence') are not directly applicable to this proceeding. [FN1] As a part of the exercise of its authority under Article 15(1), however, the Tribunal may look to the IBA Rules on Evidence for guidance.

FN1: *See* tape recording of the February [hearing] beginning at minute 35, second 45 to minute 44.

10. The Tribunal notes in particular the standards for production referenced in the IBA Rules on Evidence. Article 3(a)(ii) emphasizes that requests for documents should be of a 'narrow and specific' nature and of documents that 'are reasonably believed to exist.' Article 3(b) underscores the need for documents to be 'relevant and material to the outcome of the case.' On the basis of this general guidance, the Tribunal has endeavored to ensure that any documents which it compels a Party to produce should be of a 'narrow and specific' nature, 'reasonably believed to exist', and 'likely material to the outcome of the case.'

207. In addition to defining the applicable law, the Tribunal made the following additional general observation regarding the Parties' requests for rulings:

15. In the interest of avoiding the burdens of litigation and protecting the expectations of the parties in the arbitration process, the Tribunal has endeavored to make its decisions regarding the Parties' Objections in such a manner as to focus on the articulated materiality of a given document or category of documents. The Tribunal believes that as the document production efforts proceed the Parties will have evaluated the publicly available records and will be in a better position to articulate which additional documents will be necessary for the Parties to prepare their arguments.

208. Based upon these interpretations of the applicable law and the Tribunal's general observations, the Tribunal held as follows with respect to the Parties' requests for specific categories of documents:

a. The Tribunal denied without prejudice Claimant's request for the following non-public documents relating to communications between the DOI and the Indian tribes; the creation and management of the Indian Pass Area of Critical Environmental Concern; the October 27, 1998 proposal to withdraw DOI lands encompassing the Imperial Project; and the October 27, 2000 withdrawal of DOI lands.[556] The Tribunal believed the production of non-public documents was premature before Claimant had reviewed the available public documents. If, however, after the review of public documents made available by Respondent, Claimant had reason to believe that specific non-public documents were likely to be material, the Tribunal indicated its willingness to review renewed requests.[557]

b. The Tribunal denied without prejudice Claimant's request for documents from a specified list of federal and state government offices that Claimant argued would have been active in "deciding or guiding the fate of the Imperial Project."[558] The Tribunal noted the overlap of this request with Claimant's Categories 1 and 7 requests (the latter of which Respondent was currently producing) and viewed the Category 8 request as encompassed within the production effort for Categories 1 and 7. Again, should Claimant have reason to believe that a particular source named above was not contained in the Categories 1 and 7 production effort and was likely to contain material information, the Tribunal indicated that the Claimant would have the opportunity to renew its request of a search for those particular offices.[559]

c. The Tribunal denied without prejudice Claimant's request for documents dating after July 21, 2003. The Tribunal concluded that these documents were, at a minimum, premature as the public record had not yet been reviewed. The Tribunal also was not disposed at that time to regard the requested documents as material. Therefore, the Tribunal explained, any renewal request should articulate as fully as possible the likely materiality of the documents requested.[560]

d. The Tribunal denied without prejudice Respondent's request that the Tribunal issue an order requiring Claimant to produce documents, wherever located, concerning complete backfilling as "contemplated, proposed or adopted by governments in foreign countries … including Mexico, Guatemala, and

[556] Claimant's "Category 3" Documents.
[557] *See* Decision on Objections, ¶¶ 17-19.
[558] Claimant's "Category 8" Documents.
[559] *See* Decision on Objections, ¶¶ 20-22.
[560] *See id.* ¶¶ 23-25.

Honduras."[561] Claimant stated it had no knowledge of "complete backfilling" requirements outside of the United States. Given this stated lack of knowledge, the Tribunal explained that such a geographically broad order would require "a more substantial nexus to be articulated between the category of requested documents and the likely materiality of such documents to the outcome of the case." The Tribunal denied with leave to renew if Respondent identified more specifically the likely material documents which should be in Claimant's possession.[562]

e. Finally, the Tribunal denied without prejudice Respondent's request that the Tribunal require Claimant to release documents concerning "the consideration, approval or review by Glamis' board of directors or committees of the board of directors of expenditures on any expansions of existing projects or any new gold mining projects, other than the Imperial Project."[563] Although the Tribunal had some appreciation that this information could assist Respondent in evaluating Claimant's investment expectations, it was not satisfied that the proposed discovery would be in practice transferable to the evaluation of the Imperial Project. In any renewal of this request, the Tribunal thus indicated that Respondent should "articulate as fully as possible the likely materiality of the documents requested, including the methodology by which a comparative analysis [would] be made."[564]

209. Following the Decision on Objections, the Parties produced numerous privilege logs to each other cataloguing the documents that they were withholding and describing the privileges that they asserted as protecting these documents. Claimant produced its first privilege log on August 3, 2005, and Respondent's first logs were received on August 16, 2005. Numerous amended and supplemental privilege logs and further explanation of logged documents followed the exchange of these initial logs until their completion in March of 2006.

210. Although the Decision on Objections extended the time to identify Objections until August 23, 2005, the Parties requested further time and postponement of the scheduled hearing by a joint letter on August 19, 2005. On August 26, 2005, in *Procedural Order No. 4*, the Tribunal granted an extension until September 15, 2005 for

[561] Respondent's Request No. 21. Decision on Objections, ¶ 26, quoting Respondent's June 30, 2005 Letter to the Tribunal, p. 2.

[562] *See* Decision on Objections, ¶¶ 26-29.

[563] Respondent's Request No. 40. Decision on Objections, ¶ 30, quoting Respondent's June 30, 2005 Letter to the Tribunal, p. 2.

[564] Decision on Objections, ¶¶ 30-34.

the identification of objections, and set the hearing on any unresolved document production issues for October 3, 2005, in Washington, D.C.

211. The deadline for the submission of objections was again extended in *Procedural Order No. 5*, issued retroactively by the Tribunal on September 19, 2005. The Tribunal granted a one-day extension, per Claimant's request. In addition, in light of the receipt of Claimant's *Request for Production of Documents Withheld by Respondent* and the accompanying 35-page legal memorandum on September 16, 2005, the Tribunal granted Respondent until September 29, 2005, to file a memorandum in opposition to Claimant's submission. The Parties timely filed these submissions.

212. On October 3, 2005, a hearing was conducted before the Tribunal in Washington, D.C., at which the Parties presented their views on their requests for production of documents and the withholding of documents by each Party on the grounds of privilege or materiality. At this time, each Party explained its objections to the withholding of categories of documents claimed by the other party to be privileged, and provided legal and factual support for its own documents withheld from production.

213. At the hearing, both Parties additionally informed the Tribunal that certain aspects of the Arbitration were requiring greater time than previously expected and that this was making the current schedule untenable. Principally, the Parties expressed concern that the great quantity of documents produced by both Parties, and the process of reviewing these documents and objecting to documents that were being withheld, was requiring significantly more time than expected. Because of these delays, both Parties expressed interest in postponing certain deadlines in the schedule, though Claimant wished not to move the date of the final arbitral hearing.

214. In addition to these discussions at the hearing of October 3, the Tribunal presented to the Parties the recently appointed Assistant to the Tribunal, as authorized at the first procedural hearing and memorialized in *Procedural Order No. 1*. The Tribunal introduced Ms. Leah D. Harhay, who was present at the hearing and presented her résumé to the Parties.

215. In response to the concerns regarding the arbitral schedule raised by the Parties at the hearing of October 3, the Tribunal issued *Procedural Order No. 6* on October 15, 2005. This order set a deadline of February 16, 2006 for the submission of Claimant's Memorial; June 22, 2006 for Respondent's Counter-Memorial; August 31, 2006 for Claimant's Reply; and October 12, 2006 for Respondent's Rejoinder. In addition, the order set December 4 to 8, 2006 for the arbitral hearing, with a possible continuation of the hearing scheduled for December 11 to 15, 2006.

216. On October 21, 2005, Respondent requested an additional three weeks to prepare and file its Rejoinder, to enable it to process the unexpectedly large quantity of documentary evidence involved in the proceeding and to provide it with a preparatory time period similar to that afforded Claimant. Claimant objected to the request on the grounds that such an extension would leave it insufficient time to address Article 1128 and non-disputing party submissions in its Reply and would place the submission of Respondent's Rejoinder only one month prior to the arbitral hearing.

217. Desiring not to delay the date of the December 2006 hearing, but cognizant of the needs of both Parties to address the large body of documentary evidence and to have adequate time to respond to each other and to non-disputing parties, the Tribunal amended the schedule of proceedings in *Procedural Order No. 7*, issued on November 10, 2005. In particular, it extended the deadline for the submission of Claimant's Reply to September 7, 2006, and Respondent's Rejoinder to October 26, 2006. The pre-hearing procedural hearing was moved one week to November 9, 2006, but the schedule of proceedings as outlined in *Procedural Order No. 6* was otherwise left unchanged.

2. DECISION ON PARTIES' REQUESTS FOR PRODUCTION OF DOCUMENTS WITHHELD ON GROUNDS OF PRIVILEGE

218. In response to the issues raised and discussed at the hearing of October 3, and in an attempt to outline a process by which the claims and objections to privilege assertions could be assessed first by the Parties and then by the Tribunal, the Tribunal issued its *Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege* on November 17, 2005 ("November 17 Decision"). In this decision, the

Tribunal defined the scope of the various privileges claimed by the Parties and outlined procedures for objections to be evaluated and submitted to the Tribunal. To begin, however, the November 17 Decision explained the law applicable to this Arbitration with respect to procedures for making determinations on claims of privilege. The Tribunal first explained that the Arbitration is conducted under the UNCITRAL Arbitration Rules and cited Article 24 of the UNCITRAL Arbitration Rules,[565] but then explained that:

> 17. … Article 24 makes clear the authority of the Tribunal to order the production of 'documents, exhibits or other evidence', but provides little guidance as to the exercise of that authority. The UNCITRAL rules are silent on the subject of the assertion of claimed privileges and provide no explicit guidance as to the Tribunal's ruling on such claims. It is only stated under Article 15(1) of the Rules that 'the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.'

219. Given not only the discretion afforded the Tribunal by the UNCITRAL rules with respect to assessing claimed privileges, but also the general lack of guidance on the subject by the rules, the Tribunal went on to explore and identify the laws and practices that could be used as guidance in its crafting of standards for each privilege. These standards were then intended for employment by the Parties in evaluating their claimed privileges and assessing their objections to the opposing Party's claimed privileges.

> 18. In their submissions on document production issues, both Parties cited the rules of the International Bar Association as a source of guidance for the Tribunal on production of documents. The Tribunal observes that those rules provide that documents requested should be 'material' to the proceeding. The Tribunal in its previous decisions has adopted the requirement of materiality.
>
> 19. The Tribunal recognizes that, in international arbitration, procedural matters such as the applicability of privileges and the form of objections to such assertions can be set out by the agreement of the Parties. The Parties in their submissions, and at the hearing, appear to agree that the privilege law of the United States should be looked to by the Tribunal for guidance as to the law of privilege to be applied in this arbitration. The Parties, however, disagree as to which jurisdiction of the United States reference should be made. Claimant points to the law of the D.C. Circuit or federal common law which it views as most reflecting the expectations of the Parties, while Respondent favors those principles that are common among the jurisdictions, noting that Claimant could have as easily filed a suit in the courts of the State of

[565] *See infra* ¶ 206.

California, or in the Federal Court in Nevada.

> 20. The Tribunal observes that the law of the United States, both as to production of documents or to the privilege enjoyed by some set of documents, is not directly applicable to this arbitration. Rather document production in this arbitration is governed by Article 24 of the UNCITRAL Arbitration Rules and guided by the Parties' own agreements to production as evidenced in their February 24, 2005 letters. Moreover, the Tribunal observes that it is unlikely in any event that the expectations of the United States as a party to the NAFTA as to privileges that it might enjoy in the NAFTA chapter 11 arbitrations would vary proceeding to proceeding depending on the jurisdictions in which a particular claimant might field an action. Thus the Tribunal has reviewed the case law of numerous United States jurisdictions—including California and the District of Columbia, neither of which were found to be outliers—and attempted to identify general consensus between courts that might be helpful in defining what the Parties would reasonably expect to apply in this situation. The Tribunal then used this information, combined with its knowledge of and appreciation for the differences between court proceedings and international arbitration [FN1], to craft standards that can assist the Parties in assessing their claims of privilege and their objections to such claims.
>
> > FN1. With respect to the differences between domestic litigation and international arbitration, the Tribunal recognizes that it is generally understood that one reason parties choose arbitration is to avoid the relatively extensive document production practices of courts generally and United States courts in particular. It feels that this expectation is not generally different in the context of NAFTA Chapter 11 arbitration, although the Tribunal notes that the investment arbitration context in which there may not be a contractual relationship between the parties does distinguish such proceedings from international commercial arbitration and thus militates in favor of some greater receptiveness on the part of the Tribunal for document production requests.

220. The Tribunal then explored each claimed privilege and, for each, defined the privilege's scope and applicability, as well as outlined procedures by which the Parties were to explain their assertions of this privilege and challenge those of the other Party.

221. With respect to documents withheld by Respondent on grounds of the attorney-client privilege, about which there were numerous questions by the Parties regarding the application of the privilege to government attorneys, the Tribunal wrote:

> 23. The Tribunal notes that the party asserting the privilege has the burden of proving that such privilege applies to each document [FN7] but, after that showing is made, the burden shifts to the other party to contest the privilege. The Tribunal recognizes that, when asserting this privilege, it is important to make clear that the attorney is indeed acting as such and providing legal advice, and is not acting as a policy-maker or corporate officer. [FN8]

> Therefore, it is critical that, when invoking the privilege, the invoking party explain with sufficient specificity the role the attorney is taking.
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> FN7. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 845, 861 (D.C. Cir. 1980); *Cobell v. Norton*, 212 F.R.D. 24, 27 (D.D.C. 2002).
>
> FN8. *See Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26 (D. Md. 1974); *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 521 (D.Del. 1980).
>
> 24. With respect to government attorneys, the Tribunal finds a general consensus among courts that the attorney-client privilege applies equally to government agencies: 'In the governmental context, the 'client' may be the agency and the attorney may be an agency lawyer.' [FN9] The Tribunal finds the application of this consensus rule is appropriate to this Arbitration. Furthermore, the Tribunal recognizes that an important prerequisite to assertion of the attorney-client privilege is the confidentiality of the information. The Tribunal understands, however, that in the government context, where the client is by nature a group, the privilege is not defeated by circulation beyond the attorney and the person within the group requesting or providing the information. [FN10] Communications between different government agencies should remain privileged to the extent that there is a 'substantial identity of legal interests' within the different agencies in the particular subject matter of the communications. [FN11]
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> FN9. *Tax Analysts v. I.R.S.*, 117 F.3d 607, 618 (D.C. Cir. 1997).
>
> FN10. *Coastal States, supra,* at 863.
>
> FN11. *U.S. v. American Tel. & Tel. Co.*, 86 F.R.D. 603, 616-17 (D.D.C. 1979).

222. The Tribunal then outlined procedures for the Parties to utilize with respect to documents withheld on the grounds of the attorney-client privilege to which they object. First, Claimant was requested to list its objections to Respondent's assertions of the attorney-client privilege, specifically explaining why it believed the privilege did not apply. Claimant was to base these objections on Respondent's privilege logs and request more detail when it felt those logs provided insufficient explanation. In response to such a request, Respondent was to provide a more detailed explanation of the basis in the document for the assertion of the privilege and, if applicable, the basis for an objection as to the materiality of the document requested. The Tribunal foresaw that the following completed statement in a privilege log, absent extraordinary circumstances, usually would suffice to assert the privilege:

> Confidential _____ (Communication/Email/Memo/etc.) dated _____ between Attorney/Attorney's Representative _____, who was at the time acting as legal counsel and not primarily as a policymaker or corporate decision-maker, and Client/Client Affiliate _____ concerning legal advice on the subject of _____.[566]

Depending on the objection raised by the Claimant, the Respondent also may have been required to state that:

> To the extent that this document was circulated to _____, (a colleague from a different agency), such circulation is protected because there was substantial identity of legal interests between the two agencies with respect to the particular subject matter of the communication.[567]

Should this explanation fail to satisfy Claimant, it was to respond with a detailed explanation as to why it believed this assertion was incorrect or why it failed based on the standards listed above. Finally, should these objections not serve to compel production of the disputed documents, and further discussions with Respondent did not resolve the matter, the Tribunal explained that it would, if requested by January 3, 2006, decide upon such objections on a document-by-document basis.[568]

223. With respect to documents withheld by Claimant on grounds of the attorney-client and work product privileges, the Tribunal noted that Respondent's concerns centered on the multiple roles played by Mr. Charles A. Jeannes as Glamis's executive vice president, administration, general counsel and secretary. The Tribunal recognized that, as discussed above, in asserting the attorney-client privilege, it is critical that the attorney involved in the production of the document in question is acting as an attorney. The same applies for assertions of the work product privilege.[569] As the objections to these documents were relatively clear, the Tribunal requested Claimant to issue an amended privilege log with

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[566] Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege, ¶ 25(b) (Nov. 17, 2005) ("November 17 Decision").

[567] November 17 Decision, ¶ 25(b).

[568] *See id.* ¶ 25. In addition to the procedures outlined, the Tribunal explained that should it decide on the claims of privilege on a document-by-document basis, such a review might include *in camera* review of the documents. Given the numerous complications raised with an *in camera* review, however, this possible final step in the procedures was suspended by the Tribunal in its December 16, 2005 letter to the Parties until such time as the Tribunal could meet as a whole (with replacement arbitrator Kenneth D. Hubbard) to discuss this issue in greater depth. In *Procedural Order No. 8*, the Tribunal eliminated an *in camera* review as a possible procedure for determining claims of privilege, in favor of the possibility of confidential review by an independent master (*see infra* ¶ 229).

[569] *See* Heger v. Bluefield Regional Medical Center, 170 F.R.D. 70, 76 (D.D.C. 1997), citing Hickman v. Taylor, 329 U.S. 495, 511 (1947).

these documents. Using the statement provided in the previous section, or something similar, Claimant was to explain the role that Mr. Jeannes was filling with respect to each document. Should this explanation not satisfy Respondent, Respondent was to respond with a detailed explanation as to why it believed the assertion was incorrect or failed based on the standards listed above. If the Parties were unable to come to a resolution, the Tribunal explained again that it would decide on the objections on a document-by-document basis.

224. With respect to documents withheld by Respondent on the grounds of work product privilege, the Tribunal noted that the core of Claimant's objections to Respondent's claims of work product privilege was that the documents were not created "in anticipation of litigation or for trial." In addition, Claimant argued that the privilege, even where successfully asserted, is qualified, and assertions based on documents that were neither litigation strategy nor attorneys' mental impressions about litigation preparation activities could be outweighed by a showing of "substantial need and inability to obtain the equivalent without undue hardship."[570] The Tribunal therefore first sought to set forth a definition of the "in anticipation of litigation or for trial" standard and identify the threshold necessary to override a claim of privilege.

> 31. Most courts recognize that the test for when a document is prepared 'in anticipation of litigation' [FN21] turns on the function of the documents rather than merely the timing of their creation. [FN22] Thus, the content of the documents must relate to preparation for litigation; this includes '[s]ubject matter that relates to the preparation, strategy, and appraisal of the strengths and weaknesses of an action, or to the activities of the attorneys involved, rather than to the underlying evidence….' [FN23] Based on this understanding of the subject matter, work product usually encompasses 'interviews, statements, memoranda, correspondence, [and] briefs' of lawyers. [FN24] With these themes within domestic case law in mind and recognizing how litigious society currently is and that there is therefore often the possibility that many actions could lead to litigation, the Tribunal observes that it is important, when claiming the work product privilege, that the withholding Party explain how the subject matter of the document relates to a likely lawsuit by an identifiable adversary in respect of a specific dispute.
>
> FN21. *See Hickman, supra* at 511-12*; see also* Fed.Rule.Civ.Proc. *26(b)(3).*

[570] Judicial Watch, Inc. v. United States DOJ, 337 F.Supp.2d 183, 186 (D.D.C. 2004) (citations omitted).

> FN22. *See Delaney, Migdail & Young, Chartered v. I.R.S.*, 826 F.2d 124, 127 (D.C. Cir. 1987).
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> FN23. *In re Air Crash Disaster at Sioux City*, 133 F.R.D. 515, 519 (D. Ill. 1990) *quoting* 4 Moore's Federal Practice, para. 26.64[1] at 26-349—350 (1980).
>
> FN24. *Heger, supra* at 76, *citing Hickman, supra* at 393-94.
>
> 32. With respect to the Parties' arguments regarding the threshold of need and unavailability that must be crossed in order to override a claim of work product privilege, the Tribunal observes that the Parties are actually not wholly in disagreement. Both Parties recognize that there is 'core' work product, including litigation strategies and attorney mental impressions, among other things, that will not be released without a showing of extraordinary justification. The Parties appear to disagree therefore only on documents, or portions of documents, that do not constitute 'core' work product. The Tribunal holds that, with respect to documents not rising to the level of attorney personal thought and strategy, the privilege is qualified and can be overruled by a sufficient showing of need and unavailability and a weighing of the importance of the claimed privilege versus the importance of production. (internal citations omitted)

225. The procedures outlined for the resolution of disputes regarding Respondent's assertions of the work product privilege closely follow those for disputing Respondent's assertion of the attorney-client privilege. First, Claimant was to list its objections on a document-by-document basis, or request further explanation, where necessary. Respondent was then to respond with a more detailed explanation of the basis in the document for the assertion of privilege and, if applicable, the basis for an objection as to the materiality of the document requested. In particular, the Tribunal foresaw that the following completed statement in a privilege log, absent extraordinary circumstances, usually would suffice to assert the privilege:

> This _____ (Document/Draft/Report/etc.), dated _____, was prepared by Attorney/Attorney's Representative _____ because of anticipated litigation and would not have been prepared in substantially the same form in the absence of such anticipated litigation.[571]

The Tribunal additionally noted that it would be important for the withholding Party to note whether the document itself identified a specific pending or potential dispute or litigation and/or identified the likely adverse party or parties. Finally, the withholding Party was to specify whether factual information that could be segregated had been so

[571] November 17 Decision, ¶ 33(b).

removed and produced. Should these explanations not satisfy Claimant, it was to respond with a detailed explanation as to either: (i) why it believed this assertion was incorrect or failed based on the standards listed above; or (ii) why it believed that its need was so great and the document so unavailable that the document must be produced regardless of the assertion of the privilege. With respect to the latter argument, Claimant also was requested to explain how the document was likely to provide material evidence to support a factual contention, which the Tribunal might otherwise conclude lacked clearly probative support. Finally, should the Parties be unable to come to resolution on the disputed documents, they were requested to submit their objections to the Tribunal for review, as discussed above.

226. Finally, with respect to documents withheld by Respondent on grounds of the deliberative process privilege, the Tribunal noted that the Parties did not disagree with the general definition of the privilege as "exempt[ing] from disclosure 'opinions, recommendations or advice offered in the course of the executive's decision making processes,'"[572] or the requirement that the documents be both pre-decisional and deliberative. Claimant, however, argued that a significant burden had to be met to prove the privilege, that the privilege is qualified and that all factual information must be segregated. The Tribunal therefore clarified the scope of the privilege and the burden necessary to claim it. In its November 17 Decision, the Tribunal wrote:

> 36. As the Parties do not disagree on the general definition of the scope of the privilege or the requirement that documents withheld under it be both pre-decisional and deliberative, the Tribunal adopts these interpretations. To elaborate on these definitions, and possibly to clear any disagreements between the parties, the Tribunal finds that the privilege shall encompass documents generated before the adoption of an agency policy or decision that contain opinions, recommendations or analyses of specific policies or decisions. [FN37] The Tribunal agrees that factual information should generally be segregated and produced, [FN38] but also recognizes that there may be situations in which the factual information is either so inextricably intertwined with policy information that it cannot be appropriately segregated or the factual information itself would reveal too much of the deliberative process to be disclosed. The opposite situation could also occur where deliberative materials are so benign as to reveal nothing of the deliberative process and should be produced. [FN39] As there is thus no black line on which to require production, the Parties and the Tribunal must evaluate the

[572] Taxation with Representation Fund v. IRS, 646 F.2d 666, 667 (D.C. Cir. 1981).

assertions of the officials who request the privilege.

> FN37. *See FTC v. Warner Communications, supra* at 1161, *citing Coastal States, supra* at 866.
>
> FN38. *Id.*
>
> FN39. *See Mead Data Central, Inc. v. United States Dep't of the Air Force*, 533 F.2d 242, 257 (D.C. Cir. 1977).

37. With respect to the burden of assertion and the formal requirements cited by Claimant for proper assertion, the Tribunal recognizes a general consensus in the case law that the head of the agency controlling the information must assert the privilege after review and analysis of the document. [FN40] Recognizing the conflicting goals of this burden—that a sufficiently senior official perform the analysis and weighing of the assertion of the privilege, but that such official must devote substantial time and effort to gain personal knowledge of each document—and given that the formalities of U.S. practice are neither directly applicable or necessarily appropriate to arbitration, the Tribunal, absent extraordinary circumstances, will accept an assertion of the privilege from an official, at the assistant secretary or deputy secretary level, controlling the information if he/she is equally or more familiar with the information, rather than an agency head.

> FN40. *See Branch v. Phillips Petroleum Company v. E.E.O.C.*, 638 F.2d 873, 882 (5th Cir. 1981); *see* also *Walker v. NCNB National Bank of Florida*, 810 F.Supp. 11, 13 (D.D.C. 1993).

227. With these principles in mind, the Tribunal established a procedure identical to that proposed above. With respect to the detailed explanation of the basis in the document necessary for the assertion of the deliberative process privilege, the Tribunal foresaw that the following completed statement in a privilege log, absent extraordinary circumstances, usually would suffice to assert the privilege:

> The document, dated _____, was prepared in order to assist an agency decision-maker, _____ (name), _____ (position) in arriving at a _____ (a specific decision)."[573]

The certifying official also was to state that: (i) the basis of assertion of the privilege had not been incorporated into a final agency decision, and (ii) he/she believed, in good faith, that the harm of disclosure would overcome the value of production of the document to Arbitration. Finally, Respondent was to specify if factual information that could be segregated had been so removed and produced.

[573] November 17 Decision, ¶ 38(b).

228. Included with the procedures outlined in the November 17 Decision was a timetable specifying the dates upon which each of the procedures was to be completed. This timetable was intentionally drawn up with short time periods so as to preserve the possibility of the Tribunal holding a hearing in this matter before the end of 2006. Although both Parties worked in good faith to meet the Tribunal's deadlines, they had difficulty in meeting this aggressive timetable. In an effort to satisfy the requirements and deadlines outlined by the Tribunal in its November 17 Decision, the Parties provided each other and the Tribunal with numerous amended privilege logs, clarifications of objections to claims of privilege, and further explanation in support of assertions of privilege, during the period of December 1, 2005 to January 26, 2006.

229. On January 31, 2006, the Tribunal issued *Procedural Order No. 8*, outlining the steps it considered necessary to complete this process of asserting and challenging claims of privilege. The Tribunal viewed "the next – and hopefully final – step in the production process as being its examination of the validity of claims of privilege on a document-by-document basis, as informed by the privilege logs submitted by the withholding party and the challenges raised by the requesting party." The Tribunal explained that, if its review of the privilege logs and corresponding challenges was insufficient to enable it to adequately determine the validity of all assertions of privilege, it would return to the Parties to discuss the process to be taken to complete this determination, including the possibility of the confidential review of individual documents by an independent special master. Finally, "[d]ue to the extensive nature of this document production process and the desire to have evidence available to the Parties prior to their memorial submissions," the Tribunal found the present arbitral schedule unsustainable and thus provided an amended arbitral schedule. In the amended schedule, the arbitral hearing was planned for March 26 to 30, 2007, with a possible extension to April 2 to 6, 2007, and interim submission dates also were adjusted.

3. DECISION ON REQUESTS FOR PRODUCTION OF DOCUMENTS AND CHALLENGES TO ASSERTIONS OF PRIVILEGE

230. In accordance with *Procedural Order No. 8*, the Parties renewed their challenges to the documents remaining in dispute and submitted final arguments on March 1, 2006.

Respondent renewed its challenges to six withheld documents, and Claimant continued to challenge the withholding of 159 documents.

231. Based on the descriptions provided in the Parties' privilege logs and supporting affidavits, and in the challenges, the Tribunal considered each request for production. On April 21, 2006, the Tribunal issued its *Decision on Requests for Production of Documents and Challenges to Assertions of Privilege* ("April 21 Decision") in which it decided on each request or, in some instances where a request required the weighing of the Parties' interests, deferred decision.

232. Prior to issuing its decisions with respect to each category of documents requested, the Tribunal made special note of the documents upon which it had deferred decision and explained the limits of those deferrals.

> 8(iii). … [W]here the analysis of an asserted privilege requires the Tribunal to balance Claimant's need for the documents against Respondent's interest in maintenance of the privilege, the Tribunal in several instances has deferred that decision until a later date. The Tribunal wishes to be clear as to the limits of these deferrals. In the Tribunal's view, the phase of this proceeding concerned with party driven requests for production of documents is closed. In deferring any particular decision on such requests, the Tribunal defers its decision only as to the particular document or documents requested. The decision of the Tribunal to defer some decisions until a later time is driven by two factors. The starting point for the Tribunal is that it should not override privileges unnecessarily. Simultaneously, the question of Claimant's need for a particular document cannot be assessed with accuracy at this early point in the arbitration. This is particularly the case given the fact that Claimant in many instances has other documents, or entirely different means of proof, available to it to establish a proposition. In deferring a decision, the Tribunal anticipates that such decision will not be made until, or following, the hearing on the merits of the claim. The Tribunal acknowledges that any later decision to order production would result in a limited extension of the proceedings.

a. Section A: Decisions with respect to Documents Withheld by the State of California

233. Claimant's first category of arguments addressed its demands for documents from the State of California, which it separated into six groups. In Group 1, the Tribunal addressed the request for 10 analyses of Senate Bill 22 that Claimant argued California Government Code § 6254(1) did not absolutely protect and the official information and deliberative process privileges also did not protect, or were overridden by Claimant's

great need for the documents. Although hesitant to delve into analysis of local state law in an international arbitration, the Tribunal recognized that the Parties had urged the Tribunal to look to California law and presented their arguments with reference to that law. The Tribunal therefore inquired into the privilege laws of California, "not because the Tribunal believe[d] it necessarily to be the applicable law, but rather because the Parties direct the Tribunal to it." The Tribunal wrote:

> 13. After analysis of California Government Code §6254(l) and relevant case law, the Tribunal finds that §6254(l) does not protect the particular documents in question. In a similar situation in which a California agency was not a party to the litigation, but was very involved in the facts of the dispute, a California Court of Appeals held that the information was critical to a party to the litigation and thus §6254(l) did not protect the agency's records. [FN8] The Tribunal finds that the rights of Claimant (in effect a litigant here) are affected by the documents requested and, in addition, the State of California has been similarly involved intimately in the events that culminated in this dispute. Therefore, the Tribunal finds that the absolute protection of California Government Code §6254(l) does not protect the documents at issue.
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> FN8. *See Marylander v. Superior Court*, 81 Cal.App.4th 1119, 1125 (2000).
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> 14. The Tribunal turns then to the other privileges asserted by Respondent over these documents, namely California's official information privilege and the deliberative process privilege. As the two are similar, the Tribunal thinks it appropriate to apply the principles of the deliberative process privilege to the analysis of both privileges. The Tribunal recognizes that '[t]he deliberative process privilege is a qualified one. A litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure.' [FN9] In this situation, although the Tribunal recognizes the assertion of and interests in the deliberative process privilege, it finds the statement of Claimant's need, particularly given the apparent absence of other documents or other means of proof available to the Claimant, to be sufficiently great to override those interests. Therefore, the Tribunal requests Respondent to produce the ten documents at issue, at its earliest opportunity.
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> FN9. *Federal Trade Commission v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984).

234. Claimant then requested a single document, Government Log No. 105 (Group 2), which it believed was logged in response to a specific document demand. Claimant argued that the attorney-client privilege was waived with respect to this document and all

communications on this subject matter between the same parties by an extrajudicial statement regarding the legal conclusion of counsel. The Tribunal wrote:

> 17. The Tribunal acknowledges Respondent's assertion that the documentary evidence that Claimant seeks does not in fact exist. Independent of the document's existence, the Tribunal notes that the attorney-client privilege is an absolute one. Moreover, as regards Claimant's argument that the privilege was waived, the Tribunal understands that subject matter waiver is intended to prevent a privilege-holder's selective disclosure of documents during litigation. However, a mere 'extrajudicial disclosure of an attorney-client communication—one not subsequently used by the client in a judicial proceeding to his adversary's prejudice—does not waive the privilege as to the undisclosed portions of the communication.' [FN12] Thus, the Tribunal does not find subject matter waiver in this situation and deems this document protected by the attorney-client privilege.
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> FN12. *In re von Bulow*, 828 F.2d 94, 102 (2d Cir. 1987).

235. With respect to emails among California government attorneys and a facsimile cover memorandum dated December 2, 2002, as requested in Claimant's demands for Group 3 and Group 4 documents respectively, the Tribunal noted Respondent's clarification as to the content of the disputed documents, and was not prepared to compel their production. The Tribunal expressed its willingness, however, to consider further arguments from Claimant based on these clarified fact patterns.[574]

236. In Group 5, Claimant sought two documents comprising the January 2002 Advisory Memoranda. At paragraph 26, the April 21 Decision explained: "The Tribunal finds that Respondent has stated sufficient facts to establish that the attorney-client privilege protects both documents, at which point the burden shifts to the Claimant to assert that the privilege does not in fact apply. The Tribunal determines that this burden has not been met and the documents are thus deemed protected."

237. Finally, in Group 6, Claimant demanded three documents relating to a proposed gubernatorial proclamation and six documents relating to the governor's public outreach strategies. With respect to the first three documents, the Tribunal held that the attorney-client privilege did provide absolute protection. With respect to the latter six documents, the Tribunal wrote:

[574] April 21 Decision, ¶¶ 18-23.

> 30. … [T]he Tribunal recognizes the qualified nature of the deliberative process privilege and that the interests in protection can be outweighed by a sufficient statement of need from the challenger. The Tribunal views Claimant's argument that a challenge to the integrity of the decision-making process vitiates any assertions of the deliberative process privilege as an extreme variation of the generally applicable analysis of whether need outweighs interest in protection. The question of Claimant's need, however, cannot be decided at this early point in the arbitration. The Tribunal therefore cannot compel production of these documents at this time, a holding that is demanded by the fact that the Tribunal does not override privilege unnecessarily and will not order production without restriction. If, at the point at which the Tribunal begins to make determinations on the merits of the claims, however, it becomes apparent that a particular decision is essential to such determinations and other documents, witnesses or evidence lead the Tribunal to believe that the documents currently requested may assist the Tribunal in such a decision, the Tribunal will revisit the requests for production of these particular documents.

b. Section B: Decisions with respect to Documents Withheld by the Advisory Council on Historic Preservation[575]

238. *Issue 1:* In response to Claimant's argument that none of the 54 documents in this section is protected by the deliberative process privilege because the integrity of the deliberative process was at issue, the Tribunal again deferred its decision as explained above in the quoted paragraph 30. In addition to the above paragraph, the Tribunal wrote: "Specifically, the Tribunal is not persuaded by Mr. Stanfill's statement alone that the ACHP's [Advisory Council on Historic Preservation] deliberative process was predetermined. As other evidence is presented, especially evidence concerning the actual mining site or the ACHP's treatment of like cases, the Tribunal will revisit this challenge and reexamine Claimant's need."[576]

239. *Issue 2:* The Tribunal denied Claimant's challenges as to the timeliness of three documents. The Tribunal deferred final determination on the challenges, "[a]s these documents are allegedly protected by the deliberative process privilege and the Tribunal

[575] In this section, Claimant sought 54 documents from the ACHP withheld on deliberative process privilege grounds. This section was presented in the form of arguments that apply to various segments of the 54 documents and Respondent followed this same structure in its response; thus the Tribunal followed this format as well in its decision.

[576] April 21 Decision, ¶ 33.

has determined that it cannot address the necessary issue of Claimant's need at this early point in the arbitration."[577]

240. *Issue 3:* The Tribunal denied Claimant's challenge with respect to 11 documents based on the alleged administrative nature of the documents. Paragraph 39 of the April 21 Decision explained: "The Tribunal finds that, if the documents contain information that moves beyond administrative process, they would be protected by the deliberative process privilege and, if they are merely procedural in nature, Claimant would have less need for them." As the documents allegedly were protected by the deliberative process privilege, however, the ultimate determination as to the applicability of the privilege was again deferred.

241. *Issues 4 and 5:* With respect to 21 of the ACHP's withheld documents relating to the ACHP's review process, and 24 documents relating to opinions and draft versions of the ACHP's formal comments to the Interior secretary in October 1999, Claimant argued that the qualified deliberative process privilege claimed by Respondent must be outweighed by Claimant's own need for these documents. With respect to both sets of documents, the Tribunal found that "Claimant ha[d] not presently shown a sufficient likelihood that these documents [would] present necessary evidence for its claims." The ultimate determination as to the applicability of the privilege was again deferred, however, as the documents allegedly were protected by the deliberative process privilege.[578]

c. Section C: Decisions with respect to Documents Relating to the Mineral Report and Valid Existing Rights Determination

242. Claimant challenged the withholding of eight documents relating to the draft Bureau of Land Management mineral report for the Imperial Project and other communications concerning the valid existing rights determination. Claimant challenged this withholding on the basis that its need for the documents outweighed Respondent's interest in the protection of its deliberative process. In deferring final determination of the claim of privilege, the Tribunal wrote:

[577] *Id.* ¶ 36.
[578] *Id.* ¶¶ 42, 25.

> 48. Without determining the precise contours of the deliberative process privilege, the Tribunal is nevertheless mindful and respectful of the Government's need for the free and open exchange of communications. The Tribunal therefore believes that when the privilege is asserted, it should not be overridden lightly. At the same time, the Tribunal is cognizant that fairness to the party whose interest is affected and who is therefore challenging the assertion of privilege is also important. Balancing these interests, the Tribunal holds that there must be a sufficient enough showing of need to ensure that the governmental process is protected. The Tribunal has not found a sufficient statement of need in the arguments presented at this point, but as the proceedings develop and evidence and witnesses are presented that show these documents to be both relevant and necessary, the Tribunal will reconsider the challenges to assertions of the deliberative process privilege over the documents in this section.

d. Section D: Decisions with respect to Documents Relating to the Development of Solicitor Leshy's M-Opinion[579]

243. *Issue 1*: Claimant first argued that interim drafts of communications that ultimately are not intended to be confidential are not protected by the attorney-client privilege. Second, Claimant asserted that Respondent's release of several key documents amounted to waiver of the attorney-client privilege with respect to "the entire spectrum of subject matter relating to the Leshy Opinion …." Respondent claimed that seven of the documents were not, in fact, privileged and, although the other four were privileged, they were produced inadvertently, which does not amount to waiver. The Tribunal examined both aspects of the dispute:

> 51. The Tribunal is assured that a proper attorney-client relationship did exist at the times of the communications and thus the privilege would ordinarily apply. Whether such privilege was waived by the inadvertent release of several documents must be determined by examining Respondent's actions surrounding the release. The Tribunal notes that a U.S. judicial decision lists five factors to consider in determining whether an inadvertent production should amount to waiver: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosure; and (5) whether the overriding interests of justice would or would not be served by relieving the party of its error. [FN50] The Tribunal finds these five factors to reflect considerations generally applicable to the analysis of waiver of privilege on the grounds of partial disclosure.

[579] Claimant sought 80 documents: 35 were preliminary drafts of the now-rescinded Legal Opinion of Solicitor Leshy (Group 1); 9 related to comments on those drafts (Group 2); and 36 related to the genesis of the development of the Legal Opinion and Leshy's interpretation of the "unnecessary and undue degradation standard" (Group 3). Again, the structure of this section is by argument.

> FN50. *Koch Materials Co. v. Shore Slurry Seal, Inc.*, 208 F.R.D. 109, 118 (D.N.J. 2002) (citations omitted).

> 52. Applying these factors, the Tribunal finds the following. First, the Tribunal recognizes the great care with which Respondent conducted its document production, not only in the logging of the numerous privileged documents, but also in the production of thousands of pages of non-protected documents. Second, the number of privileged documents produced (four) is small in comparison to the overall production by Respondent. Third, the Respondent's partial disclosure does not appear to be particularly extensive. Fourth, although Respondent has done little to promptly request the return of the documents or take other measures to rectify its apparently inadvertent disclosure, the Tribunal understands that, in a complex arbitration with large scale document production, a party may only become aware of an inadvertent disclosure after such is pointed out or made use of by the opposing party. Therefore, the Tribunal does not find this single factor dispositive. Fifth, the Tribunal finds that there are no overriding interests of justice that would compel it to not relieve Respondent of its error. Therefore, the Tribunal finds that the documents claimed as protected by the attorney-client privilege in this section D are indeed so protected. [FN51] As the attorney-client privilege is an absolute privilege, no further challenge may be made to the withholding of these documents in this proceeding.
>
> > FN51. As mentioned, the Tribunal discovered numerous discrepancies in Claimant's summary logs and especially in Section D. Therefore, the Tribunal addresses the argument in general and to which documents the argument actually applies will be determined upon further clarification of the privilege logs.

244. *Issue 2:* Claimant next argued that the documents were not protected by the work product privilege as they were not created in anticipation of litigation. Further, Claimant asserted, if the work product privilege did apply to the documents, it was waived as the documents did not pertain to a party's litigation strategies or trial preparation for the present litigation.[580]

245. *Issue 3:* Claimant finally argued that, with respect to the deliberative process privilege, its need for the documents in dispute outweighed Respondent's interests in secrecy. In addition, Claimant again raised the argument with respect to all documents in this section, except for one, that the deliberative process should not protect these documents as the integrity of the deliberative process was at issue.[581]

[580] April 21 Decision, ¶¶ 53-55.
[581] *Id*. ¶¶ 56-58.

246. With respect to both challenges described in Issues 2 and 3, the Tribunal's holding was the same as explained in paragraph 48 of the April 21 Decision, quoted above. The Tribunal did not find a sufficient statement of need in the arguments presented at that point, but stated that, as the proceedings develop and evidence and witnesses are presented to show these documents to be both relevant and necessary, the Tribunal would reconsider the challenges to assertions of the privileges over the documents in this section that are challenged under each privilege and were not deemed protected by the attorney-client privilege above.[582]

4. DECISION WITH RESPECT TO DOCUMENTS WITHHELD BY CLAIMANT ON GROUNDS OF THE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES

247. Respondent renewed challenges to Claimant's claims of privilege with respect to six documents. Claimant produced two of these documents and provided further explanation for the remaining four disputed documents. The Tribunal held:

> 61. With respect to the four documents remaining at issue, the Tribunal believes that, based on the further clarifications provided by Claimant, the attorney-client and/or work product privileges do indeed protect these documents. Therefore, the challenges to the assertions of privilege with respect to these documents are denied. If, however, Respondent wishes to make additional arguments based on these further explanations of the documents, the Tribunal is willing to hear such arguments.

248. On March 21, 2008, the Tribunal issued *Procedural Order No. 13*, in which the Tribunal found that, in accordance with its April 21, 2006 *Decision on Requests for Production of Documents and Challenges to Assertions of Privilege*, in order to assess Claimant's renewed request for documents withheld on the basis of privilege, the Tribunal must determine whether Claimant had stated sufficient materiality of the documents, in light of the Tribunal's current deliberations and determinations, to warrant application of the balancing test required by the deliberative process privilege. Based on Claimant's arguments and issues currently before the Tribunal in deliberations, the Tribunal determined that these documents with respect to which Claimant had renewed its request for production at the hearing (California Log Nos. 162, 192, 193, 194, 197 and 208) did appear to be material and there was a need for the Tribunal to review them. Although the Tribunal recognized the assertions for and interests in the deliberative

[582] *Id*. ¶ 58.

process privilege, it found the need to review these documents to be sufficiently great to override these interests. Therefore, the Tribunal requested Respondent to produce these six documents to the Tribunal and Claimant, at its earliest opportunity.

249. In making this request for production, the Tribunal accepted the same conditions under which California had agreed to produce documents in May of 2006. Namely, the documents would be covered by a confidentiality agreement and used only for the purposes of this Arbitration. California's production would be without prejudice to its ability to assert a claim of privilege or exemption from disclosure with respect to any of these documents in any other legal proceeding.

250. *Procedural Order No. 13* additionally provided that, within three weeks of the production of these documents, the Tribunal would accept brief analysis of the content of these documents and their relevance from the Parties. The Tribunal informed the Parties that these comments had to be strictly limited to the relevance of the newly produced documents and arguments already made.

251. In accordance with *Procedural Order No. 13*, California produced to the Tribunal and Claimant California Log Nos. 162, 192, 193, 194, 197 and 208 on August 13, 2008.

252. Also in accordance with *Procedural Order No. 13*, the Parties timely filed their comments with respect to relevance of these documents within the three-week time limit, on September 3, 2008. Respondent argued that the six documents prove that, "while the Imperial Project may have served as the impetus" for the California measures, they were targeted at open-pit mining generally, and not the Imperial Project.[583] Respondent asserted that the documents make clear that the "key concern" was to ensure that operators, not taxpayers, covered clean-up costs.[584] Finally, Respondent contended that the measures "responded, independently, to different concerns and constituencies."[585] In its submission, Claimant argued that the six documents provided further support for its arguments that: Senate Bill 22 and the emergency backfilling regulations targeted the Imperial Project; "the acknowledged purpose" of both California measures was to make the Project economically infeasible; and the California measures were not "mere

[583] Respondent's Letter to the Tribunal, at 1-2 (Sept. 3, 2008).
[584] *Id.* at 2.
[585] *Id.* at 4.

clarifications of pre-existing reclamation requirements in California."[586] Claimant additionally argued that redactions on three of the documents produced were improper in that they removed information on "internal processes" that Claimant viewed as integral to its argument that "the two California measures were closely related avenues to accomplish a single objective."[587] Claimant therefore requested the Tribunal to draw an adverse inference to this effect.[588]

253. On September 26, 2008, Respondent timely submitted its response to Claimant's request for an adverse inference with respect to redactions on documents 162, 192 and 197.[589] Respondent argued that, in considering whether an adverse inference should be drawn, a tribunal should look at whether: (1) the party has possession or control of the documents; (2) the party has provided any evidence contrary to the adverse inference sought; (3) the party has provided a reason for its non-disclosure; and (4) there exists a logical nexus "between the probable nature of the non-disclosed information and the inference to be drawn."[590] Respondent argued that each of these four factors weighs against the drawing of an adverse inference. First, the privileged documents are in the possession of the State of California, a non-party which has nonetheless "acted in a spirit of voluntary cooperation."[591] Second, Respondent asserted that it "has produced extensive evidence addressing ... whether the SMGB Regulation and SB 22 were 'inextricably intertwined' efforts to 'stop the Imperial Project from ever proceeding.'"[592] Third, Respondent points to the sworn affidavits explaining the reasons for the redactions, and the fact that the redactions are very limited.[593] Fourth and finally, Respondent argued that Claimant is attempting to draw "sweeping" conclusions—conclusions that Claimant has failed to prove with the thousands of produced

[586] Claimant's Letter to the Tribunal (Sept. 3, 2008).
[587] *Id.* at 6-7.
[588] *Id.*
[589] *See* Respondent's Letter to the Tribunal (Sept. 26, 2008)
[590] *Id.* at 1.
[591] *Id.* at 2-3.
[592] *Id.* at 3-5, quoting Claimant's Letter to the Tribunal, at 7 (Sept. 3, 2008). Respondent reviewed various evidence in the record that the SMGB operated independently of the California Governor's Office and that the California measures would not stop open-pit metallic mining, generally, or the Imperial Project specifically.
[593] *Id.* at 5-6.

documents—from limited, non-substantive redactions.[594] Respondent closed by offering an *in camera* review of the redactions, if the Tribunal were to determine that such a review would be helpful.[595]

254. Claimant timely submitted its response to Respondent's submission on October 2, 2008.[596] Claimant countered each of Respondent's arguments. First, Claimant argued that "internal governmental structure provides no excuse under international law," and that the NAFTA makes State Parties responsible for their state governments.[597] Second, Claimant asserted that Respondent's rule that no adverse inference is possible if "any credible evidence" is produced allows a party to produce only favorable evidence, while withholding damaging evidence with impunity.[598] Third, Claimant argued that Respondent's affidavits fail to explain why the redactions' substance "is so sensitive that redaction is 'compelled'"; and argued that the custodian's feeling "compelled" to withhold the information is conclusory.[599] Fourth, Claimant asserted that there *is* evidence in the record supporting its conclusion; specifically, it argued that "it is indisputable" that Governor Gray Davis' "own directive" called for legislative and executive actions to block the Glamis mine.[600] Finally, Claimant explained that it did "not consent to any open-ended process" such as the offered *in camera* review, citing the five months for the production of the redacted documents and Respondent's offer only to "work with" California to secure the review.[601]

255. The Tribunal responded to the Parties on October 9, 2008, and specifically addressed the issue of a possible *in camera* review.[602] The Tribunal commended both Parties' good faith efforts with respect to the production of the six California documents.[603] The Tribunal further stated that it did believe it needed Party consent to conduct such an *in camera review* and further that "it [was] not entirely persuaded that it

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[594] *Id.* at 6-8.
[595] *Id.* at 8.
[596] *See* Claimant's Letter to the Tribunal, (Oct. 2, 2008).
[597] *Id.* at 2.
[598] *Id.* at 3.
[599] *Id* at 2, 4.
[600] *Id.* at 3-4 (citing further evidence in the record to support its conclusion).
[601] *Id.* at 5.
[602] Tribunal's Letter to the Parties (Oct. 9, 2008).
[603] *Id.* at 1 (stating its awareness of the difficulty for Respondent in acting at the intersection of the federal and state governments, and its appreciation of Claimant's patience throughout the process).

should draw the requested adverse inference by what has currently been produced and argued by the Parties."[604] In light of this, the Tribunal explained that it might therefore decide to close the issue in favor of Respondent, but would conduct the *in camera* review offered by Respondent, should Claimant prefer.[605]

256. Claimant responded to the Tribunal on October 15, 2008, turning down the offer of *in camera* review.[606] Claimant, though noting the Tribunal's assurance that it would conduct the review "with great haste," explained that it was "less sanguine that Respondent [would] actually produce the documents in a timely fashion." Claimant therefore "respectfully requested the Tribunal make its ruling on the redactions and proceed with the issuance of the decision on the merits."[607]

G. PARTY SUBMISSIONS

257. On May 5, 2006, Claimant submitted its Memorial, in accordance with *Procedural Order No. 8* and an extension granted in an April 25, 2006 letter from the Tribunal.

258. On September 19, 2006, Respondent submitted its Counter-Memorial, also in accordance with *Procedural Order No. 8* and the Tribunal's April 25, 2006 letter to the Parties.

259. On October 20, 2006, Claimant contacted the Tribunal by letter and requested a four to five week extension for the submission of its Reply.[608] Claimant detailed three events as causing it to request an adjustment to the case management schedule. In making this request, Claimant recognized that such an extension would necessitate an

[604] *Id.* at 2.

[605] *Id.* at 2. The Tribunal also explained that, should Claimant prefer the *in camera* review, it would request Respondent to produce unredacted versions of the documents "with great haste"; and, if Claimant did not request the review, it would make its decision as to the request for the drawing of an adverse inference.

[606] Claimant's Letter to the Tribunal (Oct. 15, 2008).

[607] *Id.*

[608] In requesting an extension of four *or* five weeks, Claimant explained that its new constitutional law expert strongly preferred an extension until December 15, 2006, but Claimant did not request this so as to attempt to preserve the current arbitral hearing date. If, however, the Tribunal determined that the hearing had to be delayed, Claimant requested a Reply deadline of the latter date so as to accommodate its expert.

equal extension for Respondent's filing of its Rejoinder and could require the delay of the final arbitral hearing.

260. By letter of October 23, 2006, Respondent objected to Claimant's extension request, arguing that the cited events did not, individually or collectively, justify the lengthy extension requested. Respondent also cited the extreme difficulty of revising the briefing schedule at that juncture without creating conflicts with Respondent's other pending cases. Therefore, Respondent requested the Tribunal to deny Claimant's extension request. In the alternative, if the request were to be granted, Respondent submitted that the hearing would have to be postponed.

261. On October 31, 2006, the Tribunal issued *Procedural Order No. 9*. In response to Claimant's request for an extension for the filing of its Reply, the Tribunal wrote:

> 11. The Tribunal recognizes the diligent efforts of both Parties to comply with the numerous and difficult requirements of the pre-hearing submission schedule. At the request of the Parties, the Tribunal has attempted to maintain a very tight timeline so as to facilitate a final arbitral hearing at the earliest date possible. This, however, has continually challenged the Parties and left no room for unexpected circumstances.
>
> 12. The Tribunal is aware of its dual responsibility to keep the arbitration schedule moving effectively forward and to ensure that both parties have the opportunity to develop and present reasoned and supported arguments. The Tribunal believes that the circumstances described by Claimant impair its ability to effectively prepare its case and thus an extension is required, though this necessitates adjustment to the hearing dates. In granting an extension to the Claimant, an equal extension of time has been granted to the Respondent….

262. *Procedural Order No. 9* postponed the deadlines for the submission of Claimant's Reply until December 15, 2006, and Respondent's Rejoinder until February 27, 2007.[609] In addition, the final arbitral hearing was moved to May 2007, with the understanding that the Assistant to the Tribunal would work with the Parties to ascertain an exact date for the hearing.

[609] In informal discussions, Respondent requested that the deadline for its Rejoinder be extended until March 15, 2007, both due to scheduling difficulties and to receive a preparation time period equal to that which Claimant now had to submit its Reply. By email correspondence on November 10, 2006, the Assistant to the Tribunal informed the Parties that the Tribunal had granted the requested extension.

263. In informal discussions between the Parties and the Assistant to the Tribunal, it was determined that the May 2007 timeframe for the final arbitral hearing was not possible for Respondent, due to previously scheduled hearings in other cases. Other dates were discussed and, on December 15, 2006, the Tribunal confirmed in a letter to the Parties that the final arbitral hearing would be held on August 13 to 17, 2007 and, as necessary, September 17 to 21, 2007. In this letter, the Tribunal stated that it appreciated the concerns expressed by Respondent concerning the division of argument between the two weeks. The Tribunal wrote that it would determine the division "in a manner that ensures fairness for both Parties, both in general now and again, in specificity, at the pre-hearing procedural hearing. The inclination of the Tribunal is to structure the hearing on an issue-by-issue basis, with the exact number, order and time limits of each issue determined at the pre-hearing procedural hearing." The Tribunal requested that the Parties consult with each other regarding a possible structure for the hearing in light of the Tribunal's comments and communicate any agreement, or their differing views, for consideration by the Tribunal. Finally, the Tribunal expressed its intent to use as much of the second week as possible for deliberations and, therefore, the Tribunal requested that the Parties inform the Tribunal if, after consultation with each other, they believed the hearing would take appreciably longer than a week.

264. Also on December 15, 2006, Claimant timely filed its Reply.

265. On February 22, 2007, the Tribunal issued *Procedural Order No. 10* confirming amendments to the arbitral schedule upon which the Tribunal and Parties had agreed in informal discussions with the Assistant to the Tribunal. In this order, the deadline for the submission of Respondent's Rejoinder was scheduled for March 15, 2007; the deadline for the submission of witness lists was set for June 14, 2007; and the pre-hearing procedural hearing was scheduled on June 28, 2007 in Washington D.C. The final arbitral hearing was confirmed as August 13 to 17, 2007 and, as necessary, September 17 to 21, 2007.

266. On March 15, 2007, Respondent timely filed its Rejoinder.

H. ARTICLE 1128 AND NON-DISPUTING PARTY SUBMISSIONS

267. In *Procedural Order No. 1* issued on March 3, 2005, the Tribunal presented the initial arbitral schedule. In this schedule, the deadline for the receipt of any applications for leave to file Article 1128 or non-disputing party submissions, and their corresponding submissions, was March 3, 2006.

268. On March 9, 2005, the Quechan Indian Nation (the "Quechan") forwarded a letter[610] to the Tribunal expressing its wish to participate in this matter. By letter dated June 21, 2005, Tribunal President Michael K. Young advised the Quechan that the Tribunal would consider its request pursuant to the principles articulated in the Free Trade Commission's Statement on non-disputing party participation (the "FTC Statement") and called its attention to Section B of the FTC Statement for details on the procedures for submitting an application and submission. His letter further advised that the application and submission should be submitted by July 26, 2005.

269. The Quechan then, in a facsimile on July 22, 2005, requested to submit its application and submission in March 2006, after the Parties submitted their memorials. Tribunal President Young, by a letter dated July 28, 2005, advised the Quechan that the Tribunal intended to allow participation by qualified non-parties but, in doing so, to also avoid disruption of the proceedings and to minimize any burden to the Parties. This letter set the application and submission deadline for August 19, 2005.

270. On August 19, 2005, the Quechan Indian Nation timely filed its application for leave to file a non-disputing party submission and its corresponding submission.

271. On August 26, 2005, however, the Tribunal amended the date for the filing of non-disputing party applications and submissions pursuant to the FTC Statement in its *Procedural Order No. 4.* The Tribunal, "wishing to provide the Claimant and the Respondent time to respond to the merits of any such submissions authorized and accepted by the Tribunal while simultaneously avoiding delay in completion of the

[610] The letter was dated February 24, 2005 and was distributed to the Parties on that date. On March 9, 2005, the Quechan provided a copy of the letter to the Secretary of the Tribunal with a request that she distribute it to the members of the Tribunal. She did so on March 10, 2005.

arbitration proceeding," set September 30, 2005 for the filing of applications and submissions pursuant to the FTC Statement.

272. On August 26, 2005, the Tribunal also contacted the Parties for comments on whether the Tribunal should accept the Quechan application and submission. On September 15, 2005, Claimant deferred to the views of the Tribunal, while taking issue with a number of factual and other aspects of the submission. Respondent, on the same date, asked the Tribunal to accept the application and submission, stating that they qualified for acceptance under the FTC Statement.

273. The Tribunal issued its *Decision on Application and Submission by Quechan Indian Nation* on September 16, 2005. In this decision, the Tribunal first defined the applicable law:

> 8. This arbitration is conducted under the UNCITRAL Arbitration Rules.
>
> 9. The Tribunal need not now decide whether the discretion to accept substantive materials from non-parties is within the discretion of the Tribunal under Article 15(1) of the UNCITRAL Rules. The Free Trade Commission's Statement on non-disputing party participation indicates that the three states in NAFTA accept such statements. More particularly, the parties in this proceeding do not object to such statements, at least where consideration of the material is in accordance with the Free Trade Commission's Statement.

274. The *Decision on Application and Submission by Quechan Indian Nation* proceeded to express the Tribunal's view that the submission satisfied the principles of the FTC Statement and did not present undue burden or cause delay, and thus concluded that the submission was accepted. The Tribunal added, however, that the granting of leave did not require the Tribunal to address the submission at any point in the Arbitration, nor did it entitle a non-disputing party to make further submissions in the Arbitration. The Tribunal also noted that Parties would have further opportunity to comment on the submission, up to and including, respectively, the Memorial and Counter-Memorial.[611]

275. On September 23, 2005, the Tribunal received requests for extensions of the deadline for submitting non-disputing party applications to file and corresponding

[611] *See* Decision on Application and Submission by Quechan Indian Nation (Sept. 16, 2005), ¶¶ 10-15.

submissions from Sierra Club/Earthworks and Friends of the Earth. These requests came in response to *Procedural Order No. 4*'s amendment to *Procedural Order No. 1* with respect to the deadline for these submissions from March 3, 2006 to September 30, 2005, as well as the concern by these non-disputing parties that this order had not been promptly posted on the U.S. Department of State website, resulting in their learning of the change with little notice.

276. On September 30, 2005, Friends of the Earth Canada and Friends of the Earth United States timely submitted to the Tribunal an application to file a non-disputing party submission and a corresponding submission.

277. Also on September 30, 2005, the Tribunal notified all interested non-disputing parties of an extension of the deadline for the filing of non-disputing party applications and submissions until October 26, 2005.

278. On October 3, 2005, a hearing was conducted before the Tribunal at which the Parties discussed, among other items, the requests of certain non-disputing parties that the Tribunal reconsider its previous decision that non-disputing party submissions be filed prior to the filing of the Parties' memorials. These non-disputing parties asserted that they could not submit meaningful submissions without the benefit of the Parties' Memorial and Counter-Memorial. The Parties understood the concerns of the non-disputing parties and agreed that non-party submissions could be filed contemporaneously with any Article 1128 filings, roughly a month following the submission of Respondent's Counter-Memorial.

279. Confirming the agreements reached at the October 3, 2005 hearing, the Tribunal issued *Procedural Order No. 6* on October 15, 2005. This order set the deadline for submission of any Article 1128 and non-disputing party submissions on July 20, 2006, almost one month after the June 22, 2006 deadline for the submission of Respondent's Counter-Memorial.

280. The submission deadline was extended by *Procedural Order No. 8*, issued on January 31, 2006, in accordance with the postponement of the final arbitral hearing. The new date for the submission of any Article 1128 and non-disputing party submissions was October 13, 2006.

281. In accordance with *Procedural Order No. 8*, on or before October 13, 2006, the Tribunal received an application for leave to file a non-disputing party submission and a corresponding submission from the National Mining Association, as well as a request for the renewal of its non-disputing party application and submission originally filed on September 30, 2005 from Friends of the Earth. In addition, on October 16, 2006, the Tribunal received a non-disputing party application and submission from Sierra Club and Earthworks pursuant to an extension granted by the Tribunal on October 10, 2006.

282. Also on October 16, 2006, the Tribunal received an application for leave to file a supplemental non-disputing party submission and corresponding supplemental submission from the Quechan Indian Nation. The supplemental submission included an expert paper from Dr. Tom King that, in subsequent email correspondence, the Quechan's counsel requested to remain confidential and not be posted on the internet or provided to the public. The Tribunal responded on October 31, 2006, explaining that the "transparency of Chapter Eleven tribunals is of particular importance to the member states of the ... (NAFTA)." The Tribunal noted that the FTC stated that "[n]othing in the NAFTA imposes a general duty of confidentiality," and that, in fact, the FTC explained that each Party agreed to make available to the public all documents submitted in a Chapter 11 dispute—including documents by non-disputing parties—subject to redaction.[612] The Tribunal therefore explained that it was not willing to grant a request to keep the entire report confidential, but invited the Quechan to submit another request for particular sections of the report to be redacted, specifying the paragraphs of concern and the basis for its request for confidentiality. The Quechan replied on November 15, 2006, agreeing to not mark the report as confidential in that, among other reasons, it responded to the report of Claimant's cultural expert and did not reveal confidential cultural information, and "the Tribe concurs with the Tribunal that proceedings under NAFTA should strive for increased transparency."

283. The government of Canada notified the Secretary to the Tribunal by email correspondence on October 13, 2006, that it did not intend to file a NAFTA Article 1128

[612] Tribunal's Letter to Courtney Ann Coyle, Esq. (Oct. 31, 2006), citing Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission (July 31, 2001), § A(2)(b) and Statement of the Free Trade Commission on non-disputing party participation, § B(10).

submission on that date, but wished to reserve the right to make submissions at the hearing.

284. On December 15, 2006, in accordance with Section B(5) of the FTC Statement and its previous practice, the Tribunal requested any comments the Parties had with respect to the Tribunal's decisions to accept or reject the above-mentioned applications to file non-disputing party submissions. The Tribunal requested all such comments be submitted by January 18, 2007. The Tribunal reminded the Parties that they should not argue the content of the non-disputing party submissions at that time, but merely should address the applications for leave to file submissions. The Tribunal explained that it would issue a letter following the receipt of the Parties' comments stating which submissions were accepted. After that point, the Parties were invited to address the content of those submissions in written submissions, if they had not already done so in their Reply and Rejoinder.

285. On January 18, 2007, the Parties timely submitted their comments on the non-disputing party applications to file submissions. Respondent requested that the Tribunal accept each submission, insomuch as it met the requirements of the FTC Statement in terms of both length and content. Respondent stated its full support of *amicus* participation, as long as that participation was effectuated in a manner that avoided placing undue burden on the Parties. Claimant did not object to the applications of the National Mining Association, the Quechan Indian Nation, or the Sierra Club and Earthworks, as it already had filed substantive comments with respect to these submissions. Claimant, however, did object to the application of the Friends of the Earth as, Claimant argued, it largely addressed the nationality of Glamis (now Goldcorp, Inc.) which is not at issue in this case.

286. On February 15, 2007, the Tribunal issued its decisions on the non-disputing party applications to file submissions in separate letters to each of the National Mining Association, the Quechan Indian Nation, Sierra Club and Earthworks, and Friends of the Earth. The Tribunal decided to accept each submission and consider it, as appropriate, in accordance with the principles stated in the FTC Statement and the particular criterion mentioned by Respondent that each submission bring "a perspective, particular

knowledge or insight that is different from that of the disputing parties."[613] The Tribunal expressed its view that it should apply strictly the requirements specified in the FTC Statement, for example restrictions as to length or limitations as to the matters to be addressed, but that, given the public and remedial purposes of non-disputing submissions, leave to file and acceptance of submissions should be granted liberally. These matters, the Tribunal determined, were best considered at a later point in the proceedings, as necessary. In accepting each submission, the Tribunal noted Section (B)(9) of the FTC Statement, which states that acceptance of a non-disputing submission does not require the Tribunal to consider that submission at any point in the arbitration, nor does it entitle the non-disputing party to make any further submissions. Finally, the Tribunal expressed its intent to ensure that the incorporation of any submission, or parts thereof, would not unduly burden the Parties or delay the proceedings.

I. PRE-HEARING PROCEDURAL HEARING

287. On June 28, 2007, the Parties and the Tribunal met at the World Bank in Washington, D.C. for the pre-hearing procedural hearing. The Tribunal and the Parties discussed the schedule of the hearing, time allocation between the Parties, witness examination, public access, and other logistical issues pertaining to the final arbitral hearing.

288. On July 9, 2007, the Tribunal issued *Procedural Order No. 11*, in which it confirmed many of the agreements reached between it and the Parties at the pre-hearing procedural hearing and provided a final schedule for the hearing on the merits. Specifically, *Procedural Order No. 11* reflected the adoption of an eight-day hearing schedule, which enabled the hearing to proceed without the necessity of splitting it based on legal issue, factual predicate, or otherwise. The first session of the hearing on the merits was scheduled for Sunday, August 12 through Friday, August 17, 2007, at the offices of the World Bank, in Washington, D.C. During this period, each Party was to have 17 hours in which to present its case-in-chief, as it wished, with Claimant presenting its case first and Respondent second. The second session of the hearing was scheduled for Monday, September 17 through Tuesday, September 18, 2007, at which the Parties

[613] Statement of the Free Trade Commission on Non-Disputing Party Participation, § B(6)(a).

each would have four hours in which to present rebuttal and closing remarks, with the option of reserving one of these hours for surre-rebuttal statements following the other Party's summation comments.

289. *Procedural Order No. 11* additionally detailed other agreements regarding the form and structure of the hearing on the merits. First, in an effort to limit direct witness testimony, it was agreed that all testimony that was presented by either Party that was "new"—in that it responded to new items in Respondent's Rejoinder or addressed events subsequent to the filing of the Rejoinder—were to be submitted prior to the hearing in writing, and deadlines were established for these submissions. In addition, a deadline was set for the submission of each Party's estimate of cross-examination times, as well as the proposed sequence of witnesses, which the Tribunal intended to use to establish a tentative schedule for witness testimony so as to limit the time each witness needed to spend waiting to testify. The order also established procedures for witness attendance, document use, and viewing by the public.

290. *Procedural Order No. 11* also explained the details of public access to the hearing, which had been requested specifically by various non-disputing parties.[614] Specifically, the public was invited to view the proceedings in a separate room via closed circuit television. The Quechan were invited to view the proceedings from a different location with a separate video feed to allow their viewing of otherwise restricted discussion of cultural locations; tribal identification would be required for admission to this location. All interested parties were requested to supply their email addresses to the Secretariat to facilitate notification of when the proceedings would be closed due to cultural discussion.

291. In accordance with *Procedural Order No. 11*, the Parties timely submitted their proposed witness sequences and estimated cross-examination times on July 23, 2007. Following these submissions, on July 26, 2007, the Tribunal issued a tentative schedule for the first session of the arbitral hearing.

[614] *See, e.g.*, Letter to the Tribunal from Earthjustice (Apr. 25, 2007); Letter to the Tribunal from Courtney Ann Coyle, Esq. (June 26, 2007) (requesting the ability of the Quechan to view all aspects of the proceedings so as to monitor the protection of tribal cultural resources confidentiality).

292. On July 27, 2007, Respondent raised concerns about this tentative schedule with the Tribunal and Claimant. Specifically, Respondent pointed out that the Tribunal had distributed the witnesses throughout the hearing week, leaving insufficient time for Respondent to present its case in chief, "which [was to be] composed primarily of oral argument," following Claimant's presentation of its case. Respondent therefore requested a revised schedule reflecting these understandings.

293. Claimant, in a letter to the Tribunal of July 30, 2007, responded to Respondent's July 27 letter, expressing its surprise at Respondent's desire "to present extensive oral argument by counsel as part of its evidentiary presentation." Claimant objected to Respondent's request but stated that, if the Tribunal were to permit the proposal, Claimant would "be forced to reserve additional time" for rebuttal argument that it doubted could be accomplished within the 34 hours scheduled for argument within the first session of the hearing on the merits.

294. Respondent and Claimant submitted further responsive letters with respect to the tentative hearing schedule on July 30, 2007 and July 31, 2007, respectively.

295. In response to the concerns expressed by the Parties with respect to the tentative schedule for the first session of the hearing on the merits, the Tribunal issued an amended schedule on July 31, 2007. In this letter to the Parties, the Tribunal noted that the agreement between the Parties and the Tribunal reached at the pre-hearing procedural hearing—as memorialized in *Procedural Order No. 11*—was that each Party would have "seventeen (17) hours to present their arguments in the first week of the hearing, as they wish." The Tribunal explained that, in preparing the July 26, 2007 proposal, it "focused upon the scheduling of witness presentation and inadvertently departed from [this] understanding …." The Tribunal additionally stated that its "understanding of the agreement of the parties and the Tribunal reached at the Pre-Hearing Procedural Meeting [was] in conformity in large measure with the view indicated by Respondent."

296. The Tribunal explained that, in approaching the scheduling of the hearing both at the pre-hearing procedural meeting and at that point, it was guided by four considerations:

> (1) that the parties be treated equally and that one way that this equality is achieved is through an equal allocation of time to each side during the hearing; (2) that the basic structure of the hearing should be that Claimant present its case, that Respondent present its defense, that Claimant present its rebuttal and Respondent present its rebuttal; (3) that the manner in which each party is to present its case or defense is left to that party; and (4) the division of the Hearing over two separate weeks should not work to the disadvantage of either party.[615]

Given Claimant's concerns, however, the Tribunal offered to reconsider the hearing schedule if revised proposals were submitted by Claimant by 4 p.m. Eastern Time on August 2, 2007. In addition, the Tribunal permitted Claimant, by the same time and date, to propose a "more fundamental reorganization," but emphasized that any reorganization would be guided by the four considerations above and likely would necessitate postponement of the hearing.

297. Claimant timely submitted a response on August 2, 2007, in which it requested a reservation of three of its 17 total argument hours for rebuttal argument following the presentation of Respondent's case in chief. On the same day, Respondent objected to this request, stating that it contravened the Tribunal's determination that "the basic structure of the hearing should be that Claimant present its case, that Respondent present its defense, that Claimant present its rebuttal and Respondent present its rebuttal." Respondent thus requested the Tribunal to issue an order either directing Claimant to present any oral argument within its case in chief, or allowing both Parties to present their rebuttal statements on Friday, August 17, 2007, thus eliminating the second session of the hearing. Claimant responded immediately that it was "adamantly opposed to eliminating" the second hearing session and that it had "confidence in the Tribunal to make any minor adjustments to the August and September hearing schedules that [were] deemed appropriate."

298. Also on August 2, 2007, the Tribunal issued a second amended schedule for both sessions of the hearing on the merits. In this letter, the Tribunal expressed its appreciation for "the efforts the Parties [had] made to accommodate each other's different styles of case presentation and work towards a hearing schedule that provide[d] equal opportunity for each Party to present its case and defense, as it wishes." After weighing

[615] Tentative Schedule for the First Session of the Arbitral Hearing: August 12 to 17, 2007 (Amended) (July 31, 2007), p. 2.

the Parties' statements with respect to the arbitral schedule, the Tribunal presented an amended schedule very similar to that provided on July 31, 2007, with one exception: "Claimant, having reduced the time it intend[ed] to examine witnesses by approximately three hours, [could] utilize that time within the presentation of its case-in-chief and preceding that of Respondent as it [saw] fit to make legal arguments and apply the facts presented to those arguments, and the Tribunal urge[d] it to do so." In addition to presenting an amended schedule in accordance with this change, the Tribunal included a schedule for the second session of the hearing on the merits to be held on September 17 to 18, 2007. In that schedule, the Tribunal foresaw Claimant's rebuttal and closing arguments occurring on Monday, September 17, and Respondent's rebuttal and closing arguments, as well as any Party surre-rebuttals and Tribunal questions, taking place on Tuesday, September 18.

J. HEARING ON THE MERITS

299. The first session of the hearing on the merits took place in Washington, D.C., at the offices of the World Bank on August 12 to 17, 2007. At this hearing, each Party presented its case in chief. At the close of the hearing, the Tribunal asked the Parties if they would agree to the possibility of the Tribunal sending a limited number of questions to be addressed and woven into the Parties' rebuttal and closing remarks at the second session of the hearing; both Parties agreed. In light of this proposal and the desire of the Tribunal to ensure that both Parties had adequate time to present oral arguments, the Tribunal questioned whether the Parties might be available for additional time on the morning of Wednesday, September 19, 2007. The Parties indicated their availability.

300. In addition, at the close of the first session of the hearing, the Tribunal requested that, with respect to documents withheld on grounds of privilege regarding which the Tribunal had previously deferred judgment, if Claimant still sought any such documents, it should clearly explain at the September hearing as to what issue the documents would be material.

301. Following this first week of the hearing, the Tribunal issued *Procedural Order No. 12* on August 28, 2007. In this order, the Tribunal affirmed that it would issue a limited number of questions to the Parties. The Tribunal also confirmed the schedule for

the second session of the hearing on the merits to be held on September 17 through 19, 2007. In addition, the Tribunal reiterated its request that Claimant provide at the September hearing any additional information as to the materiality of any documents withheld on the grounds of privilege about which the Tribunal had deferred judgment and which Claimant still sought.

302. On September 6, 2007, the Tribunal issued several questions to the Parties to be addressed in their closing and rebuttal arguments at the second session of the hearing.

303. The second session of the hearing on the merits was held at the World Bank in Washington, D.C. on September 17 to 19, 2007. At this session, the Parties presented their closing and rebuttal arguments, and the Tribunal conducted extensive questioning of the Parties. As part of its closing argument, Claimant renewed its request for the production of six documents held by the State of California under the deliberative process privilege.

K. TRIBUNAL'S REQUEST FOR FURTHER INFORMATION

304. Additionally on March 21, 2008, the Tribunal issued a request for further information with respect to financial assurances. Specifically, the Tribunal cited to numerous references in the record and noted that the potentially disparate requirements of these sources had raised certain questions about which the Tribunal requested further explanation. One set of references suggested to the Tribunal that financial guarantees must be made available for the total amount of all of the disturbance anticipated by the Plan of Operations; while the other reference grouping suggested that assurances may be required only for the amount disturbed in the given year. Together, these references appeared to the Tribunal to create a potential conflict between the requirements of the State of California and Imperial County, and those of the federal regulations.

305. The Tribunal therefore requested the Parties to inform it regarding the actual amount of financial guarantees, and the timing with respect to the posting of these assurances, required in the State of California to secure state and federal approval of a plan of operations. The Tribunal asked the Parties to provide the requested information to the Tribunal, with copies to each other, by April 4, 2008, and to limit their responses

strictly to the questions presented regarding the annualization of financial assurances, and to not re-open argument on or address any other issues.

306. In accordance with this request, the Parties timely filed their responses to the questions posed by the Tribunal on April 4, 2008. Claimant presented its views as to why sufficient funds for the reclamation needed to be posted prior to beginning any surface mining operations.[616] Respondent, on the other hand, argued that an operator need post only those financial assurances necessary to cover 100% of the disturbance estimated to occur in the coming year.[617]

307. On April 11, 2008, Respondent requested an opportunity to further respond to Claimant's submission, which was granted by the Tribunal on April 18, 2008. In light of the Tribunal's decision, on April 21, 2008, Claimant sought an equivalent opportunity to respond to Respondent's further response; which the Tribunal granted on April 23, 2008.

308. Respondent submitted its further response with respect to the timing of the posting of financial assurances on April 25, 2008; and Claimant submitted its final thoughts on the issue on May 16, 2008.

IV. PRELIMINARY OBJECTIONS

A. ISSUE PRESENTED

309. Respondent argues that Claimant has not met the requirements of Article 1117(1) in that it has not yet suffered damage, resulting in the fact that its claim under Article 1110 is not ripe.[618] Article 1117(1) states:

> 1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to Arbitration under this Section a claim that the other Party has breached an obligation under: (a) Section A or Article 1503(2) … and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

[616] Claimant's Letter to the Tribunal (Apr. 4, 2008). For significant further discussion of Claimant's position, *see infra* ¶¶ 495-501.

[617] Respondent's Letter to the Tribunal (Apr. 4, 2008). For significant further discussion of Respondent's position, *see infra* ¶¶ 502-506.

[618] *See supra* ¶ 195. *Also see supra*, ¶¶ 196-200. The Tribunal denied Respondent's request for bifurcation of these proceedings on May 31, 2005, holding that "[t]o do so would not ultimately avoid expense for the Parties, contribute to Tribunal efficiency, or be practical." It is therefore at this stage, after full Tribunal deliberations and as part of this final award, that the Tribunal presents both the Parties' arguments with respect to preliminary objections and its holding with respect to both.

Respondent additionally asserts that Claimant's claims under NAFTA Article 1105(1) are time-barred under the limitation set forth in NAFTA Article 1117(2), inasmuch as they are based upon three federal actions that took place in October 1999, December 1999 and November 2000.[619] Article 1117(2) provides:

> 2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

B. RIPENESS

1. RESPONDENT'S CONTENTIONS

310. Respondent argues that neither Senate Bill 22 nor the amendments to the SMGB Regulations have been applied to Claimant, and thus Claimant's challenges to these measures are not ripe and should be dismissed by the Tribunal.[620] For a claim to be ripe under the NAFTA, Respondent asserts, a claimant must assert that it has "incurred loss or damage" from the alleged breach; likewise, under customary international law, a challenged measure must actually interfere with claimant's property right.[621] Therefore, the "mere adoption" of an expropriatory measure, or a corresponding threat of its application, is not on its own sufficient to give rise to a cognizable expropriation claim.[622] Respondent argues that the determination of when the measures were actually applied is

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[619] *Id.*

[620] Respondent's Counter-Memorial, at 108.

[621] *Id.* at 109, citing numerous international arbitral awards. Respondent asserts that this customary international law requirement of actual interference with a property interest is also reflected in the national laws of the United States and Canada. Respondent's Counter-Memorial, at 113-14. For evidence of a similar requirement of ripeness in Canada, Respondent cites to Mariner Real Estate Ltd. v. Nova Scotia (Attorney General), 90 A.C.W.S. (3d) 589 (Can.) ¶ 54. Respondent explains that U.S. courts require a "final, definitive position" by a relevant agency concerning the application of challenged measures to a particular property before they will review such measures. Without such a final decision, the court is unable to assess the factors necessary to evaluate a claim of indirect expropriation, such as the economic impact of the measures and the extent of interference with the investor's expectations. Respondent's Counter-Memorial, at 113, citing Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 190-91 (1985).

[622] Respondent's Counter-Memorial, at 109 (citations omitted). Alternatively, Respondent submits, if Claimant *did* want to facially challenge the measures without having them applied to it, although facial challenges to regulations are "strongly disfavored," Claimant could attempt to make such a challenge, but then it would have to make a much higher showing. Respondent submits that Claimant "must show that that statute acts in a manner that's inconsistent with the law here, that it acts in an expropriatory manner in every conceivable situation, and that Glamis cannot show." Counsel for Respondent, Tr. 2152:7-14.

especially critical in the case of gold mining, as illustrated by the dramatic rise in gold prices since the adoption of the SMGB Regulations in December 2002.[623]

311. Respondent contends that neither California nor the BLM has applied either of the California measures to the Imperial Project and that Claimant is conflating the *adoption* of the SMGB Regulations and SB 22 with the *application* of the regulations and legislation to the Imperial Project.[624] On December 12, 2002, the day the emergency backfilling regulations were adopted—Claimant's proposed date of expropriation—Respondent argues that Claimant did not have an active application before either the Imperial County or the BLM as, three days prior, Claimant had requested that BLM suspend the processing of its Plan of Operations during discussions with the U.S. government about a potential buyout of Claimant's interests in the Imperial Project.[625] After corresponding with the BLM regarding a waiver of the BLM's liability resulting from such a suspension, Claimant declined to reaffirm its suspension request on March 31, 2003.[626] Subsequently, Claimant filed its Notice of Intent to commence arbitration on July 21, 2003, and its Notice of Arbitration in December 2003.[627]

312. According to Respondent, there was not sufficient time for either the BLM or Imperial County to apply the challenged California measures to Claimant between the recommencement of the process of reviewing Claimant's POO on March 31, 2003, and the cessation of this review with the filing of Claimant's NOI on July 21, 2003.[628] According to Respondent, BLM was continuing to process the Imperial Project Plan of Operations at the time of Claimant's submission of its Notice of Intent in this Arbitration, and it never did complete this review.[629] As an approved reclamation plan, Respondent

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[623] Respondent's Rejoinder, at 4.

[624] Respondent's Rejoinder, at 4 (citations omitted).

[625] Respondent's Counter-Memorial, at 115, citing Letter from C. Kevin McArthur, President and CEO, Glamis Gold Ltd., to Mike Pool, California State Director, BLM, re: The Imperial Project Plan of Operations (Dec. 9, 2002) [Ex. 265].

[626] Respondent's Counter-Memorial, at 115, citing Letter from Charles A. Jeannes, Senior Vice President, Administration, Glamis Gold Ltd., to Mike Pool, California State Director, BLM, re: the Imperial Project Plan of Operations (Mar. 31, 2003) [Ex. 280].

[627] *Id*.

[628] Respondent believes that, with the Notice of Intent, Claimant "unilaterally ceased cooperating in the process and notified the United States that government actions 'have effectively destroyed and expropriated' the company's investment …." Respondent's Counter-Memorial, at 116.

[629] *Id*. at 108.

explains, is necessary "only if a corresponding mining project will go forward,"[630] the absence of a final decision by the BLM on the Imperial Project application resulted in the situation that Imperial County "had no occasion to complete processing of [Claimant's] proposed reclamation plan or to apply the challenged California reclamation measures ...."[631] Therefore, Respondent submits, Claimant has not been refused authorization to develop the Imperial Project, its reclamation plan has not been denied, and the California measures have not been applied to it.[632]

313. In addition, because the 3809 Regulations have been amended, Respondent submits that it is an "open question as to whether in processing the Plan of Operations on the federal side … they would have had to have taken into account compliance with California measures or not …."[633] Respondent asserts that, as Claimant's plan fell into this window, it is not clear whether the California measures would have been part of the federal government's approval process.[634]

314. Without a final decision, Respondent argues, it is impossible to know either the economic impact the California measures would have on the Imperial Project as this would "turn on the particular facts surrounding their application," or their effect on Claimant's reasonable investment-backed expectations, and thus whether such an effect constituted expropriation.[635] Respondent asserts that it was also for this reason that Claimant's challenge of the 1999 M-Opinion in Nevada federal court was dismissed for lack of subject matter jurisdiction: "the opinion did not mandate any specific outcome concerning the Imperial Project plan of operations and thus was not ripe for review."[636]

315. The fact that the measures were never applied to Claimant's Imperial Project is particularly evident, asserts Respondent, when considering a temporary expropriation (as between the enactment and rescission of the denial of the ROD by the federal

[630] *Id*. at 115.
[631] *Id*. at 115-16.
[632] *Id*. at 108-09.
[633] Counsel for Respondent, Tr. 2163:12-17.
[634] Counsel for Respondent, Tr. 2163:19-2164:3.
[635] Respondent's Counter-Memorial, at 117.
[636] *Id*. at 117-18, citing Glamis Imperial Corp. v. Babbitt, Case No. 00-CV-1934 (S.D. Cal. 2000), Order Granting Defendant's Motion to Dismiss on Grounds that Glamis Sought Impermissible Judicial Interference in an Ongoing Administrative Process, at 6-7 (Oct. 31, 2000) [LA 3 tab 59].

government).[637] Respondent asserts that, when an expropriatory measure is applied and later retracted, it is "ordinarily easy to see the impact that the measure had on the Claimant and to assess the economic consequences" of it.[638] The fact that it is not possible to do so in this case, Respondent argues, highlights the fact that neither of the California measures has ever been applied to Claimant.[639]

316. Respondent submits that this case varies from the situation presented in *Whitney Benefits, Inc. v. United States*, which involved an outright ban on certain mining activity, as the California measures at issue here merely impose certain reclamation requirements upon future mining activities.[640] The court in *Whitney Benefits*, Respondent explains, observed that "[t]he Government does not suggest, and did not suggest at trial, any basis whatever on which a permit could be legally granted to surface mine Whitney coal."[641] Respondent argues that in this case, by contrast, the challenged reclamation measures do not prohibit the issuance of a permit and that it has presented extensive evidence demonstrating the possibility that the Imperial Project could be mined profitably in December 2002 and today, even subject to California requirements.[642] Claimant is not subject to a mining ban, Respondent reiterates, only reclamation requirements, the economic impact of which will turn on the particular facts of the mining site and market conditions.[643]

317. In addition, Claimant's argument that the legislative history to Senate Bill 22 shows that the true purpose of the bill was to prevent the Imperial Project from ever going forward should be disregarded, argues Respondent. Respondent disputes Claimant's characterization of Respondent's statements as a concession that the

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[637] Counsel for Respondent, Tr. 1833:17-1834:3.

[638] Counsel for Respondent, Tr. 1834:4-9.

[639] Counsel for Respondent, Tr. 1834:10-12.

[640] Counsel for Respondent, Tr. 1834:20-1835:4, citing Whitney Benefits, Inc. v. United States ("*Whitney Benefits*"), 18 Cl. Ct. 394 (1989) (*aff'd by* 926 F.2d 1169 (Fed. Cir. 1991)) [Ex. 110].

[641] Counsel for Respondent, Tr. 1837:13-16, quoting *Whitney Benefits.*

[642] Counsel for Respondent, Tr. 1837:17-1838:1. Respondent points to contemporaneous internal company documents showing Claimant also originally believed that it could operate profitably subject to the California measures, but that it would not produce a sufficient "strategic profit." Counsel for Respondent, Tr. 2161:13-20.

[643] Counsel for Respondent, Tr. 1838:17-22. Respondent presents the illustration of Golden Queen Mining Company as alleged proof that the reclamation requirements are not cost-prohibitive for every project. Counsel for Respondent, Tr. 1838:22-1839:5. For further discussion of the Golden Queen mineral project, *see supra* ¶ footnote 539.

California measures were adopted to prevent the only economically viable use of Claimant's property.[644] Respondent asserts that there is thus no evidence to suggest that, if Claimant were to proceed with a mining application and reclamation plan in compliance with the requirements of SB 22, that it would be prevented from going forward.[645]

318. Respondent therefore argues that there was no reason why Claimant could not await a final decision from the DOI on its POO; that the Imperial Project POO was not "'condemn[ed]' to an 'eternal bureaucratic limbo.'"[646] Respondent asserts that Claimant's own legal challenges and suspension requests "detracted from the efficient processing of the plan of operations."[647] In addition, Respondent contends that Claimant secured "significant advances" in the review process when it actively engaged DOI and BLM officials, and thus it would not have been futile to have DOI continue to process its plan.[648]

319. Respondent therefore claims that Claimant cannot meet its burden of showing that further action on its part would be futile and points to the "radical change" in Claimant's actions before and after the July 2003 Notice of Intent to show that "[a]ny '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 expropriated' mining claims."[649] According to Respondent, prior to July 2003, Claimant communicated "persistently" with DOI and BLM officials concerning its Imperial Project application; however, since that communication, Claimant has made no further request for DOI to continue the processing of its POO.[650] Respondent asserts that, given Claimant's "persistent approaches to DOI during the months preceding the release of the validity

[644] Counsel for Respondent, Tr. 1838:3-6. For further elaboration of this argument, *see infra* ¶ 321.
[645] Counsel for Respondent, Tr. 1333:20-1334:3.
[646] Respondent's Counter-Memorial, at 117, quoting Claimant's Memorial, ¶ 511.
[647] *Id*.
[648] *Id*.
[649] Respondent's Rejoinder, at 8-9; *see also* Counsel for Respondent, Tr. 1047:19-20.
[650] Respondent's Rejoinder, at 8-9.

report … any 'firm expectation' of continued processing surely would have been accompanied by additional approaches by Glamis to DOI."[651]

320. In sum, Respondent contends that the Tribunal must choose a date of alleged expropriation in order to calculate economic impact as of that date. As the date of expropriation cannot pre-date the time when a measure was applied to Claimant, and the measures have not been applied, Respondent requests the Tribunal to find that Claimant's Article 1110 claims are not ripe and dismiss them for lack of subject matter jurisdiction.[652]

2. CLAIMANT'S CONTENTIONS

321. Claimant agrees that the passage of a measure that produces a mere threat of a future deprivation is insufficient to support an expropriation claim.[653] Claimant asserts, however, that it was not faced with "a mere threat of interference with its property right, as it had already been deprived of the value of that right by the California measures."[654] The actual deprivation already experienced, Claimant contends, is demonstrated by the fact that neither the BLM nor Imperial County has taken any further action on its still-pending Plan of Operations in more than six years.[655] According to Claimant, the deprivation actually began with the federal government's unlawful refusal in January 2001 to approve Claimant's POO and, despite the fact that the denial has been rescinded, it has never been cured.[656] Claimant submits that this initial denial and the subsequent California measures were enacted "wholly to prevent the only economically viable use of [Claimant's] property."[657] Claimant argues that Respondent concedes as much in its statements that such measures frequently arise in response to specific situations.[658] Claimant contends that "there is no economically viable plan … that could extract gold

[651] *Id.* at 9, footnote 29.
[652] Counsel for Respondent, Tr. 1047:6-11.
[653] Counsel for Claimant, Tr. 1620:16-1621:1.
[654] Claimant's Reply Memorial, ¶ 290. Claimant argues that there is no evidence in the record to support Respondent's assertion that because of the "window" in which the processing of Claimant's POO fell, it is unknown whether or not the federal government would have taken into account the California measures in processing Claimant's plan. Counsel for Claimant, Tr. 2164:10-20.
[655] Counsel for Claimant, Tr. 1621:2-9.
[656] Counsel for Claimant, Tr. 1621:9-13.
[657] Counsel for Claimant, Tr. 1624:11-14.
[658] Counsel for Claimant, Tr. 1624:14-19.

from the Imperial Project while satisfying the mandatory complete backfill and site recontouring requirements."[659]

322. At the hearing, Claimant argued that more than three years had passed since the enactment of the California measures, and more than five years since the November 23, 2001 rescission of BLM's denial of Claimant's proposed Plan of Operations, and no further action had been taken on the POO either at the federal or state level, nor had there been any indication that any such action was forthcoming.[660] Claimant points out that it cannot proceed with the Imperial Project without the approval of its POO, and that "the last federal legal hurdle (the Leshy Opinion) was rescinded over five years ago, [and] final administrative action has not been forthcoming."[661] According to Claimant, deprivations of this and even shorter length, consistently have been found to be more than "merely ephemeral" and thus compensable under customary international law;[662] and, Claimant argues, Respondent's own refusal to act cannot insulate it from liability for an expropriation.[663]

323. Claimant asserts that its "unsuccessful request" for suspension of the review of its POO on December 9, 2002, is unrelated to the failure of the United States to render a final administrative decision.[664] Claimant argues that Respondent's assertion that by filing its Notice of Intent Claimant is somehow responsible for halting the processing of its POO is incorrect.[665] Claimant asserts that it "never directed the government to stop processing its Imperial Plan when it initiated this NAFTA claim."[666] Nor does Respondent, according to Claimant, provide any reason for why it had to stop the processing at that point.[667] Claimant submits that its enforcement of its rights through arbitration should have motivated Respondent to correct the problem, rather than

[659] Counsel for Claimant, Tr. 1625:1-6.
[660] Claimant's Reply Memorial, ¶ 292.
[661] *Id.* ¶ 293.
[662] *Id.* ¶ 294.
[663] *Id.* ¶ 293.
[664] *Id.* ¶ 297.
[665] *Id.* ¶ 298.
[666] *Id.*
[667] *Id.*, citing *Metalclad*, Award, ¶ 67 (Aug. 30, 2000) for the proposition that there is no requirement that regulatory activity be suspended during the pendency of proceedings under the NAFTA.

quarantine it; Claimant points to the urging of Article 1118 to negotiation or settlement of claims and Article 1119's mandatory consultation period as support for this contention.[668]

324. Claimant submits that Respondent, beyond arguing that Claimant should have "more forcefully insisted that Respondent fulfill its own obligations," has not identified a single action of legal consequence that Claimant could have taken to compel Respondent to continue the processing of its plan.[669] In addition, Claimant submits, "[t]here is no reason or legal basis to require [Claimant] to do anything more than it has already done, which was to submit the only economically viable plan for extracting gold at the Imperial Site, a plan that calls for partial backfill."[670] Claimant's position is that "once the regulations were adopted, there was nothing more that could be done or that Respondent has shown that [Claimant] could do."[671]

325. Pointing to statements by California Governor Gray Davis that the new requirements essentially "stop[] the Glamis Gold Mine proposal" and make it "cost prohibitive," Claimant argues that the State of California "made it perfectly clear that the mandatory and complete backfilling requirements applied to Glamis to prevent the Imperial Project from proceeding."[672] Claimant submits that Respondent, in making its ripeness argument, has "utterly … ignored evidence that the emergency regulations, the challenged California statute, and the implementing regulations were adopted with the express goal of killing the Imperial Project."[673] Claimant therefore argues: "It would have been futile for Glamis to pursue a reclamation plan and final Plan of Operations (a necessary prerequisite to mine) to the California authorities at that point. The wasteful expenditure of further resources on a futile permitting process would only have added to Glamis' damages."[674] In addition, unlike in *Williamson County*, in which the plaintiff failed to avail itself of potential variances, Claimant argues that there were no variance procedures for Claimant to pursue.[675] If the passage of the regulations is insufficient to

[668] Counsel for Claimant, Tr. 1623:1-7.
[669] Counsel for Claimant, Tr. 1622:1-7.
[670] Counsel for Claimant, Tr. 1626:13-18.
[671] Counsel for Claimant, Tr. 2143:19-22.
[672] Claimant's Reply Memorial, ¶ 291.
[673] *Id.* ¶ 297.
[674] *Id.*
[675] *Id.* ¶¶ 295-96. Claimant argues that the Canadian case of *Mariner Real Estate* is also not dispositive as permits were available to the plaintiff in that case to circumvent the effects of the

make its claims ripe, Claimant submits that it is Respondent's burden—as ripeness is an affirmative defense—to demonstrate what Claimant should have done.[676]

326. Claimant stresses that international law and U.S. case law support the conclusion that "where a measure prohibits all economical use of a property upon enactment, a plaintiff need not seek a permit before challenging the action as a taking."[677] According to Claimant, *Whitney Benefits* specifically rejected a "nearly identical argument" when it found that it would have been futile for a mining plaintiff to seek further processing of its permit because "when a statute [prohibiting surface coal mining] is enacted, at least in part, specifically to prevent the only economically viable use of a property, an official determination that the statute applies to the property in question is not necessary to find that a taking has resulted …."[678] Claimant disputes Respondent's characterization of *Whitney Benefits* as a complete ban on mining. It was, Claimant explains, a surface mining ban, which left open the possibility of underground mining, which was uneconomical and therefore, like here, there was no point in submitting a plan that could not be approved because "there was no economical use."[679] Claimant asserts that "further processing of a proposed mine that faces insurmountably 'cost prohibitive' reclamation requirements would be futile. It would likewise be futile for Glamis to withdraw the pending proposed Plan of Operations and resubmit a plan that it could not financially perform."[680]

327. To summarize its arguments and contentions, Claimant states:

> Glamis has already been deprived of the value of its investment. Glamis cannot mine absent approval by Interior, and the agency has steadfastly refused to grant such approval, notwithstanding the total absence of any legal basis for withholding it. Even if it were to approve it, there are no variance procedures in the California requirements that Glamis can invoke, and there is no exception to them for which

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governmental act, which Claimant argues were not available to it to with respect to the California measures.

[676] Counsel for Claimant, Tr. 2145:7-10.

[677] Claimant's Reply Memorial, ¶¶ 299-300, citing Ethyl Corp. v. Canada ("*Ethyl*"), NAFTA/UNCITRAL, Award on Jurisdiction, ¶ 84 & footnote 33 (June 24, 1998) (internal citations omitted).

[678] *Id.* ¶ 299, quoting *Whitney Benefits*, at 407.

[679] Counsel for Claimant, Tr. 2049:17-2050:2. Claimant contends that the example of Golden Queen does not prove that the California measures are not cost-prohibitive, as it is "quite a speculative venture." Counsel for Claimant, Tr. 2050:3-17.

[680] Claimant's Reply Memorial, ¶ 292.

> Glamis could qualify. Under *Whitney Benefits*, the fact that Glamis has not undertaken a review process with a predetermined outcome does not compromise the ripeness of the claim; and, accordingly, the Tribunal should reject Respondent's ripeness argument.[681]

3. CONCLUSION OF THE TRIBUNAL WITH RESPECT TO RIPENESS

328. In the determination of whether the Tribunal has subject matter jurisdiction to decide the Article 1110 claims before it, the Tribunal begins from the premise that a finding of expropriation requires that a governmental act has breached an obligation under Chapter 11 and such breach has resulted in loss or damage. NAFTA Article 1117(1) establishes standing for an investor of a State Party to bring a claim for harm done to its subsidiary in the territory of another State Party under the investment provisions of Chapter 11. Through the language of Article 1117(1), the State Parties conceived of a ripeness requirement in that a claimant needs to *have* incurred loss or damage in order to bring a claim for compensation under Article 1120. Claims only arise under NAFTA Article 1110 when actual confiscation follows, and thus mere threats of expropriation or nationalization are not sufficient to make such a claim ripe; for an Article 1110 claim to be ripe, the governmental act must have directly or indirectly taken a property interest resulting in actual present harm to an investor.

329. This factual predicate, the Tribunal finds, is required by NAFTA Article 1117(1). A similar concept is found in international law and in the domestic law of the United States invoked by the Parties, and is agreed upon by both of the Parties. Numerous international tribunals also have considered and determined that actual interference with a property interest is necessary in order to determine whether expropriation or nationalization has occurred. This issue has arisen frequently as tribunals have assessed whether a governmental act was self-executing—so as to immediately impact a property interest—or whether it more closely resembled a threat of possible future expropriation, thus requiring additional steps or factors to determine whether the property in question was in fact affected.

[681] Counsel for Claimant, Tr. 1628:6-19.

330. The Iran-U.S. Claims Tribunal, for instance, held in *Mohtadi* that the "mere passage" of law allowing for nationalization did not equate to expropriation. Although the act appeared from a textual reading to be self-executing, it required that certain procedures be carried out and therefore "remained contingent upon a determination that the land in question" was of the type being expropriated.[682] The International Claims Settlement Commission held similarly: "the mere enactment of a law under which property may later be nationalized" does not render an expropriation as of that date; the possession of the property must actually be interfered with.[683]

331. Although none of these disputes addressed the NAFTA and none of the tribunals provided evidence that its analysis rested on customary international law, the logic utilized by each of these tribunals to come to the same conclusion is instructive. Without a governmental act that moves beyond a mere threat of expropriation to an actual interference with a property interest, it is impossible to assess the economic impact of the interference.

332. Presumably because of this common underlying logic, these international arbitral awards are in congruence with the domestic takings law of the United States, which holds that a court needs a "final, definitive position" of the administrative agency to evaluate whether a governmental act has effected a taking.[684] United States courts have required such a final agency act because, they claim, economic impact and interference with reasonable investment-backed expectations (the first and second factors in the three-factor factual analysis of takings described by the U.S. Supreme Court) "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."[685]

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[682] Mohtadi v. Islamic Republic of Iran, Iran-US Cl. Trib., Case No. 273, Award No. 573-271-3, ¶¶ 53-54 (1996).

[683] Pobrica (Int'l Cl. Settlement Comm'n 1953), Amended Final Decision, ¶ 2. *See also* Mariposa (U.S. v. Pan.), American and Panamanian General Claims Arbitration 577 (1933); Malek v. Republic of Iran, Iran-US Cl. Trib., Case No. 193, Award No. 534-193-3 (1992); Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2, Decision of Jurisdiction (Dec. 24, 1996); and Starrett Housing Corp. v. Iran, Interlocutory Award No. ITL 32-24-1, 4 Iran-U.S. C.T.R. 122 (Dec. 19, 1983).

[684] Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 191 (1985).

[685] *Williamson County*, 473 U.S. at 191 (1985) ("As the [Supreme] Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a

Most importantly, of course, is that the Respondent also relies on this premise and Claimant does not dispute it and even appears to agree with its validity.

333. Central to the determination of whether a governmental act, or acts, has culminated in a sufficiently final action so as to effect an expropriation is the consideration of whether there were further steps that a claimant should have, or even could have, taken that would have assisted the process of attaining a "final, definitive position." In general, however, although a claimant should be expected to perfect its claim, international and domestic courts do not require futile attempts that will merely waste a claimant's resources and fail to change an inevitable final decision.

334. The seminal case in U.S. jurisprudence to which the Parties have pointed the Tribunal for its review, and which also is instructive factually as it pertains to mining, is *Whitney Benefits*.[686] It provides that "when a statute [prohibiting surface coal mining] is enacted, at least in part, specifically to prevent the only economically viable use of a property, an official determination that the statute applies to the property in question is not necessary to find that a taking has resulted."[687] On appeal, defendant United States argued that it was not a taking until it was specifically determined that the SMCRA prohibition applied to Whitney. The court, however, disagreed, saying it was plain to the eye that farming had long operated on the surface above the Whitney Coal property (the precondition for the application of the challenged provision).[688] In addition, the Federal Circuit noted that "SMCRA's legislative history confirmed the presence of a legislative taking," specifically noting that "Congress revised the bill to insure [sic] that SMCRA itself *would* preclude the mining of Whitney Coal."[689]

335. The issue of ripeness therefore turns on the determination of whether the challenged California measures had effected harm upon Claimant's property interests by the time Claimant submitted its claim to arbitration. It is therefore necessary to resolve whether the California measures have been applied to Claimant, in that the mere passage

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final decision regarding the application of the regulations to the property at issue.").

[686] *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989) (*aff'd* by 926 F.2d 1169 (Fed. Cir. 1991)).

[687] *Whitney Benefits*, 18 Cl. Ct. at 407.

[688] *Whitney Benefits*, 926 F.2d at 1173.

[689] *Id.* at 1173-174.

of the measures so clearly affected the value of the Imperial Project as to effect an actual confiscation rather than a mere threat of such. There are several questions for the Tribunal to address in the analysis of this inquiry.

336. First, is it certain that the California measures would apply to the Imperial Project? In looking to answer this query, the Tribunal notes that the Imperial Project satisfies the conditions under which Senate Bill 22 would apply—it is "located on, or within one mile of, any Native American sacred site and is located in an area of special concern"—and also that of the amended SMGB Regulations—namely, that it is an "open-pit metallic mining operation." In addition, Claimant points to numerous comments by the California governor stating that the legislation was intended to affect the Imperial Project. The Tribunal considers these comments not to judge their validity, but only to determine that the Imperial Project, as a member of the class of mines falling under the purview of the legislation, likely would be affected by the legislation should its application progress to the point at which those requirements would be applied.

337. Second, was there any other action Claimant could have taken to perfect its claim? Although the Tribunal notes the arguments of Respondent that Claimant could have been more diligent or more persistent in its communications with the DOI and BLM following the submission of its claim to arbitration, the Tribunal is not convinced that such actions should be required of Claimant, as they would not normally be expected of a mining applicant in order for the normal review processes to continue. In addition, it is not clear to the Tribunal how such actions *after* the submission of the Notice of Intent would affect Claimant's claim of harm occurring *prior* to that submission.

338. Third, if Claimant had waited for a final decision from the BLM, would it likely be anything but a denial? This query arises from the fact that, arguably, Claimant could have waited for a formal denial of its mining plan before submitting its claims in this arbitration. The Tribunal therefore must consider whether such an action would be futile so that it should not be required in order to further ripen Claimant's Article 1110 claim.

339. The Tribunal begins its analysis of this question by noting that, with the current plan submitted by Claimant, which includes only partial backfilling, it would be impossible for the BLM to approve the plan *if* it applied the California regulations. The

Tribunal additionally notes that there was only one comment at the hearing, at which Respondent said that it is *possible* that the DOI would not consider the California measures in making its determination on the Imperial Project Plan of Operations, and that Claimant insists there is no evidence in the record to this effect.[690] Even if this were so, however, it is difficult to see how Imperial County would not apply the California measures when considering the reclamation plan. It therefore appears to the Tribunal that, regardless of the amount of time Claimant waited for a final decision on its current plan, it is almost certain that such final decision would be a denial.

340. This conclusion leads to another question, however: following such a denial, is there anything further that Claimant could do to successfully reapply for the profitable operation of the Imperial Project? Respondent asserts that there are numerous ways in which the Imperial Project plan could be amended to perhaps make it profitable and raises the example of the Golden Queen mine to show that other companies believe it is *possible* to operate under the California regulations. Respondent argues that Claimant has not attempted to ascertain whether there could be a profitable option for exploiting the gold in the Imperial Project.

341. Claimant, however, argues that there is no profitable way to mine the Imperial Project with the requirements of the California measures, there exist no variance procedures, and it is not required to undertake futile actions. Claimant asserts that, as an experienced mineral operator, it had at the time of the passage of the California measures, and has today, the expertise and experience to make this determination. Claimant also stresses that this was California's intent and it succeeded.

342. The Tribunal holds that, to the extent Claimant is arguing that California passed its measures in a way that evidences that California would, under no conceivable circumstances, let the Imperial Project go forward, such a claim is not ripe under the requirements of Article 1117(1). Insufficient evidence was provided to the Tribunal to prove that no viable option could be developed sometime in the future, with improved technology and, in particular, increased gold prices, to make the Imperial Project profitable. As Claimant has constructed its claim, however, to argue that the California

[690] Counsel for Respondent, Tr. 2163:12-2164:3; Counsel for Claimant, Tr. 2164:10-20.

measures caused such significant harm to its investment as to effect an expropriation *on the date of their passage*, its claim is adequately presented in a timely way for adjudication. The Tribunal is able to assess whether in fact the Imperial Project was worthless on the date utilized by the Parties as that of a possible expropriation—December 12, 2002. In this way, the inquiry into ripeness in this case leads directly to the threshold inquiry of any expropriation analysis: evaluation of the economic impacts of the complained of measures.

C. TIME BAR

1. CONTENTIONS OF THE PARTIES

343. Respondent objects to the jurisdiction of the Tribunal to the degree that the claim brought by Claimant is based on events that are time barred by Article 1117(2) of the NAFTA.[691] Respondent points to three particular events, cited by Claimant as "offending measures" in its Notice of Arbitration, as being time barred under Article 1117(2). These events are: (1) the October 19, 1999 federal ACHP recommendation; (2) the December 27, 1999 M-Opinion; and (3) the November 17, 2000 Final EIS/EIR, which recommended the "no action" alternative to Glamis' Plan of Operations. Respondent argues: "Each of these measures is time-barred under Article 1117(2). While these measures may be taken into account as background facts, none of them can serve as a basis for finding a violation of the NAFTA."[692]

344. Claimant asserts that, in order to raise a timeliness defense, Respondent must demonstrate that each specified event prior to the three-year window provides a separate and distinct basis for its claim.[693] Claimant argues that the measures referred to by Respondent were not asserted as the basis of its claim, but rather were recited merely as its "factual predicate," with the claim itself being based on the "January 17, 2001

[691] This argument was foreshadowed in Respondent's Request of Bifurcation of April 8, 2005 at pp. 2-3. At that time the Tribunal held that it "need not decide which of the references to government actions in Claimant's Notice of Arbitration are asserted as the direct basis of a NAFTA claim and which are asserted as supporting factual evidence of a NAFTA claim." The Tribunal added that "[w]ithout prejudice to that question, it is clear that Claimant relies on the January 17, 2001, Department of Interior Record of Decision and subsequent state and federal acts as a basis for its Chapter 11 claims." *Procedural Order No. 2*, ¶ 20 (May 31, 2005).

[692] Respondent's Counter-Memorial, at 105 (citation omitted).

[693] Claimant's Reply Memorial, ¶ 287.

Secretarial Record of Decision denying the Imperial Project …."[694] According to Claimant, Respondent concedes that "these measures may be taken into account as background facts," which is the way in which Claimant introduced them.[695]

2. CONCLUSION OF THE TRIBUNAL WITH RESPECT TO TIME BAR

345. As provided above, Article 1117(2) of the NAFTA provides that a claim may not be brought if more than three years have passed since the investor's knowledge, or constructive knowledge, of the breach and subsequent damage.

346. Assuming that a "claim is brought" when the Notice of Arbitration is filed, the claim was brought in this proceeding on December 9, 2003. Three years prior to the date the claim was brought, therefore would be December 9, 2000. It is true that the three events specifically pointed to by Respondent all occurred before December 9, 2000.

347. The Tribunal notes, however, that Article 1117(2) does not provide for a simple, fixed three-year period before the date the claim is brought, but rather refers to three years "from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage."[696] As one commentary opines, "[t]he three-year limitation period presumably runs from the later of these events [knowledge of breach and of damage] to occur in the event that the knowledge of both events is not simultaneous."[697]

348. The Tribunal in this instance, however, is presented with a preliminary question. In particular, does Claimant bring its claim on the basis of the events referred to by Respondent? Both Claimant and Respondent state that a claim brought on the basis of an event properly within the time limit of Article 1117(2) may cite to earlier events as "background facts" or "factual predicates." The Tribunal agrees. It is necessary that any action be preceded by other steps, but such factual predicates are not *per se* the legal basis for the claim.

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[694] *Id*.
[695] *Id*.
[696] The requirement of knowledge, both as to breach and as to damage, is related to the jurisdictional limits present in Article 1117(1), which provides that a claim may be submitted to arbitration when "the other Party has breached an obligation" and "the enterprise has incurred loss or damage by reason of, or arising out of, that breach."
[697] KINNEAR, BJORKLUND & HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA CHAPTER 11 1116-33.

349. The basis of the claim is to be determined with reference to the submissions of Claimant. Claimant argues that the events listed by Respondent are not the basis of its claim but rather form "the factual predicate of the unlawful and now rescinded January 17, 2001 Secretarial Record of Decision denying the Imperial Project, and are thus the context for the substantial damage flowing from that decision and the failure of the federal and state government authorities to comply with the law and approve Glamis's Plan of Operation on a timely basis."[698]

350. The Tribunal has reviewed the submissions of Claimant and finds that Claimant does not in its Notice of Arbitration, nor its subsequent filings, bring a claim on the basis of the earlier events listed by Respondent. The Tribunal denies Respondent's objection.

D. FINAL DISPOSITION OF THE TRIBUNAL WITH RESPECT TO PRELIMINARY OBJECTIONS

351. The Tribunal holds that Claimant's claims are not time barred. Claimant does not in its Notice of Arbitration, nor its subsequent filings, bring a claim on the basis of the earlier events listed by Respondent.

352. The Tribunal additionally holds that Claimant's claim as articulated, that the California measures caused such significant harm to its investment as to effect an expropriation *on the date of their passage*, is ripe for adjudication.

V. CLAIMANT'S CLAIM FOR EXPROPRIATION UNDER ARTICLE 1110

353. NAFTA Article 1110(1), titled "Expropriation and Compensation," provides:

> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis;
>
> (c) in accordance with due process of law and Article 1105(1); and
>
> (d) on payment of compensation in accordance with paragraphs 2 through 6.

[698] Claimant's Reply Memorial, ¶ 287.

354. The inclusion in Article 1110 of the term "expropriation" incorporates by reference the customary international law regarding that subject. Under custom, a State is responsible, and therefore must provide compensation, for an expropriation of property when it subjects the property of another State Party's investor to an action that is confiscatory or that "unreasonably interferes with, or unduly delays, effective enjoyment" of the property.[699] A State is not responsible, however, "for loss of property or for other economic disadvantage resulting from bona fide … regulation … if it is not discriminatory."[700]

355. A direct expropriation is readily apparent: there is an "open, deliberate and acknowledged taking[] of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State…."[701] In an indirect expropriation, the property is still "taken" by the host government in that the economic value of the property interest is radically diminished, but such an expropriation does not occur through a formal action such as nationalization. Instead, in an indirect expropriation, some entitlements inherent in the property right are taken by the government or the public so as to render almost without value the rights remaining with the investor. An action "tantamount to expropriation", like an indirect taking, does not involve the direct transfer of title from the investor to the host State. "Tantamount" means equivalent and thus the concept should not encompass *more* than direct expropriation; it merely differs from direct expropriation which effects a physical taking of property in that no actual transfer of ownership rights occurs.[702]

356. This proceeding involves the particularly thorny issue of what is commonly known as a regulatory taking. More specifically, the question presented in this

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[699] RUDOLF DOLZER, EXPROPRIATION AND NATIONALIZATION, 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 319 (Rudolf Bernhardt, ed. 1995).

[700] RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 712, Comment (g) (1986).

[701] *Metalclad*, Award, ¶ 103 (Aug. 30, 2000).

[702] *See S.D. Myers*, Partial Award, ¶ 285 (Nov. 13, 2000). Actions that result in an indirect taking or are "tantamount to expropriation" include those acts that sometimes constitute what is known as "creeping expropriation". *See S.D. Myers*, *supra*, ¶ 286. Creeping expropriation occurs when the expropriating measures are implemented over a period of time. *See Feldman*, Award, ¶ 101 (Dec. 16, 2002). Most often, creeping expropriation is said to occur when a State seeks "to achieve the same result [as an outright taking] by taxation and regulatory measures designed to make continued operation of a project uneconomical so that it is abandoned." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712, Reporter's Note 7 (1986) [Ex. 44].

proceeding is whether the administrative and legislative actions taken individually, or in concert, by the federal government and the State of California constitute an expropriation under Article 1110. The Parties, citing to the *2004 Model Bilateral Investment Treaty*,[703] indicate that tribunals in such instances often assess whether measures of a State constitute a non-compensable regulation or a compensable expropriation by examining, *inter alia*, (1) the extent to which the measures interfered with reasonable and investment-backed expectations of a stable regulatory framework,[704] and (2) the purpose and character of the governmental actions taken.[705] There is for all expropriations, however, the foundational threshold inquiry of whether the property or property right was in fact taken. This threshold question is relatively straightforward in the case of a direct taking, for example, by nationalization. In the case of an indirect taking or an act tantamount to expropriation such as by a regulatory taking, however, the threshold examination is an inquiry as to the degree of the interference with the property right. This often dispositive inquiry involves two questions: the severity of the economic impact and the duration of that impact.

357. Several NAFTA tribunals agree on the extent of interference that must occur for the finding of an expropriation, phrasing the test in one instance as, "the *affected property* must be impaired to such an extent that it must be seen as 'taken'";[706] and in another instance as, "the test is whether that interference is sufficiently restrictive to support a

[703] Claimant's Memorial, ¶ 423; Respondent's Counter-Memorial, at 160. The Tribunal notes that both Parties, to support this assertion, refer to the *2004 U.S. Model Bilateral Investment Treaty*, ann. B ¶ 4, and Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978). The Parties both cite to and rely on U.S. law of takings, not because it is applicable, but because it is argued by both as a well-developed body of law.

[704] Cane Tenn., Inc. v. United States, 63 Fed. Cl. 715 (2005), quoting Cienega Gardens v. United States, 331 F.3d 1319, 1345-46 (2003) (internal citations omitted) ("The purpose of consideration of plaintiffs' investment-backed expectations is to limit recoveries to property owners who can demonstrate that 'they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.'").

[705] OECD, "INDIRECT EXPROPRIATION" AND THE "RIGHT TO REGULATE" IN INTERNATIONAL INVESTMENT LAW, (OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT) 10 (2004/4) [Ex. 53]. *See also Saluka*, Award, ¶ 264 (Mar. 17, 2006) (emphasis in original) ("It thus inevitably falls to the *adjudicator* to determine whether particular conduct by a state 'crosses the line' that separates valid regulatory activity from expropriation. Faced with the question of *when, how and at what point otherwise valid regulation becomes, in fact and effect, an unlawful expropriation*, international tribunals must consider the circumstances in which the question arises. The context within which an impugned measure is adopted and applied is critical to the determination of its validity.").

[706] *GAMI Investments*, Final Award, ¶ 126 (Nov. 15, 2004).

conclusion that the property has been 'taken' from the owner."[707] Therefore, a panel's analysis should begin with determining whether the economic impact of the complained of measures is sufficient to potentially constitute a taking at all: "[I]t must first be determined if the Claimant was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto ... had ceased to exist."[708] The Tribunal agrees with these statements and thus begins its analysis of whether a violation of Article 1110 of the NAFTA has occurred by determining whether the federal and California measures "substantially impair[ed] the investor's economic rights, *i.e.* ownership, use, enjoyment or management of the business, by rendering them useless. Mere restrictions on the property rights do not constitute takings."[709]

358. To determine whether Claimant's investment in the Imperial Project has been so radically deprived of its economic value to Claimant as to potentially constitute an expropriation and violation of Article 1110 of the NAFTA, the Tribunal must assess the impact of the complained of measures on the value of the Project. Claimant has alleged that the federal and California measures acted both individually and together to effect a taking.[710] As to their collective effect, Claimant argues that Respondent, at the federal and state levels, committed a "continuum of acts" with the delay and denial of decisions and approvals by the federal government's having allowed the State of California the time to impose legislative and regulatory measures on the Imperial Project.[711] Although the federal measures were "partially lift[ed]," there was not, according to Claimant, ever a "correction" of that act; thus Claimant's investment was left exposed to the subsequent California measures.[712]

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[707] *Pope & Talbot*, Interim Award, ¶ 102 (June 26, 2000).

[708] *Tecmed*, Award, ¶ 115 (May 29, 2003).

[709] OECD, "INDIRECT EXPROPRIATION" AND THE "RIGHT TO REGULATE" IN INTERNATIONAL INVESTMENT LAW, (OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT) 11 (2004/4) [Ex. 53].

[710] Counsel for Claimant, Tr. 1591:10-1592:4.

[711] Counsel for Claimant, Tr. 1591:14-1592:1.

[712] Counsel for Claimant, Tr. 1591:14-1592:1. *See also* Claimant's Memorial, ¶¶ 512-514. Claimant argues that the denial of its Plan of Operations by Secretary Babbitt also severely affected the value of the Imperial Project, occasioning "unreasonable and improper delays" that are "the very reason that Glamis became subject to the California measures in December 2002." Claimant argues, however that, should the denial not appear sufficiently severe on its own, it breaches international obligations when viewed in totality with the California measures.

359. As this is an indirect expropriation claim and Claimant argues that there are several acts working together to effect the expropriation, several dates of expropriation are discussed. Claimant argues that the date of the California regulations—December 12, 2002—would be the last date upon which expropriation occurred (though it may have occurred previously), and it argues for this date as it is "so much more clear of [a] precise date of expropriation."[713] With respect to the federal measures, Claimant places the date of expropriation as January 17, 2001, the date of the ROD denying the Plan of Operations.[714] The Parties in fact discuss many possible dates because, as Claimant explains, "in cases such as these involving measures tantamount to expropriation, the Tribunal could look to other dates as well …."[715] Respondent argues, however, that this, or presumably any date, is an "artificial" date for valuation, as the California reclamation requirements have not yet been applied to Claimant.[716]

360. To the extent that Claimant argues that the delay and temporary denial occasioned by the federal government themselves effected an expropriation, the Tribunal finds Claimant's argument without merit. The Tribunal finds that the federal Record of Decision denying approval of the Imperial Project, even if it presented difficulties to Claimant, was quickly reversed and therefore of short duration. This does not constitute an expropriation under NAFTA Article 1110. The Tribunal therefore denies Claimant's claim that the delay and temporary denial occasioned by the federal government either individually or in combination with subsequent complained of measures of the State of California were violations of Article 1110.

361. To the extent that Claimant is arguing that the federal measures facilitated the expropriation by the California measures, the issue becomes the effect of the California measures. The Tribunal thus focuses upon the effect of the California measures, which

[713] Counsel for Claimant, Tr. 1593:3-4; *see also* 1592:5-11. *See also supra* ¶¶ 181-84. These regulations took effect on December 18, 2002, and were set to expire as of April 17, 2003, but were re-filed on April 15, 2003, and were finally made final and permanent on April 18, 2003 and, on May 30, 2003, were approved by the Office of Administrative Law.

[714] Counsel for Claimant, Tr. 2001:21-2002:3.

[715] Claimant's Reply Memorial, ¶ 302; *See* Counsel for Claimant, Tr. 2002:4-13 (arguing that Respondent, is "responsible for all of the measures," and therefore, in a claim for an act tantamount to expropriation, there is no need to divide up each of the individual actions. There is a choice as to when, in the pattern of practice that begins with the federal measures on July 17, 2002, expropriation actually occurs.).

[716] Counsel for Respondent, Tr. 1903:2-6.

Claimant itself has done.[717] The Tribunal necessarily turns its attention to the impact of the California measures—Senate Bill 22 ("SB 22") and the State Mining and Geology Board Regulations ("SMGB Regulations") (collectively referred to as "the backfilling measures" or the "California measures"). Therefore, the Tribunal turns to the determination of whether there has been a radical diminution in value of the Imperial Project, which is ascertained by the analysis of the entitlements and value that remain with Claimant after the enactment of these measures.

362. The Tribunal begins with Claimant's assertion that the value of the Imperial Project before the adoption of the backfilling measures was $49.1 million and its further assertion that after the adoption of the backfilling measures the value of the Project was negative $8.9 million.[718] The Parties focus on five different elements which, Claimant argues, together lead to this asserted negative value. In making its own evaluation of whether the Imperial Project retained value following the backfilling measures, the Tribunal starts with the values and methodologies offered by Claimant for the several elements of its valuation, reviews them one-by-one with Respondent's objections to each, and makes adjustments that the Tribunal considers appropriate in light of the facts presented.

363. The first of the five contested elements concerns the cost of backfilling and involves weighing the two Parties' contentions as to the appropriate cost of backfilling, which in turn is based on four sub-factors: (a) the calculated cost per ton of backfilling, which includes an analysis of the regulatory requirements for and estimated expenses of pit engineering, (b) the cost of equipment refurbishment, (c) the appropriate swell factors for the two identified mineral groups—ore-containing materials and waste rock—a critical issue for determining how many tons of material would need to be backfilled and thus the ultimate cost of backfilling; and (d) the estimated total tonnage that would need to be backfilled to satisfy the California requirements, which includes evaluating the Parties' disparate views regarding the timing of such movement and the associated costs of performing the various stages of backfilling at different times. The second element examined is the appropriate weight to be given the third pit, the Singer Pit, and

[717] Counsel for Claimant, Tr. 1593:1-6.
[718] Behre Dolbear Response Report (Dec. 2006), at 4.

Claimant's assertion that its value is too speculative to include in the post-backfilling valuation and Respondent's argument that this assumption is incorrect. The third element that the Tribunal analyzes is the appropriate price of gold: although the Parties agree on the correct price of gold at the alleged date of expropriation, they dispute the relevance of the current price to the value of the Imperial Project. The fourth element the Tribunal analyzes is the Parties' dispute regarding the amount and type of financial assurances that the federal, state and county governments would require to be posted to ensure proper reclamation of the Imperial Project. The Tribunal assesses both the types of financial assurances available to Claimant, as well as the timing for posting these assurances as required by the various responsible governmental entities. In the fifth and final element, the Tribunal determines the appropriate discount rate to be employed in valuing the Imperial Project as of the asserted date of expropriation—December 12, 2002—which includes an assessment of the disparate discount rates offered by the Parties to use in calculating the present value of the Imperial Project. This rate is based on the risk-free rate plus a component that accounts for the specific risks of the particular project and is a critical component of valuing an asset with an uncertain or risky income stream.

364. The Tribunal in the following sections examines each of these elements and the contentions of the Parties regarding each. With respect to each element, the Tribunal decides upon the appropriate reduction in value, if any, for each of these five elements and modifies the Claimant's asserted post-backfilling measures valuation. This approach—namely, the Tribunal's acceptance of Claimant's assumptions as a starting point—is a best case scenario for Claimant. In essence, this approach asks: "Even if the Tribunal accepts Claimant's pre-backfilling measures valuation as correct and further accepts Claimant's characterization of the factors resulting in a reduced value, does a review of the claimed reduction and the resulting adjustments by the Tribunal result in a radical diminution in the value of the Imperial Project?"[719]

365. Thus, to be specific, the Tribunal's goal in this inquiry into Claimant's valuation model is not to determine if there *was* an expropriation, but to determine if there was *not*

[719] The Tribunal notes that this methodology would not apply at a damages phase, where the Tribunal would be required to reach a final definitive number; whereas in this situation, the Tribunal need only reach the conclusion that substantial value remained.

significant economic impact. These are very different inquiries: the first requires definitive cost calculations and a full revision of the discounted cash flow methodologies to determine exactly the value of the Imperial Project post-backfilling; while the second requires only sufficient calculation to determine if the Project's value is positive. In this latter endeavor, issues presenting specific complexity, in which the Tribunal is satisfied with neither of the calculations offered by either Party, can be resolved in Claimant's favor, as the question above is not what is the exact value of the Imperial Project following the complained of measures, but is the value of the post-backfilling Imperial Project positive *even* if such an issue is decided in Claimant's favor.

366. The Tribunal, after completing its analysis, concludes that the California backfilling measures did not result in a radical diminution in the value of the Imperial Project. Therefore, it denies Claimant's claim that the actions of the state and federal government resulted in an expropriation under Article 1110. The Tribunal observes that, although Arbitrator Hubbard dissents to the Tribunal's conclusion with respect to the fourth element, financial assurances, he agrees that the remaining value of the Imperial Project would be sufficiently positive to warrant dismissal of Claimant's claim for expropriation.[720]

A. THE FIRST DISPUTED ELEMENT OF CLAIMANT'S VALUATION: THE COST OF BACKFILLING

1. ISSUE PRESENTED

367. The California measures require complete backfilling of all pits to the extent possible, and spreading and recontouring of any remaining piles to a maximum height of 25 feet. The cost of this required backfilling is central to the determination of whether the value of the Glamis Imperial Project has been so dramatically decreased as to warrant a finding of expropriation under Article 1110. Claimant estimates total reclamation costs at the end of the Project being as much as $98.5 million; Respondent places the total cost of backfilling, spreading and recontouring at approximately $55.4 million, a difference of $43 million.

[720] *See infra* footnote 1044.

368. The dramatic difference between the two estimations is a consequence of different views regarding the numerous sub-factors, several of which the Tribunal considers as within the cost of backfilling. In this section, the Tribunal thus considers and determines the following sub-factors: (a) the appropriate per ton cost of backfilling: whether it is 35.3 cents as contended by Claimant, or 25.5 cents as calculated by Respondent; contributing to this sub-factor is the proper methodology for the engineering of the pits ("pit engineering") which requires consideration of whether the California mining regulations require that pit backfilling be carefully engineered with waste rock compacted in layers or whether backfill materials can be dumped from the edge of the pit in a process known as pit crest dumping; (b) the necessary cost of equipment refurbishment: whether the used trucks purchased for the Imperial Project would need to be refurbished at a cost of $7.7 million per refurbishment once or twice in the life of the Project and reclamation; (c) the appropriate swell factor for both the ore-containing minerals (which make up 79% of the material that would be excavated from the Imperial Project) and the waste rock (which makes up the remaining 21%), and whether, in particular, the former has a swell factor of either 35% according to Claimant, or 23% according to Respondent; and whether the latter's swell factor is 35% per Claimant, or 18% per Respondent; and (d) the prediction of the total tonnage of mineral waste that would have to be moved to satisfy California's backfilling requirements, which turns upon the above factors and an analysis of the appropriate timing and cost of spreading the remaining leach pad material in relation to the filling of the mined pits with waste material.

369. Therefore, the Tribunal is tasked with determining the appropriate cost of backfilling as determined by evaluation of these sub-factors. As explained above, with respect to each determination, the Tribunal will begin with the cost calculations made by Behre Dolbear, valuation expert for Claimant, and then, assessing the arguments of both Parties with respect to each of these calculations, determine whether these assumptions need to be adjusted to any extent.

2. CLAIMANT'S CONTENTIONS

370. In its post-backfilling valuation of the Imperial Project, Claimant estimates a total reclamation cost of $98.5 million, including $55.6 million for backfilling of the East Pit,

$24.5 million for spreading and recontouring the heap leach pad, and $15.4 million for two equipment refurbishments,[721] in addition to the original $3 million planned for reclamation prior to the backfilling measures.[722] This assessment reflects Behre Dolbear's estimate that, under a two-pit plan,[723] an additional 227.2 million tons of material would have to be removed from the waste rock piles and heap leach pad and transported to the pits for backfilling,[724] based at least in part upon its projected swell factor of 35%.[725] This projection comprises the sum of moving an additional 157.6 million tons of material to backfill the East Pit, 67.2 million tons to spread the leach pad down to 25 feet, and 2.4 million tons to spread the remaining material on the waste dump.[726] As detailed above, Claimant's reclamation cost calculation was based primarily on its estimation of four factors, each of which is now examined.

a. Backfilling Cost per Ton

371. Claimant's projection of the total reclamation cost is based upon Behre Dolbear's estimate of a per ton cost of backfilling and spreading of 35.3 cents.[727] "The basic premise for estimating the cost of backfilling the East Pit is that the cost of loading and hauling the blasted waste from the pit and placing it on the waste dump locations is equal to the cost of re-handling the material and placing it back."[728] Claimant contends that the operations are "essentially the same, but in reverse order."[729] Accordingly, Behre Dolbear calculates the estimated per ton cost of backfilling by subtracting the 8.9 cents

[721] For discussion of the proposed equipment refurbishments, see *infra* at ¶ 376 *et seq*.
[722] Behre Dolbear Expert Report (Apr. 2006), at A5-9.
[723] This estimate excludes the Singer Pit, see *infra*, ¶¶ 441-42 (arguing that the Singer Pit represents only exploration potential which has some level of value if the other two pits are mined, but would not add more value should the backfilling regulations render the two primary mines uneconomical).
[724] Behre Dolbear Response Report (Dec. 2006), pp. 1-2.
[725] *Id*. ¶ 27.
[726] *Id*. ¶ 31.
[727] Behre Dolbear Expert Report (Apr. 2006), at A4-10. Behre Dolbear adds that per ton reclamation costs could actually be higher because the rinsed heap material will have a higher moisture content, making it heavier and requiring more loads than originally planned. In addition, the regulatory requirement of avoiding impediments to natural drainage would require a very large drainage diversion structure. Behre Dolbear Response Report (Dec. 2006), ¶ 32(f)-(g).
[728] Behre Dolbear Expert Report (Apr. 2006), at A4-10.
[729] *Id*.

per ton drilling and blasting cost from the total average life-of-project mining cost per ton of 44.2 cents, as provided in Claimant's 1996 Final Feasibility Study.[730]

372. Claimant defends the reasonableness of this per ton cost estimate by arguing that it is based upon the average life-of-project mining cost of 44.2 cents as determined in the 1996 Final Feasibility Study, a cost, Claimant argues, that is a "bottom-up, fully developed, and detailed cost estimate."[731] In addition, Claimant contends that the 8.9 cents that Behre Dolbear estimates as the cost of drilling and blasting was developed from Glamis' "detailed cost information and is also a bottom-up number."[732] These estimates, Claimant notes, are less than the Bureau of Land Management's ("BLM") projected cost of 40 to 50 cents for complete backfilling, as utilized in the BLM's Final Environmental Impact Statement/Environmental Impact Report ("EIS/EIR") for the Imperial Project.[733]

373. Contrary to Respondent's contentions,[734] Claimant argues that its estimate of the cost of backfilling is also consistent with its own contemporaneous January 9, 2003 internal assessment of reclamation costs of 25.0 cents per ton.[735] This earlier assessment, Claimant asserts, was merely a "very preliminary and incomplete estimate of the adverse impact" of the backfilling measures on project economics made within a few weeks of the measures' passage and solely for Claimant's internal preliminary planning

[730] *Id. See also* A4-3, Tbl. A4.1 for calculation of the 44.2 cents per ton cost of mining.

[731] Behre Dolbear Response Report (Dec. 2006), ¶ 32(a). The term "bottom up", as used by the Parties, describes a process of cost calculation whereby each underlying cost is identified, ascertained and added together to comprise the final cost per ton figure. Conversely, the term "top down" is used by Respondent to describe the cost analysis undertaken by Behre Dolbear, in which Behre Dolbear takes the final calculation of the mining cost per ton and subtracts out the underlying costs that it determines would not be included in the backfilling process.

[732] *Id*.

[733] Counsel for Claimant, Tr. 1684:19-1685:5. *See also* Counsel for Claimant, Tr. 1685:10-1686:7 (Claimant counters Respondent's criticism (*infra* ¶ 396) of BLM's 2000 Final EIS/EIR per ton estimate by arguing that Norwest provides no critique of the Sage Engineering cost estimates upon which BLM relied. According to Respondent, Environmental Management Associates, BLM's EIS contractor, retained Sage Engineering to provide an independent review of the current industry practices and costs which it found appropriate after a cursory analysis of the costs presented by Newmont Mining Company relating to a Nevada mining project).

[734] *See infra* ¶ 395 (Norwest corroborates its estimate of the total per ton cost of backfilling by comparing it to Glamis' January 9, 2003 estimations, implying that Behre Dolbear's estimate is not similarly comparable).

[735] Behre Dolbear Response Report (Dec. 2006), ¶ 35, citing Memorandum from James S. Voorhees, Glamis Gold, Ltd., to Charles A. Jeannes, Senior Vice President and General Counsel, Glamis Gold, Inc. and C. Kevin McArthur, President and CEO, Glamis Gold, Ltd. (Jan. 9, 2003) [FA 7 tab 43].

purposes.[736] Claimant contends that the January 9, 2003 estimate "was not an engineered number" and did not account for, among other things, the additional costs involved in re-spreading the heap leach pad, the increased use of the mining equipment, or any administrative costs.[737]

374. Claimant argues that one significant reason that Respondent's estimated per ton cost of backfilling is underestimated is that, contrary to Respondent's contentions,[738] California's reclamation standards require, *inter alia*, that backfilled pits be engineered to avoid long-term settlement and surface water ponding.[739] According to Claimant, the only way to avoid future subsidence in a backfilled pit is to engineer the pit from the ground up, backhauling the waste and placing it in the pit with mechanical compaction "from bulldozer spreading and truck traffic" to avoid settlement in the long term.[740]

375. Behre Dolbear asserts that the method of pit crest dumping proposed by Respondent would increase the swell factor and waste material would inevitably settle once in the pit, causing substantial depressions.[741] Claimant asserts that such conditions would not meet the California regulatory requirements to prevent long-term settlement and permit natural drainage without requiring the mine operator to return to the site to complete further refilling and contouring at additional cost.[742] Claimant contends that even Norwest, mining expert for Respondent, admitted in its 2007 report that the California regulations required engineered backfilling to prevent surface water ponding and long-term settlement.[743] According to Claimant, Mr. Guarnera of Behre Dolbear concluded that the material must be hauled down into the pit and then compacted by

[736] Behre Dolbear Response Report (Dec. 2006), ¶ 35.
[737] *Id.*; Counsel for Claimant, Tr. 1681:9-1682:5.
[738] *See infra* ¶ 397 (Respondent argues that the engineered backfilling requirement of California's SMGB Regulations does not require Claimant to perform a complete, bottom-up reclamation with layered compaction).
[739] Claimant's Reply Memorial, ¶ 100, citing Behre Dolbear Response Report (Dec. 2006), ¶ 32(c).
[740] Behre Dolbear Response Report (Dec. 2006), ¶ 32(d); Guarnera Rebuttal Statement, ¶ 17; Counsel for Claimant, Tr. 1680:12-16.
[741] Behre Dolbear Response Report (Dec. 2006), ¶¶ 33-34.
[742] *Id.* ¶ 32, citing CAL. CODE REGS. tit. 14, § 3704.1; Guarnera Rebuttal Statement, ¶ 19.
[743] Guarnera Rebuttal Statement, ¶ 15; Counsel for Claimant, Tr. 1680:8-12.

truck movement as lifts are built up in gradual levels.[744] Therefore, Claimant asserts that Norwest's cost of 25 cents "underestimates the true cost of backfilling."[745]

b. Equipment Refurbishment

376. In addition to estimates of the per ton cost of backfilling, Claimant's projected cost of backfilling includes $15.4 million for two equipment refurbishments at a cost of $7.7 million each: one at the start of backfilling activities (after eight years of service), and then a second refurbishment four years later, prior to the start of contouring.[746] Claimant maintains that the trucks used at the Imperial Project would have been brought over from Claimant's Picacho Mine, at the completion of that project.[747] Claimant therefore asserts that the trucks would have been operating for 11 years, or 50,000 hours; they would thus require rebuilding prior to any reclamation activities at the Imperial Project.[748] As for the second refurbishment, Claimant argues that the spreading of the heap leach pad would have taken a minimum of two years and would require an additional equipment refurbishment.[749]

377. Claimant argues that running loaded trucks downhill is as expensive as running them uphill and causes equal wear and tear on the equipment.[750] Claimant supports its position by reliance on the mining safety standards that require trucks on downhill grades to apply sophisticated braking systems and run at controlled speeds to avoid catastrophic accidents.[751] These safety requirements, Claimant maintains, necessarily require

[744] Counsel for Claimant, Tr. 1680:12-16.

[745] Behre Dolbear Response Report (Dec. 2006), ¶ 34; Guarnera Rebuttal Statement, ¶ 21 (estimating the additional costs that would be incurred in Norwest's analysis "by properly meeting the backfilling requirement" as 4.6 cents per ton, or a total additional cost of $7.25 million for the 157.6 millions tons required for backfilling).

[746] Behre Dolbear Expert Report (Apr. 2006), at A4-11, 12, 13, and Tbl. A4.9; Behre Dolbear Response Report (Dec. 2006), ¶ 37. Claimant estimates the $7.7 million refurbishment cost by calculating 25% of the original on-site purchase cost of the equipment and including the purchase of an additional haul truck for $1.6 million.

[747] Guarnera, Valuation Expert for Claimant, Tr. 638:16-20.

[748] Guarnera, Tr. 638:21-639:3.

[749] Guarnera, Tr. 639:6-10.

[750] Claimant's Reply Memorial, ¶ 100.

[751] *Id.*, citing Behre Dolbear Response (Dec. 2006), ¶ 33(a).

downhill-loaded cycles to proceed slowly and thus do not represent a cost savings to uphill costs.[752]

378. Claimant disputes Respondent's suggestion that the equipment could be run until breakdown.[753] Instead, it contends that a preventive maintenance program would be necessary to achieve the backfill schedule without major breakdowns which would lengthen the schedule and increase costs.[754] Claimant asserts that, as the equipment would have been purchased in used condition at the commencement of operations, it would have retained no residual value after 13.7 years of operations.[755]

c. The Appropriate Swell Factors

379. Behre Dolbear calculates a 35% swell factor on the basis of the ratio of bank density (in-place density) to loose density (density once excavated) as derived from Claimant's 1996 Final Feasibility Study for the Imperial Project.[756] Claimant explains that Western States Engineering chose a loose density of 3,050 pounds per cubic yard (113 pounds per cubic foot) for use in the 1996 Final Feasibility Study to determine equipment production capacity and to estimate the number and size of the units of equipment required.[757] Behre Dolbear then divided the bank density of 153 pounds per cubic foot, also from the 1996 Final Feasibility Study, Claimant asserts, by 113 pounds per cubic foot to arrive at 1.3539, or a swell factor of 35%.[758]

380. For support of its reliance upon the 1996 Final Feasibility Study for this swell factor calculation, Claimant argues that the study is the definitive source of technical information for the Project.[759] Claimant asserts that a "final feasibility study is the defining document for any successful open pit metallic mine, and is the industry-accepted blueprint that would have governed the development, construction, and operation of the

[752] Behre Dolbear Response Report (Dec. 2006), ¶ 33(a).
[753] *See infra* ¶ 402.
[754] Behre Dolbear Response Report (Dec. 2006), ¶ 37(c).
[755] *Id.* ¶ 37(d).
[756] *Id.* ¶ 27.
[757] *Id.*; Final Feasibility Study for the Imperial Project (Apr. 6, 1996), p. 4-11 [Navigant Consulting Expert Report (Sept. 2006), Ex. 25].
[758] Behre Dolbear Response Report (Dec. 2006), ¶ 27.
[759] Behre Dolbear Expert Report (Apr. 2006), at A4.4.

Imperial Project over the Project's life."[760] Claimant points out that the study was drafted six years prior to adoption of the mandatory backfilling requirement, and therefore Claimant would have had no reason to over- or underestimate the amount of material it needed to handle and it had every incentive to project accurately all mining costs.[761]

381. Claimant argues that Behre Dolbear's swell factor estimate of 35% is conservative and in line with the average swell factor of 30% to 40% generally accepted in the mining industry.[762] Claimant asserts that this is especially the case considering the additional high-swell materials contained within the Imperial Project's overburden, including basalt with a swell factor of 64%, and gneiss and schist with swell factors of 67%.[763] Claimant additionally cites to the State Mining and Geology Board, Executive Officer's Report approving the addition of the language of the California Backfill Regulations (Section 3704.1), which states: "Industry statements provide that swelling as much as 40% occurs."[764]

382. Behre Dolbear describes the waste rock as observed at the nearby Picacho Mine and in core samples from the Imperial Project as "very friable under hand pressure," adding that "water appears to break the rock down further to a coarse sand consistency."[765] According to Claimant, core samples taken at the Project site reveal that approximately 80% of the overburden could be classified as "well-cemented

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[760] Behre Dolbear Response Report (Dec. 2006), at 2.

[761] Claimant's Reply Memorial, ¶ 99, citing Behre Dolbear Response Report (Dec. 2006), ¶ 27; Behre Dolbear Response Report (Dec. 2006), at 2-3.

[762] Guarnera, Valuation Expert for Claimant, Tr. 622:17-21, 634:12-635:2. Claimant offers the Final Statement of Reasons for the State Mining and Geology Board Regulations for the proposition that "[w]hen consolidated rock material is excavated from a pit, the volume of the rock material expands in the order of 30% to 40% (swell factor), depending on the material's composition and degree of disaggregation." Cross Examination of Parrish, Tr. 517:14-19. Claimant also offers a finding by the National Research Council that waste material expands an average of about 30% to 40%. Cross Examination of Parrish, Tr. 555:12-19.

[763] Guarnera Rebuttal Statement, ¶ 10; Guarnera, Tr. 632:21-633:12, 634:4-6 (citing to the Horace Church Excavation Handbook); Guarnera, Tr. 634:15-20 (adding that all non-conglomerate rocks which comprise the Imperial Project waste rock would have had a higher swell factor than the conglomerate).

[764] Guarnera Rebuttal Statement, ¶ 9, quoting SMGB, EXECUTIVE OFFICER'S REPORT RE: APPROVAL OF REGULATORY LANGUAGE ADDING SECTION 3704.1 TO TITLE 14, CALIFORNIA CODE OF REGULATIONS (Jan. 16, 2003) [Ex. 332].

[765] Behre Dolbear Expert Report (Apr. 2006), at A3-5; *see also* BLM, Mineral Validity Examination of the Glamis Imperial Project, p. 26 (Sept. 27, 2002) (stating the same).

conglomerate,"[766] or "highly-indurated conglomerate," which is "gravel where the spaces between the previously loose pebbles have been filled with sand or silt which then became cemented."[767] Such conglomerate, Claimant asserts, possesses a swell factor of 33%, as opposed to just 15% for non-cemented, or loose, gravel,[768] according to the *Church Handbook*, an authority on mining and minerals.[769]

383. Claimant uses a swell factor of 35% for all material at the Imperial Project, based on the ratio of the bank density to loose density as used in the Final Feasibility Study, and explained above.[770] Behre Dolbear disputes Norwest's use of the 339 Au spreadsheet to ascertain an 18% swell factor for the waste rock. In that spreadsheet, Behre Dolbear asserts, the loose density for materials movement was provided as 3,060 pounds per cubic yard, "which was used by Western States Engineering for estimating equipment capacity and the number of units of equipment required in the 1996 Final Feasibility Study." The resulting density, Claimant argues, thus also represents a 35% swell factor.[771]

384. Claimant argues that the shorthand use of the term "congl./gravel," a notation found in many of the early Project documents, does not describe loose gravel (or unconsolidated alluvium), as interpreted by Respondent;[772] instead, the term was used to describe this material as conglomerate or cemented gravel.[773] As Mr. Purvance, Project Geologist, testified: "Gravel was a simplified shorthand term that we used quite commonly, but at no time was this rock ever classified or considered as gravel."[774] In support of its position, Claimant points to the pit slope recommendation report prepared by WESTEC in February 1996. WESTEC was engaged by Chemgold, Claimant's predecessor in interest, to determine the necessary bearing capacity and the strength of the wall of the proposed open-pit mine, so as to ensure that the slopes of the open pit

[766] Purvance, Tr. 270:19-273:2; Guarnera, Tr. 627:8-12.
[767] Guarnera Rebuttal Statement, ¶ 5.
[768] Guarnera, Valuation Expert for Claimant, Tr. 622:22-623:4.
[769] Behre Dolbear Response (Dec. 2006), ¶ 27(e), citing CHURCH, HORACE K., EXCAVATION HANDBOOK, MCGRAW-HILL BOOK COMPANY [Behre Dolbear Response Report (Dec. 2006), App. 5.0].
[770] Behre Dolbear Expert Report (Apr. 2006), at A4-9.
[771] Behre Dolbear Response Report (Dec. 2006), at 27.
[772] *See supra* ¶ 405.
[773] Behre Dolbear Response Report (Dec. 2006), ¶ 29(a); Purvance, Tr. 276:2-277:2.
[774] Purvance, Tr. 276:22-277:2.

would not slide or crumble.[775] Claimant argues that only highly cemented material, such as conglomerate-based pit walls, could safely support WESTEC's design of open pits with slopes between 40 and 55 degrees, which would result in a collapse of the pit walls if they were composed of loose gravel with a 15% swell factor.[776]

385. Claimant also points to the fact that WESTEC's report stated that as much as a 700-foot thickness of conglomerate would be exposed by the pit wall.[777] WESTEC's 1996 report classifies the tertiary conglomerate as "a moderately well indurated (hardened) and cemented unit, which is not loose alluvium or gravel."[778] Finally, Claimant refers to the July 2002 BLM Mineral Report which, Claimant asserts, provides geologic cross sections of both the West and East pits that "clearly show that much of the waste is Tertiary conglomerate."[779]

386. With respect to Respondent's reliance on Claimant's repeated earlier and contemporaneous estimates of the Imperial Project's swell factor as 23%,[780] Claimant argues that this estimate originated as a preliminary assumption made by C. Kevin McArthur in November 1994, many years prior to the promulgation of California's new reclamation measures, and at a time when swell factor was not a substantial issue.[781] Claimant maintains that this was merely an assumption that was repeated without subsequent review in the cited documents, as opposed to a detailed calculation based on the 1996 Final Feasibility Study,[782] which is proven, Claimant asserts, by the repeated qualification in the various contemporaneous Glamis documents that specifies: "swell

[775] Guarnera, Tr. 630:20-631:5.

[776] Behre Dolbear Response Report (Dec. 2006), ¶ 29(e); Guarnera Rebuttal Statement, ¶ 6; Guarnera, Tr. 630:20-631:14 (explaining that a pit with gravel walls would have required a much shallower pit design); Houser, Mining Expert for Respondent, Tr. 829:4-5 (on cross-examination, Mr. Houser explained that "[g]ravel would have a natural repose of roughly 30 percent...").

[777] Counsel for Claimant, Tr. 1564:14-1565:3.

[778] Behre Dolbear Response Report (Dec. 2006), ¶ 29(e), citing BLM MINERAL REPORT: SITE GEOLOGY AND CROSS SECTIONS, BLM, MINERAL VALIDITY EXAMINATION OF THE GLAMIS IMPERIAL PROJECT 20, Fig. 5 (Sept. 27, 2002) [Ex. 255].

[779] Behre Dolbear Response Report (Dec. 2006), ¶ 29(c); Counsel for Claimant, Tr. 1565:4-14 (contending that "all material above the ore zone is tertiary conglomerate. It is not unconsolidated gravel," and adding that there is a very thin layer of alluvium across the surface of the property that is so thin that it does not show up on the cross-section).

[780] *See supra* ¶ 403.

[781] Counsel for Claimant, Tr. 1574:10-15; 1585:21-1586:8.

[782] Counsel for Claimant, Tr. 1574:13-19; 1578:13-17.

factor (assumed)."[783] Behre Dolbear additionally asserts that the 22.65 weighted average swell factor in the June 3, 2003 Au 339 spreadsheet is "a relic or artifact of prior uses of the spreadsheet and was never used in the Au 339 Spreadsheet analysis."[784]

387. In addition, according to Claimant, there are at least two contemporaneous documents that list or imply a swell factor of 35%. First, the January 9, 2003 contemporaneous valuation calculated by Glamis lists that the area of disturbance will increase by 20% with the new reclamation requirements which, Claimant argues, indicates a swell factor of 35%.[785] Second, Claimant cites to a December 2, 2003 memo from James S. Voorhees that specifies an average swell factor of 35%.[786]

388. Finally, Claimant argues that the BLM Mineral Report made no determination of an average swell factor for the rock types found at the Imperial Project.[787] Instead, Claimant asserts, the BLM determined "average bulk density figures which are essentially the same as the ones Behre Dolbear has relied on, 12.92 to 12.96 versus 13 cubic feet per ton calculated by Behre Dolbear."[788] According to Claimant, this is essentially the same as the 153 pounds per cubic foot upon which Behre Dolbear relied from the 1996 Final Feasibility Study.[789]

389. Claimant concludes that, because the volume of waste material is the "primary driver of increased reclamation costs," calculating the swell factor is critical to

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[783] Counsel for Claimant, Tr. 1672:17-1674:20 (pointing specifically to such references in the Internal Chemgold Memo from Gary C. Boyle to C. Kevin McArthur, "Imperial Project Rock Densities" (Nov. 9, 1995), att. "Pre-Feasibility Material Densities ..."; Letter from Daniel Purvance, Project Geologist, Chemgold, Inc., to Larry Allen, Mine Reserves Assoc. Inc. (Mar. 5, 1996), att. "Pre-Feasibility Material Densities ..."; Internal Chemgold Memo from Daniel Purvance, Project Geologist, to C. Kevin McArthur, "Imperial Project Rock Density Analsyis" (Nov. 16, 1994), att. "Feasibility Material Densities").

[784] Behre Dolbear Response Report (Dec. 2006), at A7-2.

[785] Counsel for Claimant, Tr. 1570:4-22; 1676:22-1677:6, citing Memorandum from James S. Voorhees, Glamis Gold, Ltd., to Charles A. Jeannes, Senior Vice President and General Counsel, Glamis Gold, Inc., and C. Kevin McArthur, President and CEO, Glamis Gold, Ltd. (Jan. 9, 2003) [FA 7 Tab 43].

[786] Counsel for Claimant, Tr. 1676:13-21, citing Internal Memo from James S. Voorhees, "Imperial Project – Backfilling" (Dec. 2, 2003), attached at p. 2 to the Memorandum from James S. Voorhees, Glamis Gold, Ltd., to Charles A. Jeannes, Senior Vice President and General Counsel, Glamis Gold, Inc. and C. Kevin McArthur, President and CEO, Glamis Gold, Ltd. (Jan. 9, 2003) [FA 7 tab 43].

[787] Counsel for Claimant, Tr. 1671:13-19, citing BLM, Mineral Validity Examination of the Glamis Imperial Project (Sept. 27, 2002) [Ex. 255].

[788] Counsel for Claimant, Tr. 1672:6-10; BLM, Mineral Validity Examination of the Glamis Imperial Project, p. 50, footnote 13 (Sept. 27, 2002).

[789] Counsel for Claimant, Tr. 1671:20-1672:5, citing Final Feasibility Study for the Imperial Project (Apr. 6, 1996), p. 4-11 [Navigant Consulting Expert Report (Sept. 2006), Ex. 25].

establishing an accurate post-backfilling valuation.[790] Behre Dolbear asserts that Norwest's estimated pit volume and tonnages are "essentially the same as Behre Dolbear's when using the correct and higher 35% swell factor and density of the conglomerate."[791] The higher costs that Norwest would have to incorporate in its analysis if using this higher swell factor, Claimant argues, would add at least $8.03 million to Norwest's estimated backfilling costs.[792] Claimant thus asserts that the difference between its and Respondent's swell factors substantially affects the valuation of the Project,[793] and amounts to a difference of approximately 39 million tons.[794]

d. Spreading of the Leach Pad

390. Finally, as discussed above, the backfilling regulations require not only that all pits be backfilled (to the extent sufficient excess material remains to refill them), but also that all remaining material be spread and recontoured to a maximum height of 25 feet.[795] In addition to the waste piles, the leach pad also retains much material that must be spread and recontoured. Claimant asserts that a total of 88.1 million tons of material would remain on the leach pad after the completion of the excavation phase of the Imperial Project and that, of this total, 67.2 million tons would have to be removed to comply with the 25-foot height requirement of the backfilling measures.[796] At an estimated cost of 35.3 cents per ton to backfill, this spreading and contouring would add $23.7 million to the cost of backfilling.[797]

391. Claimant disputes Norwest's assertions that this material remaining on the leach pad could be used to backfill the East Pit.[798] Behre Dolbear explains that the leach pad

[790] Respondent's Rejoinder, at 80.
[791] Guarnera Rebuttal Statement, ¶ 13.
[792] *Id*.
[793] Counsel for Claimant, Tr. 1031:10-18.
[794] Counsel for Claimant, Tr. 2056:13-2057:3 (This difference is calculated as between Behre Dolbear's estimate of a total of 226 million tons to be moved to meet the reclamation requirements and Norwest's estimate of a total of 187 million tons).
[795] *See supra* ¶ 183.
[796] Behre Dolbear Expert Report (Apr. 2006), at A4-14.
[797] *Id.* Behre Dolbear contends that "theoretically" another 2.4 million tons would remain on the waste dumps after backfilling both the East and West pits, which would cost approximately $847,000 to spread down to a height of 25 feet.
[798] *See infra* ¶ 409 (Respondent asserts that the backfilling regulations allow for backfilling to be achieved through the use of all available material, including overburden, waste rock, and processed or leached ore, such as that remaining on the leach pad).

requires four years to be leached, rinsed and detoxified, prior to which it is not suitable for backfilling, spreading, or recontouring.[799] Concurrent with this four-year process, the East Pit would be completely backfilled with waste dump materials, according to Claimant.[800] Based on Behre Dolbear's calculations, the loose volume on the waste dumps would be approximately 4,599 million cubic feet, very close in volume to the 4,552 million cubic feet needed to fill both pits. In other words, Behre Dolbear contends that the waste from the dumps would completely fill the pits, leaving the leach pad material to be spread and recontoured to the 25-foot maximum limit as required by the backfill measures.[801]

3. RESPONDENT'S CONTENTIONS

392. The total cost for reclamation, according to Respondent, should not exceed $55.3 million if two pits are mined, and $60.1 million if the Singer Pit is also exploited.[802] This is based on Norwest's calculation that the backfilling cost per ton is 25.5 cents; Respondent's acceptance of one of the two proposed equipment refurbishments of $7.7 million asserted by Claimant; the assertion that less backfill material would be created, and thus moved, based upon Respondent's projected swell factor of 23%; and additionally that less material would need to be removed from the leach pad, so that the leach pad would require no additional spreading.[803]

a. Backfilling Cost per Ton

393. Respondent takes issue with the methodology used by Claimant's expert to arrive at its 35.3 cents per ton estimate, a calculation 41% higher than Glamis' own contemporaneous January 9, 2003 internal assessment of reclamation costs.[804] Respondent argues that Claimant's "top-down" cost calculation over-estimates the cost of backfilling, as it ignores substantial efficiencies present during the reclamation phase that are not enjoyed in the excavation process.[805] For example, Respondent asserts that

[799] Behre Dolbear Response Report (Dec. 2006), ¶ 30(a).
[800] *Id.*
[801] *Id.* ¶ 30(c).
[802] Navigant Consulting Expert Report (Sept. 2006), ¶ 180.
[803] *Id.*
[804] Norwest Expert Report (Sept. 2006), ¶ 26; *see supra* ¶ 371.
[805] *Id.* ¶ 24. For further explanation of "top-down" and "bottom up", see *supra* footnote 731.

during the reclamation process loaded trucks would be running downhill, which is quicker, more fuel efficient, and causes less wear and tear on the equipment than running loaded trucks uphill during the excavation phase.[806] Respondent also contends that additional reclamation cost savings are present because of shorter truck distances covered, as trucks do not have to repeatedly travel all the way to the bottom of the pit but can dump material at the pit's perimeter, a process known as "pit crest dumping."[807]

394. As an alternative to Claimant's valuation, Respondent offers Norwest's "bottom-up" analysis of the cost of handling the material at the reclamation phase of the Imperial Project. Norwest bases its analysis on what it alleges to be a detailed evaluation and inclusion of all pertinent costs, including but not limited to: the "determination of equipment types and sizes, equipment operating and maintenance costs, labor costs, taxes, overhead, etc."[808] Based upon its calculations, Norwest concludes that the unit cost of backfilling and recontouring would be 25.5 cents per ton.[809]

395. Norwest corroborates its estimated per ton cost of backfilling by reference to two sources. First, it points to Claimant's own contemporaneous January 9, 2003 internal assessment of reclamation costs, in which Claimant estimated that the cost of backfilling the open East Pit to comply with the California reclamation requirements would be 25.0 cents per ton.[810] Second, Norwest uses the data on productivity of the haul truck fleet contained in Claimant's Plan of Operations to suggest that productivity is, on average, nearly 25% greater during the reclamation process than during the mining phase.[811]

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[806] *Id.* ¶ 24(c). Norwest recognizes that downhill hauls result in greater wear of the trucks' front tires, but argues there is up to a 30% decrease in the use of fuel. Norwest Rejoinder Report (Mar. 2007), p. 18, footnote 57. The difference in cost between backfilling and excavating, Norwest argues, is the difference between hauling uphill an average of 500 feet vertically and 5,000 feet horizontally versus hauling downhill an average of 175 feet vertically and 1,750 feet horizontally. Norwest Rejoinder Report (Mar. 2007), ¶ 61.

[807] Norwest Expert Report (Sept. 2006), ¶ 24(d). The concept and cost of pit engineering is discussed in the next section.

[808] Norwest Expert Report (Sept. 2006), ¶¶ 25-26, and Tbl. 9.

[809] Respondent's Counter-Memorial, at 174, citing Norwest Expert Report (Sept. 2006), ¶¶ 25-26.

[810] *Id.*, citing Norwest Expert Report (Sept. 2006), ¶ 26, citing Memorandum from James S. Voorhees, Glamis Gold, Ltd., to Charles A. Jeannes, Senior Vice President and General Counsel, Glamis Gold, Inc. and C. Kevin McArthur, President and CEO, Glamis Gold, Ltd. (Jan. 9, 2003) [FA 7 tab 3].

[811] *Id.*, citing Norwest Expert Report (Sept. 2006), ¶ 27. This is calculated from the estimated productivity of the haul truck fleet during excavation of 1,166 tons per operating hour, as listed in Glamis' Plan of Operations. Norwest estimates the productivity of backfilling at 1,545 tons per operating hour, or 25% more productive than excavation.

Reducing Behre Dolbear's backfilling cost estimate of 35.3 cents per ton by this 25% "productivity adjustment" results in a unit cost of 26.6 cents per ton, a figure that, Respondent asserts, is close to Norwest's estimate of 25.5 cents.[812]

396. In response to Claimant's argument that Respondent's per ton backfilling cost estimate is lower than the 40 to 50 cents per ton cost estimated by BLM in its 2000 Final EIS/EIR, Respondent asserts that BLM's analysis relies upon an October 1997 analysis performed by Michael Smith, president of Sage Engineering that, Respondent argues, is merely a "back of the envelope" estimate.[813] Based on what Respondent characterizes as Mr. Smith's unsupported use of comparable cost figures supplied by Newmont Mining Company to estimate a range of costs for the Imperial Project, Respondent argues that the analysis "lacks the rigor required to produce an estimate that can be relied upon with an acceptable degree of confidence."[814] Respondent supports its projections by asserting that its estimate of $55.3 million for backfilling the two original pits is comparable to Glamis' contemporaneous January 9, 2003 internal assessment of reclamation costs, which estimated the total cost of compliance with the California measures as $51.1 million.[815]

397. With respect to the portion of the backfilling cost per ton calculations that is determined by whether or not the pit backfilling must be engineered, Respondent argues

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[812] *Id.*, citing Norwest Expert Report (Sept. 2006), ¶ 26.

[813] For Claimant's argument, *see supra* footnote 733 (Claimant argues that Respondent provides no critique of the Sage Engineering cost estimates upon which BLM relied). Navigant Consulting Expert Report (Sept. 2006), ¶¶ 181-83, quoting Mr. Smith's description of his analysis:

> Related to the Complete Backfill Alternative, Glamis Imperial submitted an estimate of $0.50 per ton as a cost to load previously stockpiled material, haul it a distance of approximately one mile to the East Pit, and end dump it into the pit, thus backfilling the East Pit. To provide a comparison, in a recent presentation (May 16, 1997 Society of Mining Engineers Spring Convention, Elko, Nevada) by Newmont Mining Company relating to the Trenton Canyon Project in Northern Nevada, mining costs for ore and waste were stated as ranging from $0.58 to $1.24 per ton. These costs were derived using 150 ton haulage units, and included drilling, blasting, loading, hauling, and dumping. Glamis Imperial proposes to move the material using 300 ton haulage units, and the material will not need to be blasted, only loaded, hauled, and dumped. Under these conditions, I would consider a range of haulage costs from $0.40 to $0.50 per ton to be appropriate.

Letter from Michael Smith (President of Sage Engineering) to Dwight Carey (Oct. 6, 1997) [Navigant Consulting Expert Report (Sept. 2006), Ex. 50].

[814] Navigant Consulting Expert Report (Sept. 2006), ¶¶ 182-183.

[815] *Id.* ¶ 180.

that the engineered backfilling requirement of California's SMGB Regulations does not require Claimant to perform a complete, engineered reclamation with layered compaction, as Claimant asserts.[816] Respondent maintains that the backfilling requirement of Section 3704.1 of Title 14 of the California Code of Regulations must be read in conjunction with Section 3704(b), which provides that "[w]here 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."[817] Norwest argues that Section 3704.1, as cited by Behre Dolbear, does not provide otherwise, but merely requires engineered backfilling, recontouring and revegetation sufficient to prevent water contamination, unnatural topographic features (so as to facilitate water drainage), and surface water ponding, and to ensure that fill slopes are stable.[818]

398. Respondent asserts that "mechanical compacting is not needed to satisfy any of these requirements."[819] Groundwater at the Imperial Project is 720 feet below the land surface (or 160 feet above the 880-foot-deep pit bottom), according to Norwest; the pit therefore would be backfilled far above the level of groundwater, thus precluding harm to it.[820] There is no freestanding water at or near the Imperial Project and precipitation is extremely limited.[821] Norwest also contends that long-term settlement is not a concern, as material would be piled 25 feet above the surface and thus settlement would be insufficient to cause a pit crater where water might pool.[822]

399. Respondent further asserts that pit crest dumping was always planned for the West and Singer pits under Claimant's Plan of Operations, and neither Claimant nor Behre Dolbear argued for employing "these onerous engineered backfilling requirements" in their plans for these pits.[823] According to Respondent, it is illogical for

[816] Respondent's Rejoinder, at 83-85.
[817] *Id.* at 84, citing CAL. CODE REGS. tit. 14, § 3704.1 (2003), quoting CAL. CODE REGS. tit. 14, § 3704(b) (2003).
[818] Norwest Rejoinder Report (Mar. 2007), ¶ 10, citing CAL. CODE REGS. tit. 14, §§ 3704.1(b)-(e) (2003).
[819] *Id.* ¶ 11.
[820] *Id.*
[821] *Id.* ¶¶ 12-13.
[822] *Id.* ¶ 14.
[823] Counsel for Respondent, Tr. 1213:15-1214:5.

Claimant to argue that California regulations require bottom-up compacting of the East Pit, but not of the other two pits in the same mining project.[824]

400. Respondent concludes that pit crest dumping is a common and cost-effective alternative to the engineered reclamation planned by Claimant.[825] Norwest identifies several mines that have successfully employed pit crest dumping in the past, including the American Girl mine, a project adjacent to the Imperial Project, as well as Asarco's Mission Mine in Arizona and Rio Tinto's Bingham Canyon Mine in Utah.[826]

b. Equipment Refurbishment

401. With respect to Claimant's argument that two payments of $7.7 million each must be included in the cost of backfilling for refurbishment of the Project's trucks, Respondent argues that such costs should be completely eliminated as they were not included in Glamis' contemporaneous January 9, 2003 estimate, thus implying that Claimant included these costs already in its cost per ton estimate.[827] Nevertheless, in order to provide what it describes as a "very conservative" estimate of backfilling costs, Norwest includes one $7.7 million payment.[828]

402. Norwest alternatively would exclude the second equipment refurbishment payment based upon the argument that it would be unnecessary to refurbish the trucks after backfilling (and prior to recontouring).[829] First, Norwest alleges that the approach to maintenance during the backfilling operation would be to run to breakdown, as opposed to a conservative preventive maintenance program; this results in minimal salvage value of the equipment at the mine closing.[830] Second, according to Norwest's calculations, following four years of backfilling, the equipment would be only 47% "used up."[831]

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[824] Counsel for Respondent, Tr. 1214:6-9.
[825] Norwest Rejoinder Report (Mar. 2007), ¶¶ 33-38.
[826] *Id*. ¶ 34.
[827] Norwest Expert Report (Sept. 2006), ¶ 28(c); Norwest Rejoinder Report (Mar. 2007), ¶ 66(b); Navigant Consulting Expert Report (Sept. 2006), ¶ 175.
[828] Norwest Expert Report (Sept. 2006), ¶ 28(d).
[829] *Id*. ¶ 28(b).
[830] *Id*. (asserting that, as Behre Dolbear did not give credit for any salvage value of the equipment, it must be presumed to be "used up").
[831] *Id*.; Norwest Rejoinder Report (Mar. 2007), ¶ 66, Tbl. 11.

c. The Appropriate Swell Factors

403. Respondent estimates the appropriate swell factor to be 23%, which is the weighted average derived from the swell factors of 30% for ore, 30% for rock waste, and 15% for gravel.[832] It adopted this estimate from Claimant's repeated contemporaneous use of these same figures which, according to Respondent, Claimant utilized throughout Project correspondence and reports from November 1994 through 2003.[833] Respondent disputes Claimant's characterization of this repeated figure as "assumed" or otherwise incorrect, in that there is no evidence in the record, according to Respondent, of Claimant realizing that this figure was indeed incorrect and remedying that fact.[834] Because of Claimant's consistent historic use of these figures, Norwest did not independently confirm the "nature or swell factor of the Imperial Project's dominant waste material."[835]

404. Norwest supports the use of this estimate as it reflects an average of three separate analyses that, Norwest contends, deal solely and specifically with the Imperial Project's in-place and loose material densities.[836] Norwest explains that material generally has

[832] *Id.* ¶ 17(b); Norwest Rejoinder Report (Mar. 2007), ¶ 40 (Norwest's estimated average swell factor for the waste rock and alluvium is 18%).

[833] Respondent's Counter-Memorial, at 172; Norwest Expert Report (Sept. 2006), p. 6, Tbl. 3 (citing Internal Chemgold Memo from Gary. C. Boyle to C. Kevin McArthur, "Imperial Project Rock Densities" (Nov. 9, 1995), att. "Rock Density Analysis"; Letter from Daniel Purvance, Project Geologist, Chemgold, Inc., to Larry Allen, Mine Reserves Assoc. Inc. (Mar. 5, 1996), att. "Rock Density Analysis"; Glamis 339 Au Spreadsheet on Worksheets 'loadopt', Summary and 'costumr' (June 3, 2003); Norwest Second Supplemental Statement (Aug. 2007), ¶ 5 (citing Internal Chemgold Memo from Daniel Purvance, Project Geologist, to C. Kevin McArthur, "Imperial Project Rock Density Analysis" (Nov. 16, 1994), att. "Rock Density Samples"; Chemgold, Inc. Imperial Project Bankable Feasibility Study, Sensitivity Analysis (Mar. 1996); Fiscal 1998 Budget – Imperial Project; Fiscal 1999 Budget – Imperial Project; 1996 letter from Glamis' project geologist to its consultant, Mine Reserves Assoc. Inc.; and 1999 internal Glamis spreadsheet, titled "Base Case at 339 Au.xls")). *See also* Counsel for Respondent, Tr. 1201:3-1205:9 (citing 1995 Memorandum from Project Manager Gary C. Boyle to C. Kevin McArthur).

[834] Counsel for Respondent, Tr. 1880:9-1881:4; 1882:4-1883:13 (arguing that not a single Glamis document predating the Arbitration lists a 35% swell factor and arguing that the only document with that figure—the December 2, 2003 memo—was drafted months after the filing of Claimant's Notice of Intent and is attached to the January 9, 2003 memo which calculated a post-backfilling valuation for the Imperial Project of positive $9.1 million).

[835] Norwest Second Supplement Statement (Aug. 2007), ¶ 9. Houser, Mining Expert for Respondent, Tr. 850:10-13 (explaining that Norwest checked Glamis' calculations against their own experience and against "the handbooks" and then concurred with them).

[836] Norwest Expert Report (Sept. 2006), ¶¶ 17-18; Norwest Rejoinder Report (Mar. 2007), Tbl. 5.

different volumes at different stages of production and argues that, unlike Behre Dolbear's estimate, Norwest's calculation of the swell factor for reclamation appropriately accounts for the different component swell factors for ore, waste rock, and gravel.[837] Respondent asserts that Norwest's estimate is also corroborated by BLM's 2002 estimate of the average swell factor for the Imperial Project at 22.3%, which was based on Claimant's own drill logs, metallurgical work, and published rock density data.[838]

405. To further support its estimated swell factor, Respondent cites to two references in which the waste material at the Imperial Project is described as "gravel." First, Respondent asserts that Behre Dolbear's own expert report states that "[a]ccording to Glamis, 79% of the waste material in both the East pit and the West pit is classified as gravel."[839] Second, Respondent points to the Imperial Project Plan of Operations which explains that "[t]he overburden thickness above the ore zones ranges from 40 to 350 feet and consists mostly of alluvial gravels, both unconsolidated and cemented, and minor amounts of volcanic rock. Mining of the unconsolidated gravels may not require blasting. However, the cemented gravels are expected to require blasting prior to excavation."[840] Respondent reads this excerpt to mean that "not everything was the kind of rock that Behre Dolbear would have us believe."[841]

406. Norwest argues that Behre Dolbear also grossly "over-swelled/inflated" the non-ore containing waste material volume by nearly twice Glamis' own 18% estimate.[842] Norwest asserts that, based on its experience, the original swell factors used by Glamis

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[837] Respondent's Rejoinder, at 82-83, citing Norwest Supplemental Report (Mar. 2007), Tbl. 5, ¶¶ 40, 43-44 (explaining that material has the most swelling when it is in the excavation bucket, and the least swelling as waste in stockpiles and pits).

[838] Norwest Expert Report (Sept. 2006), p. 6, Tbl. 3; Navigant Consulting Expert Report (Sept. 2006), Ex. 28 (BLM, Mineral Validity Examination of the Glamis Imperial Project (Sept. 27, 2002), App. A, p. 3 (estimating the swell factor of ore on the leach pad to be 22.3%, and material on the waste dump at 4.8%) [NAV1-28]; Counsel for Respondent, Tr. 1206:6-12 (adding that BLM's estimate relied on the *Horace Church Excavation Handbook* for rock density data).

[839] Norwest Second Supplemental Statement (Aug. 2007), ¶ 7 (*quoting* Behre Dolbear Expert Report (Apr. 2006), at A4-9).

[840] Counsel for Respondent, Tr. 1199:20-1200:4, citing ChemGold Inc. Imperial Project - Plan of Operations, p. 11 (Revised Sept. 1997) [Hearing Ex. 33]. This is almost identical to the description in the final ChemGold Inc. Imperial Project - Plan of Operations and Reclamation Plan, p. 10 (Nov. 1994) [Ex. 55].

[841] Counsel for Respondent, Tr. 1200:5-6.

[842] Norwest Expert Report (Sept. 2006), ¶ 18.

during the engineering of its Project were reasonable and "the weighted average for the waste material swell should be about 18% before any compaction."[843] Respondent argues that Glamis Gold itself used this swell factor of 18% for waste rock and alluvium in its 1999 spreadsheet, created "in the course of developing its mine and reclamation plans and as support for their permit and EIS submissions."[844] Norwest concurs with this estimate.[845] Norwest cites to numerous additional contemporaneous Glamis Gold documents that list a swell factor for gravel of 15% and states that, "[g]iven these contemporaneous documents, Norwest did not independently confirm the nature or swell factor of the Imperial Project's dominant waste material. Rather Norwest simply adopted Glamis' own data."[846]

407. Finally, Respondent objects to Claimant's reliance on the 1996 Final Feasibility Study. According to Respondent, the study did not produce an estimate of swell factor, but rather determined the "loader productivity", a measurement of the loose density of the waste material calculated to "determine equipment production capacity and to estimate the number and size of the units of equipment required" for excavation.[847] As explained by Respondent, the "loader productivity" analysis contains only one assumption regarding loose density and makes no distinction between the various swell factors for ore, waste gravel, and waste rock.[848] Norwest explains that the *Caterpillar Performance Handbook* reports three phases of material density during earthmoving: "bank" (in-place) density, "loose" density (a less dense state ready for loading into trucks) and "compacted" density (a once again more dense state after the material is compacted by the movement of heavy equipment).[849] Accordingly, Respondent argues, Behre Dolbear

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[843] *Id.*

[844] Norwest Expert Report (Sept. 2006), ¶ 17.b.iii, citing Glamis 339 AU Spreadsheet on worksheet "loadopt" cell G7 [Norwest Expert Report, app. G].

[845] Norwest Expert Report (Sept. 2006), ¶ 17.b.i.

[846] Norwest Second Supplemental Statement (Aug. 2007), ¶¶ 8-9, citing 1994 Memorandum from Project Geologist Daniel Purvance to C. Kevin McArthur [app. A, p. 3]; 1995 Memorandum from Gary C. Boyle to C. Kevin McArthur [Norwest Supplemental Statement (Nov. 2006), app. K, p. 4]; 1996 Letter from Daniel Purvance to Glamis' Mining Consultant [Norwest Supplemental Statement (Nov. 2006), app. H, p. 3]; 1996 Glamis Bankable Feasibility Study [app. B, p. 2]; 1998 Imperial Project Budget [app. C, p. 2]; 1999 Imperial Project Budget [app. D, p. 2]; and 2003 Imperial Project Financial Model [Norwest Expert Report (Sept. 2006), 8th spreadsheet].

[847] Respondent's Rejoinder, p. 82, citing Behre Dolbear Response Report (Dec. 2006), ¶ 27; Norwest Rejoinder Report (Mar. 2007), ¶ 42.

[848] Norwest Rejoinder Report (Mar. 2007), ¶ 43.

[849] *Id.*

improperly applied the same "loose" (highest) 35% swell factor (immediately after the material has been blasted and prior to any compaction by heavy equipment) for each phase of production, thus inflating the estimated cost of backfilling.[850] In addition, Respondent contends that, although Claimant supposedly found an in-place density in its own Final Feasibility Study from which it derived a ratio with the loose density, no such page designating the in-place density was produced as evidence.[851]

408. By using a highly inflated and inappropriately uniform swell factor, Respondent argues, Behre Dolbear has overestimated the amount of material that would need to be moved above the 25-foot amount permitted to remain in the reclamation process by 15 million tons.[852] Multiplying this tonnage by Respondent's estimate of a 25.5 cent cost per ton cost of backfilling, leads to an overstatement of backfilling costs by Claimant of $3.8 million.[853] According to Respondent, however, the impact on the Imperial Project's net present value is less than $1 million.[854] Accordingly, Respondent asserts that the financial impact of this factor is marginal in the context of the entire dispute.[855]

d. Spreading of the Leach Pad

409. Finally, Respondent contends that Behre Dolbear assumes that the East Pit would be filled completely with waste material during the time that the leach pad is processed and cleaned.[856] Respondent asserts that the regulations allow for backfilling to be effected through the use of "all of the available material remaining as overburden, waste rock, and processed or leached ore."[857] According to Respondent, using only waste

[850] *Id.* ¶¶ 43-45 and Tbl. 5; Norwest Second Supplemental Statement (Aug. 2007), ¶ 6. Houser, Mining Expert for Respondent, Tr. 830:11-831:2 (explaining that the material could have a swell factor of around 35% at its first blasting, but that it is then consolidated as it is moved around and driven over).

[851] Counsel for Respondent, Tr. 1254:16-20.

[852] Respondent's Counter-Memorial, at 172; Counsel for Respondent, Tr. 1207:21-1208:4; *but see* Norwest Second Supplemental Statement (Aug. 2007), ¶ 10 (stating the difference is 18 million tons); Counsel for Respondent, Tr. 2091:2-10 (asserting that Claimant's estimate of an impact of 39 million tons is overstated because that includes not only the effect of the difference in swell factor estimates, but also the effect of moving all material off of the leach pad rather than leaving it at 25 feet).

[853] Counsel for Respondent, Tr. 1208:7-11; 1885:6-12.

[854] Counsel for Respondent, Tr. 1208:7-11.

[855] Counsel for Respondent, Tr. 1208:12-14.

[856] Navigant Consulting Expert Report (Sept. 2006), ¶ 165; *see also supra* ¶ 391 (presenting Claimant's argument with respect to the time of spreading the material on the leach pad).

[857] Navigant Consulting Expert Report (Sept. 2006), ¶ 164, quoting STATE MINING AND GEOLOGY BOARD: EXECUTIVE OFFICER'S REPORT (Jan. 16, 2003) [Navigant Consulting Expert Report (Sept. 2006), Ex. 12].

material to fill the East Pit leads to "inefficient and unnecessarily expensive handling of excess material," as only 2.4 million tons of material is left on the waste piles which, Respondent contends, is far below the 25-foot height requirement.[858]

410. Respondent states that, even assuming Claimant could completely backfill the East Pit with waste material in the four years that it takes for the leach pad to be leached and rinsed, it does not make economic sense to do so.[859] According to Respondent, by planning to reduce the stockpiled waste below 25 feet, Behre Dolbear unnecessarily assumes the movement of an additional 25.9 million tons of material.[860] In other words, Behre Dolbear's model moves an unnecessary 25.9 million tons that could instead be taken from the leach pad; this method results in the waste piles being reduced below the regulatory requirements and the same amount of material needing to be moved again from the leach pad to reduce the pad to the maximum allowable 25 feet. Respondent argues that it would be "far more reasonable and economic to gradually slow the pace of backfilling such that the waste piles are reduced to 25 feet at the end of four years."[861] The process still would require six years to complete backfilling, the same period estimated by Behre Dolbear.[862]

411. Respondent's approach, it contends, leads to cost savings in three ways. First, not completely filling the East Pit with waste rock leaves approximately 25.9 million tons that would not need to be moved, according to Norwest, thus reducing the total tons to be moved from Behre Dolbear's estimate of 227.2 million tons to approximately 201.3 million tons.[863] Respondent asserts that this reduction in total tonnage to be moved as

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[858] *Id.*, ¶ 165, citing Behre Dolbear Expert Report (Apr. 2006), at A4-14.

[859] Navigant Consulting Rejoinder Report (Mar. 2007), ¶ 263.

[860] Norwest Rejoinder Report (Mar. 2007), ¶ 55. The Tribunal notes that in its Second Supplemental Statement, Norwest states that Behre Dolbear unnecessarily moved 22.1 million tons of material, instead of the figure of 25.9 million tons. *See* Norwest Second Supplemental Statement (Aug. 2007), ¶ 3. The Tribunal also notes, however, the consistent use by Norwest and Respondent of the 25.9 million ton figure both prior to and subsequent to this reference. *See* Norwest Rejoinder Report (Mar. 2007), ¶ 55; Counsel for Respondent, Tr. 1236:22-1237:2, 1239:3-1240:4. Indeed, even in providing the 22.1 million ton figure in its Second Supplemental Statement, Norwest cites back to its prior report and the 25.9 million figure. *See* Norwest Second Supplemental Statement (Aug. 2007), footnote 2. The Tribunal can ascertain no explanation for this discrepancy other than clerical error. It thus utilizes the figure of 25.9 million tons otherwise used consistently by Norwest and by Respondent in both its submissions and at the hearing.

[861] Navigant Consulting Supplemental Report (Mar. 2007), ¶ 263.

[862] *Id.*

[863] Norwest Rejoinder Report (Mar. 2007), ¶ 55(b). Norwest asserts that the additional difference

part of the backfilling results in a cost savings of $9.1 million within Behre Dolbear's model (i.e., at Claimant's estimated per ton cost of backfilling of 35.3 cents).[864] Second, spreading becomes unnecessary as both the waste pile and leach pad are left below 25 feet in height, resulting in additional savings.[865] Third, Respondent asserts that the overall project value would increase with the deferment of these costs to a later period.[866]

4. DECISION OF THE TRIBUNAL WITH RESPECT TO THE COST OF BACKFILLING

412. The Tribunal first considers in turn the four disputed sub-factors and then considers the overall question of the projected cost of backfilling as a consequence of the California backfilling measures.

a. Backfilling Cost per Ton

413. First, with respect to the appropriate cost per ton of backfilling, the Tribunal notes that the Parties use disparate methodologies to calculate their respective estimates. Claimant's "top down" subtraction method of reducing the total average life-of-project mining cost per ton of 44.2 cents by 8.9 cents per ton for drilling and blasting is based on its 1996 Final Feasibility Study, which provides substantiation of the 44.2 cents mining cost per ton, though not the 8.9 cents calculated by Behre Dolbear as the difference between this cost and that of the backfilling cost per ton. Respondent, on the other hand, utilizes a "bottom-up" analysis, assessing each of the cost components that make up the per ton cost of backfilling. The Tribunal is not persuaded that the costs associated with backfilling material are identical to those associated with its removal; the Tribunal therefore determines that the "bottom up" analysis is better calculated to reach an accurate figure.

414. With respect to this "bottom up" analysis, the Tribunal finds it significant that Respondent's estimated per ton cost is reasonably close to that estimated in Claimant's assessment of the effects of the backfilling measures contemporaneous with their passage. Moreover, in reviewing Respondent's analysis, the Tribunal finds it to be

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between this reduced 201.3 million tons and Norwest's own calculation of 186.7 million total tons to be moved is due to Behre Dolbear's inflated swell factor.

[864] *Id.* ¶ 55(c).

[865] Navigant Consulting Expert Report (Sept. 2006), ¶ 167.

[866] Navigant Consulting Supplemental Report (Mar. 2007), ¶ 263.

substantially correct, although the Tribunal also concludes that Respondent has not fully accounted for all of the relevant costs of backfilling. In particular, the Tribunal is not persuaded that Respondent has correctly estimated the savings of pit crest dumping, truck efficiency on downhill runs, or the projected shortened truck hauls.

415. Specifically, the Tribunal has carefully considered the evidence presented regarding whether the backfilling regulations and California mining practices require special engineering and layered compaction of waste and other material into the backfilled pits or whether the open pits could be backfilled through "pit crest dumping." Claimant provides authoritative evidence that pit crest dumping can lead to subsidence which can result in water drainage problems and additional cost for the mine operator to remedy. Respondent, however, presents persuasive evidence that pit crest dumping is permitted within the bounds of the applicable regulations and is in fact employed at several mines, including one in the region of the Imperial Project. In addition, Respondent points to Claimant's Plan of Operations in which Claimant proposed to backfill the West and Singer pits through pit crest dumping. The Tribunal notes, however, that except for the American Girl mine, the examples cited by Respondent of mines utilizing pit crest dumping are outside of California; in addition the Imperial Project Plan of Operations assuming pit crest dumping for the West and Singer pits was submitted prior to the backfilling measures' passage; thus these examples are less than fully persuasive. The Tribunal concludes that Respondent has not clearly established that all of the projected savings associated with pit engineering and pit crest dumping would be realized.

416. Therefore, although the Tribunal finds Respondent's "bottom up" calculation to be substantially correct, the Tribunal also finds that there is some uncertainty in Respondent's estimated per ton cost of backfilling. The Tribunal notes that Respondent has not asserted an individual value for the cost reduction occasioned by the use of pit crest dumping as opposed to engineered backfilling. In the absence of a precise value to be discounted, the Tribunal instead applies a discount to Respondent's overall bottom-up calculation. The Tribunal, therefore, in keeping with its approach of starting from the most favorable scenario for Claimant and based on the best available data in the expert reports, adjusts Respondent's "bottom up" figure by 30% of the difference between the

Parties' estimated per ton cost figures, resulting in an increase to its per ton cost of backfilling, that brings it to 28.44 cents per ton.

b. Equipment Refurbishment

417. With respect to the number of payments required to cover necessary refurbishment of the used equipment purchased for the Imperial Project, the Tribunal notes that Respondent has conceded one of the two proposed equipment refurbishments of $7.7 million.[867] The Parties therefore appear to agree on the inclusion of at least one such payment in the calculation of the total backfilling cost.

418. With respect to Respondent's alternative argument that the second payment of $7.7 million is unnecessary following the backfilling of the East Pit but prior to the recontouring of the waste piles and leach pad, the Tribunal finds persuasive Norwest's contentions that sufficient work hours remained on the equipment at Year 12 (2014) so that an additional refurbishment was not required. Specifically, Respondent presents convincing evidence that the second payment is not necessary, as the equipment would be only 47% "used up" at the end of the first four years of backfilling and therefore no further refurbishment would be necessary to complete the task of recontouring. Finally, Respondent was also persuasive that, as no salvage value was calculated for the equipment upon completion of the Imperial Project, the approach to maintenance would be a "run to breakdown," as opposed to "preventive maintenance."

419. Based upon these conclusions, the Tribunal reduces Claimant's estimated cost of backfilling by $7.7 million in Year 12.

c. The Appropriate Swell Factors

420. Swell factor is a term of art used in mining "to refer to the natural expansion of rock and other materials when they are removed from the ground."[868] Rock material crumbles into smaller components as it is excavated and subsequently moved throughout the mining process; this "swell" from the original in-place, or undisturbed, density increases the volume of the material, often quite substantially. Swell factor is calculated

[867] *See supra* ¶ 401 (Respondent accepts one equipment refurbishment so as to be "very conservative").

[868] Behre Dolbear Response Report (Dec. 2006), ¶ 27.

as the ratio between the in-place density of the material still in the pit to the loose density once it is excavated from the pit.[869] Swell factor is thus determined by the mineral composition of the material excavated and the calculation of the amount that each mineral will expand after blasting and hauling. It is an important factor in that the greater the swell factor, the greater the volume of material that must be backfilled, spread and recontoured, therefore increasing the costs of reclamation.

421. The Parties agree that 79% of the waste material in both the East and West pits is classified in various documents as "gravel."[870] They also agree on the in-place density of this material.[871] However, they dispute what the use of the term "congl./gravel" signifies precisely, and more specifically the mineral composition to be assigned to this gravel. Hence, the Parties disagree on how much this material will swell once it is excavated from the pits and moved throughout the mining process.

422. A primary point of debate with respect to this determination is the repeated use early in the life of the Project by Claimant of the generic and vague term "conglomerate/gravel", or simply "congl./gravel." Conglomerate is generally defined as "individual pieces of rock cemented in a matrix of other material such as sand and clay;"[872] whereas the term "gravel" is generally described as "unconsolidated, natural accumulation of rounded rock fragments resulting from erosion, consisting predominantly of particles larger than sand ... such as boulders, cobbles, pebbles, granules, or any combination of these."[873] What is unclear in these early documents is the relative presence of each of the components.

423. The heart of the lengthy debate between the Parties concerns the proper swell factor to be ascribed to this conglomerate/gravel, which Claimant estimates to be 35% and Respondent estimates at an average of 23%.[874] The Parties also dispute the appropriate swell factor to be ascribed to the remaining 21% of material (the waste

[869] Navigant Consulting Expert Report (Sept. 2006), ¶ 154.

[870] Behre Dolbear Expert Report (Apr. 2006), at A4-9; Norwest Expert Report (Sept. 2006), ¶ 14. The Parties also agree that the remaining 21% is waste rock.

[871] Norwest Expert Report (Sept. 2006), ¶ 15.

[872] Norwest Rejoinder Report (Mar. 2007), ¶ 46.

[873] U.S. BUREAU OF MINES, DICTIONARY OF MINING, MINERAL, AND RELATED TERMS (1996), *available at* http://webharvest.gov/peth04/20041015011634/imcg.wr.usgs.gov/dmmrt/.

[874] Behre Dolbear Expert Report (Apr. 2006), at A4-9; *see* Navigant Consulting Expert Report (Sept. 2006), ¶ 163.

material) at the Imperial Project, with Claimant assigning it the same 35% swell factor, and Respondent estimating an 18% swell factor.[875]

424. The Tribunal is therefore tasked with determining the proper swell factor to be used in the projection of how much material must be moved throughout the life of the Imperial Project. This determination is central to estimating the costs of the Project, especially those of backfilling, spreading and recontouring, as required by the California backfilling measures.

425. As mentioned, there are two swell factors to determine: that of the ore-bearing material and that of the waste material. With respect to the proper swell factor of the ore-bearing material at the Imperial Project, the Tribunal notes that three different swell factors are offered for the material that makes up 79% of the total material mined: Behre Dolbear's 35%, Norwest's 23%, and BLM's 22.3%. The Tribunal has reviewed all of these offered calculations closely. The estimation of the BLM is particularly significant not only in that it is contemporaneous, but also it is not offered by a party to the dispute. In addition, the Tribunal notes that neither Party challenges the authoritativeness of the BLM report. Claimant does argue that the BLM Mineral Report does not determine an average swell factor for the rock types of the Imperial Project, but also notes that the average bulk density figures used by the BLM are "essentially the same" as those relied upon by Behre Dolbear.[876]

426. Weighing the evidence offered, the Tribunal is not persuaded of the accuracy of the significantly larger figure of 35% offered by Claimant. The 23% swell factor offered by Norwest, on the other hand, is comparable to that of BLM at 22.3%, and is persuasive to the Tribunal. Simultaneously, however, the Tribunal retains some doubts with respect to the Norwest-derived swell factor. In particular, the Tribunal finds that Respondent has not established that the vast majority of material in the various pits at the Imperial Project would be loose gravel, as asserted. Instead, the Tribunal finds persuasive the evidence offered by Claimant that such material likely would not support the pit slope walls as designed.

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[875] Norwest Rejoinder Report (Mar. 2007), ¶ 40 and p. 13, Tbl. 5; Behre Dolbear Response Report (Dec. 2006), ¶ 28.

[876] *See supra* ¶ 388.

427. Given that the determination of swell factor requires the examination and identification of various material compositions and an analysis of how each will expand through the various stages of mining activity, the Tribunal determines that the calculation of the proper swell factor is significantly complex and simple assumptions are thus not warranted. The Tribunal has been offered three swell factors, with the only calculation offered by a non-Party being that of the BLM, and those of the Parties falling on either side. The Tribunal is not altogether persuaded by either Party's calculation of the swell factor, though it finds Norwest's estimation substantially correct. In its consistent efforts to use the best valuation scenario for Claimant in this initial determination of whether the Imperial Project suffered significant economic harm, the Tribunal adjusts Norwest's figure upward by 60% of the difference between its estimation and that of Claimant. This yields a swell factor of 30.2% for the tertiary conglomerate that accounts for 79% of the material that would be mined at the Imperial Project.

428. With respect to the waste rock that makes up the remaining 21% of material to be moved at the Imperial Project, the Tribunal notes the greatly disparate estimated swell factors of Claimant's 35% and Respondent's 18%. Behre Dolbear clearly assumes that the 21% of waste rock is analogous in its composition to the other 79% of ore-containing material, despite the differentiation agreed upon by the two Parties between the 79% ore-containing material and 21% waste rock mined. Norwest, on the other hand, clearly assumes that the waste rock is predominantly, if not almost completely, composed of loose alluvium (loose "clay, silt, sand, gravel, or similar unconsolidated detrital material"[877]), which is consistently given a swell factor of 15%. It appears to the Tribunal that each of these assumptions is over-simplified and the most convenient for the Party making it, and thus both assumptions are somewhat questionable.

429. Although the Tribunal recognizes that a difference presumably exists between the swell factors of the ore-containing rock and the waste material, as the Parties have spent not insubstantial portions of the record differentiating between these two groups, the Tribunal finds that it has been provided with insufficient information to persuade it as to either position. In this situation of equipoise between the contentions of the two Parties,

[877] U.S. BUREAU OF MINES, DICTIONARY OF MINING, MINERAL, AND RELATED TERMS (1996), *available at* http://webharvest.gov/peth04/20041015011634/imcg.wr.usgs.gov/dmmrt/.

the Tribunal continues its practice of using, whenever possible, the valuation most favorable to Claimant. The Tribunal stresses again that this is not a definitive manner in which to prove an expropriation, but is a rough manner in which to demonstrate that such an expropriation has not occurred.[878] The Tribunal therefore adopts Claimant's methodology of assuming the same swell factor for the waste rock as for the ore-containing rock. The Tribunal thus uses its swell factor of 30.2% for both the waste rock and ore-containing conglomerate of the Imperial Project.

430. Therefore, on the basis of the evidence in the record and taking into account this stage of the Tribunal's analysis, the Tribunal finds that the appropriate swell factor for all minerals excavated from the Imperial Project pits would be 30.2%.

431. Based on Respondent's claim that the resulting difference in tonnage of waste rock as a consequence of the two swell factor estimates offered by the Parties is 15 million tons,[879] the Tribunal finds that the use of a swell factor of 30.2% would reduce Claimant's estimated tonnage to be hauled by 6.0 million tons.[880]

d. Total Tonnage to Be Moved to Comply with the California Backfilling Requirements

432. Finally, with respect to the assessment of the total tonnage to be moved, the Tribunal notes that the Parties produced a significant amount of evidence regarding the total tonnage that needed to be removed and backfilled in compliance with the California measures. The primary debate over the correct tonnage centered on the swell factor. An additional debate arose, however, regarding the precise timing of the movements of this waste rock and whether or not some material needed to be moved at all. In an effort to analyze this latter debate, the Tribunal spent significant time reviewing the charts and

[878] *See supra* ¶¶ 364-65.

[879] The Tribunal chose this estimation over that of Claimant's as it appears to the Tribunal that Claimant's estimation of a 39 million ton difference includes the tons that would not need to be moved should the backfilling process be slowed so as to leave more material on the leach pad. The Tribunal also notes the apparent oddity that the Parties argue the difference in swell factor-related cost based on the change in tonnage, as swell factor would appear, to the Tribunal at least, to affect *volume*. The Tribunal therefore assumes that there is a large cost component within these estimations for the increased truck trips in order to carry the increased volume of material.

[880] This is based on the assumption that the 15 million tons attributable to the Parties' different swell factor estimates, as estimated by Respondent, equals 12% (the difference between 23% and 35%) of 125 million tons. Therefore, the Tribunal calculated the percentage difference based on the difference between its predicted swell factor and that of Claimant's, multiplied by a base tonnage of 125 million tons.

graphs depicting the movement of waste material and material from the leach pad to assess whether there is indeed savings in slowing the backfilling of the East Pit so that the waste piles would be reduced only to 25 feet by the time the leach pad was completely leached and cleaned. The Tribunal additionally carefully reviewed the Parties' arguments with respect to this issue on the merits of the various methods of backfilling.

433. After this analysis, the Tribunal finds credible Respondent's alternative reclamation plan regarding the spreading of the leach pad. The Tribunal also finds that Claimant has not provided sufficient evidence that it would not in fact prove economical to slow the backfilling of the East Pit to require four years until the leach pad material was also available, so as to leave both the waste piles and the leach pad at the maximum height possible under the regulations.

434. The Tribunal therefore reduces the total volume of tonnage to be moved under Claimant's estimated post-backfilling valuation by another 25.9 million tons, as calculated by Respondent.[881]

435. Based upon this final determination, the Tribunal reduces Claimant's predicted additional tonnage of 227.2 million tons to be moved pursuant to the requirements of the California measures[882] by 6.0 million tons based upon the Tribunal's calculation of the swell factors, and by 25.9 million tons based upon an assumption that the backfilling could be slowed so as to reduce the tonnage to be removed from the waste piles. The Tribunal therefore concludes that, as a result of the California backfilling measures, the Claimant would have had to remove and backfill an additional 195.3 million tons of rock and ore.

e. Final Disposition – Cost of Backfilling

436. Based upon the above findings, the Tribunal determines that the appropriate per ton cost of backfilling is 28.44 cents, which includes any reduced cost savings for pit crest dumping as opposed to engineered backfilling. The Tribunal lowers Claimant's total cost of backfilling estimates by approximately $7.7 million for one equipment refurbishment and reduces the predicted total tonnage to be moved by 31.9 million tons.

[881] *See supra* ¶ 410.
[882] *See supra* ¶ 370.

These holdings, brought to the present value with the appropriate discount rate as determined by the Tribunal, are applied *infra*, at paragraph 534, in the Tribunal's calculation of the overall effects of its adjustments on Claimant's estimation of the Imperial Project's post-backfilling valuation.

B. THE SECOND DISPUTED ELEMENT OF CLAIMANT'S VALUATION: THE SINGER PIT – RESERVES VERSUS RESOURCES

1. ISSUE PRESENTED

437. The second element presented in the determination of the value of the Imperial Project turns on whether, as Respondent argues, the pre-backfill valuation of the Singer Pit should be included in the post-backfill valuation or, as Claimant asserts, should be removed from the post-backfill valuation as it is overly speculative. In the Tribunal's view, the greatest difference between the Parties' characterizations of the Singer Pit valuation is that Behre Dolbear values the Singer Pit potential as a second, independent property reflecting only exploration potential that would not be considered by a potential buyer after it had already determined that the first two pits were uneconomical as a result of the backfilling measures.[883] Respondent, however, argues that Behre Dolbear has already properly considered the higher risk of the lower-confidence Singer Pit mineralization by reducing the quantum of mineralization from 500,000 to 250,000 ounces,[884] and thus there is no reason to not include the exploration potential in a discounted cash flow valuation of the entire Project for the post-backfilling scenario.[885]

438. It is undisputed between the two Parties that there is a significant difference between mineral reserves and resources and the degree of certainty or assurance between the two, a difference that has implications for the valuing of the mineral property and the

[883] Behre Dolbear Response Report (Dec. 2006), ¶ 17.

[884] Navigant Consulting Rejoinder Report (Mar. 2007), ¶ 121. In addition, although both Parties agree on the difference between reserves and resources, they disagree as to whether Behre Dolbear's assessment of the 500,000 ounces of gold resources in the Singer Pit at a 50% probability of recovery resulted in the valuation of 250,000 ounces of resources, or converted the resources to 250,000 ounces of "probability-adjusted additional gold reserve additions." *Id*. As both Parties base their valuations on the assumption of 250,000 ounces of gold present with a discount for the fact that they are not proven, however, the issue becomes not how to characterize this gold—as both characterizations appear to result in the same number of ounces of gold and thus the same valuation—but how to characterize its role with respect to the rest of the Imperial Project.

[885] *Id*. ¶¶ 123-127.

mineral operator.[886] The Parties also agree that both the U.S. Security and Exchange Commission and Canadian accounting rules require that mineral operators re-examine their reserves and resources annually and, if there is no "reasonable expectation of having the legal right to mine and remove those minerals," they must be recharacterized from "proven and probable reserves" to the "lesser category of mineral resources."[887] There is also no disagreement that, once the Interior Department denied the Imperial Project on January 17, 2001, it was incumbent upon Claimant to perform such an accounting "write-down."[888] Finally, the Parties are in agreement that the third potential pit—the Singer Pit—possessed and continues to possess approximately 500,000 ounces of gold resources.[889]

439. Claimant's expert Behre Dolbear values the Singer Pit gold in the pre-backfilling scenario at $6.43 million based on a determination of a 50% probability of attaining these additional 500,000 ounces of resources using the market approach and based on its proprietary chart.[890] In the post-backfilling scenario, Behre Dolbear attributes no value to the resources because it determines that they represented an exploration value that would not be considered once the basic property had already been proven uneconomic.[891] Respondent attacks Claimant's failure to include the Singer Pit mineralization value in its post-backfilling valuation and disputes the accounting methodology used by Behre Dolbear to derive this valuation. In addition, Respondent argues that an additional "incremental" or "strategic value" of the Singer Pit exists in that it would delay backfilling of the large East Pit by approximately two years, thus reducing the present

[886] Jeannes, Tr. 204:11-205:11; Behre Dolbear Response Report (Dec. 2006), pp. 7, 11, 20. Navigant Consulting Rejoinder Report (Mar. 2007), ¶¶ 96-99. Navigant stresses that it is "in complete agreement with Behre Dolbear on the total quantity of Reserves at the Imperial Project" and that, if any confusion arose because of Navigant's reference to the Singer Pit mineralization and other exploration value as "Reserves," it only did so as that is what Behre Dolbear did. To support this contention, Respondent cites to Behre Dolbear's Expert Report at p. 19, where Behre Dolbear describes the Singer Pit mineralization as "probability-adjusted gold reserves." *Id.* ¶ 98.

[887] Jeannes, Tr. 204:11-19; Kaczmarek, Valuation Expert for Respondent, Tr. 737:17-738:10.

[888] Jeannes, Tr. 204:19-21; Kaczmarek, Tr. 737:17-738:10. *See also* Claimant's Reply Memorial, ¶ 86 (explaining that on Glamis' records, the Imperial Project mining claims carry no asset value, as the company wrote off their value following Secretary Babbitt's denial of the Imperial Project POO). The Tribunal notes that, although the denial was later reversed, the Parties do not argue the implications of this reversal on the accounting measure described.

[889] Behre Dolbear Expert Report (Apr. 2006), p. 4, Tbl. 1.1 and pp. 17-19.

[890] *Id.* at 17-19.

[891] *Id.* at 4, Tbl. 1.1; Behre Dolbear Response Report (Dec. 2006), p. 20.

value of the backfilling costs of the East Pit by, per Respondent's estimation, approximately $6 million.[892]

440. The issues related to the Singer Pit characterization and valuation are thus whether the potential Singer Pit value should be included in the post-backfilling scenario for the Imperial Project and, if so, what the correct accounting methodology and transaction multiple are for estimating such a value.

2. CLAIMANT'S CONTENTIONS

441. Behre Dolbear ascribes $6.43 million to the "exploration upside" in the pre-backfilling valuation; it does not however attribute any value to the Singer Pit exploration potential in the post-backfilling valuation.[893]

> Behre Dolbear ascribed no value to the mineralization in the backfill scenario because no rational purchaser would try to acquire the Imperial Project in the post-law environment. With the basic property already proven to be uneconomic, it is Behre Dolbear's opinion that a prospective buyer, upon determining that the value by discounted cash flow (DCF) is negative, would attribute no value to exploration potential, particularly in light of the cost and time necessary to determine if such potential is realizable.[894]

The Singer Pit, Claimant contends, is exploration potential that "has some level of value if you're going to be at the site mining because then it makes sense to continue exploring and see what else is there."[895] If the backfilling regulations made the rest of the mine uneconomical, however, Claimant argues that one would not add more value for this unexplored mineralization.[896]

442. Behre Dolbear therefore argues that Navigant's categorization of the Singer Pit mineralization as reserves, rather than resources holding exploration potential, and its subsequent inclusion of $6.43 million for this mineralization in the post-backfilling valuation is incorrect.[897] Behre Dolbear asserts that "[t]oo little is known about the

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[892] Counsel for Respondent, Tr. 1220:19-1221:4; Navigant Consulting Rejoinder Report (Mar. 2007), ¶ 240 (asserting that at a discount rate of 9.2%, delaying Behre Dolbear's total estimated reclamation costs of $98.5 million for two years, yields a present-value cost savings of $6.0 million; at 6.5%, the cost savings is $5.8 million).

[893] Behre Dolbear Expert Report (Apr. 2006), p. 4, Tbl. 1.1.

[894] Behre Dolbear Response Report (Dec. 2006), p. 20.

[895] Counsel for Claimant, Tr. 2060:22-2061:6.

[896] Counsel for Claimant, Tr. 2061:7-9.

[897] Behre Dolbear Response Report (Dec. 2006), p. 20.

Singer pit material to estimate the costs and revenues for that area … any Resource would be inferred at best" due to lack of information regarding the stripping ratio, economic potential and other data.[898] In response to the example raised by Respondent of a property for which Behre Dolbear included exploration potential in its valuation of the property, Behre Dolbear explains that the property in that transaction was "an existing mining operation" with an established operating history and many other well established factors, in contrast with the development stage of the Imperial Project.[899]

443. Using the market approach—which derives a transaction multiple from comparison with sales of similar mineral properties—Behre Dolbear calculates that the exploration potential of the Singer Pit added an additional $6.43 million to the pre-backfilling valuation.[900] Behre Dolbear explains that it utilized this methodology instead of including the Singer Pit mineralization in its discounted cash flow analysis, as doing so would be in violation of accepted mineral valuation codes.[901] The market approach is based on the resources and/or reserves of contained metal and depends upon the degree of reliability of the resource/reserve, the amount of work necessary to ready the property for production, the cost of producing a salable product, and less tangible factors, such as climate, physical location, and country location.[902] To complete this analysis, Behre Dolbear relies on its proprietary database, "A Decade of Deals: Gold and Copper Ore Reserve Acquisition Costs, 1990-1999" and its supplement for years 2000 to 2002.[903]

444. This market analysis yields a mean acquisition cost per unit of contained gold for mineral acquisitions over the period of $25.71 per ounce.[904] Behre Dolbear believes that, on a "probabilized" basis, half of the 500,000 ounces would be produced; therefore

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[898] *Id.*

[899] Guarnera Rebuttal Statement, ¶ 50, discussing the Behre Dolbear report on Anglo Asian Mining's Azerbaijan mine, citing Navigant Consulting Rejoinder Report (Mar. 2007), ¶ 23.

[900] Behre Dolbear Expert Report (Apr. 2006), pp. 17-19.

[901] Behre Dolbear Response Report (Dec. 2006), at 7. Specifically, Behre Dolbear explains that although CIMVal and VALMIN do not require all assets to be valued by the same method and CIMVal will allow mineralization of low confidence with great care, exploration potential cannot be included. *Id.* at 11.

[902] Behre Dolbear Expert Report (Apr. 2006), p. 18.

[903] *Id.* The database is compiled by the Mining Business Digest to "determine a related transaction for the Property." Although Respondent contends that this database was not produced in the course of document production, Behre Dolbear claims that it was aware of no request for this specific information, though other back-up information was specifically requested. Guarnera Rebuttal Statement, ¶ 53.

[904] *Id.* at 19.

valuing 250,000 ounces at $25.71 per ounce yields a valuation of the exploration value of the Singer Pit of $6.43 million.[905] Behre Dolbear thus includes this amount in its pre-backfilling valuation.[906]

445. Behre Dolbear takes issue with the methodology used by Navigant to derive its transaction multiple. Behre Dolbear complains that Navigant's weighting method places a majority of weight on two transactions, and Behre Dolbear illustrates that different weights provide different multiples from $21.25 to $23.75.[907] Behre Dolbear also criticizes the transactions to which Navigant compares the Imperial Project, pointing out that two of the six transactions post-date the enactment of the backfilling regulations, and only one of the six mineral properties employed the same mining and processing methods as the Imperial Project or was otherwise comparable to the Project.[908]

446. Because of the difficulty in comparing individual mineral properties, Behre Dolbear explains that it prefers to rely on values developed from "a large basket of transactions, covering hundreds of transactions from which an average can be developed."[909] This average can then be factored against the property in question if the property is considered "better" or "worse" than the average.[910] The property's stage of development is important and thus, Behre Dolbear explains, its database categorizes properties by their development stages.[911]

3. RESPONDENT'S CONTENTIONS

447. Respondent argues that it is inconsistent of Behre Dolbear to include the value of the Singer Pit in the pre-backfilling scenario, but not in the post-backfilling valuation of the Imperial Project. Respondent cites to Behre Dolbear's first expert report where Behre Dolbear explained that in the pre-backfilling valuation, "Behre Dolbear believes that on a 'probabilized' basis, half of the 500,000 ounces would be produced and has valued the probability-adjusted additional gold reserve additions as a development-stage project.

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[905] *Id.*
[906] *Id.* at 4, Tbl. 1.1.
[907] Behre Dolbear Response Report (Dec. 2006), p. 12.
[908] *Id.* at 12-15. ("All valuation codes require that valuations for takings and condemnation be based solely on information known or available as of the date of the valuation").
[909] *Id.* at 16.
[910] *Id.*
[911] *Id.*

The adjusted additional gold reserve is thus 250,000 ounces of gold, which the market values at $25.71 per ounce or $6.43 million."[912] As Behre Dolbear, according to Respondent, converted the Singer Pit resources to probability-adjusted additional gold reserves and included this additional value in its pre-backfilling valuation,[913] Respondent asserts that Claimant's failure to account for the Singer Pit reserves in the *post*-backfill scenario cannot be justified.[914]

448. Respondent argues that its expert, Navigant Consulting, has proven two distinct elements of value that the Singer Pit mineralization provides to the post-backfill valuation.[915] First, there is the additional gold that "even Behre Dolbear valued at approximately $6.43 million."[916] Second, there is the "incremental" or "strategic value" created by the fact that mining this additional mineralization would delay backfilling of the large East Pit by approximately two years, reducing the present value of backfilling costs of the East Pit by approximately $6 million.[917] Navigant explains that, although more material would be mined should the Singer Pit be exploited, the total tons of material that would need to be backfilled and spread would not change dramatically as the Singer Pit waste could be placed into the open East Pit as part of routine operations. This incremental cost of handling the additional waste would not exceed the cost savings of delaying backfilling, and thus mining the Singer Pit actually would reduce the present value of the cost of compliance with the reclamation requirements.[918]

449. Respondent asserts that including the Singer Pit mineralization in the discounted cash flow ("DCF") analysis is not precluded by accepted mineral valuation codes.[919]

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[912] Counsel for Respondent, Tr. 1219:12-21, quoting Behre Dolbear Expert Report (Apr. 2006), at 19.

[913] Counsel for Respondent, Tr. 1220:5-9; Navigant Consulting Rejoinder Report (Mar. 2007), ¶ 17.

[914] Counsel for Respondent, Tr. 1220:9-12; Navigant Consulting Expert Report (Sept. 2006), ¶¶ 141-143.

[915] Counsel for Respondent, Tr. 1220:14-16.

[916] Counsel for Respondent, Tr. 1220:17-19.

[917] Counsel for Respondent, Tr. 1220:19-1221:4; Navigant Consulting Rejoinder Report (Mar. 2007), ¶ 240 (asserting that at a discount rate of 9.2%, delaying Behre Dolbear's total estimated reclamation costs of $98.5 million for two years yields a present-value cost savings of $6.0 million; at 6.5%, the cost savings is $5.8 million).

[918] Navigant Consulting Expert Report (Sept. 2006), ¶¶ 143, 172.

[919] Navigant Consulting Rejoinder Report (Mar. 2007), ¶¶ 19-26, 116-123. Navigant points out that VALMIN states that valuing exploration properties separately can actually lead to an understatement of value. *See also* Navigant Consulting Rejoinder Report (Mar. 2007), Ex. 104, ¶ 71.

Navigant therefore performs a DCF analysis on the Singer mineralization.[920] Navigant additionally claims that others, including Behre Dolbear, have factored exploration value into DCF analysis.[921] Respondent argues that the central issue in this dispute—the effect of the new reclamation requirements—"demands that such reserves be included the in [sic] DCF valuation approach in order to accurately capture the proper impact the Reclamation Requirements had on the value of the entire Imperial Project."[922]

450. Respondent believes that both the DCF valuation and comparable transaction approaches are appropriate valuation methods that should be applied individually to the entire Imperial Project.[923] By valuing the Singer mineralization using the comparable transaction method alone, however, Respondent argues that Behre Dolbear "inherently presumes that the Singer Pit is a separate property that can be mined independently."[924] Navigant asserts that this presumption is incorrect in that it assumes that the Singer Pit is a separate development stage project that would be mined in the near term, rather than in 10 years.[925] In this case, Respondent claims that the sum of the three pits is greater than the sum of the two pits together and the Singer Pit as a "stand-alone entity."[926] According to Navigant, using the comparable transaction method alone, as Behre Dolbear does, cannot capture the operational and economic complexities caused by the changes in the timing and amount of backfilling and spreading costs caused by mining the Singer Pit.[927]

451. Finally, Respondent attacks the transaction multiple derived by Behre Dolbear as it is based upon a proprietary database that Respondent asserts Claimant failed to produce.[928] Because the database was never produced, Respondent argues that figures derived from it cannot be accepted, as neither Respondent's expert nor the Tribunal was

[920] Navigant Consulting Expert Report (Sept. 2006), ¶¶ 99-104, Tbl. 8 and Ex. E.
[921] Navigant Consulting Rejoinder Report (Mar. 2007), ¶¶ 22, 55-56, 124-127, Exs. 103 ¶ 5.4.1 (discussing Anglo Asian Mining's Azerbaijan mine), 113, 114, 115, 116.
[922] Navigant Consulting Rejoinder Report (Mar. 2007), ¶ 235; *see also id.* ¶¶ 128-129.
[923] Navigant Consulting Expert Report (Sept. 2006), ¶ 96.
[924] Navigant Consulting Rejoinder Report (Mar. 2007), ¶ 236.
[925] *Id*. ¶¶ 236-37.
[926] *Id*. ¶ 239.
[927] Navigant Consulting Expert Report (Sept. 2006), ¶ 97. *See also* Navigant Consulting Rejoinder Report (Mar. 2007), ¶¶ 128-129.
[928] Counsel for Respondent, Tr. 1184:22-1185:14.

able to examine and verify the "comparables."[929] In addition, Respondent questions Behre Dolbear's valuation methodology as it "veered" from approaches it took in other valuations.[930] Specifically, in assessing the Imperial Project, Behre Dolbear evaluates sales over a seven-year period, whereas it allegedly used a two- to three-year period in previous valuations;[931] and it relied upon hundreds of transactions in this valuation whereas, in at least two previous valuations, it relied on only eight to 11 transactions.[932]

452. Respondent's expert, Navigant Consulting, calculates its own transaction multiple of $20.08 by the transaction method, examining six contemporaneous sales of "reasonably similar gold mines."[933] Navigant defends this multiple by explaining that its weighting correctly turned on "comparability" with other properties and that an average, such as the one purportedly used by Behre Dolbear, is appropriate only when the subject property is "average."[934]

453. With the addition of the Singer Pit mineralization, Respondent asserts that the value of the Imperial Project after the passage of the complete-backfilling regulations was $21.5 million, including $9.1 million for the East and West pits, and $12.4 million for the Singer Pit ($6.43 million for the actual mineralization and $6 million in "strategic value").[935] Respondent argues that simply adding this $12.4 million to Behre Dolbear's post-backfill valuation model would put the Imperial Project in the black.[936]

4. DECISION OF THE TRIBUNAL WITH RESPECT TO THE SINGER PIT VALUATION

454. The Tribunal begins its analysis of the proper accounting for the value of the Singer Pit in the post-backfilling scenario by noting that, in the pre-backfilling scenario, Claimant argued that, although it had delayed exploration programs of this pit to allay

[929] Respondent's Rejoinder, at 75; Counsel for Respondent, Tr. 1185:15-19.
[930] *Id.* at 76.
[931] *Id.*
[932] Navigant Consulting Rejoinder Report (Mar. 2007), ¶ 214.
[933] Counsel for Respondent, Tr. 1184:15-21.
[934] Navigant Consulting Rejoinder Report (Mar. 2007), ¶¶ 205-218. Navigant stresses that Behre Dolbear does not specify the characteristics of an average property and thus does not explain how the Imperial Project compares with an "average" property.
[935] Counsel for Respondent, Tr. 1870:10-17. Respondent points out that this is the same fair market value that Navigant independently calculated for the Imperial Project on that date. *See also* Navigant Consulting Expert Report (Sept. 2006), ¶ 200, Tbl. 23 (Navigant calculated the post-backfilling valuation of the Imperial Project to be $21,482,858).
[936] Counsel for Respondent, Tr. 1892:13-18.

BLM concerns and prevent any unnecessary disturbance, it was reasonable to assume that an amount of gold equal to that already defined at the Project would be found, though it discounted this for the risk caused by its unproven nature.[937] In the post-backfilling scenario, the Tribunal finds that Claimant's argument regarding the trepidation that a prospective buyer would have about valuing and purchasing such unproven exploration potential also appears to have merit. However, based upon the record before it, the Tribunal determines that Claimant has not persuaded it that these arguments result in the inclusion of the Singer Pit value in the pre-backfilling scenario, but not in the post-backfilling one. In other words, the Claimant's arguments are convincing to either include or exclude the Singer Pit exploration potential in both scenarios, but not in one and not the other.

455. With respect to the correct valuation of the Singer Pit gold, the Tribunal notes that, despite the disagreement between the Parties regarding the correct methodology for valuing the Singer Pit potential—transaction multiple versus inclusion in the discounted cash flow method—and the correct transaction multiple to apply, Respondent appears to accept and utilize Claimant's pre-backfilling valuation of $6.43 million as a reasonable estimation of the resources present in the Singer Pit.

456. Therefore, even accepting Behre Dolbear's transaction multiple and putting aside the evidentiary issues of it being the product of a proprietary database that was produced to neither Respondent nor the Tribunal and therefore, at a minimum, must be evaluated as having less probative value, the Tribunal finds that the Behre Dolbear's assessment of the Singer Pit's $6.43 million in the pre-backfilling scenario is reasonable but, if it is included in the pre-backfilling scenario (as it is), it must also be included in its post-backfilling scenario.

457. With respect to Respondent's final argument that an additional $6.0 million should be "added back" to Claimant's post-backfilling valuation for the "strategic value" of the delay of approximately two years of backfilling the large East Pit, the Tribunal notes that, at a minimum, this amount would need to be discounted for the fact that there is an even chance that the Singer Pit would not be exploited after further exploration. In

[937] Behre Dolbear Expert Report (Apr. 2006), pp. 18-19.

addition, although the Tribunal is willing to credit the benefit of the delay in complying with the backfilling requirements and appreciates the quantification of this benefit as provided by Respondent in Navigant's Rejoinder Report at Exhibit I, the Tribunal remains unconvinced as to the exact value to attach to this delay, especially in light of Claimant's lack of briefing on this point. As explained above, in this determination solely of whether value remains in the Imperial Project following the imposition of the backfilling measures, the Tribunal will make its calculations in Claimant's favor, whenever possible.[938] Therefore, the Tribunal determines not to adjust Claimant's post-backfilling valuation for this "strategic value."

458. In addition, in Claimant's favor and despite Respondent's argument that the increased cost of backfilling of the Singer Pit would be marginal, the Tribunal determines that the exploitation of the Singer Pit adds 18.7 million tons to the total tonnage to be moved and backfilled per the California measures.[939]

a. Final Disposition of the Tribunal with respect to the Singer Pit Valuation

459. For the above-stated reasons, the Tribunal finds that the $6.43 million value included in Claimant's pre-backfilling scenario for the Singer Pit exploration potential must also be included in its post-backfilling scenario. The Tribunal also determines, however, that there should be no adjustment to Claimant's post-backfilling valuation for the strategic value of delaying backfilling of the East Pit, and 18.7 million tons is added to the total estimated tonnage to be moved and backfilled to account for this additional mining.

[938] *See supra* ¶ 364-65.

[939] This additional tonnage is derived from Respondent's estimates of total backfilling and spreading costs for a two-pit versus a three-pit mine. Specifically, at Tab H to its Expert Report of September 2006, Navigant lists the total mandatory backfill tonnage of a two-pit mine as 186.8 million tons and, at Tab I, lists the total tonnage of a three-pit mine as 205.5 million tons. Subtracting 186.8 million tons from 205.5 millions derives an estimated 18.7 million tons of rock to be moved and backfilled as a consequence of mining the third pit, the Singer Pit.

C. THE THIRD DISPUTED ELEMENT OF CLAIMANT'S VALUATION: GOLD PRICE

1. ISSUE PRESENTED

460. The price per ounce of gold is critical to the valuation of the Imperial Project as it is this figure, when multiplied by the potential ounces extracted (and less costs) that determines how much the Project is worth. The Parties agree that, on the chosen date of asserted expropriation, the price of gold was $326 per ounce. Despite this agreement, however, the Parties argue whether the gold price at the time of the proceeding is relevant—or not—for determining if an expropriation occurred, or whether there is a "real option value" inherent in the Imperial Project that should be factored into the valuation. The Tribunal therefore explores each of these issues, in turn.

2. CLAIMANT'S CONTENTIONS

461. In calculating the price at which to value the ounces of gold at the Imperial Project (and thus the value of the Imperial Project), Claimant's expert Behre Dolbear uses the traditional 10-year average preceding the valuation date.[940] For support of its methodology, Behre Dolbear explains: "Gold prices are subject to extreme volatility, making the selection of a single price to use for valuation purposes difficult. Gold mining companies accordingly base their planning on long-term price projection."[941] Behre Dolbear additionally notes that the price of gold was depressed in 2002, due to sales by central banks and production hedges.[942]

462. Claimant defends the use of the 10-year average to determine gold prices as the industry-standard approach and "the most rational way to value metallic mineral properties, particularly in a market subject to significant and unpredictable fluctuation."[943] Behre Dolbear explains that it did not consider commodity prices because, over the life of a typical mine, commodity markets can vary greatly based on

[940] Behre Dolbear Expert Report (April 2006), p. 3.

[941] Behre Dolbear Response Report (Dec. 2006), pp. 23-24. Behre Dolbear also contests Respondent's contention that Goldcorp and Glamis relied on a price similar to the spot price in their merger, explaining that if the 30% premium to market capitalization at the time of the offer is removed, the price of gold used was actually only 39% of the spot price at that time.

[942] *Id.* at 23.

[943] Claimant's Reply Memorial, ¶ 105.

supply, demand, and public perception of economic trends and thus they do not serve as accurate indicators of actual prices.[944]

463. In response to Respondent's assertions, Behre Dolbear concedes that it varied from this methodology with respect to the two valuations raised by Respondent, in which it used an average of prices in the preceding 10 years and in the preceding 10 months. It explains, however, that it is appropriate to consider near-term prices in such projects that are operating or produced in the past and can begin production quickly.[945]

464. Behre Dolbear determines the 10-year average gold price to be approximately $328 per ounce, which it alleges correlates well with the spot prices on December 11-12, 2002 (approximately $324 and $326, respectively). Behre Dolbear thus uses $326 per ounce as a representative gold price for December 11-12, 2002, and for the analyses of both the pre- and post-backfilling scenarios.[946] Behre Dolbear notes that this price is very close to the $325.23 gold price used by the BLM in its September 2002 mineral examination report.[947]

465. With respect to the current gold price, Behre Dolbear notes that, although not relevant to its study, the current price of gold indeed rose to an average of $445 per ounce in 2005.[948] Again using the 10-year average gold price approach, Behre Dolbear estimates that the appropriate value of gold to use in a current valuation would be $337 per ounce.[949] Behre Dolbear incorporates this price into its cash flow analysis, along with escalated capital and operating costs, for the period of 2002-2005; the result is still a negative valuation of $23.8 million due to dramatically increased costs.[950] Behre Dolbear stresses, however that, in providing its valuation, it was charged with determining the fair market value on the day preceding enactment of the backfilling regulations and, "[i]nherent in such a valuation is working with information known at that time. Information relating to transactions and prices beyond that time is not relevant."[951]

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[944] Behre Dolbear Expert Report (Apr. 2006), at 13.
[945] Guarnera Rebuttal Statement, ¶¶ 32-33.
[946] Behre Dolbear Expert Report (Apr. 2006), at 15.
[947] *Id.* at 14.
[948] *Id.* at 20.
[949] *Id.*
[950] *Id.*
[951] Guarnera Rebuttal Statement (July 2007), ¶ 36.

466. Finally, Claimant contests Respondent's assertion of a "real option value" in the Imperial Project valuation. Claimant explains that work commenced on the Imperial Project in 1984, required the investment of millions of dollars over 12 years, and would require an additional 12 months after the issuance of permits before extraction could begin.[952] Claimant argues that "[d]elaying construction until an optimal gold price is achieved, as Navigant suggests, requires that all other factors affecting the development and economics, and thus the value of the project, remain in balance with the original economic scenario.... Meanwhile, while waiting for this confluence of events, the Company's investment in the property sits sterile and holding costs continue to mount."[953]

3. RESPONDENT'S CONTENTIONS

467. To calculate its gold price for the valuation of the Imperial Project on the asserted date of expropriation, Respondent utilizes the spot price—the price of gold on December 12, 2002.[954] Respondent asserts that the spot price is the appropriate price for the valuation of the Imperial Project, in that "the value of gold stocks is highly correlated with the spot price of gold."[955] In addition, according to Respondent, the availability of forward contracts and futures allows gold mine operators to lock in expected future prices, making the spot price more representative of future prices than the 10-year average.[956]

468. Respondent argues that Claimant's use of the 10-year average gold price "is fundamentally at odds with the premise that valuations are forward-looking and based on expectations."[957] Respondent contends that mineral valuation codes state that reports should take into account "high commodity prices and/or buoyant share market

[952] *Id.* ¶ 40.
[953] Guarnera Rebuttal Report, ¶ 41.
[954] Navigant Consulting Expert Report (Sept. 2006), ¶ 29.
[955] *Id.* ¶¶ 214-15 and p. 81, fig. 6, citing the CHICAGO BOARD OF OPTIONS GOLD MINING INDEX; Navigant Consulting Supplemental Report (Aug. 2007), ¶ 27 (noting that, in the Glamis-Goldcorp merger, the parties relied upon a gold price that was not based on the 10-year average, but instead was 9% less that the spot price at the time).
[956] *Id.* ¶ 217.
[957] *Id.* ¶ 120 (citing public statements by the CEO's of Glamis and Goldcorp that they expected the gold price to rise and not trend in accordance with the ten-year average).

conditions" when they exist.[958] Respondent also attacks Behre Dolbear's assertion that the 10-year rolling average is the proper methodology for determining applicable gold prices and its contention that this is what it is has done "for all other similar mineral appraisals over the past decade …."[959] Respondent points to two other valuations performed by Behre Dolbear in which Claimant's expert in fact acknowledged the strength in the present metals markets and thus adapted its usual average of the 10-year historic prices by averaging it with the average price of the mineral commodities over recent months.[960]

469. Despite these lengthy arguments about the correct methodology by which to value gold price, Respondent explains that "it was not necessary to correct Behre Dolbear's gold price assumption because the spot price of gold was also $326 on December 12, 2002."[961]

470. Respondent also argues that the *current* gold price of $635 per ounce (in September 2006) is relevant to the valuation of the Imperial Project in two respects: to question whether an expropriation occurred and to argue for additional value of the Imperial Project from "real options."[962] First, Respondent asserts that the present value of gold is important in the determination of whether an expropriation has occurred at all, arguing that the current valuation of the Imperial Project should be $159 million, based on a current spot price of $635 per ounce as of September 2006, and would yield an even higher valuation based on the futures market.[963] According to Respondent, the relevance of this fact is that, based on current gold prices, "the California regulations—far from expropriating Glamis's mining claims—would reduce their value by only *seven percent*."[964]

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[958] *Id.* ¶ 29, quoting VALMIN CODE – CODE OF THE TECHNICAL ASSESSMENT AND VALUATION OF MINERAL AND PETROLEUM ASSETS AND SECURITIES FOR INDEPENDENT EXPERT REPORTS, AUSTRALASIAN INSTITUTE OF MINING AND METALLURGY, ¶ 58 (2005).

[959] Respondent's Rejoinder, at 88, quoting Behre Dolbear Supplemental Expert Report (Dec. 2006), pp. 4, 9 (emphasis omitted).

[960] *Id.*, citing Behre Dolbear's Hellas Gold Mine Valuation Report and Anglo Asian Mining's Azerbaijan Gold and Copper Claims.

[961] Navigant Consulting Expert Report (Sept. 2006), ¶ 122.

[962] Counsel for Respondent, Tr. 1904:10-14; 1905:15-1906:1.

[963] Respondent's Counter-Memorial, at 179, citing Navigant Consulting Expert Report (Sept. 2006), ¶¶ 211-221.

[964] Respondent's Counter-Memorial, at 179-80.

471. Second, with respect to the "real option value," Navigant argues that "Glamis' right to the mining claim is necessarily valuable because they can delay investment until gold prices rise to a level where mining is economic."[965] "Real options" represent the "value of managerial flexibility inherent in projects involving real assets";[966] in other words, because of the volatility of gold, Claimant has the option to merely delay the Project until prices rise and, because a volatile commodity always has the potential ability to rise, there is inherent value in the Project.[967] Respondent asserts that this is exactly the value that Claimant realized when it reopened its Cerro Blanco project in Guatemala when gold prices rose.[968]

472. Respondent finally objects to Claimant's estimation of the current value of the Imperial Project using a 10-year rolling average gold price of $337 per ounce and mining cost escalation of 85%, arguing that with these factors, the "Imperial Project would have a negative value today even *without the reclamation requirements.*"[969] Respondent also points to the fact that the Western Mine Engineering Cost Index shows that, between 2002 and 2006, mining companies' average capital costs increased by 18.09%, and their average operating costs increased by 26.44%.[970]

4. DECISION OF THE TRIBUNAL WITH RESPECT TO GOLD PRICE

473. The Tribunal notes, at the outset, that the Parties agree upon the date of asserted expropriation to be used in the valuation of the Imperial Project: December 12, 2002. Although numerous dates are included in the Parties' discussion of the imposition of the California measures,[971] the first of those with respect to the California measures—December 12, 2002—represents the day upon which the SMGB enacted the emergency backfilling regulations. Claimant also explains that, with the exception of January 2001 (before Secretary Babbitt's ROD went into effect), the 2003 dates would yield a

[965] Navigant Consulting Expert Report (Sept. 2006), ¶ 29.
[966] *Id.*
[967] *Id.* ¶¶ 203-10.
[968] Navigant Consulting Second Supplemental Report (Aug. 2007), ¶¶ 9-11.
[969] Respondent's Rejoinder, at 88; Navigant Consulting Rejoinder Report (Mar. 2007), ¶ 76 (arguing that, utilizing these cost figures, Behre Dolbear's valuation model would yield a negative $119.8 million even without the reclamation measures).
[970] Respondent's Rejoinder, at 89.
[971] *See, e.g., supra* ¶ 359.

comparable gold price.[972] As explained by Claimant, in the end, the Parties agreed that December 12, 2002 was a reasonable date upon which to value the Imperial Project for the possible expropriation.[973]

474. The Tribunal also notes that the Parties agree that, on this date, the appropriate value of gold is $326 per ounce, whether derived by the 10-year rolling average of gold prices, or by the spot price of gold on that day.

475. The Tribunal stresses that, for other purposes, such as the calculation of damages, it would need to precisely define the date of asserted expropriation and the price of gold on that date. As the Tribunal has explained above, however, at this stage, it is endeavoring solely to determine whether an expropriation occurred at all, by ascertaining whether the Imperial Project in fact retains value following the complained of measures. The Tribunal therefore accepts the alleged date of expropriation and corresponding gold price asserted by Claimant—and accepted by Respondent—for its determination of the post-backfilling value of the Imperial Project.

476. The Tribunal notes, however, that there was significant additional discussion presented by the Parties as to the relevance of the present value of gold to this dispute.

477. A claim of expropriation is a claim for the fair market value of an investment taken. The value of the claim is determined as the value of the investment as if the measures have not occurred. The relevance of future increased gold prices to the value measured at the time of asserted expropriation was indeed argued. It is a complex assertion based on the idea that the value of the Imperial Project at the alleged time of taking is understated because gold prices are volatile and thus have the potential to increase in the future. This potential for higher gold price, it is argued, enables Claimant to wait until such time as increases in the price of gold enable the Imperial Project to achieve profit even with the backfilling requirements, a situation that Respondent argues has already been attained using current gold prices.

478. Given the Tribunal's effort to assess Claimant's valuation to determine whether or not an expropriation of the Imperial Project in fact occurred at the time of alleged taking,

[972] Claimant's Reply Memorial, ¶ 302.
[973] Counsel for Claimant, Tr. 2002:21-2003:3.

using the price of gold at that time and given the results of that effort, the Tribunal need not consider the relevance, if any, of the current price of gold to this dispute.

a. Final Disposition of the Tribunal with respect to Gold Price

479. The Tribunal therefore determines that, despite the differing methodologies employed by the Parties, it is undisputed between the Parties that the price of gold on the asserted date of expropriation is $326 per ounce. For the determination of whether there was significant economic impact as to satisfy the first requirement of an expropriation, the Tribunal determines that this gold price is sufficient. The relevance of future gold prices, though debated intensely between the Parties, does not aid in this inquiry.

D. THE FOURTH DISPUTED ELEMENT OF CLAIMANT'S VALUATION: FINANCIAL ASSURANCES

1. ISSUE PRESENTED

480. The federal, state and local regulations require the posting of financial assurances by mine operators to "ensure reclamation is performed in accordance with the surface mining operation's approved reclamation plan."[974] A mine operator is required to post sufficient funds to provide for the complete reclamation of any mine site on federal land by a third party.[975] The Parties disagree as to the cost of the financial assurances for implementing the post-backfilling requirements. This disagreement between the Parties results in a difference in their respective valuations of $11.7 million.

481. Three types of instruments are generally acceptable financial assurances: surety bonds, trust funds, and irrevocable letters of credit.[976] The traditional and most inexpensive type of assurance used by mine operators is the surety bond. The Parties, however, agree that surety bonds were largely unavailable, at least in 2002, due to perceived regulatory and operational risks for mining projects, as well as significant losses by surety companies in 2000, which caused several surety bankruptcies.[977] The crux of the dispute therefore concerns the types of financial assurances that remained

[974] CAL. PUB. RES. CODE § 2773.1 (2007).

[975] Claimant's Letter to the Tribunal (Apr. 4, 2008), pp. 1-2, citing 43 C.F.R. §§ 3809.552(a) and 554(a) [Ex. 148].

[976] CAL. CODE REGS. tit. 14, § 3803(a)(1)-(3) (2007); Craig, Tr. 695:22-696:6.

[977] Behre Dolbear Response Report (Dec. 2006), at 18, app. 4.0; Navigant Consulting Rejoinder Report (Mar. 2007), ¶¶ 243-44.

available to the Claimant in the absence of surety bonds and the differing costs of the instruments.

482. The debate centers on whether Claimant, at that time, could secure a letter of credit without the provision of full cash collateral, which in significant part accounts for the difference between the two financial assurance estimates of $61.07 and $49.37 million. Claimant argues that the only instruments available to it after the dry-up of the surety market were those that required backing of 100% cash reserves. Therefore, Claimant calculates the total projected cost of backfilling starting in Year 8 (2010), when the majority of backfilling would begin, and determines the amount of funds that would need to be placed in an interest-bearing account at the beginning of the Project to reach this amount by Year 8. To fund the $83.1 million projected reclamation, backfilling and spreading costs starting in Year 8, Claimant estimates that $61.07 million would need to be placed in an account bearing 3.2% interest at the beginning of the Imperial Project; this is thus Claimant's estimated cost of financial assurances.[978] Respondent, however, asserts that Claimant could have utilized non-cash-backed letters of credit at a cost of merely 1% per annum. Navigant explains that, in order to calculate the annual fee required for a letter of credit, it is necessary to start by quantifying the annual amount to be guaranteed by the bank. This annual guarantee amount must be sufficient to reclaim all disturbance created through the next year, less any area reclaimed. This yearly guarantee amount, once determined, is then multiplied by 1% to obtain the annual fee.[979] According to Respondent, even assuming Behre Dolbear's estimated reclamation costs, the use of annually determined letters of credit without cash backing would result in a total financial assurance cost of only $49.37 million.[980] Navigant contends that the

[978] Behre Dolbear Expert Report (Apr. 2006), app. 5, at A5-9. Claimant's Letter to the Tribunal (Apr. 4, 2008), p. 6.

[979] Navigant Consulting Expert Report (Sept. 2006), ¶¶ 191-97.

[980] Navigant Consulting Rejoinder Report (Mar. 2007), ¶ 62. Navigant claims that, if Glamis had used a letter of credit instead of a cash bond, the post-backfill value of the Imperial Project would be positive $2.8 million. To convert negative $8.9 million to a positive $2.8 million requires a difference in financial assurance costs of $11.7 million. Subtracting this difference of $11.7 million from Behre Dolbear's estimate of $61.07 million for financial assurances derives Navigant's estimate of financial assurances as $49.37 million. Navigant did not calculate an estimate for financial assurances in its pre-backfilling valuation.

financial assurance costs would be even lower using its own estimate of the total reclamation cost of $55.3 million.[981]

483. Although the disagreement over the types of financial instruments that were available to the Claimant to meet its financial assurance needs at that time is the first source of the $11.7 million difference between the Parties' projections, the Parties debate a second issue as to the required timing for the posting of these assurances. Claimant asserts that the net present value of the entire reclamation costs for the life of the Imperial Project must be posted at the Project's commencement.[982] Respondent, on the other hand, asserts that financial assurances can be posted annually for the disturbance already caused and for that anticipated for the coming year.[983] Respondent contends that posting financial assurances annually, as opposed to entirely at the Project's commencement, reduces the cost of financial assurances, though it does not quantify the amount of this reduction separately from the cash-backed bonding versus letter of credit issue.[984]

484. The Tribunal is therefore tasked with determining the reasonable cost of financial assurances for the Imperial Project in 2002 and the subsequent years. First, the Tribunal must assess whether Claimant has established that only expensive, cash-collateralized instruments remained an option to it for meeting its financial assurance obligations; or whether letters of credit, with an annual fee but without cash backing, were still available, as Respondent contends. Second, the Tribunal must determine whether Claimant would have been required to post all financial assurances at the beginning of the Project or could post them annually to cover the expense of reclamation in the coming year. The Tribunal will evaluate each of these components in turn.

2. APPROPRIATE AND AVAILABLE FINANCIAL INSTRUMENTS TO MEET FINANCIAL ASSURANCE REQUIREMENTS

a. Claimant's Contentions

485. In its valuation of the Imperial Project after the passage of the backfilling regulations, Claimant includes $61.07 million for the financial assurances required for

[981] Navigant Consulting Expert Report (Sept. 2006), ¶ 197.
[982] *See generally* Claimant's Letter to the Tribunal (Apr. 4, 2008).
[983] Craig, Tr. 684:7-15.
[984] Navigant Consulting Expert Report (Sept. 2006), ¶¶ 191-97, Ex. J; Respondent's April 25, 2008 Letter to the Tribunal, p. 3; Claimant's May 16, 2008 Letter to the Tribunal, p. 4.

reclamation.[985] This estimation is based on the presumption that Claimant would place all funds at the beginning of the Project in an interest-bearing account providing 3.2% annually, so that the fund would have sufficient assets to pay for all reclamation requirements for the Project starting in Year 8 (2010), estimated at $83.1 million.[986]

486. As asserted by Claimant's expert Behre Dolbear and witness Charles A. Jeannes, because of the surety crisis starting in 2001-2002, "[t]he traditional way of getting a surety bond from an insurance company just went away, so all of [Claimant's] new financial assurances, as those surety bonds rolled over, became a hundred percent cash-backed Letters of Credit."[987] Because of these circumstances, Claimant contends that it would have been impossible for it to have obtained a letter of credit without cash backing in the sum of $50 to $60 million.[988]

487. To support this assertion, Claimant points to the testimony of itself and others in an oversight hearing in 2002 before the U.S. House of Representatives, Committee on Resources, Subcommittee on Energy and Mineral Resources, regarding the availability of bonds to meet federal requirements for mining, oil and gas projects. At this hearing, speakers presented testimony that sureties, unlike banks, would not always accept collateral, thus requiring mine operators to qualify as to performance and financial strength. In addition, sureties would not underwrite long-term bonds and often were completely unwilling to underwrite bonds at all.[989] The effect of the surety market's collapse was that Claimant would have had to post letters of credit through U.S. Bank, which were 100% cash backed.[990] In his congressional testimony, Mr. Jeannes explained that Glamis Gold, Ltd. was unable to attain a surety bond for a planned expansion of its Marigold mine in Nevada. Mr. Jeannes testified that, although Glamis needed only an incremental bond increase of approximately $10 million, its worldwide search found no surety company willing to provide even a quote on the bonds. Jeannes pointed out that

[985] Behre Dolbear Expert Report (Apr. 2006), app. 5, at A5-9. This estimate reflects an increase of $58.77 million, or 96%, from Claimant's pre-backfilling estimation of reclamation costs of $2.3 million.

[986] *Id*.

[987] Jeannes, Tr. 216:21-217:4.

[988] Jeannes, Tr. 217:11-14. Claimant argues that it had economic incentives to obtain financial assurances in the most cost-effective manner, and it "certainly would have done it" another way if it could have conserved capital or it was otherwise less expensive. Counsel for Claimant, Tr. 1687:14-19.

[989] Behre Dolbear Response Report (Dec. 2006), app. 4.0, at 29, 31, 34.

[990] *Id.* at app. 4.0; Jeannes, Tr. 215:19-216:1.

this was the situation despite the company's "absolutely clean balance sheet, no debt, short-term or long-term ... [and] $45 million in the bank."[991]

488. In response to the examples provided by Respondent of California surface mining operations that were able to secure letters of credit without cash collateralization, Claimant argues that the amounts obtained by these operators were not comparable to that required for the Imperial Project. Specifically, Claimant contends that the vast majority of the examples were financial assurances of less than $4 million, only a few were for over $10 million, and the highest example in California was less than $17 million.[992] This, Claimant maintains, provides no evidence that the financial assurances required by the Imperial Project—between $50-90 million—could be obtained without cash collateralization.[993]

489. In response to Respondent's specific examples of three larger companies that were able to secure letters of credit in the range of $80 to $100 million without cash collateralization,[994] Claimant argues that these companies were not "similarly situated to the type of gold company that Glamis was that could not get backing that was not cash-backed financing, either Letters of Credit or bonds."[995] For this reason, Claimant also contests the comparison of it to Goldcorp, explaining that Goldcorp "is a significantly larger company than Glamis, which can from banks obtain noncash-backed securities, although nothing the size they would have needed for this project."[996] In addition, Claimant argues that even some large companies were unable to secure letters of credit without cash collateralization. Rio Tinto, for instance, "at that time the world's largest and best-funded mining company," could not secure a bond for its Jacobs Ranch coal mine in Wyoming in 2002. Unable to secure the estimated $300 million bond needed for

[991] "Availability of Bonds to Meet Federal Requirements for Mining, Oil and Gas Projects," Oversight Hearing before the Subcommittee on Energy and Mineral Resources of the Committee on Resources, U.S. House of Representatives, (July 23, 2002), Statement of Charles A. Jeannes, Senior Vice President and General Counsel, Glamis Gold Limited, p. 44 (Behre Dolbear Response Report (Dec. 2006), app. A4-48).

[992] Counsel for Respondent, Tr. 1690:14-19.

[993] Counsel for Respondent, Tr. 1690:20-1691:4.

[994] *See* Navigant Consulting Expert Report (Sept. 2006), ¶ 190 (citing Newmont Mining Corporation, Kinross Gold Corporation, and Cameco Corporation).

[995] Counsel for Claimant, Tr. 2060:7-11.

[996] Counsel for Claimant, Tr. 2060:12-16.

reclamation and closing costs, Claimant contends that Rio Tinto spent $303 million of its own funds to purchase U.S. Treasury notes to secure a bond.[997]

b. Respondent's Contentions

490. Respondent maintains that Claimant should have been able to acquire letters of credit without cash collateralization for its financial assurances. Respondent's expert, Navigant Consulting, asserts that letters of credit are standard banking instruments for which banks undertake an underwriting process similar to that for issuing a loan, in which the bank would evaluate a client's financial strength.[998] Navigant contends that, as Claimant had a market capitalization in 2002 of over $1 billion and a consistent history of generating operating cash flow with no debt on its books, it would be "incredible to think that a bank would not issue" it letters of credit for $50 million.[999]

491. Respondent also argues that there was no documentary evidence to support Claimant's assertions that, in recent years, it was forced to meet its financial assurance obligations with cash-backed letters of credit.[1000] Instead, Respondent cites to a list of California mining operations provided by the SMGB and entered into the record, illustrating various surface mining operations with financial assurances in excess of $1 million backed either by a letter of credit or a surety bond, but not by a cash bond.[1001] Specifically highlighted by Respondent, in response to Claimant's allegations that the financial assurance amounts were not comparable to that needed for the Imperial Project, are three mine operators who posted between $80 and $200 million in non-cash-backed letters of credit.[1002] Navigant also points to Claimant's parent, Goldcorp, and the fact that in 2006, only 8% of its $135.5 million in outstanding letters of credit were collateralized by cash.[1003] Finally, Respondent counters the example of Rio Tinto's $303 million cash-backed bond, contending that this was required as Rio Tinto is a coal mine

[997] Behre Dolbear Response Report (Dec. 2006), ¶ 15.
[998] Kaczmarek, Valuation Expert for Respondent, Tr. 765:2-15.
[999] Kaczmarek, Tr. 765:16-766:3.
[1000] Counsel for Respondent, Tr. 1190:14-22.
[1001] Counsel for Respondent, Tr. 1191:18-22. *See also* Craig Statement, Ex. A.
[1002] Counsel for Respondent, Tr. 1888:20-1889:3 (citing Kinross Gold, Cameco Corporation, and Agnico-Eagle); *See also* Navigant Consulting Expert Report (Sept. 2006), Exs. 54-55.
[1003] Counsel for Respondent, Tr. 1194:10-14.

and the regulations applicable to coal mines did not permit the use of letters of credit for financial assurances.[1004]

492. Finally, Respondent points to the testimony of Mr. Jeannes before the U.S. Congress on the surety crisis to support its assertion that letters of credit without cash collaterization not only remained an option, but were being used at the time by Claimant. To support this position, Respondent cites to the testimony of Charles A. Jeannes in the congressional hearing regarding the Marigold expansion, in which Mr. Jeannes explained that Glamis' "only option in connection with the Marigold expansion will be to put up cash or equivalents in the amount of 100% of the required bond amount, or to attempt to enter into a banking credit facility that provides for the issuance of letters of credit for bonding. Glamis is fortunate to have the financial capacity to meet its bonding requirements in this fashion."[1005]

493. Respondent therefore calculates its valuations based on the use of a letter of credit with a fee of 1% per annum.[1006] Based on its research of all client types (not just mines), Respondent's expert asserts that 1% is a reasonable fee.[1007]

494. Respondent asserts that the magnitude of the difference in opinion on this matter, when combined with the effect of posting the bonds annually versus at commencement of the Project, is nearly $12 million.[1008] Correcting for this error, Respondent argues, would result in a positive net present value of the Imperial Project after compliance with the

[1004] Navigant Consulting Rejoinder Report (Mar. 2007), ¶ 243, citing Surface Mining Control and Reclamation Act of 1977, § 509 at p. 55 (Aug. 3, 1977), 43 C.F.R. § 2474 (1979) [Navigant Consulting Rejoinder Report (Mar. 2007), Exs. 134, 135].

[1005] "Availability of Bonds to Meet Federal Requirements for Mining, Oil and Gas Projects," Oversight Hearing before the Subcommittee on Energy and Mineral Resources of the Committee on Resources, U.S. House of Representatives, (July 23, 2002), Statement of Chuck Jeannes, Senior Vice President and General Counsel, Glamis Gold Limited, p. 46 (Behre Dolbear Response Report (Dec. 2006), app. A4-48).

[1006] Navigant Consulting Expert Report (Sept. 2006), ¶ 125.

[1007] Navigant Consulting Rejoinder Report (Mar. 2007), ¶ 249. Claimant does not dispute whether or not a 1% per annum fee is reasonable for a letter of credit. It argues instead that, in Glamis' experience, all letters of credit had to be backed by 100% cash, thus "[t]he net effect would be the same as if Glamis put up the cash, but it would cost 1% more." Behre Dolbear Response Report (Dec. 2006), p. 19, ¶ 15(c).

[1008] Respondent's Counter-Memorial, at 177, citing Navigant Consulting Expert Report (Sept. 2006), ¶ 196.

new reclamation requirements without changing any other conclusion of Claimant and Behre Dolbear.[1009]

3. REQUIRED TIMING OF FINANCIAL ASSURANCE POSTING

a. Claimant's Contentions

495. In review of the record, and in particular the Parties' post-hearing correspondence on the issue, the Tribunal finds that there is no apparent disagreement that the California regulations that preceded the pre-backfilling measures allowed for annualized posting of financial assurances. In addition, the Parties agree that, on at least some occasions, the federal regulations appear to permit this practice as well. However, Claimant raises, and Respondent objects to, three arguments as to why incremental bonding was not a possibility with respect to the Imperial Project: (1) the federal exception to the general requirement that financial assurances must cover reclamation needs for the life of the project applies only when one part of the mining project is disturbed and another remains, for some period, totally undisturbed; (2) under the current mining plan, the vast majority of the Imperial Project is disturbed very quickly; and (3) in any event, the previous two points of contention are moot because: (a) Claimant submitted a Plan of Operations that requires the posting of the full cost of reclamation at the Project's commencement and therefore Claimant is held to this requirement; and (b) whatever the state or the federal law was in regard to incremental bonding, the requirements imposed on the mining company would be the more restrictive of those required by the two overseeing governments—federal and California—and this therefore requires, in light of SB 22, that a mine operator post the entire financial assurances required to cover the reclamation needs throughout the life of the mine.

496. As introduced above, Claimant calculates its financial assurance costs from the assumption that the net present value of the total required reclamation funds required for all disturbance created throughout the life of the Imperial Project should be placed in an interest-bearing account at the beginning of the Project that would produce the necessary amount by the time that reclamation began.[1010] This was reiterated by Mr. Jeannes in

[1009] *Id.* at 178, citing Navigant Consulting Expert Report (Sept. 2006), ¶ 196.
[1010] Behre Dolbear Expert Report (Apr. 2006), app. 5, at A5-9.

testimony before the Tribunal in which he stated that financial assurance costs are substantial because mine operators must provide security for costs that will happen at the end of a mine's life at a time when the mine is not earning revenue.[1011]

497. Claimant acknowledges that, although the federal regulations require the reclamation cost estimates to be sufficient to "fully reclaim" the federal land, there do exist circumstances in which mine operators may post financial guarantees for only a part of their planned operations.[1012] Claimant explains BLM's rationale for this policy: "[W]here an operation is large or is of long duration or will be developed in phases, there is no need to require financial guarantees for areas that will not be immediately disturbed. The purpose of the financial guarantee requirement is to ensure reclamation of disturbed surface areas. To the extent that the surface is not disturbed, no financial guarantee is needed."[1013] Claimant asserts, however, that those areas excluded from coverage must not be disturbed by *any* mining operations.[1014]

498. This exception is of no benefit to a compact open pit project like the Imperial Project, Claimant argues, in that most of the land disturbance of the Project occurs very early in the mine's life. Claimant contends that the record establishes that the entire land surface of all three of the mine pit areas would be disturbed within the first three years of operations, with substantial disturbance occurring within that time.[1015] According to Claimant, within the first three years of operations, the surface soils and associated surface materials would be removed from all three mine pits.[1016] Respondent's argument that land disturbance at the Imperial Project continues to increase throughout much of the life of the mine and would only peak in Years 7 (2009) and 8 (2010)—or Years 10 (2012) and 11 (2013) under the three-pit plan—is basically an argument for a "vertical phasing

[1011] Jeannes, Tr. 215:4-11 (explaining that the economic burden of the financial assurance requirement "was substantial because you're being required to put up security in the form of a bond or cash, Letter of Credit or whatever it may be, for something that's not going to happen until the very end of the mine life, which, in this case, would have added four or five years to the Imperial Project. And it's a substantial cost at a time when you have got no revenue coming in.").

[1012] Claimant's Letter to the Tribunal (Apr. 4, 2008), p. 2, citing 43 C.F.R. §§ 3809.401(d), 3809.553(a).

[1013] *Id.*, quoting 64 Fed. Reg. 6,442-01, 6,442 (Feb. 9, 1999) (proposed rule); *see also* Great Basin Mine Watch v. Hankins, 456 F.3d 955, 960 (9th Cir. 2006).

[1014] *Id.*, citing 43 C.F.R. § 3809.553(a) (2000) [Ex. 148].

[1015] *Id.*, citing Glamis Imperial Reclamation Plan, at 64, tbl. 6 (rev. Aug. 1997), Attachment A to the Glamis Imperial Project Final Environmental Impact Statement (Sept. 2000) [FA tab 150].

[1016] *Id.*

approach," Claimant argues.[1017] Claimant asserts that this novel method would lead to increases in financial assurances as a pit proceeds downward in the same general disturbed land area. According to Claimant, such a practice has never been applied in California.[1018]

499. Claimant asserts, however, that these arguments are moot, as the reclamation plan Claimant offered to BLM in September 1997 to be included as part of the FEIS of the Imperial Project required the posting of financial assurances for the full disturbance created by the Project.[1019] Specifically, the Plan provides that "Glamis Imperial will allocate funds to post a bond for an amount consistent with the estimated cost of reclamation."[1020] Therefore, Claimant contends that, even if it could have justified incremental bonding under California law, its own reclamation plan recognized the federal requirement of posting assurances for the full reclamation required.[1021]

500. Finally, Claimant asserts that the arguments with respect to the federal requirements are additionally mooted by the passage of SB 22 and the SMGB Regulations which, Claimant argues, require the posting of sufficient financial assurances to reclaim *all* planned excavations.[1022] Claimant acknowledges that California's financial assurance requirements were potentially in conflict with the federal requirements as, prior to 2003, they allowed for the calculation of assurances based solely on the current annual disturbance, regardless of whether the disturbances occurred within a discrete permitted phase or area of the project.[1023] This disparity, however, had no practical effects for projects on federal land, Claimant argues, as operators still had to meet the federal requirements.[1024] In addition, any potential past disparity disappeared, according to Claimant, with the passage of the backfilling measures. Specifically, SB 22 requires that no reclamation plan be approved unless: "(1) the reclamation plan requires that all excavations be backfilled and graded to the approximate original contours of the mined

[1017] Claimant's Letter to the Tribunal (May 16, 2008), p. 2.
[1018] *Id.*
[1019] Claimant's Letter to the Tribunal (Apr. 4, 2008), p. 8.
[1020] *Id.*, quoting Glamis Imperial Reclamation Plan, at 70-73 (rev. Aug. 1997), Attachment A to the Glamis Imperial Project Final Environmental Impact Statement (Sept. 2000) [FA tab 150].
[1021] *Id.* at 9.
[1022] *Id.* at 4, citing CAL. PUB. RES. CODE § 2773.3 (2001) [4 LA tab 135].
[1023] *Id.* at 3, citing CAL. PUB. RES. CODE § 2773.1(a)(3) (2001) [4 LA tab 135].
[1024] *Id.* at 3, citing 43 C.F.R. § 3809.570(c).

lands ...; [and] '(2) [t]he financial assurances are sufficient in amount to provide for the backfilling and grading required by paragraph (1).'"[1025] Claimant asserts that the SMGB's *Surface Mining and Reclamation Act Financial Assurance Guidelines* ("SMGB Guidelines"), which were revised in 2004 following the passage of SB 22, contain no evidence to support Respondent's contentions that the "general phased bonding language parroted in the SMGB Guidelines" trumps the "plain language" of SB 22.[1026] In this way, Claimant contends, Respondent fails to acknowledge that SB 22's requirement to post financial assurances sufficient to cover the cost of all reclamation activities is "tied to the requirement that the sufficiency of those financial assurances must be demonstrated *before* a lead agency can 'approve a reclamation plan ... or financial assurances for the operation ....'"[1027]

501. Claimant thus argues that, although California can review the assurances annually and take into account any changes in the operational plan and other factors, SB 22 requires the posting of assurances sufficient to ensure compliance with the mandatory backfilling requirements.[1028] Under the SMGB Regulations as well, Claimant asserts that assurances for *all* disturbance must be posted. In support of this contention, Claimant explains that the regulations require the maintenance of an amount of assurances sufficient to backfill and grade "mined lands."[1029] According to Claimant, "mined lands" are defined to include "surface, subsurface, and ground water of an area in which surface mining operations *will be*, are being, or have been conducted ...."[1030]

b. Respondent's Contentions

502. Contrary to the method utilized by Claimant of placing funds required for reclamation in an interest-bearing account at the beginning of the project, Respondent asserts that funds are only required at the beginning of each year of the project for the disturbance estimated in the ensuing year.[1031] Therefore, even if Claimant had to pledge

[1025] *Id.* at 4, quoting CAL. PUB. RES. CODE § 2773.3 (2001) [4 LA tab 135].
[1026] Claimant's Letter to the Tribunal (May 16, 2008), p. 3.
[1027] *Id.*, quoting CAL. PUB. RES. CODE § 2773.3 (2003), citing CAL. CODE REGS. tit. 14, § 3704.1 (2003) [4 LA tab 143].
[1028] Claimant's Letter to the Tribunal (Apr. 4, 2008), p. 4.
[1029] *Id.* at 5, citing CAL. CODE REGS. tit. 14, § 3704.1 (2003) [4 LA tab 143].
[1030] *Id.*, citing CAL. PUB. RES. CODE § 2729 (2001) (emphasis added) [4 LA tab 135].
[1031] Craig, Tr. 684:7-15.

cash in order to meet its financial assurance obligations, Respondent argues that Claimant would not have to post the entire amount (or the net present value of that amount) at the beginning of the Project as claimed by Behre Dolbear; it would have to post merely the costs of reclamation for the coming year's disturbances.[1032]

503. With respect to the first point of contention regarding the federal exception allowing for incremental bonding in the case of mines that disturb only part of their land for a period of time, Respondent asserts that the 3809 Regulations, and specifically Section 3809.553, authorize the BLM to accept financial guaranties covering "part" of a given project, provided that these assurances cover all reclamation costs required within the incremental area of operations and the operations do not exceed what is specifically covered by the partial financial guarantee.[1033] Respondent quotes the Preamble to the 3809 Regulations, which states that Section 3809.553 "permits operators to provide financial guarantees on an incremental basis to cover only those areas being disturbed."[1034] Respondent also cites to *Great Basin Mine Watch v. Hankins,* in which the Ninth Circuit interpreted 43 C.F.R. § 3809.552 to "merely require[] [BLM] to obtain a financial guarantee before permitting," but does not require BLM to calculate the full reclamation cost for an entire project before approving such a guarantee.[1035]

504. Respondent disputes Claimant's contentions that this exception does not apply to a compact mine, like the Imperial Project, as the majority of the total surface disturbance would occur in just the first three years. According to Respondent, the excavation

[1032] Counsel for Respondent, Tr. 1195:9-16.

[1033] Respondent's Letter to the Tribunal (Apr. 4, 2008), p. 3, citing 43 C.F.R. § 3809.553 (Jan. 20, 2001) [Ex. 148].

[1034] Respondent's Letter to the Tribunal (Apr. 4, 2008), pp. 3-4, quoting Preamble to 3809 Regulations, 65 Fed. Reg. 69998, 70070 (Nov. 21, 2000) [Ex. 148]. Respondent additionally argues that there is no conflict between the incremental guarantees authorized by the State of California and Imperial County, and the fact that the 3809 Regulations state that "relying exclusively on State bonding may not provide adequate protection of the public resources. Not all states require a financial guarantee for all disturbances at 100 percent of the estimated reclamation cost." Respondent's Letter to the Tribunal (April 4, 2008), p. 2, quoting Preamble to the 3809 Regulations, 65 Fed. Reg. 70002 (Nov. 21, 2000) [Ex. 148]. The 3809 Regulations specifically provide for the concurrent jurisdiction of state and federal authorities to ensure coverage of reclamation costs, Respondent points out, and an operator can satisfy the requirement with a state guarantee as long as it provides at least the same amount of financial guarantee as required by the BLM regulations. Respondent's Letter to the Tribunal (April 4, 2008), p. 2, citing 43 C.F.R. § 3809.570 (Jan. 20, 2001) [Ex. 148]. Respondent argues that this requirement is met as California *does* require bonding to cover *all* estimated reclamation costs arising from the operator's current operations. Respondent's Letter to the Tribunal (April 4, 2008), p. 2.

[1035] *Id.*, p. 4, quoting Great Basin Mine Watch v. Hankins, 456 F.3d 955, 974 (9th Cir. 2006).

activities giving rise to Claimant's backfilling costs occur over many years and would continue to increase throughout the life of the mine.[1036] "Specifically, disturbances and corresponding reclamation costs would peak only in years seven and eight (under a two-pit plan) or years ten and eleven (under a three-pit plan) of the project."[1037]

505. Finally, Respondent argues that the above two points of argument are not moot, as "[n]othing in SB 22 or the SMGB Regulation bars annualized bonding."[1038] According to Respondent, whether financial assurances are sufficient to cover the cost of all reclamation is a separate question from that of whether the entire amount of those assurances must be posted at the project's commencement.[1039] Given this distinction, Respondent asserts, SB 22 and the SMGB Regulations do not modify the existing language of Cal. Pub. Res. Code § 2773.1, "which provide[s] that the amount of financial assurances required 'for any one year shall be adjusted annually' to account for new land disturbances."[1040] Respondent contends that the SMGB Guidelines are not a "general set of guidelines," but that the SMGB was required to create them under the Surface Mining and Reclamation Act of 1975 ("SMARA"). Importantly, Respondent alleges that "the 2004 version of the Guidelines cited by [Claimant] post-dates the 2003 adoption of SB 22 and the SMGB Regulation, which further underscores that SB 22 and the SMGB Regulation did not limit the availability of annualized bonding in California."[1041]

506. Respondent argues for annualized bonding, but does not separately quantify the benefit of this method over that of posting all financial assurances at the commencement of the Project. Specifically, Respondent states that "incremental bonding would have been both beneficial for, and available to, the Imperial Project under both federal and California law."[1042]

[1036] Respondent's Letter to the Tribunal (Apr. 25, 2008), p. 2, citing "Reclamation Guarantee and Letter of Credit Fee Calculation," Expert Report of Navigant Consulting (Sept. 2006), tab J.

[1037] *Id.*, citing Navigant Consulting Expert Report (Sept. 2006), tab J.

[1038] *Id.* Respondent did not address Claimant's argument that the fact that its Plan of Operations required the posting of all financial assurances at the commencement of the Project mooted any arguments with respect to the possibility of incremental bonding.

[1039] *Id.*

[1040] *Id.* at 2-3, quoting CAL. PUB. RES. CODE § 2773.1 (2003).

[1041] *Id.* at 3.

[1042] *Id.* at 3.

4. DECISION OF THE TRIBUNAL WITH RESPECT TO FINANCIAL ASSURANCES

a. Reasonable Cost of Financial Assurances for the Imperial Project[1043]

507. At the outset, the Tribunal notes that the Parties appear to agree that the mining industry traditionally relied upon the surety market to satisfy its needs for posting financial assurances, but that this industry was in significant trouble in 2001-2002, and surety bonds were no longer available to mineral operators. The Tribunal is therefore assured of the fact that surety bonds were indeed not available to mineral operators in general, and to Claimant in particular, at the time that Claimant sought financial assurances for the Imperial Project.

508. The Tribunal also notes, however, the argument raised by Navigant Consulting that one would ordinarily expect that, in the absence of surety bonds, the financial markets would provide letters of credit to companies exhibiting sufficient financial strength and savvy. The Tribunal understands that it is possible that a shift in the financial industry to offering a new product, such as letters of credit, to mineral operators could indeed take some time. It is difficult to comprehend, however, that the industry would not, at some point, have made this adaptation, as businesses are usually quick to fill a profitable void, such as that created by the exit of the surety industry.

509. The Tribunal has been presented with conflicting evidence regarding whether or not the financial industry had adapted quickly enough to offer letters of credit during the 2001-2002 period in which Claimant was seeking information regarding financial assurances for the Imperial Project. This evidence indicates that some companies smaller than Claimant, and some larger, were able to attain letters of credit. Claimant has offered distinctions as to why these companies differ from it: the financial assurance amounts required of some were significantly smaller than that necessary for the Imperial Project, while the others with comparable financial assurance needs involved companies with significantly greater size and capitalization than Claimant. The Tribunal finds that these contentions do not overcome the counter-arguments. In particular, although Claimant was indeed smaller than some of the companies mentioned, it was in excellent financial

[1043] Arbitrator Hubbard dissents with respect to the Tribunal's holding on the reasonable cost of financial assurances. This dissent appears at footnote 1044, *infra.*

health and was seeking a smaller financial assurance than those acquired by these larger corporations.

510. Specifically, the Tribunal determines that Claimant has failed to prove that letters of credit were not available to it for the life of the Imperial Project. The Tribunal notes, for instance, the examples provided by Respondent of the three larger companies that did in fact obtain letters of credit without cash backing in the range of $80 to $200 million. Newmont Mining Corporation obtained a letter of credit for $177 million in 2002; Kinross Gold Corporation acquired a $87.2 million letter of credit in 2003; and also as reported in 2003, Cameco Corporation attained several letters of credit totaling $203 million. Respondent also points to the success of Goldcorp in 2006 in attaining significant letters of credit without cash backing. Therefore, the Tribunal finds that letters of credit were indeed available to some mineral operators, if not at the time that Claimant sought financial assurances, then soon after.

511. In light of this evidence, the Tribunal is not persuaded that Claimant has met its burden of proving that it could not have satisfied its financial assurance obligations, at least for some portion of the long life of the Imperial Project, with a letter of credit without the provision of cash collateral.[1044]

[1044] Arbitrator Hubbard was persuaded by the evidence presented by Claimant, and specifically by the hearing testimony of Mr. Charles A. Jeannes of Glamis and Mr. Bernard Guarnera of Behre Dolbear, that letters of credit without cash collateralization were not available to Claimant at the time it was seeking quotations for the Imperial Project's financial assurances.

The only direct rebuttal evidence offered by Respondent to this testimony was: (1) Mr. Kaczmarek's comment that it would be "incredible to think that a bank would not issue a $50 million letter of credit without cash collateralization to a company with Glamis' financial strength (¶ 490); (2) Respondent's contention that there was no documentary evidence to support Claimant's assertion in this regard (¶ 491); and (3) a list provided by Respondent of California mining operators with non-cash-collateralized financial assurances as provided by the California SMGB (¶ 491).

Arbitrator Hubbard was not persuaded by this rebuttal evidence, however. With respect to the first rebuttal—Respondent's statement of incredulity—Arbitrator Hubbard was not persuaded by this conclusory statement. As to the lack of documentary evidence, Arbitrator Hubbard knows from personal experience (as recently as November 2008), that banks usually announce decisions such as this (i.e, that they will not provide a letter of credit without cash collateralization) only in direct conferences, or in telephone conference calls, with representatives of the applicant. Arbitrator Hubbard therefore finds the lack of written evidence of the decision not to be unusual. Finally, Arbitrator Hubbard does not find the examples offered by Respondent of mining operators with non-cash-collateralized financial assurances to be relevant for the reasons offered by Claimant in that they were not similarly situated to Claimant (¶¶ 488-89).

b. Requirement as to the Timing for Posting Financial Assurances

512. With respect to the issue of whether financial assurances for the present value of the full reclamation costs must be posted prior to the commencement of any mining, or whether such financial assurances may be posted annually solely for the incremental reclamation costs for disturbance already made and that expected in the coming year, the Tribunal holds that Claimant presented a prima facie showing that such financial assurances must be posted, in their entirety, prior to the commencement of any mining activity, and that Respondent did not carry its burden of rebutting this showing.

513. Specifically, the Tribunal notes that, although much argument was presented as to the fact that annualized assurances could be acceptable to the State of California, it remains unclear to the Tribunal as to whether this less demanding requirement would be upheld in the face of that of the federal regulations. The Tribunal notes that it received

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Arbitrator Hubbard additionally notes that he does not read the congressional testimony with respect to the Marigold expansion, as cited above by Respondent at paragraph 492, as being in any way contrary to Mr. Jeannes' testimony that only cash-backed letters of credit were available to Glamis at the time of the Marigold expansion. All of the testimony of those who testified at the congressional hearing in question emphasized the then lack of any alternatives to cash or cash equivalents. Arbitrator Hubbard finds the quotation of Mr. Jeannes' testimony to be entirely consistent with the testimony of others at the hearing, even with the phrase "*or to attempt* to enter into a banking credit facility that provides for the issuance of letters of credit for bonding …" included. (emphasis added) Even if the addition of this phrase meant that Mr. Jeannes thought, at the time of the congressional testimony, that a non-cash-backed letter of credit for the expansion of the Marigold project was then a possibility, his testimony and that of others during the arbitral hearing makes it clear that this was not possible for Glamis at the time of posting the financial assurances for the Glamis Imperial Project (¶ 487).

Finally, Arbitrator Hubbard does not agree with the determination in paragraph 510, that "the Tribunal determines that Claimant has failed to prove that letters of credit were not available to it for the life of the Imperial Project .... Therefore, the Tribunal finds that letters of credit were indeed available to some mineral operators, if not at the time that Claimant sought financial assurances, then soon after." Arbitrator Hubbard finds that letters of credit were not available to Claimant at the time that its financial assurances were required. Likewise, he disagrees with the implication that Claimant could have obtained non-cash-backed letters of credit shortly thereafter, even if it could not obtain one during the 2001-2002 period. The reclamation plan and the financial assurances had to be in place prior to the commencement of any surface operations and the cash-backed letter of credit arrangement would have to be shown, to BLM's satisfaction, to be in place for the duration of the Project, including the reclamation phase. *See* Claimant's Letter to the Tribunal (Apr. 4, 2008). It is therefore unlikely that Claimant would have been able to: (1) obtain an arrangement under which a bank would agree to drop the cash collateral arrangement at some later point; or (2) find another bank, at some later point in time, that would be willing to accept something less than the earlier arrangement required.

For all of these reasons, Arbitrator Hubbard feels that Claimant met its burden of proving that its financial assurances would have required cash collateral. As this determination did not alter the overall conclusion of the Tribunal with respect to its finding of no breach of Article 1110, however, Arbitrator Hubbard has chosen to join in this decision.

no statements from BLM officials as to this point, evidence that was particularly within Respondent's ability to obtain.

c. Final Disposition of the Tribunal with respect to Financial Assurances

514. The Tribunal therefore incorporates in its adjustments to Claimant's valuation model the financial assurance costs of a letter of credit at a fee of 1% per annum for the entire reclamation amount posted prior to the commencement of any mining activity.

E. THE FIFTH DISPUTED ELEMENT OF CLAIMANT'S VALUATION: THE APPROPRIATE DISCOUNT RATE

1. ISSUE PRESENTED

515. The valuation of an investment like that of the Imperial Project must take into account the fact that the activities of, and cash flows from, that investment will span many years. This lengthy duration increases the number and variety of risks that may interfere with the investment and reduce its expected return. This uncertainty is reflected in the discount rate, a rate at which future cash flows are discounted to account for a number of risks, both general and specific, to reflect the investment's specific risk profile. This rate is factored into the discounted cash flow ("DCF") determination and, as explained below, is extremely influential in the valuation.

516. The primary issue to be resolved with respect to the discount rate in this situation is the fact that the Parties' experts arrived at widely disparate rates: Behre Dolbear, Claimant's expert, calculates a discount rate of 6.5%, while Navigant Consulting, Respondent's expert, derives a discount rate of 9.2%. Cash flow analyses are very sensitive to changes in the discount rate, with very small changes leading to large differences in the appraised value.[1045] Therefore, the effect of the difference in these discount rates on the valuation of the Imperial Project is one of the largest differences between the Parties' post-backfilling scenarios, estimated at a $10 million disparity.[1046]

517. At the foundation of these disparate discount rates are the two different methodologies used by the Parties to arrive at their rates. Behre Dolbear employs the "risk build-up method", which entails identifying, quantifying, weighting, and summing

[1045] Respondent's Rejoinder, at 72.
[1046] Counsel for Respondent, Tr. 1181:8-10; Counsel for Claimant, Tr. 1659:13-14.

("building up") a combination of site-specific and global risks.[1047] Navigant, on the other hand, employs the "capital asset pricing model" or "CAPM", which quantifies the rate of return of an investment "by measuring the risks of that investment relative to the overall risks of the market."[1048]

518. Despite these different methodologies, however, the disparity between the Parties' final discount rates is the result almost completely of Behre Dolbear's assumption that the discount rate that it preliminarily derives from its risk build-up method—9.283%—is pre-tax and that an adjustment must therefore be made for tax liabilities, which brings its discount rate down to 6.5%. Claimant aptly summarizes this primary difference between the Parties' views on the calculation of the discount rate:

> Both experts agree that the appropriate discount rate should be an after-tax rate applied to the after-tax net income stream, ... The experts disagree on whether the buildup rate reflects pre- or after-tax rates, and whether a particular Capital Asset Pricing Model, CAPM, relied on by Navigant may be used to value a mineral property.[1049]

519. The Tribunal therefore must determine the appropriate discount rate to apply in its adjustments to Claimant's valuation. To do this, the Tribunal must assess the two methodologies offered by the Parties and specifically consider the question of whether the discount rates derived by the build-up method or the capital asset pricing model are inherently pre-tax from which a reduction for corporate taxes must be taken, or are post-tax and thus sufficient as initially derived.

2. CLAIMANT'S CONTENTIONS

520. Claimant's expert, Behre Dolbear, calculates an after-tax discount rate of between 6% and 7%, with the best single rate of 6.5%, by evaluating site-specific factors (geology, ore reserves, reclamation, etc.) and global factors (market risk, sovereign risk, civil risk, etc.).[1050] Specifically, Behre Dolbear calculates the nominal risk-free rate of return from U.S. Treasury notes, removes the expected rate of inflation to get a "real risk-

[1047] Behre Dolbear Expert Report (Apr. 2006), app. A.
[1048] Navigant Expert Report (Sept. 2006), ¶ 111.
[1049] Counsel for Claimant, Tr. 1661:10-18.
[1050] Behre Dolbear Expert Report (Apr. 2006), app. 6, at 2-4. Behre Dolbear explained that site-specific risks were moderate because of similarities between the Imperial Project and the nearby Picacho and Mesquite mines. Country risks were higher, however, because of anti-mining sentiment in the United States, which varies from site to site and state to state.

free" rate of 2.033% and then adds these site-specific and global risk increments to arrive at a pre-tax discount rate of 9.283%.[1051] According to Claimant, however, there is no tax element in any of these risk factors; they are all pre-tax.[1052] Therefore, once the risk associated with the Project has been calculated, it has to be converted to an after-tax rate by using the Lerch formula.[1053]

521. Claimant argues for the reasonableness of its discount rate of 6.5% by comparing it to the 5.5% rate used by the BLM in its 2002 Mineral Report to evaluate whether or not a reasonable investor would pursue the Project.[1054] In addition, it compares the rate to that used in Claimant's contemporaneous April 28, 2002 valuation memo in which it is documented that Claimant used a standard 5% discount rate for its U.S. operations.[1055]

522. Claimant maintains that Respondent's use of the capital asset pricing model to value the Imperial Project's discount rate is improper. According to Claimant, CAPM is used for valuing corporations and corporate values, not individual mining properties.[1056] This is because the basis of the CAPM method is that an individual corporate stock return can be related to the stock market as a whole and to a market-based beta.[1057] Behre Dolbear maintains that single properties, like the Imperial Project, require a build-up method to incorporate all of the risk factors affecting the property.[1058]

523. In addition, the CAPM rate, according to Claimant, is pre-tax, and therefore should not be used for a post-tax net present value analysis.[1059] Respondent erred, Claimant argues, by also combining this rate with a 3% project risk premium for which it

[1051] *Id.*, app. 6, at 4-7.
[1052] Counsel for Claimant, Tr. 2224:5-10; Behre Dolbear Response Report (Dec. 2006), p. 16.
[1053] Counsel for Claimant, Tr. 2224:11-15; Behre Dolbear Expert Report (Apr. 2006), app. 6, at 6-7. The article cited by the Parties for the "Lerch formula" (1 less the tax rate) is MARY ANN LERCH, PRETAX/AFTERTAX CONVERSION FORMULA FOR CAPITALIZATION RATES AND CASH FLOW DISCOUNT RATES, BUSINESS VALUATION REVIEW 18-22 (Mar. 1990), [Navigant Consulting Expert Report (Sept. 2006), Ex. 30].
[1054] Counsel for Claimant, Tr. 1663:12-16.
[1055] Counsel for Claimant, Tr. 1663:16-19.
[1056] Counsel for Claimant, Tr. 1662:19-22.
[1057] Counsel for Claimant, Tr. 1663:2-7.
[1058] Behre Dolbear Response Report (Dec. 2006), at 17.
[1059] *Id.* at 17. This is contradicted by attorney testimony, however, which claims that CAPM actually produces a post-tax rate. Counsel for Claimant, Tr. 2224:16-2225:1.

does not properly provide a basis, and which is not a market-based risk premium and is thus not after-tax.[1060]

3. RESPONDENT'S CONTENTIONS

524. Respondent's expert, Navigant, calculates a discount rate of 9.2% using the CAPM method which, it claims, is a standard way to value an income-producing investment such as the Imperial Project.[1061] It defends its use of CAPM for the calculation of the discount rate by arguing that, if CAPM is applicable to the valuation of a single mining company, it should be applicable to the valuation of a single mine.[1062] Navigant also explains that it included many project-specific risks into its CAPM analysis.[1063] In addition, Navigant then confirms this rate with industry standards, which it found to be between 9% and 12%.[1064] Finally, Respondent notes that this rate is "nearly identical" to the original discount rate of 9.28% calculated by Behre Dolbear prior to its tax adjustment.[1065]

525. Respondent agrees that the build-up method itself is a proper technique for calculating a discount rate, provided that the reasoning behind each component is supplied, which, Respondent asserts, Behre Dolbear fails to do.[1066] Respondent also argues that Claimant's post-calculation reduction for corporate taxes was improper. Respondent contends that a discount rate "accounts for the risks of certain future events turning out less favorably than anticipated." As such, Respondent contends, it is "nonsensical" to incorporate corporate taxes into such a rate.[1067] According to Navigant, corporate taxes are not different from other corporate expenses. Thus, project owners have access to the cash flow of their business only after corporate taxes have been paid. Reducing a discount rate for corporate taxes assumes that an investor's return is on a pre-

[1060] Counsel for Claimant, Tr. 2225:2-11.
[1061] Counsel for Respondent, Tr. 1178:8-12; Navigant Expert Report (Sept. 2006), ¶¶ 111-16.
[1062] Navigant Consulting Rejoinder Report (Mar. 2007), p. 65.
[1063] *Id.* at 66.
[1064] Navigant Consulting Expert Report (Sept. 2006), ¶ 13, and Exs. 33, 34, 35.
[1065] Counsel for Respondent, Tr. 1181:10-13.
[1066] Navigant Consulting Expert Report (Sept. 2006), ¶ 107. Navigant criticizes Behre Dolbear for its explanation that risk levels and discount rate percentages were determined "as a consensus opinion of the Behre Dolbear professionals who contributed to the project." Navigant Consulting Rejoinder Report (Mar. 2007), quoting Behre Dolbear Expert Report (Apr. 2006), app. 6, at 4.
[1067] Respondent's Counter-Memorial, at 169.

tax cash flow, which is incorrect.[1068] Navigant suggests that Behre Dolbear's confusion stems from misreading the article that provides the Lerch Formula for grossing-up a post-tax rate to a pre-tax rate.[1069]

526. With respect to the rates calculated by BLM and Claimant in contemporaneous documents, Respondent argues that they are irrelevant. Respondent maintains that the Imperial Project's fair market value cannot be derived from a "generic discount rate" as used by Claimant internally to evaluate all of its U.S. operations. It also cannot be derived, Respondent asserts, from the risk-free discount rate used by BLM. The value of the Imperial Project must be derived, according to Respondent, "based on a project-specific analysis and project-specific discount rate."[1070] However, Respondent contends that, should the Tribunal choose a discount rate of 5%, according to Claimant's January 9, 2003 valuation method, the Imperial Project would be worth $17.2 million in the pre-backfilling scenario, as opposed to $9.1 million.[1071]

4. DECISION OF THE TRIBUNAL WITH RESPECT TO THE PROPER DISCOUNT RATE

527. The Tribunal notes that, as introduced above, Claimant's expert Behre Dolbear utilized a risk build-up method to derive its discount rate.[1072] This method involves identifying the various risk factors affecting a property, assigning risk levels to these factors and adding them together—"building them up"—to a master risk level. Behre Dolbear identified site-specific risks and global risks, and derived risk levels and discount rates for each by "a consensus opinion of the Behre Dolbear professionals who contributed to the project."[1073]

528. Within the sub-category of site-specific risks, Behre Dolbear calculated a discount rate of 1% for geology risk, 1% for development risk, and 1.5% for operations risk, for a

[1068] Counsel for Respondent, Tr. 1181:17-1182:1; Navigant Consulting Expert Report (Sept. 2006), p. 39. Navigant additionally cites to "authoritative commentary" and "standard industry practice" to show that experts' discount rates are necessarily calculated after taxes and thus no additional adjustment is necessary. Respondent's Rejoinder, at 73, citing Navigant Consulting Rejoinder Report (Mar. 2007), ¶¶ 182-85.

[1069] Navigant Consulting Expert Report (Sept. 2006), ¶ 109, Ex. 30.

[1070] Counsel for Respondent, Tr. 1869:1-9.

[1071] Counsel for Respondent, Tr. 1869:17-1870:2.

[1072] Behre Dolbear Expert Report (Apr. 2006), app. 6, at 2-7.

[1073] *Id.*, app. 6, at 2-4.

total site-specific risk increment of 3.5%.[1074] The global risk category included a 3% discount rate for market risk and 0.75% for country risk,[1075] for a total global risk increment of 3.75%.[1076] These two percentages were then added to a real risk-free rate of 2.033%, which was calculated from a nominal risk-free rate of return derived from United States Treasury notes and bonds (which are considered to be a risk-free investment), and then reduced by the expected rate of inflation to attain a constant-dollar basis.[1077] Adding these three discount rates together results in discount rate of 9.283%.[1078]

529. Behre Dolbear asserts that this rate is based upon pre-tax criteria and thus is a pre-tax discount rate for the company.[1079] Behre Dolbear's analysis, however, assumes that income taxes are a "normal cost of doing business" and thus, "the final cash flow and associated net present value is after-tax."[1080] Therefore, Behre Dolbear utilized the "Lerch method" to adjust this allegedly pre-tax rate to an after-tax discount rate of 6.5%.[1081]

530. The Tribunal acknowledges that Respondent's expert, Navigant Consulting, does not object to the build-up methodology utilized by Claimant, nor does it object to "the quantum of the individual risk components that Behre Dolbear utilized to construct the discount rate;" it disputes only the final tax adjustment.[1082] Specifically, Navigant argues:

> [R]isks borne by project owners are inherently after corporate taxes. Owners of projects, like owners of shares of stock, only have access to the cash flows of their project or business after corporate taxes are paid. In essence, corporate tax expense is no different than salary expense, fuel expense, chemicals expense, etc.

[1074] *Id.*, app. 6, at 5-6.

[1075] *Id.*, app. 6, at 6 (Behre Dolbear notes that the United States is usually considered risk-free, however local government varies substantially depending on the particular locality. Therefore, if the Imperial Project were located in Nevada, Behre Dolbear probably would have assigned it a zero risk increment, but California required a higher risk increment).

[1076] *Id.*, app. 6, at 6-7.

[1077] *Id.*, app. 6, at 4-5.

[1078] *Id.*, app. 6, at 6.

[1079] *Id.*

[1080] *Id.*

[1081] *Id.* The Lerch formula adjusts discount rates from a pre-tax rate to an after-tax rate and vice versa. It is written as: (after-tax cap. rate) = (pre-tax cap. rate) x t (where t = the average tax rate on the earnings which will be capitalized (discounted)).

[1082] Navigant Consulting Rejoinder Report (Mar. 2007), ¶ 174.

> These expenses must be paid first, and owners only have a residual claim to income that might remain thereafter. As such, all of the methods that have been developed to quantify 'ownership' risk (such as the risk build-up method, the CAPM, the Arbitrage Pricing Theory, the Fama-French Three Factor Model, etc.) apply to after-tax cash flows. The discount rates developed from these models do not need to be adjusted for taxes.[1083]

531. In light of these conflicting interpretations and upon thorough review of the record, the Tribunal finds that Claimant has failed to adequately explain why its calculation results in a pre-tax discount rate. In addition, the Tribunal determines that Claimant has not sufficiently explained why it adjusted its discount rate for this one expense—corporate taxes—and no other corporate expense. The Tribunal further notes that Claimant did not provide rebuttal argument with respect to why taxes differ from other expenses and thus should be uniquely applied to the discount rate. Finally, although Claimant's methodology of reducing a discount rate for the tax rate is consistent with at least one prior analysis performed by Behre Dolbear (the Hellas Gold SA Mineral Properties),[1084] the Tribunal notes that this does not establish the correctness of this procedure. The Tribunal therefore rejects Claimant's tax adjustment to its discount rate.

532. With the removal of the tax adjustment, the Tribunal is satisfied with the build-up methodology as employed by Claimant, as well as its identification and quantification of the various risks included. The Tribunal also notes that, in rejecting the tax adjustment, Behre Dolbear's initial discount rate of 9.283% is confirmed by Navigant Consulting's alternate CAPM valuation. The Tribunal therefore accepts Claimant's calculation of the discount rate, prior to its adjustment for corporate taxes: 9.283%.

a. Final Disposition of the Tribunal with respect to the Discount Rate

533. The Tribunal therefore holds that, while Claimant presented a prima facie showing that the build-up method is an accurate methodology for the derivation of a discount rate, it simultaneously has not met its burden with respect to the tax adjustment that it applied to this calculation, thus causing the significant drop from 9.283% to 6.5%. The Tribunal therefore removes this tax adjustment and adopts Claimant's build-up

[1083] *Id.* ¶ 175 (internal citations omitted).

[1084] *See* VALUATION OF HELLAS GOLD SA MINERAL PROPERTIES, CHALKIDIKI PREFECTURE, GREECE, FOR EUROPEAN GOLDFIELDS LTD., PREPARED BY BEHRE DOLBEAR INTERNATIONAL LTD. 35 and app. 9 (Sept. 2004) [Navigant Consulting Rejoinder Report (Mar. 2007), Ex. 106].

derived discount rate of 9.283% in its determination of whether the Imperial Project has in fact suffered significant enough diminution in value as to meet the first requirement of an expropriation.

F. FINAL DETERMINATION OF THE TRIBUNAL WITH RESPECT TO CLAIMANT'S CLAIM FOR EXPROPRIATION UNDER ARTICLE 1110

534. The Tribunal therefore makes the following adjustments to Claimant's post-backfilling valuation to determine whether value remains in the Imperial Project following the imposition of the backfilling measures:

- Substitutes Claimant's cost per ton figure with that of 28.44 cents;
- Adds $7.7 million to the cash flows in Year 12 (2014) based on the Tribunal's determination that an equipment refurbishment would not be necessary at that point;
- Determines the appropriate swell factor for both the ore-containing and waste rock at Imperial Project site to be 30.2%; based upon this calculation, the Tribunal reduces the estimate of the total tonnage of waste material that Claimant would need to backfill by 6 million tons;
- Adds $6.43 million to the value of the Imperial Project post-backfilling scenario for additional profits associated with the Singer Pit, but also adds 18.7 million tons that will be produced by mining this pit to the total tons to be backfilled;
- Adopts the price of gold per ounce of $326, as used by both Parties;
- Derives from these adjustments a total cost of backfilling and spreading of $60.86 million (starting in Year 8 and continuing for six years), based on 214 million tons to be backfilled and spread at a cost of $0.2844 per ton;
- Adjusts the cost of financial assurances based on this revised calculation of the total cost of backfilling and spreading and the use of a Letter of Credit at a fee of 1% per annum posted at the Project's inception; and
- Brings all figures to net present value as of December 12, 2002, using a discount rate of 9.283%.

535. When these adjustments are applied to Claimant's valuation methodology, the post-backfilling valuation of the Imperial Project exceeds $20 million.

536. In light of this significantly positive valuation, the Tribunal holds that the first factor in any expropriation analysis is not met: the complained of measures did not cause a sufficient economic impact to the Imperial Project to effect an expropriation of

Claimant's investment. The Tribunal thus holds that Claimant's claim under Article 1110 fails.

VI. CLAIMANT'S CLAIM UNDER ARTICLE 1105

537. Claimant argues that the complained of measures of the United States federal and California state governments, viewed both individually and collectively, violated its rights to receive fair and equitable treatment as promised by Article 1105 of the NAFTA. In order to evaluate these claims, the Tribunal must first determine the scope and bounds of the customary international law minimum standard of treatment of aliens which, as discussed below, comprises the fair and equitable treatment standard of Article 1105. The Tribunal begins this task by identifying the sources which bear on determining this standard; it then assesses the record to determine what state obligations are required by the customary international law minimum standard of treatment. Finally, the Tribunal will hold the federal and California measures, both individually and as a collective whole, up against this standard and assess whether Claimant has proven a breach of Article 1105.

A. ARTICLE 1105(1) LEGAL STANDARD: WHAT IS REQUIRED OF A STATE PARTY BY THE OBLIGATION TO PROVIDE "FAIR AND EQUITABLE TREATMENT"

1. ISSUE PRESENTED

538. Article 1105(1) of the NAFTA provides that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." The scope and reach of what is required of a Party by this standard has been addressed in numerous arbitrations and debated by scholars; this case is no different.

539. The Parties to this Arbitration agree that fair and equitable treatment is a "recognized standard under customary international law,"[1085] and that it is "firmly within the minimum standard of treatment to be accorded under customary international

[1085] Counsel for Claimant, Tr. 2078:22-2079:6.

law."[1086] They disagree, however, on what that standard requires of a State Party and what authorities are permissibly referenced by the Tribunal to define the standard.

540. In its analysis of the fair and equitable treatment standard of Article 1105, the Tribunal therefore addresses first the proper scope of authoritative sources to which it may look for guidance in defining this elusive standard; and second, assesses Claimant's contentions to determine what obligations it has proven the customary international law minimum standard of treatment now requires of a State Party.

541. The Tribunal thus turns to its first task: determining the universe of sources available to instruct it on the bounds of "fair and equitable treatment." Although, by the close of proceedings, both Parties agreed that the NAFTA standard is the customary international law minimum standard of treatment of aliens, they, as well as numerous other scholars, jurists, States and corporations, disagree as to how to define this customary international law standard. A major difference between the Parties' positions turns on Claimant's assertion that the Tribunal may rely on decisions of tribunals that apply an autonomous analysis—driven by the language of the treaty, which may or may not reflect customary international law standards—in addition to those decisions that rest explicitly on customary international law.

542. Specifically, Claimant contends that the fair and equitable treatment standard includes interrelated and dynamic obligations providing for, among other duties, protection against arbitrariness and discrimination, protection of legitimate investment-backed expectations, and a requirement of a transparent and predictable legal and business framework.[1087] Claimant arrives at this interpretation from the guidance of

[1086] Counsel for Claimant, Tr. 36:15-18; Counsel for Respondent, Tr. 1390:11-14.

[1087] *See, e.g.*, Counsel for Claimant, Tr. 40:9-16. The Tribunal notes that, as exhibited under the NAFTA, there are two types of discrimination: nationality-based discrimination and discrimination that is founded on the targeting of a particular investor or investment. The former falls under the purview of Article 1102 and Claimant does not argue this. Inasmuch as Claimant argues that it was discriminated against, this argument appears primarily in the discussion of Article 1110, in which Claimant asserts that the discriminatory nature of the California measures provides additional proof that the measures were not a bona fide exercise of State police power and thus a non-compensable regulation. *See, e.g.*, Claimant's Memorial, ¶¶ 497-510; Claimant's Reply Memorial, ¶¶ 170-75. Claimant does not argue the discriminatory nature of the California measures in its Article 1105 claim, explaining that *Waste Management* was criticized in *obiter dictum* by the *Methanex* tribunal to the extent that *Waste Management* implies a duty of non-discrimination in Article 1105(1). Claimant's Memorial, at 291, footnote 1015, citing *Methanex*, Final Award, Part IV, Ch. C, ¶ 26 (Aug. 3, 2005). Claimant asserts that *Waste*

arbitral decisions based on bilateral investment treaties ("BITs"), as well as NAFTA arbitrations, scholarship, and state practice.

543. Respondent argues that Article 1105's duty to provide fair and equitable treatment is solely a reference to the minimum standard of treatment demanded by customary international law.[1088] As customary international law, this interpretation is derived from "general and consistent practice of states followed by them out of a sense of legal obligation or *opinio juris*."[1089] Respondent reiterates that "international tribunals do not create customary international law. Only nations create customary international law."[1090]

544. The Tribunal therefore begins its analysis by identifying those sources that illuminate the customary international law standard and then, based on the record before it, determines the content of that standard. Following this analysis, the Tribunal will hold up the disputed facts to this standard and determine whether Claimant has proved that Respondent has failed to fulfill the obligations required.

2. CONTENTIONS OF THE PARTIES

a. Sources Relevant to Determine the Article 1105 Standard

i. *Claimant's Contentions*

545. Claimant explains the task for this Tribunal, and all tribunals addressing Article 1105, as "determin[ing] whether the facts of a particular case violated those established and commonly accepted legal principles that comprise the fair and equitable treatment standard of treatment under customary international law."[1091] Claimant thus agrees that the fair and equitable treatment standard articulated in Article 1105 is the customary

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Management does so, however, only in circumstances where the claimant's allegations of discrimination were offered in regard to Article 1102 and only incidentally as regards a claim under Article 1105(1). Claimant continues to explain, however, that *Loewen Group v. United States* does state that discrimination can be unfair and inequitable in the context of Article 1105(1). Claimant's Memorial, at 291, footnote 1015, citing *Loewen*, Award, ¶ 135 (June 26, 2003). The Tribunal therefore interprets Claimant's arguments made in its Memorial, at paragraph 568, regarding "Respondent's arbitrary and discriminatory treatment" as an assertion that, as part of the duty prescribed by Article 1105 to not act arbitrarily, there is a duty to not unfairly target a particular investor, whether based upon nationality or some other characteristic.

[1088] Respondent's Counter-Memorial, at 218-19.
[1089] Counsel for Respondent, Tr. 105:10-13.
[1090] Counsel for Respondent, Tr. 105:17-19.
[1091] Counsel for Claimant, Tr. 36:7-13.

international law minimum standard of treatment, but argues that there is a universe of principles that are so "fundamental" that they are common throughout the world, "regardless of whether the standard is viewed through the lens of customary international law or the so-called autonomous Treaty standard."[1092] These principles, it asserts, include "the duty to act in good faith, due process, transparency and candor, and fairness and protection from arbitrariness."[1093]

546. Claimant argues that, to accept Respondent's framework, the Tribunal would have to accept three principles fundamentally at odds with international law:

> *[F]irst*, that the content of Article 1105 is *sui generis* and thus, divorced from the substantive protections recognized by arbitral tribunals as comprising the international standard of treatment for foreign investors under customary international law; *second*, that Article 1105 need not be interpreted in an evolutionary fashion; and *third*, that reference to the 'minimum standard' somehow means that the most arbitrary and capricious of state actors sets the bar for how any state may treat foreign investors.[1094]

Such a framework, contends Claimant, is both unsupported by international law, and contradictory "even to positions Respondent has advanced in the past."[1095]

547. Claimant argues that Respondent is attempting to freeze a historical interpretation of the requirements of Article 1105 from the 1920s rather than interpreting it, as it should, in an evolutionary fashion.[1096] Claimant asserts that freezing the protection provided by the fair and equitable treatment standard is criticized by modern tribunals, which have explicitly rejected any threshold limitation that conduct be "egregious," "outrageous," "shocking," or otherwise extraordinary (as was required by the seminal case of *Neer v. Mexico*).[1097]

[1092] Counsel for Claimant, Tr. 39:22-40:6.
[1093] Counsel for Claimant, Tr. 40:6-8.
[1094] Claimant's Reply Memorial, ¶ 206.
[1095] *Id.*
[1096] *Id.* ¶ 214.
[1097] *Id.* ¶ 215, citing Neer v. Mexico ("*Neer*"), 4 R. Int'l Arb. Awards, 60-62 (Oct. 15, 1926). Mr. Neer, a citizen of the United States employed as the superintendent of a mine near Guanaceví, Mexico, was riding home on horseback with his wife when they were stopped by a number of armed men who engaged Mr. Neer in conversation, and subsequently shot him dead. Mrs. Neer claimed that the Mexican authorities "showed an unwarrantable lack of diligence or an unwarrantable lack of intelligent investigation in prosecuting the culprits ...." *Id.* ¶ 1. "Without attempting to announce a precise formula" for determining an international delinquency, the commission held:

548. Claimant argues instead that the duty to accord fair and equitable treatment and the minimum standard of treatment are dynamic standards, elucidated by review of current legal and treaty activity. Citing the OECD Working Papers on Fair and Equitable Treatment, Claimant argues that all three NAFTA Parties have accepted this characterization.[1098] This is also reflected, Claimant contends, in the fact that "FTC interpretations incorporate *current* international law, whose content is shaped by the conclusion of more than 2,000 bilateral investment treaties and many treaties of friendship and commerce."[1099] Claimant also points to the decision of the *Mondev* tribunal and its finding that BITs, "through their incorporation of the 'fair and equitable treatment' standard, reflected both the State practice, as well as the sense of obligation, legal obligation, *opinio juris* required under customary international law."[1100]

549. Claimant does not dispute that NAFTA Free Trade Commission's ("FTC") interpretation "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."[1101] Still, Claimant contends, the standard must be interpreted in "good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose," as required by Article 31(1) of the

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> (first) that the propriety of governmental acts should be put to the test of international standards and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.

Id. ¶ 4. *But see Mondev*, Award, ¶ 116 (Oct. 11, 2002) ("[B]oth the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of 'fair and equitable treatment' and 'full protection and security' of foreign investments to what those terms – had they been current at the time – might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.").

[1098] Claimant's Memorial, ¶ 518, citing OECD, *Fair and Equitable Treatment Standard in International Investment Law* (OECD Working Papers on International Investment, 2004/3) ("*OECD Working Papers*"), at 11-12 ("United States expressed the view that the customary international law referred to in NAFTA Article 1105(1) is not 'frozen in time' and that the minimum standard of treatment does evolve." "Canada agreed with the US on the view that the minimum standard of treatment does evolve." "Mexico also agrees that 'the standard is relative and that the conduct which may not have violated international law [in] the 1920s might very well be seen to offend internationally accepted principles today.'" (citations and emphasis omitted)) [Ex. 174].

[1099] Counsel for Claimant, Tr. 37:1-7, quoting *Mondev*, Award, ¶ 125 (Oct. 11, 2002) (emphasis added).

[1100] Counsel for Claimant, Tr. 37:8-13, citing *Mondev*, Award (Oct. 11, 2002).

[1101] Claimant's Memorial, ¶ 517.

Vienna Convention, which requires looking at the standard as it has *evolved* under customary international law.[1102]

550. Claimant does dispute Respondent's allegations that "there is any restriction that fair and equitable treatment be defined only by customary international law rather than international law in general, given that the plain language of Article 1105 requires treatment in accordance with international law."[1103] Claimant cites to the NAFTA awards in *Mondev*, *Pope & Talbot*, *Loewen* and *ADF* for the proposition that there is no rule that fair and equitable treatment be defined solely by customary international law, rather than the "normal sources of international law."[1104]

551. Claimant agrees that there is a difference between the autonomous and customary international law standards and that the standard articulated in NAFTA Article 1105 is the customary international law minimum standard of treatment of aliens, but it argues that the two sources of law, at this point, require the same conduct of states. Claimant thus asserts that this dispute between "customary international law" and "international law" is unnecessary, as "BIT jurisprudence has converged with customary international law in this area ...."[1105] That the standards are generally the same, Claimant argues, is demonstrated in the OECD Draft Convention and recognition by the United States, which incorporated the same standard as that in the Draft Convention in its various BITs.[1106] In addition, according to Claimant, some tribunals—including *Occidental* and *CMS*—have affirmatively stated that the treaty standard at issue does not differ from the customary international law standard.[1107]

552. Finally, Claimant reiterates that the customary standard referenced in the NAFTA has been influenced by the many BITs that require fair and equitable treatment.[1108] BIT jurisprudence demonstrates both elements of customary international law—State practice and *opinio juris*—and thus informs the international standard of

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[1102] *Id.*
[1103] Counsel for Claimant, Tr. 1709:20-1710:3.
[1104] Counsel for Claimant, Tr. 1710:3-19; *see also* Claimant's Reply Memorial, ¶¶ 210-11.
[1105] Counsel for Claimant, Tr. 1710:20-22.
[1106] Counsel for Claimant, Tr. 1711:3-14.
[1107] Counsel for Claimant, Tr. 1713:5-9, citing *Occidental v. Ecuador*, Final Award (July 1, 2004) and *CMS v. Argentina*, Award (May 12, 2005).
[1108] Claimant's Reply Memorial, ¶ 207.

treatment owed to foreign investors under customary international law.[1109] Claimant quotes the *Mondev* award for its finding that "the vast number of bilateral and regional investment treaties (more than 2,000) almost uniformly provide for fair and equitable treatment of foreign investments, and largely provide for full security and protection of investments …. On a remarkably widespread basis, States have repeatedly obliged themselves to accord foreign investment such treatment."[1110]

ii. *Respondent's Contentions*

553. While Claimant states that it agrees with Respondent that Article 1105 is the "obligation to accord investments the customary international law minimum standard of treatment," Respondent argues that this is merely "lip service" as Claimant nowhere proves the existence of any rule of customary international law violated by Respondent.[1111] According to Respondent, establishment of a rule of customary international law requires: (1) "a concordant practice of a number of States acquiesced in by others" and (2) "a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)."[1112] Respondent asserts that the burden is on Claimant to prove the existence of a rule of customary international law and Respondent's violation of that rule, and that Claimant has done neither.[1113]

554. Customary international law cannot be proven, alleges Respondent, by decisions of international tribunals, as they do not constitute State practice.[1114] In support, Respondent cites to the U.S. Court of Appeals for the Second Circuit which distinguishes between primary and secondary sources of customary international law: "[A] primary source of authority" is one upon which, standing alone, courts may rely for propositions of customary international law; while secondary sources (such as "the writings of jurists") "at most provide evidence of the practice of States, and then only insofar as they

[1109] *Id.* ¶ 208, citing *Mondev*, Award, ¶¶ 110-125 (Oct. 11, 2002).
[1110] *Id.*, quoting *Mondev*, Award, ¶ 117 (Oct. 11, 2002) (internal citation omitted).
[1111] Counsel for Respondent, Tr. 1390:10-20.
[1112] Respondent's Counter-Memorial, at 219 (citation omitted).
[1113] *Id.* at 222.
[1114] Respondent's Rejoinder, at 151, citing MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 71 (1997).

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.'"[1115]

555. Respondent argues that the NAFTA Free Trade Commission could not have been clearer in its note of interpretation of July 31, 2001 ("FTC Note"): the requirement under Article 1105(1) requires the customary international law minimum standard of treatment, nothing more and nothing less.[1116] According to Respondent's view of this interpretation, an investor is barred from claiming that the language regarding the fair and equitable treatment standard under Article 1105(1) differs from or is greater than that required by customary international law.[1117] This is supported, Respondent asserts, by arbitral awards subsequent to the issuance of the FTC Note. Respondent cites to the *ADF* award in which the tribunal held that the FTC Note "clarifies that so far as the three NAFTA Parties are concerned, the long-standing debate as to whether there exists such a thing as a minimum standard of treatment of non-nationals and their property prescribed in customary international law, is closed."[1118] In addition, the *Mondev* award states that the FTC Note "makes it clear that Article 1105(1) refers to a standard existing under customary international law, and not to standards established by other treaties of the three NAFTA Parties."[1119]

556. Therefore, Respondent asserts, any tribunal interpreting a BIT that finds the fair and equitable treatment provision in that BIT as being "something other than a shorthand reference to customary international law" (i.e., an autonomous standard) is not interpreting it "in accordance with the intent of the NAFTA parties, nor in a manner that the NAFTA parties have all through the Free Trade Commission instructed and bound NAFTA Tribunals to interpret that phrase."[1120]

[1115] *Id.* at 151-52, quoting U.S. v. Yousef, 327 F.3d 56, 93, 99 (2d Cir. 2003) (emphasis omitted).

[1116] Counsel for Respondent, Tr. 1931:19-1932:8.

[1117] Counsel for Respondent, Tr. 1932:8-15.

[1118] Respondent's Counter-Memorial, at 218-19, citing *ADF Group*, Award, ¶ 178 (Jan. 9, 2003) (citation omitted).

[1119] *Id.*, citing *Mondev*, Award, ¶ 121 (Oct. 11, 2002).

[1120] Counsel for Respondent, Tr. 1934:9-20. Specifically, in response to Tribunal questions, Respondent stated that it does not believe that the standard articulated in the cases based on the U.S.-Argentine BIT is "reflective or has been shown to be reflective of the minimum standard of treatment under customary international law." Counsel for Respondent, Tr. 2134:2-11.

557. The additional danger of looking to BIT jurisprudence, Respondent warns, is that "the majority of fair and equitable treatment clauses in international investment agreements do not include any reference to international law."[1121] There are, Respondent admits, some agreements in force with provisions similar to Article 1105, but that does not mean that all fair and equitable treatment provisions are the same.[1122] Respondent points to UNCTAD's study of fair and equitable treatment in which it concluded 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."[1123] UNCTAD reports, in fact, that there are at least four different approaches to fair and equitable treatment that it found in various BITs.[1124]

558. According to Respondent, the fact that treaty practice establishes the repeated inclusion of fair and equitable treatment provisions in BITs proves nothing in and of itself.[1125] There are, Respondent argues, significant textual differences among the various fair and equitable treatment provisions, which indicate that their meanings are not uniform across agreements.[1126] Quoting *Mondev*, Respondent contends that the central question in Chapter 11 cases still remains: "what is the *content* of customary international law providing for fair and equitable treatment …?"[1127]

b. Scope of the Standard

i. *Introductory Note*

559. The Tribunal notes that numerous NAFTA tribunals have wrestled with the question of the scope and bounds of "fair and equitable treatment" and the duties and obligations that this treatment requires of a State Party. Probably the most comprehensive review was done by the tribunal in *Waste Management*¸ in which it attempted a survey of the holdings to date in NAFTA jurisprudence:

[1121] Respondent's Rejoinder, at 147 (citation omitted).
[1122] *Id.*
[1123] *Id.* at 148, quoting UNCTAD, *Fair and Equitable Treatment*, Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/11 (Vol. III) (1999), at 40.
[1124] Respondent's Rejoinder, at 148, citing *id*. at 13.
[1125] *Id.* at 142.
[1126] *Id.*
[1127] *Id.*, quoting *Mondev*, Award, ¶ 113 (Oct. 11, 2002) (emphasis added).

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment… of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety–as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[1128]

The tribunal in *GAMI* primarily followed this line of reasoning, extracting four "implications" that it found particularly salient: (1) "The failure to fulfill the objectives of administrative regulations without more does not necessarily rise to a breach of international law;" (2) "A failure to satisfy requirements of national law does not necessarily violate international law;" (3) "Proof of a good faith effort by the Government to achieve the objectives of its laws and regulations may counter-balance instances of disregard of legal or regulatory requirements;" and (4) "The record as a whole—not isolated events—determines whether there has been a breach of international law."[1129]

560. The tribunal in *International Thunderbird Gaming* had a slightly different holding: "the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards."[1130] Although bad faith would meet the standards described, most tribunals agree that a breach of Article 1105 does not require bad faith.[1131]

561. In this case, Claimant argues that the international minimum standard of treatment is a dynamic, evolving standard and points to two particular duties that it argues are current requirements of a host State under its obligations to provide fair and

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[1128] *Waste Management*, Award, ¶ 98 (Apr. 30, 2004). As noted above at footnote 1087, Claimant is not arguing a duty of non-discrimination as a duty separate from those included in the requirement of fair and equitable treatment under Article 1105.

[1129] *GAMI Investments*, Final Award, ¶ 97 (Nov. 15, 2004).

[1130] *International Thunderbird*, Award, ¶ 194 (Jan. 26, 2006).

[1131] *See Loewen*, Award, ¶ 132 (June 26, 2003); *Mondev*, Award, ¶ 115 (Oct. 11, 2002); *Waste Management*, Award, ¶ 93 (Apr. 30, 2004).

equitable treatment: (1) an obligation to protect legitimate expectations through establishment of a transparent and predictable business and legal framework;[1132] and (2) an obligation to provide protection from arbitrary measures.[1133] It is against these alleged duties that Claimant weighs the disputed facts and argues that Respondent has breached Article 1105. It is therefore incumbent upon the Tribunal to address the contention of the evolution of the standard and these two asserted aspects of the obligation to provide fair and equitable treatment.

562. The Tribunal notes that Claimant asserts that these two duties are both aspects of the same obligation, "interrelated" "strands" that are typically evaluated together;[1134] while Respondent asserts that there is "no greater showing of State practice and *opinio juris* with respect to the combined," as opposed to individual, duties.[1135] In order to best assess the scope of the standard as the Parties argue it, the Tribunal first examines the two individual duties asserted and then weaves them back into a comprehensive standard against which to weigh the facts.

ii. *The Asserted Evolution of the Customary International Law Minimum Standard of Treatment*

a. Claimant's Contentions

563. Claimant argues that, "[g]iven the international minimum standard of treatment is comprised of customary international law, the standard is an evolving one based on the general and consistent practice of states and *opinio juris* …."[1136] Claimant asserts that "[a]ll three parties to the NAFTA accept that the Article 1105(1) standard is a dynamic one."[1137] Claimant cites to statements by the United States in *Mondev* that "Article 1105(1) is intended to provide a real measure of protection of investments, and ... having regard to its general language and to the evolutionary character of international law, it has evolutionary potential."[1138] Claimant therefore argues that Respondent's treatment of it

[1132] Claimant's Reply Memorial, ¶¶ 224-34.
[1133] *Id.* ¶¶ 235-41.
[1134] Counsel for Claimant, Tr. 40:9-16.
[1135] Counsel for Respondent, Tr. 1402:8-12.
[1136] Claimant's Memorial, ¶ 518, citing *OECD Working Papers*, at 40 [Ex. 174].
[1137] *Id.*, citing *OECD Working Papers*, at 11-12.
[1138] *Id.*, quoting *Mondev*, Award, ¶ 119.

must be judged against the international law minimum standard of treatment, "which incorporates current standards of fair and equitable treatment."[1139]

564. Claimant contends that the resources and levels of development particular to a host State play an integral role in the application of the minimum standard of treatment to it.[1140] Claimant argues that this is especially important in determining an investor's legitimate expectations.[1141] Therefore, "[f]or a highly developed legal system with relatively extensive resources and institutional stability, such as the United States, the international minimum standard thus requires better conduct than what may be required for a less-developed country."[1142]

565. This is not because the fair and equitable treatment standard is a contingent standard, Claimant explains, that varies based on a host State's treatment of foreigners or its own nationals, but because the exact meaning of the standard is to be determined "by reference to specific circumstances of application."[1143] The specific circumstances of application, Claimant continues, "necessarily involve[] a consideration of the host state's level of development."[1144] Claimant quotes OECD Working Papers to explain this concept:

> It is an 'absolute', 'non-contingent' standard of treatment, i.e., a standard that states the treatment to be accorded in terms whose exact meaning has to be determined, *by reference to specific circumstances of application*, as opposed to the 'relative' standards embodied in 'national treatment' and 'most favoured nation' principles which define the required treatment by reference to the treatment accorded to other investment.[1145]

b. Respondent's Contentions

566. Respondent argues that the minimum standard of treatment is neither dynamic nor flexible based on the particular development of a country. Citing also to the OECD Working Papers, Respondent asserts that "the international minimum standard of treatment under customary international law 'is an "absolute," "noncontingent" standard

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[1139] *Id*.
[1140] *Id.* ¶ 519.
[1141] *Id.*, citing *Generation Ukraine*, Award, ¶ 20.37 (Sept. 16, 2003).
[1142] *Id.*
[1143] Claimant's Reply Memorial, ¶¶ 219-20, quoting *OECD Working Papers*, at 2.
[1144] *Id.* ¶ 220.
[1145] *Id.* ¶ 218, quoting *OECD Working Papers*, at 2 (emphasis added) [Ex. 174].

of treatment, … as opposed to the "relative" standards embodied in "national treatment"'….'"[1146] Claimant's standard, according to Respondent, would tie the minimum standard of treatment to the domestic legal system of the respondent in each case.[1147] Respondent asserts that this is incorrect as the standard, by definition, sets a minimum:

> 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.[1148]

567. Respondent argues that, as Claimant "itself recognizes, a rule only crystallizes into customary international law over time through a general and consistent practice of States that is adhered to from a sense of legal obligation."[1149] Respondent therefore asserts that the establishment of such a rule requires two elements: "a concordant practice of a number of States acquiesced in by others; and a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)."[1150]

iii. *The Asserted Obligation to Protect Legitimate Expectations through Establishment of a Transparent and Predictable Legal and Business Framework*

a. Claimant's Contentions

568. Claimant asserts that the "NAFTA Treaty itself in its preamble, resolved, 'that it was to ensure a predictable commercial framework for business planning and investment.'"[1151] Inherent in business planning and investment based upon prediction of the commercial framework is the concept of an investor's "legitimate expectations." Claimant argues that, "[t]he principle of 'legitimate expectation,' though not explicitly mentioned in Article 1105 or in other similar investment treaties, is considered to be part

[1146] Respondent's Counter-Memorial, at 220, footnote 964, quoting *OECD Working Papers*, at 2 and 8, footnote 32.

[1147] Respondent's Rejoinder, at 143.

[1148] *Id.* at 144, quoting *OECD Working Papers*, at 8, footnote 32 (emphasis added) (additional citations omitted).

[1149] Respondent's Counter-Memorial, at 219, citing Claimant's Memorial, ¶ 518 and RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

[1150] *Id.*, quoting CLIVE PARRY, JOHN P. GRANT, ANTHONY PARRY & ARTHUR D. WATTS, ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 82 (1986).

[1151] Counsel for Claimant, Tr. 44:2-5, 44:12-15.

of the fair and equitable treatment standard as an expression and part of the 'good faith' principle recognized in international law …."[1152] Claimant draws on the *Tecmed* award for support of this contention. In that award, the tribunal held that the fair and equitable treatment standard under the Spain-Mexico BIT in question required the "Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."[1153]

569. Similarly, Claimant cites to the *CMS* tribunal which, in analyzing the underlying United States-Argentina bilateral investment treaty, held that "[t]here can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment."[1154] Claimant quotes the *CMS* tribunal as explaining:

> In addition to the specific terms of the Treaty, the significant number of treaties, both bilateral and multilateral, that have dealt with this standard also unequivocally shows that fair and equitable treatment is inseparable from stability and predictability. Many arbitral decisions and scholarly writing point in the same direction.[1155]

570. Claimant also cites to *International Thunderbird*, in which, Claimant argues, a NAFTA tribunal accepts the notion that the protection of legitimate expectations is part of the fair and equitable treatment obligations under customary international law.[1156] The award states:

> Having considered recent investment case law and the good faith principle of international customary law, the concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA party to honour those expectations could cause the investor (or investment) to suffer damages.[1157]

Claimant additionally references numerous other arbitral decisions based on various BITs that, Claimant claims, "have found that stability of the legal and business framework is an

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[1152] Claimant's Memorial, ¶ 532, quoting *Tecmed*, Award, ¶ 153 (May 29, 2003).
[1153] *Id.* ¶ 533, quoting *Tecmed*, Award, ¶ 154 (May 29, 2003).
[1154] *Id.* ¶ 534, quoting *CMS v. Argentina*, Award, ¶ 274 (May 12, 2005).
[1155] Claimant's Reply Memorial, ¶ 226, quoting *CMS v. Argentina*, Award, ¶ 276 (May 12, 2005).
[1156] Counsel for Claimant, Tr. 45:8-20, citing *International Thunderbird*, Award, ¶ 147 (Jan. 26, 2006).
[1157] *International Thunderbird*, Award, ¶ 147 (Jan. 26, 2006) (internal citation omitted).

essential or dominant element of fair and equitable treatment …."[1158]

571. Claimant stresses that a tribunal should not "second-guess" a State's action, but that it still must evaluate whether the State complied with its international obligations. Claimant quotes *Saluka v. Czech Republic*: "The Czech Republic, once it had decided to bind itself by the Treaty to accord 'fair and equitable treatment' to investors of the other Contracting Party, was bound to implement its policies, including its privatization strategies, in a way that did not lead to unjustified differential treatment unlawful under the Treaty."[1159] A determination of a breach of the fair and equitable treatment standard therefore, according to Claimant, requires weighing the legitimate and reasonable expectations of the investor against the legitimate regulatory interests of the State.[1160]

572. Claimant argues that "numerous tribunals—interpreting BITs and other instruments around the world—have concluded that measures which *lack transparency*, fail to provide predictability or are otherwise arbitrary violate the customary international law obligation to provide fair and equitable treatment."[1161] It relies on *Waste Management*, among other awards,[1162] to support this contention.[1163] *Waste Management* held that the minimum standard of fair and equitable treatment can be "infringed by conduct attributable to the State and harmful to the claimant" if it "involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a *complete lack of transparency and candour* in an administrative process."[1164]

573. Claimant also cites to the *Tecmed* award for the proposition that a foreign investor expects its host State to act consistently, free from ambiguity and "totally

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[1158] Counsel for Claimant, Tr. 47:16-22, citing *Saluka v. Czech Republic*; *Azurix v. Argentina*; *Occidental v. Ecuador*; *PSEG v. Turkey*; *CMS v. Argentina*; and *Enron v. Argentina*.

[1159] Counsel for Claimant, Tr. 1728:13-19, quoting *Saluka v. Czech Republic*, Partial Award, ¶ 337 (Mar. 17, 2006).

[1160] Counsel for Claimant, Tr. 1729:1-6.

[1161] Claimant's Reply Memorial, ¶ 222 (emphasis added).

[1162] *See* Claimant's Memorial, ¶ 534, citing *CMS v. Argentina*, Award, ¶ 274 (May 12, 2005); Claimant's Memorial, ¶ 535, citing *Metalclad*, Award, ¶ 76 (Sept. 2, 2000); Claimant's Memorial, ¶ 537, citing Mazzeffini v. Kingdom of Spain ("*Mazzeffini*"), ICSID Case No. ARB/97/7, Award, ¶ 83 (Jan. 25, 2000).

[1163] Claimant's Memorial, ¶ 538.

[1164] *Id.*, quoting *Waste Management*, Award, ¶ 98 (Apr. 30, 2004) (emphasis added).

transparently" in its relations with the investor.[1165] This enables the investor to "know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices to be able to plan its investment and comply with such regulations."[1166] Claimant quotes *ADC v. Hungary* which provides: "It is one thing to say that an investor shall conduct its business in compliance with the host State's domestic laws and regulations. It is quite another to imply that the investor must also be ready to accept whatever the host State decides to do to it."[1167]

574. Finally, Claimant finds additional support for its contention that fair and equitable treatment includes a duty of transparency in the 1999 UNCTAD Report on fair and equitable treatment:

> The concept of transparency overlaps with fair and equitable treatment in at least two significant ways. First, transparency may be required, as a matter of course, by the concept of fair and equitable treatment. If laws, administrative decisions and other binding decisions are to be imposed upon a foreign investor by a host State, then fairness requires that the investor is informed about such decisions before they are imposed. This interpretation suggests that where an investment treaty does not expressly provide for transparency, but does for fair and equitable treatment, then transparency is implicitly included in the treaty. Secondly, where a foreign investor wishes to establish whether or not a particular State action is fair and equitable, as a practical matter, the investor will need to ascertain the pertinent rules concerning the State action; the degree of transparency in the regulatory environment will therefore affect the ability of the investor to assess whether or not fair and equitable treatment has been made available in any given case.[1168]

b. Respondent's Contentions

575. Respondent asserts that Claimant has failed to demonstrate the existence of any customary international law rule requiring "States to regulate in such a manner—or refrain from regulating—so as to avoid upsetting foreign investors' settled expectations

[1165] Counsel for Claimant, Tr. 1724:8-16, citing *Tecmed*, Award, ¶ 154 (May 29, 2003).

[1166] *Id.* Claimant argues that this decision is instructive, despite the fact that it is based on an autonomous fair and equitable treatment standard in the Spain-Mexico BIT, because the tribunal expressly interpreted the provision by giving effect to "the good faith principle and international law." Counsel for Claimant, Tr. 1724:5-8; *Tecmed*, Award, ¶ 155 (May 29, 2003).

[1167] Claimant's Reply Memorial, ¶ 231, quoting *ADC v. Hungary*, Award, ¶ 424 (Oct. 2, 2006).

[1168] *Id.* ¶ 229, quoting UNCTAD, FAIR AND EQUITABLE TREATMENT 51 (UNCTAD Series on International Investment Agreements, 1999) (internal citations omitted).

with respect to their investments."[1169] For support of this contention, Respondent points to the cases relied upon by Claimant for the proposition that the "duty to accord fair and equitable treatment" includes protection "against disappointment of an investor's expectations." None of these cases, Respondent contends, explains how such a principle became a part of the minimum standard of treatment under customary international law.[1170] *Generation Ukraine* is not relevant to Claimant's argument, Respondent contends, because the claimant in that case alleged only a breach of the prohibition against expropriation, not a breach of the minimum standard of treatment.[1171] Claimant's reliance on *Tecmed* was similarly misplaced, according to Respondent, as that tribunal interpreted the Spain-Mexico BIT and, in doing so, expressly interpreted the fair and equitable treatment standard in that BIT as an "autonomous" standard.[1172] Similarly, Respondent contends that the *Saluka* tribunal also was applying an autonomous standard.[1173] Finally, the *CMS* tribunal, according to Respondent, "summarily equated the international law minimum standard of treatment with 'the required stability and

[1169] Respondent's Counter-Memorial, at 230. As noted above, Claimant divided the asserted duties inherent in the fair and equitable treatment of Article 1105(1) into two obligations: (1) the duty to protect investor expectations through the maintenance of a predictable and transparent framework, and (2) the duty to protect investors from arbitrary acts. Claimant's Reply Memorial, ¶¶ 224-41. Respondent, in countering these asserted duties, divided them instead into three obligations: (1) to act transparently, (2) to act in a manner that does not frustrate investors' legitimate expectations, and (3) to refrain from arbitrary conduct. Counsel for Respondent, Tr. 1390:21-1391:8. As it is the burden of the Claimant to prove the content of the customary international law minimum standard of treatment that it asserts has been breached in this situation, it is its right to determine the methodology by which to argue its positions. The Tribunal therefore adopts Claimant's methodology of analysis and combines the first two obligations. In addition, as explained below in its holding, the Tribunal takes this approach because it finds that Claimant has not in fact alleged a separate stand-alone claim for breach of transparency in the usual sense of insufficient notice and comment, and instead argues for a "transparent and predictable framework" which the Tribunal interprets to mean a knowable and consistent regime in which significant changes should be forewarned and not surprising. To the extent that Respondent argued its positions based upon three inherent State obligations, the Tribunal has combined its first two asserted duties into one and consolidated Respondent's arguments with respect to these duties.

[1170] Respondent's Rejoinder, at 179.

[1171] Respondent's Counter-Memorial, at 230-31.

[1172] *Id.* at 231, quoting *Tecmed*, Award, ¶¶ 155-56 (May 29, 2003). For further explanation of the "autonomous" standard, as opposed to that of customary international law or international law, *see supra* ¶¶ 541-43.

[1173] Counsel for Respondent, Tr. 1980:12-19, citing *Saluka v. Czech Republic*, Award, ¶ 305 (Mar. 17, 2006). Respondent also notes that the *Saluka* tribunal nevertheless recognized that no investor may reasonably "expect that the circumstances prevailing at the time the investment is made remain totally unchanged." *Id.*

predictability of the business environment, founded on solemn legal and contractual commitments,' without purporting to rely on *any* evidence" of *opinio juris.*[1174]

576. Respondent argues that frustration of an investor's expectations cannot form the basis of a stand-alone claim under NAFTA Chapter 11.[1175] Respondent asserts that if States were prohibited from regulating in any manner that frustrated expectations—or had to compensate for any diminution in profit—they would lose the power to regulate.[1176] In contrast to such a stand-alone provision, Respondent points to tribunals interpreting BITs which have found breaches of the obligation to provide fair and equitable treatment when express assurances or contractual commitments made to induce foreign investment had been breached.[1177] For instance, Respondent argues that both the *CMS* and *Enron* tribunals found a breach of the fair and equitable treatment obligations when Argentina abandoned the energy privatization incentives it had agreed to in the Gas Law of 1992, in the form of inflation-adjusted tariffs that could be calculated in U.S. dollars and converted to pesos.[1178] Similarly, in *Azurix* and *Siemens*, the tribunals found that Argentina breached its fair and equitable treatment obligations when it forced renegotiation of rate adjustment provisions contained in their respective Concession Contracts.[1179] Finally, the *Tecmed* tribunal found such a breach based on a conclusion that Mexico had breached a quasi-contract between the investor and various governmental entities.[1180]

577. Respondent cites to the fact that a breach of contract does not rise to the level of a Chapter 11 claim without something beyond mere breach as the best example of why the duty to protect legitimate investor expectations is not a component of the customary

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[1174] Respondent's Counter-Memorial, at 232, citing *CMS v. Argentina*, Award, ¶ 284 (May 12, 2005).

[1175] Counsel for Respondent, Tr. 1396:12-15; Respondent's Counter-Memorial, at 233-34; Respondent's Rejoinder, at 178-79.

[1176] Respondent's Counter-Memorial, at 233, citing *Feldman*, Award, ¶ 103 (Dec. 16, 2002) (noting, in the context of an indirect expropriation claim, that "[r]easonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say the customary international law recognized this.").

[1177] Counsel for Respondent, Tr. 1981:18-1982:11.

[1178] Counsel for Respondent, Tr. 1982:12-16; *see also CMS*, Form 8-K at Ex. 99.1 (May 17, 2005).

[1179] Counsel for Respondent, Tr. 1983:1-6.

[1180] Counsel for Respondent, Tr. 1983:7-17.

international law minimum standard of treatment.[1181] Respondent asserts that a claimant must demonstrate something more than a contract breach, such as denial of justice or repudiation in a discriminatory way, or in a manner motivated by non-commercial considerations.[1182] According to Respondent, if "the expectations [that] manifest in a contract cannot provide a basis for a breach of the minimum standard of treatment, no lesser basis for such expectation can do so."[1183]

578. Respondent asserts that Claimant also has failed to show "any relevant State practice to support its contention that States are obligated under international law to provide a transparent and predictable framework for foreign investment."[1184] Respondent contends that "neither [Claimant] nor the sources it cites demonstrate that any such rule is part of customary international law … or how—if at all—such a binding customary international practice has evolved."[1185] Respondent explains that, although there may be transparency aspects within the customary international law minimum standard of treatment, there is not a stand-alone rule:

> [O]bviously in established sets of rules recognized as being part of the minimum standard of treatment, there are some transparency aspects. For example, in a judicial denial of justice, the accessibility of the foreign national to the courts and the availability of records, for example, is obviously a part of the protection. You might call that transparency, but no stand-alone rule of transparency [exists] for all State conduct.[1186]

Respondent argues that Claimant is instead suggesting a standard that amounts to an imposition of the same kind of procedural rigidity that has been administratively imposed by the Administrative Procedure Act in the United States,[1187] which, *inter alia*, provides detailed instructions on how the rulemaking of U.S. federal agencies is to be conducted and reviewed.

579. In addition, Respondent argues that Claimant has failed to identify "what exactly it believes States are required to do in order to conform to the so-called rule of customary

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[1181] Counsel for Respondent, Tr. 1396:18-1398:1; Respondent's Rejoinder, at 179-80.

[1182] Respondent's Rejoinder, at 179-80, citing *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 4, cmt. ¶ 6 (additional citations omitted).

[1183] Counsel for Respondent, Tr. 1397:15-18; *see also* Respondent's Rejoinder, at 180.

[1184] Respondent's Counter-Memorial, at 226-27.

[1185] Respondent's Rejoinder, at 154.

[1186] Counsel for Respondent, Tr. 1444:10-18.

[1187] Respondent's Rejoinder, at 154; *see also* Counsel for Respondent, Tr. 1393:14-16.

international law."[1188] For instance, while Claimant cites to *Tecmed* and *Azurix*, both of these tribunals, Respondent asserts, spoke of transparency in terms of a State making public its laws and regulations that govern foreign investment.[1189] Claimant does not, however, allege that Respondent failed to properly publish its laws and regulations.[1190] Respondent contends that if, however, Claimant is alleging that the international minimum standard of treatment requires States to provide "ample opportunity" in advance of all laws and regulations for foreign investor comment, this is legally incorrect.[1191]

580. According to Respondent, all three State Parties to the NAFTA have agreed that there is no general transparency requirement in Article 1105 and have expressly rejected the notion that transparency forms part of customary international law.[1192] In addition, the United States and Canada consider that, "unless explicitly provided for elsewhere in the NAFTA, Chapter Eighteen comprise[s] the extent of the Parties' agreement on their transparency obligations. That is, *expressio unius est exclusio alterius.*"[1193] Chapter 18, Respondent points out, "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."[1194] Respondent adds that the NAFTA Parties have not consented to arbitrate any alleged breaches of obligations arising under Chapter 18 through Chapter 11's investor State arbitration mechanism.[1195]

581. Respondent then challenges Claimant's cited arbitral awards for its contention that the customary international law minimum standard of treatment includes a requirement of transparency. Respondent points out that the portion of the *Metalclad*

[1188] Counsel for Respondent, Tr. 1392:19-22.
[1189] Counsel for Respondent, Tr. 1392:22-1393:5.
[1190] Counsel for Respondent, Tr. 1393:5-9.
[1191] Counsel for Respondent, Tr. 1393:10-19.
[1192] Respondent's Rejoinder, at 158, citing *Methanex*, Rejoinder Memorial of the United States on Jurisdiction, Admissibility and the Proposed Amendment, p. 33 (June 27, 2001); *Metalclad*, Amended Petition of Mexico to the Supreme Court of British Columbia (Sup. Ct. B.C.), ¶ 72 (Oct. 27, 2000); *Metalclad*¸ Outline of Argument of Intervenor Attorney General of Canada (Sup. Ct. B.C.), ¶¶ 31-33 (Feb. 16, 2001).
[1193] Respondent's Rejoinder, at 159, citing U.S. Statement of Administrative Action (hereinafter "*U.S. SAA*") at 193, and Canadian Statement of Implementation (hereinafter "*Canadian SOI*") at 196 (internal citation omitted).
[1194] *Id.*, quoting NAFTA, IMPLEMENTATION ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-159, 103d Cong., at 193 (1993).
[1195] *Id.* at 131, citing NAFTA, arts. 1116 & 1117.

award that addresses transparency was overturned by the Supreme Court of British Columbia, and this ruling was then quoted approvingly in the *Feldman v. United Mexican States* NAFTA Chapter 11 award.[1196] The *Feldman* award continued to state that "a denial of transparency alone thus does not constitute a violation of Chapter Eleven."[1197] Respondent also dismisses Claimant's reliance on *ADC v. Hungary* as it considered an autonomous BIT standard.[1198] Finally, the 2004 OECD Working Papers on fair and equitable treatment, Respondent asserts, specifically note that "[i]n 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."[1199]

582. Finally, Respondent argues that to the extent any of the arbitral decisions cited by Claimant applied an obligation of transparency, it was merely a general obligation to publish relevant laws and regulations.[1200] Respondent alleges that *Tecmed*, for instance, spoke of transparency in terms of an obligation to make known "beforehand any and all rules and regulations that will govern …."[1201]

iv. *The Asserted Obligation to Provide Protection from Arbitrary Actions*

a. Claimant's Contentions

583. Claimant contends that the duty to accord fair and equitable treatment includes protection from arbitrariness and finds support for this assertion in two NAFTA awards. First, Claimant cites to *S.D. Myers*, in which the tribunal held that "a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the

[1196] Counsel for Respondent, Tr. 1394:18-1395:22.
[1197] Counsel for Respondent, Tr. 1395:12-1396:1, quoting *Feldman*, Award, ¶ 133 (Dec. 16, 2002).
[1198] Respondent's Rejoinder, at 168, citing *ADC v. Hungary*, Award, ¶ 445 (Oct. 2, 2006).
[1199] *Id.* at 156; *see also* Counsel for Respondent, Tr. 1394:10-17, quoting *OECD Working Papers*, at 37.
[1200] *Id.* at 169.
[1201] *Id.* at 170, quoting *Tecmed*, Award, ¶ 154 (Award) (May 29, 2003).

international perspective."[1202] Similarly, *International Thunderbird* held that "manifest arbitrariness falling below international standards" is prohibited under Article 1105.[1203]

584. Citing BIT jurisprudence, Claimant points to the *Tecmed* tribunal, which found that the Spain-Mexico BIT at the heart of that dispute protected the investor from arbitrary actions and required the host State "to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor."[1204] Claimant also cites to *LG&E v. Argentina*, in which the tribunal held that a State must engage in a rational decision-making process to avoid arbitrariness.[1205]

585. Arbitrariness, Claimant asserts, lacks "procedural fairness."[1206] Claimant argues that "government actions are arbitrary, in violation of the fair and equitable treatment standard, when the conduct is 'grossly unfair,' 'unjust,' 'clearly improper and discreditable ….'"[1207] "Thus, when there is an insufficient nexus between the government measure and the apparent objective, the government has acted arbitrarily, since its actions are not founded on fair and adequate reasons and lack legal justification."[1208]

586. Claimant cites to the definition of arbitrariness provided by the *Restatement (Third) of Foreign Relations Law*: an arbitrary act is one that is "unfair and unreasonable, and inflicts serious injury to established rights of foreign nationals, though falling short of an act that would constitute an expropriation."[1209] Claimant expands on this definition with that provided in *Lauder v. Czech Republic*: an arbitrary act is "not founded on reason or fact nor on the law."[1210] In addition, the *Tecmed* award states:

> The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the

[1202] Claimant's Reply Memorial, ¶ 239, quoting *S.D. Myers*, Partial Award, ¶ 263 (Nov. 13, 2000).
[1203] *Id.*, quoting *International Thunderbird*, Award, ¶ 194 (Jan. 26, 2006).
[1204] Counsel for Claimant, Tr. 45:21-46:14, quoting *Tecmed*, Award, ¶ 154 (May 29, 2003).
[1205] Counsel for Claimant, Tr. 47:9-15, citing *LG&E v. Argentina*.
[1206] Counsel for Claimant, Tr. 1717:22-1718:5.
[1207] Claimant's Reply Memorial, ¶ 235.
[1208] Claimant's Memorial, ¶ 530.
[1209] *Id.* ¶ 523, quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 712, footnote 11.
[1210] *Id.*, citing *Lauder v. Czech Republic*, Final Award, ¶ 232 (Sept. 3, 2002).

> investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.[1211]

The *ELSI* tribunal, in turn, provides that:

> Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the *Asylum* case, when it spoke of 'arbitrary action' being 'substituted for the rule of law' … It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.[1212]

Claimant also points to the outer limits of this standard as defined in *Pope & Talbot*: "there is no threshold limitation that the conduct complained of be egregious, outrageous, or shocking, or otherwise extraordinary."[1213] Nor, according to Claimant, does a party need to show that the host State acted in bad faith.[1214]

587. To prove that Respondent acted arbitrarily, Claimant argues that it need not show that the particular measure at issue is a violation of customary international law, but that the legal framework from which the measure sprang violated the "established and accepted principles embodied in the fair and equitable treatment standard …."[1215] Claimant cites to *Occidental v. Ecuador*, in which the tribunal held that the claimant did not need to prove a violation of customary international law for the failure to refund value-added taxes, "but rather whether the legal and business framework [met] the requirements of stability and predictability under international law."[1216] Therefore, Claimant argues, there is no duty for it to demonstrate customary international law rules regarding mine reclamation; it need only prove that fair and equitable treatment obligations have been breached in terms of a failure to maintain a legal and business environment free from arbitrariness.[1217]

[1211] Counsel for Claimant, Tr. 1719:6-17, quoting *Tecmed*, Award, ¶ 154 (May 29, 2003).

[1212] Claimant's Memorial, ¶ 525, quoting *ELSI*, Judgment, ¶ 128 (July 28, 1989) (internal citation omitted).

[1213] Counsel for Claimant, Tr. 1719:1-5; *see also* Claimant's Memorial, ¶ 526, quoting *Pope & Talbot*, Award on the Merits of Phase 2, ¶ 118 (Apr. 10, 2001).

[1214] Claimant's Memorial, ¶ 522, quoting *Loewen*, Award, ¶ 132 (June 26, 2003); *Mondev*, Award, ¶ 116 (Oct. 11, 2002); *CMS v. Argentina*, Award, ¶ 280 (May 12, 2005).

[1215] Counsel for Claimant, Tr. 1714:13-1715:16.

[1216] Counsel for Claimant, Tr. 1714:13-1715:16, quoting *Occidental v. Ecuador*, Final Award, ¶ 191 (July 1, 2004).

[1217] Counsel for Claimant, Tr. 1715:10-16.

588. Finally, Claimant agrees that the task of the Tribunal is not to second-guess the activities of the United States government, but rather to take the national conduct as a fact and measure it against the international law standards of Chapter 11 to determine whether the conduct was in accordance with those standards.[1218] Claimant argues, however, that "[w]hile tribunals cannot substitute their policy judgments for the State[']s, they can and must probe the host State's rationale to see whether its measures matched its objectives."[1219]

b. Respondent's Contentions

589. Respondent asserts that Claimant has "failed to present any evidence of relevant State practice to support its contention that Article 1105(1) imposes a general obligation on States to refrain from 'arbitrary' conduct."[1220] According to Respondent, no Chapter 11 tribunal has found that decision-making that appears "arbitrary" to some parties is sufficient to constitute an Article 1105 violation; instead these tribunals have consistently accorded a high level of deference to administrative decision-making.[1221]

590. Respondent additionally argues that Claimant, in making this argument, is requesting the Tribunal to find a violation of Article 1105 "based on what it perceives to be unwise legislation and mistakes made in the … administrative processing of its plan of operations."[1222] According to Respondent, Claimant seeks to impose upon Respondent the burden of justifying the appropriateness of the regulatory and legislative measures and proving that they are without "relevant flaws"; that they conform with "international and U.S. best practice"; and that they are the "least restrictive measures available" and "necessary, suitable, and proportionate."[1223]

591. Imperfect legislation or regulation, however, does not give rise to State responsibility under customary international law, Respondent contends.[1224] Under international law, every State is free to "change its regulatory policy," and every State

[1218] Counsel for Claimant, Tr. 70:21-71:21, quoting *Saluka v. Czech Republic*, Partial Award, ¶ 308 (Mar. 17, 2006) and *International Thunderbird*, Award, ¶ 127 (Jan. 26, 2006).
[1219] Counsel for Claimant, Tr. 1722:4-7.
[1220] Respondent's Counter-Memorial, at 227.
[1221] *Id.*
[1222] Counsel for Respondent, Tr. 1399:3-7.
[1223] Counsel for Respondent, Tr. 1399:8-17.
[1224] Respondent's Rejoinder, at 188.

"has a wide discretion with respect to how it carries out such policies by regulation and administrative conduct."[1225] The issue is not the legislature's motivation, but only whether the measure is rationally related to a legitimate governmental purpose.[1226]

592. Respondent asserts that Claimant would have the Tribunal "engage in *de novo* review of factual determinations made by agencies and legal conclusions drawn by agencies on issues of first impression."[1227] Respondent quotes *S.D. Myers* for the proposition that tribunals are allowed limited, if any, appellate review of domestic decisions: "determination [that Article 1105 has been breached] must be made in … light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."[1228] The tribunal explained the rationale for this holding:

> When interpreting and applying the 'minimum standard', a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. 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.[1229]

593. Respondent asserts that this is reiterated by the tribunal in *International Thunderbird*:

> [I]t is not up to the Tribunal to determine how [the state regulatory authority] should have interpreted or responded to the [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).[1230]

This deference is further reinforced by the tribunals in *ADF* and *Mondev*, both of which stress that international tribunals do not sit as courts of appellate jurisdiction with

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[1225] *Id.*, quoting *International Thunderbird*, Award, ¶ 127 (Jan. 26, 2006).

[1226] *Id.* at 189, citing Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 583, 487 (1955).

[1227] Counsel for Respondent, Tr. 104:15-18.

[1228] Respondent's Counter-Memorial, at 230, quoting *S.D. Myers*, Partial Award, ¶ 263 (Nov. 13, 2000).

[1229] Counsel for Respondent, Tr. 1400:9-1401:3, quoting *S.D. Myers*, Partial Award, ¶ 261 (Nov. 13, 2000).

[1230] Respondent's Rejoinder, at 207, quoting *International Thunderbird*, Award, ¶ 160 (Jan. 26, 2006).

authority to review the legal validity of domestic measures.[1231] Finally, it is also confirmed by the *Saluka* award, Respondent contends, which holds that "[i]n 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."[1232]

594. Respondent argues that the deference usually accorded to administrative agency and legislative decisions is not limited to separation of power, but also "arises out of a recognition that those courts are not best placed to make those determinations; that they lack the expertise that the legislature and/or the administrative agency has on these particular questions" and they do not possess the full administrative record.[1233] Respondent cites to Claimant's own expert to support this contention: "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."[1234]

595. Respondent observes that such deference is acknowledged by both U.S. and Canadian courts. U.S. courts, for instance, have adopted the "arbitrary and capricious" standard in which they will uphold a challenged agency action unless the petitioner can show the action to be "arbitrary and capricious;"[1235] the scope of review is narrow and a court is not to substitute its judgment for that of the agency.[1236] Canadian courts, Respondent argues, 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 …."[1237]

[1231] Counsel for Respondent, Tr. 2106:5-15, citing *ADF Group*, Second Article 1128 Submission of the United Mexican States, ¶ 190 (Jan. 9, 2003) (citing *Mondev*, Award, ¶ 136 (Oct. 11, 2002)).

[1232] Respondent's Rejoinder, at 207, quoting *Saluka v. Czech Republic*, Partial Award, ¶ 273 (Mar. 17, 2006).

[1233] Counsel for Respondent, Tr. 1457:11-20.

[1234] Counsel for Respondent, Tr. 1457:21-1458:11, quoting Expert Report of Professor Wälde, at IV-27, footnote 474; *see also* Respondent's Rejoinder, at 210.

[1235] Respondent's Rejoinder, at 208, quoting 5 U.S.C. § 706(2)(A) (1966).

[1236] *Id.* at 208-9, quoting Motor Vehicles Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (additional citations omitted).

[1237] *Id.* at 209, quoting Baker v. Minister of Citizenship and Immigration, [1999] S.C.R. 817, 853 (Can.).

596. If there is an obligation for a State to not act arbitrarily, as the *ELSI* court determined based on the BIT under consideration in that case, Respondent argues that a breach of such an international duty must go far beyond the measure's mere domestic illegality:

> 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. … 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 qualification given to the impugned act by a municipal authority may be a valuable indication.[1238]

597. Respondent argues that NAFTA tribunals have held that there is a very high threshold beyond which an act must rise to be so arbitrary as to violate Article 1105. The *International Thunderbird* tribunal, for instance, held that mere "arbitrary" conduct by an administrative agency is insufficient to amount to an Article 1105 breach; to constitute a breach of international obligations, the regulatory action had to amount to a "gross denial of justice or manifest arbitrariness falling below international standards."[1239] The tribunal in *S.D. Myers* held similarly: a breach of Article 1105 occurs only when "an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective."[1240] The *S.D. Myers* tribunal continued on to note that this "determination must be made in light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."[1241] The *S.D. Myers* tribunal, Respondent notes, found no Article 1105 breach under an arbitrariness standard despite its conclusion that "there was no legitimate environmental reason for introducing the ban" at issue.[1242]

[1238] *Id.* at 206, quoting *ELSI*, Judgment, p. 74 (July 28, 1989).

[1239] Respondent's Counter-Memorial, at 227-28, quoting *International Thunderbird*, Award, ¶ 194 (Jan. 26, 2006).

[1240] *Id.* at 230, quoting *S.D. Myers*, Partial Award, ¶ 263 (Nov. 13, 2000).

[1241] *Id.*, quoting *S.D. Myers*, Partial Award, ¶ 263 (Nov. 13, 2000).

[1242] *Id.*, quoting *S.D. Myers*, Partial Award, ¶ 195 (Nov. 13, 2000).

3. DECISION OF THE TRIBUNAL WITH RESPECT TO THE ARTICLE 1105(1) LEGAL STANDARD

598. As noted above, Article 1105(1) of the NAFTA provides that "[e]ach party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

599. There is no disagreement among the State Parties to the NAFTA, nor the Parties to this arbitration, that the requirement of fair and equitable treatment in Article 1105 is to be understood by reference to the customary international law minimum standard of treatment of aliens.[1243] Indeed, the Free Trade Commission ("FTC") clearly states, in its binding Notes of Interpretation on July 31, 2001, that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party."[1244]

600. The question thus becomes: what does this customary international law minimum standard of treatment require of a State Party vis-à-vis investors of another State Party? Is it the same as that established in 1926 in *Neer v. Mexico*?[1245] Or has Claimant proven that the standard has "evolved"? If it has evolved, what evidence of custom has Claimant provided to the Tribunal to determine its current scope?

601. As a threshold issue, the Tribunal notes that it is Claimant's burden to sufficiently answer each of these questions. The State Parties to the NAFTA (at least Canada and Mexico) agree that "the test in *Neer* does continue to apply," though Mexico "also agrees that the standard is relative and that conduct which may not have violated international law [in] the 1920's might very well be seen to offend internationally accepted principles today."[1246] If, as Claimant argues, the customary international law

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[1243] Counsel for Claimant, Tr. 36:15-18; Counsel for Respondent, Tr. 1390:11-14; Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, § B(2) (July 31, 2001) ("FTC Notes").

[1244] *FTC Notes*, § B(1). For further discussion of the binding nature of the FTC Notes, *see* NAFTA Article 1131(2): "An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."

[1245] Neer v. Mexico, 4 R. Int'l Arb. Awards, 60 (Oct. 15, 1926).

[1246] *ADF Group*, Second Article 1128 Submission of the United Mexican States, p. 15 (July 22, 2002), quoting *Pope & Talbot*, Post-Hearing Article 1128 Submission of the United Mexican States (Damages Phase), ¶ 8 (Dec. 3, 2001), quoting *Pope & Talbot*, Respondent Canada's Counter-Memorial (Phase 2), ¶ 309 (Aug. 18, 2001) (Mexico's Post-Hearing Article 1128 Submission in *Pope & Talbot* quotes with approval Canada's submission as respondent in *Pope & Talbot*, which states in paragraph 8:

minimum standard of treatment has indeed moved to require something less than the "egregious," "outrageous," or "shocking" standard as elucidated in *Neer*, then the burden of establishing what the standard now requires is upon Claimant.

602. The Tribunal acknowledges that it is difficult to establish a change in customary international law. As Respondent explains, establishment of a rule of customary international law requires: (1) "a concordant practice of a number of States acquiesced in by others," and (2) "a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)."[1247]

603. The evidence of such "concordant practice" undertaken out of a sense of legal obligation is exhibited in very few authoritative sources: treaty ratification language, statements of governments, treaty practice (e.g., Model BITs), and sometimes pleadings.[1248] Although one can readily identify the practice of States, it is usually very difficult to determine the intent behind those actions. Looking to a claimant to ascertain custom requires it to ascertain such intent, a complicated and particularly difficult task. In the context of arbitration, however, it is necessarily Claimant's place to establish a change in custom.

604. The Tribunal notes that, although an examination of custom is indeed necessary to determine the scope and bounds of current customary international law, this requirement—repeatedly argued by various State Parties—because of the difficulty in proving a change in custom, effectively freezes the protections provided for in this provision at the 1926 conception of egregiousness.

605. Claimant did provide numerous arbitral decisions in support of its conclusion that fair and equitable treatment encompasses a universe of "fundamental" principles common throughout the world that include "the duty to act in good faith, due process, transparency and candor, and fairness and protection from arbitrariness."[1249] Arbitral awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove

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"The conduct of government toward the investment must amount to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, an outrage, bad faith or the willful neglect of duty.").

[1247] Respondent's Counter-Memorial, at 219 (citations omitted).

[1248] In the NAFTA context, there is the addition of Article 1128 submissions through which the State Parties can express directly their views on and interpretations of the provisions of the NAFTA.

[1249] Counsel for Claimant, Tr. 40:1-8.

customary international law.[1250] They can, however, serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation.

606. This brings the Tribunal to its first task: ascertaining which of the sources argued by Claimant are properly available to instruct the Tribunal on the bounds of "fair and equitable treatment." As briefly mentioned above, the Tribunal notes that it finds two categories of arbitral awards that examine a fair and equitable treatment standard: those that look to define customary international law and those that examine the autonomous language and nuances of the underlying treaty language. Fundamental to this divide is the treaty underlying the dispute: those treaties and free trade agreements, like the NAFTA, that are to be understood by reference to the customary international law minimum standard of treatment necessarily lead their tribunals to analyze custom; while those treaties with fair and equitable treatment clauses that expand upon, or move beyond, customary international law, lead their reviewing tribunals into an analysis of the treaty language and its meaning, as guided by Article 31(1) of the Vienna Convention.

607. Ascertaining custom is necessarily a factual inquiry, looking to the actions of States and the motives for and consistency of these actions. By applying an autonomous standard, on the other hand, a tribunal may focus solely on the language and nuances of the treaty language itself and, applying the rules of treaty interpretation, require no party proof of State action or *opinio juris.* This latter practice fails to assist in the ascertainment of custom.

608. As Article 1105's fair and equitable treatment standard is, as Respondent phrases it, simply "a shorthand reference to customary international law,"[1251] the Tribunal finds that arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom. The various BITs cited by Claimant may or may not illuminate customary international law; they will prove helpful to this Tribunal's analysis when they seek to provide the same base floor of

[1250] Respondent's Rejoinder, at 151, quoting 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) (additional citation omitted).

[1251] Counsel for Respondent, Tr. 1934:9-20.

conduct as the minimum standard of treatment under customary international law; but they will not be of assistance if they include different protections than those provided for in customary international law.

609. Claimant has agreed with this distinction between customary international law and autonomous treaty standards but argues that, with respect to this particular standard, BIT jurisprudence has "converged with customary international law in this area."[1252] The Tribunal finds this to be an over-statement. Certainly, it is possible that some BITs converge with the requirements established by customary international law; there are, however, numerous BITs that have been interpreted as going beyond customary international law, and thereby requiring more than that to which the NAFTA State Parties have agreed. It is thus necessary to look to the underlying fair and equitable treatment clause of each treaty, and the reviewing tribunal's analysis of that treaty, to determine whether or not they are drafted with an intent to refer to customary international law.

610. Looking, for instance, to Claimant's reliance on *Tecmed v. Mexico* for various of its arguments, the Tribunal finds that Claimant has not proven that this award, based on a BIT between Spain and Mexico,[1253] defines anything other than an autonomous standard and thus an award from which this Tribunal will not find guidance. Article 4(1) of the Spain-Mexico BIT involved in the *Tecmed* proceeding provides that each contracting party guarantees just and equitable treatment conforming with "International Law" to the investments of investors of the other contracting party in its territory.[1254] Article 4(2) proceeds to explain that this treatment will not be less favorable than that granted in similar circumstances by each contracting party to the investments in its territory by an investor of a third State.[1255] Several interpretations of the requirement espoused in Article 4(2) are indeed possible, but the *Tecmed* tribunal itself states that it "understands that the scope of the undertaking of fair and equitable treatment under Article 4(1) of the Agreement described ... is that resulting from *an autonomous interpretation* ...."[1256]

[1252] Counsel for Claimant, Tr. 1710:20-22.

[1253] *See Tecmed*, Award, ¶ 4 (May 29, 2003), citing Agreement on the Reciprocal Promotion and Protection of Investments signed by the Kingdom of Spain and the United Mexican States, (Dec. 18, 1996).

[1254] Claimant's Memorial, ¶ 533, footnote 1033, quoting *Tecmed*, Award, ¶ 154 (May 29, 2003).

[1255] Agreement on the Reciprocal Promotion and Protection of Investments signed by the Kingdom of Spain and the United Mexican States, Article 4(2) (Dec. 18, 1996).

[1256] *Tecmed*, Award, ¶ 155 (May 29, 2003) (emphasis added).

Thus, this Tribunal finds that the language or analysis of the *Tecmed* award is not relevant to the Tribunal's consideration.

611. The Tribunal therefore holds that it may look solely to arbitral awards—including BIT awards—that seek to be understood by reference to the customary international law minimum standard of treatment, as opposed to any autonomous standard. The Tribunal thus turns to its second task: determining the scope of the current customary international law minimum standard of treatment, as proven by Claimant.

612. It appears to this Tribunal that the NAFTA State Parties agree that, at a minimum, the fair and equitable treatment standard is that as articulated in *Neer*:[1257] "the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[1258] Whether this standard has evolved since 1926, however, has not been definitively agreed upon. The Tribunal considers two possible types of evolution: (1) that what the international community views as "outrageous" may change over time; and (2) that the minimum standard of treatment has moved beyond what it was in 1926.

613. The Tribunal finds apparent agreement that the fair and equitable treatment standard is subject to the first type of evolution: a change in the international view of what is shocking and outrageous. As the *Mondev* tribunal held:

> *Neer* and like arbitral awards were decided in the 1920s, when the status of the individual in international law, and the international protection of foreign investments, were far less developed than they have since come to be. In particular, both the substantive and procedural rights of the individual in international law have undergone considerable development. In light of these developments it is unconvincing to confine the meaning of 'fair and equitable treatment' and 'full protection and security' of foreign investments to what those

[1257] *ADF Group*, Second Article 1128 Submission of the United Mexican States, p. 15 (July 22, 2002), quoting *Pope & Talbot*, Post-Hearing Article 1128 Submission of the United Mexican States (Damages Phase), ¶ 8 (Dec. 3, 2001), quoting *Pope & Talbot*, Respondent Canada's Counter-Memorial (Phase 2), ¶ 309 (Aug. 18, 2001).

[1258] *Neer v. Mexico*, 4 R. Int'l Arb. Awards, ¶ 4 (Oct. 15, 1926). The *Neer* tribunal continued to explain that its inquiry was limited to "whether there [was] convincing evidence either (1) that the authorities administering the Mexican law acted in an outrageous way, in bad faith, in wilful neglect of their duties, or in a pronounced degree of improper action, or (2) that Mexican law rendered it impossible for them properly to fulfil their task." *Id.* ¶ 5.

> terms—had they been current at the time—might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.[1259]

Similarly, this Tribunal holds that the *Neer* standard, when applied with current sentiments and to modern situations, may find shocking and egregious events not considered to reach this level in the past.

614. As regards the second form of evolution—the proposition that customary international law has moved beyond the minimum standard of treatment of aliens as defined in *Neer*—the Tribunal finds that the evidence provided by Claimant does not establish such evolution. This is evident in the abundant and continued use of adjective modifiers throughout arbitral awards, evidencing a strict standard. *International Thunderbird* used the terms "*gross* denial of justice" and "*manifest* arbitrariness" to describe the acts that it viewed would breach the minimum standard of treatment.[1260] *S.D. Myers* would find a breach of Article 1105 when an investor was treated "in *such an unjust or arbitrary* manner."[1261] The *Mondev* tribunal held: "The test is not whether a particular result is surprising, but whether the *shock or surprise* occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome ...."[1262]

615. The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community. Although the circumstances of the case are of course relevant, the standard is not meant to vary from state to state or investor to investor. The protection afforded by Article 1105 must be distinguished from that provided for in Article 1102 on National Treatment. Article 1102(1) states: "Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors ...." The treatment of investors under Article 1102 is compared to the treatment the State's own investors receive and thus can

[1259] *Mondev*, Award, ¶ 116 (Oct. 11, 2002).
[1260] *International Thunderbird*, Award, ¶ 194 (Jan. 26, 2006) (emphasis added).
[1261] *S.D. Myers*, Partial Award, ¶ 263 (Nov. 13, 2000) (emphasis added).
[1262] *Mondev*, Award, ¶ 127 (Oct. 11, 2002) (emphasis added).

vary greatly depending on each State and its practices. The fair and equitable treatment promised by Article 1105 is not dynamic; it cannot vary between nations as thus the protection afforded would have no minimum.

616. It therefore appears that, although situations may be more varied and complicated today than in the 1920s, the level of scrutiny is the same. The fundamentals of the *Neer* standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105(1). The Tribunal notes that one aspect of evolution from *Neer* that is generally agreed upon is that bad faith is not required to find a violation of the fair and equitable treatment standard, but its presence is conclusive evidence of such. Thus, an act that is egregious or shocking may also evidence bad faith, but such bad faith is not necessary for the finding of a violation. The standard for finding a breach of the customary international law minimum standard of treatment therefore remains as stringent as it was under *Neer*; it is entirely possible, however that, as an international community, we may be shocked by State actions now that did not offend us previously.

617. Respondent argues below that, in reviewing State agency or departmental decisions and actions, international tribunals as well as domestic judiciaries favor deference to the agency so as not to second guess the primary decision-makers or become "science courts." The Tribunal disagrees that domestic deference in national court systems is necessarily applicable to international tribunals. In the present case, the Tribunal finds the standard of deference to already be present in the standard as stated, rather than being additive to that standard. The idea of deference is found in the modifiers "manifest" and "gross" that make this standard a stringent one; it is found in the idea that a breach requires something greater than mere arbitrariness, something that is surprising, shocking, or exhibits a manifest lack of reasoning.

618. With this thought in mind, the Tribunal turns to the duties that Claimant argues are part of the requirements of a host State per Article 1105: (1) an obligation to protect

legitimate expectations through establishment of a transparent and predictable business and legal framework, and (2) an obligation to provide protection from arbitrary measures. As the United States explained in its 1128 submission in *Pope & Talbot*, and as Mexico adopted in its 1128 submission to the *ADF* tribunal: "'fair and equitable treatment' and 'full protection and security' are provided as examples of the customary international law standards incorporated into Article 1105(1). … The international law minimum standard [of treatment] is an umbrella concept incorporating a set of rules that has crystallized over the centuries into customary international law in specific contexts."[1263] The Tribunal therefore finds it appropriate to address, in turn, each of the State obligations Claimant asserts are potential parts of the protection afforded by fair and equitable treatment.

a. Asserted Obligation to Protect Legitimate Expectations Through Establishment of a Transparent and Predictable Legal and Business Framework

619. As explained above, the minimum standard of treatment of aliens established by customary international law, and by reference to which the fair and equitable treatment standard of Article 1105(1) is to be understood, is an absolute minimum, a floor below which the international community will not condone conduct. To maintain fair and equitable treatment as an absolute floor, a breach must be based upon objective criteria that apply equally among States and between investors.

620. The Tribunal notes Respondent's argument that even those expectations that manifest in a contract are insufficient to provide a basis for a breach of the minimum standard of treatment.[1264] The Tribunal agrees that mere contract breach, without something further such as denial of justice or discrimination, normally will not suffice to establish a breach of Article 1105.[1265] Merely not living up to expectations cannot be sufficient to find a breach of Article 1105 of the NAFTA. Instead, Article 1105(1)

[1263] *ADF Group*, Second Article 1128 Submission of the United Mexican States, p. 8 (July 22, 2002), quoting *Pope & Talbot*, Fourth Article 1128 Submission of the United States, ¶¶ 3, 8 (Nov. 1, 2000).

[1264] Counsel for Respondent, Tr. 1397:15-18; Respondent's Rejoinder, at 180.

[1265] *See* Azinian v. United Mexican States ("*Azinian*"), NAFTA/ICSID Case No. ARB/(AF)/97/2, Award, ¶ 87 (Nov. 1, 1999) (holding, "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.").

requires the evaluation of whether the State made any specific assurance or commitment to the investor so as to induce its expectations.[1266]

621. The Tribunal therefore agrees with *International Thunderbird* that legitimate expectations relate to an examination under Article 1105(1) in such situations "where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct …."[1267] In this way, a State may be tied to the objective expectations that it creates *in order to induce* investment.

622. As the Tribunal determines below that no specific assurances were made to induce Claimant's "reasonable and justifiable expectations," the Tribunal need not determine the level, or characteristics, of state action in contradiction of those expectations that would be necessary to constitute a violation of Article 1105.

b. Asserted Obligation to Provide Protection from Arbitrary Measures

623. With respect to the asserted duty to protect investors from arbitrariness, the Tribunal notes Claimant's citations to several NAFTA arbitrations that have found a violation of Article 1105 in arbitrary state action. Claimant cites to *S.D. Myers* for its holding that "a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust and arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective."[1268] Similarly, it quotes *International Thunderbird*'s holding that "manifest arbitrariness falling below acceptable international standards" is prohibited under Article 1105.[1269]

624. The Tribunal also notes, however, Respondent's argument that no Chapter 11 tribunal has found that decision-making that appears arbitrary to some parties is sufficient to constitute an Article 1105 violation.[1270] In *Mondev*, for instance, the tribunal held: "The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the

[1266] *Methanex*, Final Award, Part IV, Ch. D, ¶ 7 (Aug. 3, 2005).
[1267] *International Thunderbird*, Award, ¶ 147 (Jan. 26, 2006) (internal citation omitted).
[1268] Claimant's Reply Memorial, ¶ 239, quoting *S.D. Myers*, Partial Award, ¶ 263 (Nov. 13, 2000).
[1269] *Id.*, citing *International Thunderbird*, Award, ¶ 194 (Jan. 26, 2006).
[1270] Respondent's Counter-Memorial, at 227.

judicial propriety of the outcome ….”[1271] Respondent understands this to be the case because tribunals consistently afford administrative decision-making a high level of deference.[1272] Respondent quotes *S.D. Myers* to illustrate this deference: “determination [that Article 1105 has been breached] must be made in light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.”[1273] This, Respondent argues, leads to the result that merely imperfect legislation or regulation does not give rise to State responsibility under customary international law.[1274]

625. The Tribunal finds that, in this situation, both Parties are correct. Previous tribunals have indeed found a certain level of arbitrariness to violate the obligations of a State under the fair and equitable treatment standard. Indeed, arbitrariness that contravenes *the* rule of law, rather than *a* rule of law, would occasion surprise not only from investors, but also from tribunals.[1275] This is not a mere appearance of arbitrariness, however—a tribunal’s determination that an agency acted in a way with which the tribunal disagrees or that a state passed legislation that the tribunal does not find curative of all of the ills presented; rather, this is a level of arbitrariness that, as *International Thunderbird* put it, amounts to a “gross denial of justice or manifest arbitrariness falling below acceptable international standards.”[1276]

626. The Tribunal therefore holds that there is an obligation of each of the NAFTA State Parties inherent in the fair and equitable treatment standard of Article 1105 that they do not treat investors of another State in a *manifestly* arbitrary manner. The Tribunal thus determines that Claimant has sufficiently substantiated its arguments that a duty to protect investors from arbitrary measures exists in the customary international law minimum standard of treatment of aliens; though Claimant has not sufficiently rebutted Respondent’s assertions that a finding of arbitrariness requires a determination of some act far beyond the measure’s mere illegality, an act so manifestly arbitrary, so unjust and surprising as to be unacceptable from the international perspective.

[1271] *Mondev*, Award, ¶ 127 (Oct. 11, 2002).
[1272] Respondent’s Counter-Memorial, at 227.
[1273] *Id.* at 230, quoting *S.D. Myers*, Partial Award, ¶ 263 (Nov. 13, 2000).
[1274] Respondent’s Rejoinder, at 188.
[1275] *ELSI*, Judgment, ¶ 128 (July 28, 1989).
[1276] *International Thunderbird*, Award, ¶ 194 (Jan. 26, 2006).

4. FINAL DISPOSITION OF THE TRIBUNAL WITH RESPECT TO THE SCOPE OF THE FAIR AND EQUITABLE LEGAL STANDARD

627. The Tribunal holds that Claimant has not met its burden of proving that something other than the fundamentals of the *Neer* standard apply today. The Tribunal therefore holds that a violation of the customary international law minimum standard of treatment, as codified in Article 1105 of the NAFTA, requires an act that is sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105. Such a breach may be exhibited by a "gross denial of justice or manifest arbitrariness falling below acceptable international standards;"[1277] or the creation by the State of objective expectations *in order to induce* investment and the subsequent repudiation of those expectations.[1278] The Tribunal emphasizes that, although bad faith may often be present in such a determination and its presence certainly will be determinative of a violation, a finding of bad faith is not a requirement for a breach of Article 1105(1).

B. DETERMINATION OF WHETHER THE FACTS ALLEGED VIOLATE THE ARTICULATED LEGAL STANDARD OF ARTICLE 1105(1)

628. Claimant argues, as part of its claim under Article 1105 of the NAFTA, that in "determining whether the Respondent's conduct rises to the level of a breach of Article 1105, the Tribunal should consider the entirety of its conduct rather than focusing on individual aspects of that conduct."[1279] Quoting *GAMI*, Claimant asserts that "[t]he record as a whole—not isolated events—determines whether there has been a breach of international law."[1280] To support its claim that the entirety of the United States federal and California State actions worked together to violate Claimant's rights under Article 1105, however, Claimant discusses the individual federal and State actions—and their

[1277] *Id.*

[1278] The Tribunal takes no position on the type or nature of repudiation measures that would be necessary to violate international obligations. As the Tribunal held above, Claimant has not proved governmental actions that would have legitimately created such expectations; the Tribunal therefore need not and does not reach the latter half of the inquiry.

[1279] Claimant's Memorial, ¶ 556.

[1280] *Id.*, quoting *GAMI Investments*, Final Award, ¶ 97 (Nov. 15, 2004).

respective offending characteristics—that Claimant alleges worked together to violate Article 1105.[1281] Respondent does not object to this approach and adopts Claimant's methodology that focuses on the analysis of each individual action[1282] and, with respect to Claimant's assertion that all of the measures should be evaluated as a whole, Respondent neither endorses nor disputes this view.

629. To proceed in the manner presented by the Parties, the factual contentions that follow are divided between the actions of the federal government and those of the State of California and, within each section, each of the complained of actions is detailed. In presenting its interpretation of the facts, each Party has, in several places, framed the presentation of its factual contentions on particular legal conclusions based upon these facts. Although these alleged legal implications are not truly factual contentions, they are included within this section as part of the Parties' arguments with respect to the facts, as they inform the context for each Party's presentation of the facts and in some cases are inseparable from their factual arguments.

630. Again following the pattern of analysis as utilized by the Parties, the Tribunal will begin its examination by assessing each action, and set of actions, individually, starting with the actions of the federal government and continuing with those of the State of California. It shall then proceed to look at the treatment of Claimant, as a whole, to determine whether Respondent's actions have violated its obligation to provide fair and equitable treatment under Article 1105.

1. FACTUAL CONTENTIONS WITH RESPECT TO THE ALLEGED VIOLATION OF ARTICLE 1105 BY THE ACTIONS OF THE UNITED STATES FEDERAL GOVERNMENT

a. Issue Presented

631. From Claimant's discussion of the manner in which acts of the United States federal government contributed to the breach by both the federal and California governments of Article 1105, the Tribunal notes three arguments into which these assertions can logically be divided. First, Claimant asserts that Solicitor Leshy's 1999

[1281] *See* Claimant's Memorial, ¶¶ 540-556; Claimant's Reply Memorial, ¶¶ 242-285.

[1282] *See, e.g.*, Respondent's Counter-Memorial, at 235-62; Respondent's Rejoinder, at 171-77, 185-87, 194-243; Counsel for Respondent, Tr. 1460:6-1507:8.

M-Opinion ("Leshy's Opinion" or "M-Opinion") and the subsequent Record of Decision ("ROD") denying the Imperial Project Plan of Operations were both arbitrary contraventions of prior law and practice and denied Claimant a fair and transparent business environment in which to invest. Second, Claimant contends that the federal actions created an intentional and unreasonable delay and thus were arbitrary and left the Imperial Project susceptible to later measures. Third, Claimant alleges that, during the government's cultural review of the Imperial Project, Claimant was subjected to arbitrary and nontransparent treatment. Respondent objects to and argues against each of these allegations in turn.

632. It is therefore the task of the Tribunal to evaluate these federal measures and determine whether, when considered alone or in combination with each other or with those actions taken by the California state government, Claimant was subjected to treatment that breached Respondent's obligations under NAFTA Article 1105, as articulated above by the Tribunal.

b. Claimant's Contentions

i. *The M-Opinion and Record of Decision Were Unexpected, Novel and Arbitrary*

633. The Tribunal therefore turns to Claimant's first argument with respect to how it believes the actions of the United States federal government breached Respondent's obligations under the fair and equitable treatment standard: the assertion that the M-Opinion and ROD were arbitrary contraventions of existing law and thus violated Respondent's obligation to maintain a fair and transparent business environment on which an investor may base reasonable expectations. As a foundation for this argument, Claimant points to the "unique property interest that's granted for mining claims under domestic United States property law ...."[1283] It is because of these "unique vested rights" that Claimant asserts it was entitled to rely on the "preexisting legal regime for the operation and reclamation of mining activities on Federal lands."[1284] Under this regime, Claimant argues that, if it met the standards for a "prudent operator" by taking reasonable, economically feasible mitigation measures, as well as considering possible

[1283] Counsel for Claimant, Tr. 48:21-49:1; *see also* Claimant's Reply Memorial, ¶ 247.
[1284] Counsel for Claimant, Tr. 49:4-9.

cultural impacts, it was entitled to approval of its Plan of Operations ("POO"), even if subsequent mining would destroy sacred sites.[1285] This regime, Claimant continues, follows the Mining Law of 1872 which "embodies 130 years' statutory promise that prospectors may enter Federal lands, locate valuable mineral deposits … and in return the Government grants them a vested property interest ...."[1286]

634. This legal regime, Claimant explains, was premised on the Federal Land Policy and Management Act of 1976 ("FLPMA"), which provides the Secretary of the Interior with authority to prevent "unnecessary or undue degradation" in approving projects on federal lands and which also resulted in the establishment of the California Desert Conservation Area ("CDCA").[1287] This latter development resulted in the passage of the California Desert Protection Act of 1994 ("CDPA"), which withdrew millions of acres of Federal land from development based on a 20-year survey of the desert.[1288] Claimant argues that Congress provided $40 million in funding to the Bureau of Land Management ("BLM") to develop the CDCA Plan and that this planning process included significant attention to Native American cultural resources[1289] and consultation with Native American tribes.[1290] At the time of this withdrawal, Congress also established that there would be no "buffer zones" around the wilderness areas, meaning that development could occur immediately outside the designated wilderness areas even if seen and heard within the wilderness areas, a provision that Claimant reads as a specific assurance leading to its reasonable expectation of the ability to mine the Imperial Project.[1291]

635. These Acts also led to the 3809 Regulations, discussed at length in the factual summary,[1292] which defined the "unnecessary or undue degradation" standard and the prudent operator test.[1293] The "undue impairment" standard of Section 601 of the

[1285] Counsel for Claimant, Tr. 49:9-17.
[1286] Counsel for Claimant, Tr. 50:11-16.
[1287] Counsel for Claimant, Tr. 54:2-11.
[1288] Counsel for Claimant, Tr. 54:10-22.
[1289] Counsel for Claimant, Tr. 1740:8-11.
[1290] Counsel for Claimant, Tr. 1741:5-9.
[1291] Counsel for Claimant, Tr. 55:1-2; Counsel for Claimant, Tr. 1727:17-21 ("In addition, Glamis had the benefit of specific assurances in the form of the CDPA which precluded the establishment of buffer zones around the withdrawn wilderness areas and the assurances of BLM Director Mr. Ed Hastey."); Counsel for Claimant, Tr. 1732:6-17.
[1292] *See* Factual Summary, *supra* ¶ 53, *et seq*.
[1293] Counsel for Claimant, Tr. 56:11-57:10.

FLPMA was not defined in these regulations, however, as Claimant points out.[1294] Claimant cites to comments of Mr. Robert Anderson, one of the individuals listed in the Federal Register Notice in 1980 as being involved with the creation of the 3809 Regulations, in which Mr. Anderson stated that they did not define the undue impairment standard as they concluded that it meant the same as unnecessary and undue degradation.[1295]

636. Claimant points to the prudent operator standard, the "preexisting legal regime," and preambular language stating that a plan must be approved if it is in compliance with the National Historic Preservation Act ("NHPA"), even if cultural resources are damaged,[1296] to argue that "it wouldn't have mattered if a wholly new … significant cultural resource were found at that site[;] under the law as applied [the] Imperial Project was entitled to approval."[1297] Claimant also finds support for this claim in statements of individuals regarding the review of the Imperial Project. For instance, Claimant points to comments of BLM Director Ed Hastey to the Quechan Tribe in which he stated in December 1997 that "BLM is 'kind of hamstrung' when it comes to 1872 mining law rights and doesn't have the same discretion as oil and gas leasing …."[1298] Claimant also cites to Dr. James H. Cleland's[1299] comments to the Quechan Cultural Committee and the tribal members in September 1997 in which he wrote: "The proposed project is a non-discretionary action. That is, the BLM cannot stop or prevent the project from being

[1294] Counsel for Claimant, Tr. 57:11-14.

[1295] Counsel for Claimant, Tr. 57:21-58:10, citing Email from Robert M. Anderson to Karen Hawbecker (Oct. 26, 2001) [Ex. 217] (writing, "[w]e purposely did not define undue impairment in 1980 because we all concluded it meant the same as undue degradation ... i.e., it is OK to have due degratdation [sic] and it is OK to have due impairment, but the undue stuff, we can't allow.").

[1296] *See* Leshendok, Mining Operations Expert for Claimant, Tr. 455:1-11 ("The preamble is very specific regarding the National Historic Preservation Act. The preamble goes on to explain that the National Historic Preservation Act cannot stop a mine plan. It can only … delay it.").

[1297] Counsel for Claimant, Tr. 60:1-61:14.

[1298] Counsel for Claimant, Tr. 62:18-63:3, quoting Notes from Government to Government Meeting: State Director Ed Hastey and Fort Mojave Quechan Tribe, at 3 (Dec. 16, 1997) [Ex. 96].

[1299] Dr. James H. Cleland is the Principal Archaeologist with KEA Environmental, Inc. ("KEA") retained in the spring of 1997 by Environmental Management Associates, Inc. ("EMA") to perform a Class III pedestrian survey and cultural resources inventory of the Imperial Project area. KEA was Claimant's third-party contractor, with an independent obligation to assist BLM in complying with the requirements of the NHPA. Cleland Declaration, pp. 2-3.

implemented, pursuant to the 1872 Mining Act, provided that compliance with other Federal, State, and Local laws and regulations is fulfilled."[1300]

637. With respect to the Imperial Project in particular, Claimant also argues that it had a legitimate expectation in the approval of its Plan of Operations based not only on the mining regime as it stood, but also based on earlier findings in its review process.[1301] Claimant explains that in both its first and second drafts of its Environmental Impact Statement/Environmental Impact Report ("EIS/EIR") in 1996 and 1997, its plan was chosen as the "'preferred alternative,' most consistent with applicable laws and land use plans …."[1302] In addition, Claimant cites to a 1998 BLM option paper which states that:

> [Claimant's] mining proposal appears to have merit under the 1872 mining law, the mining claims are properly recorded, [and] a practical [plan of operations] was submitted consistent with 3809 regulations. Thus, denial of the POO could constitute a taking of rights granted to a claimant under the Mining Law. If such finding is made, compensation would be required under this option.[1303]

Claimant contends that "[t]hese written and oral statements all reflect that the understanding both on Respondent's side and Glamis's side that there was no lawful basis to deny the plan of operation."[1304]

638. In light of the precedent described above, Claimant argues that "the Leshy Opinion clearly and unlawfully imposed a new legal standard for mines on Federal land …."[1305] According to Claimant, "the Record of Decision not only wilfully disregarded applicable law by relying on Leshy's manufactured grounds for denial, but it also violated expressly the very promise in the California Desert Protection Act on which Glamis had relied in making its significant investment."[1306] Claimant asserts that "Interior's creation of a discretionary authority by which it could deny [Claimant's] project goes beyond merely applying existing criteria in an imprecise fashion."[1307] The

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[1300] Counsel for Claimant, Tr. 63:10-20, quoting Draft Letter to Quechan Cultural Committee and Tribal Members from James H. Cleland, Principal Archaeologist, KEA, at 1 (Sept. 10, 1997) [Ex. 89].

[1301] Claimant's Reply Memorial, ¶ 244.

[1302] *Id.*

[1303] *Id.*, quoting BLM, Draft Opinion Paper, Imperial Project (Chemgold) – Glamis Corp (May 7, 1998) [Ex. 112].

[1304] Counsel for Claimant, Tr. 64:16-19.

[1305] Counsel for Claimant, Tr. 1612:13-15.

[1306] Counsel for Claimant, Tr. 1613:2-7.

[1307] Claimant's Memorial, ¶ 543.

M-Opinion, Claimant contends, disregarded "decades of settled law and practice" by taking the phrase "undue impairment"—which had always been equated with "unnecessary and undue degradation"—and "breathing into it a new discretionary mine-veto authority never previously known to exist."[1308] Claimant explains that it reasonably expected the BLM to apply the mining laws as they had been applied for decades, but instead, "Respondent acted in an arbitrary and non-transparent manner, preventing [Claimant] from knowing 'beforehand any and all rules and regulations that will govern its investments'…."[1309]

639. Claimant asserts that, contrary to Respondent's arguments, the review process of the Imperial Project was "far from transparent and fair."[1310] Claimant argues that one reason that the M-Opinion eventually was overturned was because the new interpretation was "adopted in blatant violation of the Administrative Procedure Act, the fundamental federal law that requires administrative agencies like BLM to adopt new rules and regulations having the force and effect of law through a fair and transparent rulemaking process."[1311] Claimant disputes Respondent's characterization of Claimant's involvement in the process as proving the process' transparency and fairness, arguing that the fact "[t]hat Solicitor Leshy met with [Claimant] on one occasion does not make the multi-year process through which he manipulated and intentionally delayed the project schedule transparent."[1312]

ii. *The Federal Measures Caused Intentional and Unreasonable Delay*

640. Claimant's second argument with respect to how the measures of the federal government contributed to behavior constituting a breach of Article 1105 centers on Claimant's allegation that the Department of the Interior delayed review of the Imperial Project intentionally and unreasonably, blocking the approval of the Project and making it susceptible to the California measures. Although Claimant asserts that it would not "contend that deliberate delay by itself would be enough to violate customary and

[1308] *Id.* ¶ 547.
[1309] *Id.* ¶ 548, quoting *Tecmed*, Award, ¶ 154 (May 29, 2003).
[1310] Claimant's Reply Memorial, ¶ 246.
[1311] *Id.* (citation omitted).
[1312] *Id.*

international law, … it does inform what transpired and support[s] [Claimant's] claim of a denial of justice."[1313] Claimant argues that arbitrary conduct is "often described as a decision that is without a reasonable link to a 'good' or 'legitimate' 'reason,' [and] is inconsistent with the standards of fair and equitable treatment established by Article 1105."[1314] Quoting *Metalclad*, Claimant also contends that the "lack of orderly process and timely disposition in relation to an investor … acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA" constitutes a violation of Article 1105.[1315]

641. To illustrate what it believes to be unreasonable and intentional delay, Claimant points to various schedules and communications stating that review of the Imperial Project was proceeding diligently prior to the involvement of Solicitor Leshy and the Washington, D.C. office of the Department of the Interior. For instance, Claimant cites to a December 4, 1998 BLM Imperial Project schedule in which it is stated that the mineral examination was expected to be completed by December 18, 1998, but that the EIS process was delayed waiting for the solicitor's M-Opinion.[1316] Claimant then points the Tribunal to a memo from Solicitor Leshy directing that the validity examination and the Final EIS be delayed until his legal review could be completed.[1317] This Opinion was not released, however, until January 2000, and thus the mineral examination did not conclude until 2002.[1318]

642. Claimant then cites to Mr. Thomas V. Leshendok's[1319] expert report, in which Mr. Leshendok catalogued the normal course and types of processing times for mining

[1313] Counsel for Claimant, Tr. 76:5-9.

[1314] Claimant's Memorial, ¶ 549, quoting *CMS v. Argentina*, Award, ¶ 290 (May 12, 2005).

[1315] *Id.* ¶ 550, quoting *Metalclad*, Award, ¶ 99 (Sept. 2, 2000).

[1316] Counsel for Claimant, Tr. 1749:22-1750:4; *see also* Claimant's Reply Memorial, ¶ 252, citing Imperial Project EIS Schedule (July 27, 1998) [Ex. 135] (placing an internal BLM deadline for issuing the Record of Decision ("ROD") and "Conditions of Approval" of October 18, 1998).

[1317] Counsel for Claimant, Tr. 1749:16-18, citing Memorandum from John Leshy, Solicitor, to Ed Hastey, California State BLM Director, re: Glamis Imperial Mining Project (Oct. 30, 1998) [Ex. 152] (Solicitor Leshy directed the BLM to "delay completion of the [Glamis mining claim] validity examination and the final EIS.").

[1318] Counsel for Claimant, Tr. 1749:16-1750:5. Claimant asserts that even the M-Opinion was delayed unnecessarily as a draft of the M-Opinion existed by January 1999. Counsel for Claimant, Tr. 1751:11-13.

[1319] Mr. Thomas V. Leshendok is an independent consultant and a retired BLM Deputy State Director, Minerals Management, Nevada. Leshendok Report, p. 6.

projects in the California Desert, which averaged about two to three years.[1320] According to Claimant, just the time period leading up to the January 2001 denial was double that of the next longest processing time.[1321] Claimant agrees that the cultural review required a certain amount of time to complete, but argues that this was completed in mid-1998; and that the Advisory Council on Historic Preservation ("ACHP") consultation process also necessitated a certain amount of time, but that this was completed in September of 1999.[1322] Therefore, according to Claimant, all of the other work was done except for that which Solicitor Leshy himself directed not to continue, namely the Mineral Report, and that is where Claimant focuses its claims of unlawful delay.[1323] "It was purposefully put on ice while they undertook the other measures which culminated in the other acts which culminated in the measure of the January 2001 Record of Decision."[1324]

643. The M-Opinion, according to Claimant, "directly resulted in the January 17, 2001, denial of the Imperial Project ...."[1325] Although the M-Opinion was later repealed, Claimant argues that it "suffered nearly two years of additional harmful delay, all of 2001 and most of 2002, as Interior slowly took steps to reverse and retract Secretary Babbitt's unlawful denial, but the Project was never approved during this time."[1326] Therefore, Claimant asserts:

> The effect of Solicitor Leshy's 1998 directive to delay the Project resulted in delays of nearly four years, and this was after the Glamis Imperial Project had been pending since December of 1994 and had been the subject of two Draft EIS/EIRs. Accordingly, the unlawful delay by Secretary Babbitt was associated [with] a four-year unlawful and deliberate delay of the Glamis Imperial Project.[1327]

644. Claimant asserts that actionable arbitrariness rising to the level of a breach of international obligations is additionally exhibited by the fact that, although four years have passed since the M-Opinion and the Babbitt denial both were rescinded, Respondent has offered no justification or basis for continuing to withhold approval of the Imperial

[1320] Claimant's Reply Memorial, ¶ 258, citing Leshendok Report, ¶ 95, Tbl. 1; *see also* Counsel for Claimant, Tr. 2022:21-2023:4;
[1321] Counsel for Claimant, Tr. 2023:5-7; *see also* Leshendok Report, ¶ 95, Tbl. 1.
[1322] Counsel for Claimant, Tr. 2023:7-15.
[1323] Counsel for Claimant, Tr. 2023:16-2024:5.
[1324] Counsel for Claimant, Tr. 2024:2-5.
[1325] Counsel for Claimant, Tr. 1751:13-15.
[1326] Counsel for Claimant, Tr. 1752:11-15.
[1327] Counsel for Claimant, Tr. 1752:21-1753:6.

Project POO.[1328] Claimant asserts that it neither asked nor encouraged Respondent to cease review of the Imperial Project during these arbitral proceedings. Claimant counters Respondent's allegation that Claimant itself contributed to any delay in the processing of the Imperial Project Plan of Operations by asserting that it never authorized the Department of the Interior to stop the processing of the Imperial Project Plan of Operations;[1329] although it requested a suspension of processing on December 9, 2002, Interior refused to comply with the request without a waiver of liability, which Claimant refused to do.[1330] In addition, Claimant contends that "nothing in the NAFTA Claim Notice of Intent in July of 2003 reflected a suggestion that Interior stop processing the Plan of Operations. If anything, the Notice should have galvanized Interior to address its failures to treat the Imperial Project Plan of Operations fairly and equitably. Sadly, it did not."[1331]

iii. *The U.S. Federal Government's Cultural Review of and Determinations regarding the Imperial Project Were Arbitrary and Lacking in Transparency*

645. Third and finally, Claimant alleges that the denial of the Imperial Project was discriminatory and thus contributed to the government's breach of Article 1105 in that numerous other projects with significant and similar cultural characteristics were approved, both before and after the denial of the Imperial Project, without complete backfilling and despite severe impacts to their cultural resources.[1332] Claimant argues that this behavior in contravention of international obligations is exhibited not only in that it alone among many culturally significant properties was singled out for complete

[1328] Claimant's Memorial, ¶ 549.

[1329] Claimant's Reply Memorial, ¶ 259; for Respondent's allegations, *see infra* ¶¶ 661-62.

[1330] *Id.*, citing Letter from Charles A. Jeannes, Senior VP, Glamis Gold, to Mike Pool, BLM California State Director (Mar. 31, 2003) [Ex. 280].

[1331] *Id.* ¶ 260 (footnote omitted).

[1332] Counsel for Claimant, Tr. 78:6-81:5 (arguing that three projects approved prior to the consideration of the Imperial Project had similarly significant cultural resources: the American Girl Mine is eight miles away from the Imperial Project and in an area of very high cultural concern; the Picacho mine is in an area of high cultural concern; and the Mesquite Mine is right next to the Singer Area of Critical Environmental Concern ("ACEC"); and that, additionally, three projects approved subsequent to the Imperial Project's consideration also significantly affected cultural artifacts: the Mesquite Mine expansion approved in 2002 is 10 miles from the Imperial Project and directly abutting the Singer Geoglyph ACEC which, according to Claimant, is "one of the region's most significant prehistoric resources"; the Baja Pipeline, also approved in 2002, is an underground pipeline that Claimant asserts "scars multiple segments of the Xam Kwatcan trail network"; and, finally, the Mesquite Landfill required a redrawing of the Singer Geoglyph ACEC.).

backfilling, but also that the procedure used to determine that it was a culturally significant property deviated significantly from those used to assess prior projects.

646. Claimant argues that numerous characteristics exhibit the unusual and discriminatory nature of the cultural review of the Imperial Project: (1) the Imperial Project was, culturally, no different than other projects approved prior to and after the Imperial Project; (2) the Imperial Project was the first project to be assessed based on the questionable Area of Traditional Cultural Concern ("ATCC") concept; and (3) the ACHP review process was unusual, if not predetermined, as exhibited by correspondence from Mr. Stanfill, the quick termination of consultations and recommendation to the Secretary of the Interior, and the "unusual" public hearings and site visit.

647. To begin, Claimant argues that if the Imperial Project was different or unique from the other projects in the area, it could not have known this in advance.[1333] Citing to the testimony and report of Dr. Lynn Sebastian, Claimant argues that there was nothing found at the Imperial Project that would distinguish it from other areas of this part of the California Desert, including areas impacted by various project sites.[1334] Specifically, based on Dr. Sebastian's comparison of the extent and types of cultural resources at the Imperial Project with those at other projects in the CDCA, she testified, "what I found was that the archeological record, just the archeological manifestations themselves in the Imperial Project, appeared to be identical to those in other projects in the general vicinity."[1335] Claimant also cites to a map created by the BLM in May 1977—during the study of the CDCA—on which very high and high areas of Native American concern were designated; Claimant notes that this map reveals that the Imperial Project was outside those designated areas.[1336]

648. Claimant spent significant time at the hearing disputing the conclusions of Respondent's chart (described below),[1337] comparing the Imperial Project's cultural

[1333] Counsel for Claimant, Tr. 1733:1-4.
[1334] Counsel for Claimant, Tr. 79:1-6.
[1335] Counsel for Claimant, Tr. 1763:22-1764:6, quoting Sebastian, Tr. 322:2-6.
[1336] Sebastian, Tr. 323:8-326:18, citing California Desert Conservation Area Map, "Native American Areas of Concern" (May 1977) [Ex. 309].
[1337] *See infra* ¶ 673.

resources and integrity with those of similar projects in the area.[1338] Claimant proceeded through each project raised for comparison and explained why it believed Respondent's characterizations of the cultural significance were inaccurate.[1339] Instead, Claimant cites to an exhibit in the record in which Mr. Cachora, Quechan Tribal Historian, is reported to have emphasized that one important factor of the Imperial Project area was that the Quechan had already given up significant areas to other projects and he is quoted as noting, this is "our last stand" and "we're at the point of extinction."[1340] The point therefore, according to Claimant, "is that this was not unique, yet it was felt to have a tremendous impact on those resources left."[1341]

649. Next, Claimant alleges discriminatory treatment not only in that it alone among many culturally significant properties was singled out for complete backfilling, but also in the procedure used to determine that it was a culturally significant property. To support this allegation, Claimant first argues that the NHPA process followed by the BLM and ACHP in this case deviated significantly and discriminatorily from that employed in other cases.[1342] Claimant argues that it was harmed by the novel use of the ATCC to define the area of study around the Project site.[1343] According to Claimant, the Imperial Project was "the only project for which an area of traditional cultural concern was identified …."[1344] Claimant argues that this ATCC did exactly what was forbidden

[1338] Counsel for Claimant, Tr. 1765:4-1773:15.

[1339] *See, e.g.*, Counsel for Claimant, Tr. 1765:4-1773:15, citing Letter from Mike Jackson, Sr., President, Quechan Indian Tribe, to Terry A. Reed, Area Manager, BLM (Apr. 15, 1996) [FA 13 tab 119] (explaining the Quechan Tribe's concern and desire to work out "suitable solutions" regarding the Mesquite Landfill, which was up for reconsideration in 2002, and stating the Tribe's belief that it would "erase for all time the remains of a significant ancient Indian settlement or religious center or a combination of the two"); Counsel for Claimant, Tr. 2067:2-2073:12. *See also* Leshendok, Mining Operations Expert for Claimant, Tr. 473:13-474:17 (explaining that the Baja Pipeline [which was approved in 2002] was constructed despite significant Native American opposition, including one Native American organization that called the project "diabolical and prayed that the Project would not be completed because it was going to desecrate their sacred land, and they were going to fight it to the end.").

[1340] Counsel for Claimant, Tr. 2065:17-2066:15, citing Notes from Government to Government Meeting: State Director Ed Hastey and Fort Mojave Quechan Tribe (Dec. 16, 1997), pp. 2-5 [Ex. 96].

[1341] Counsel for Claimant, Tr. 2066:16-18.

[1342] Counsel for Claimant, Tr. 81:15-19.

[1343] Counsel for Claimant, Tr. 81:21-82:11; *see* Factual Summary, *supra* ¶ 104, *et seq.*, for discussion of the ATCC.

[1344] Counsel for Claimant, Tr. 1761:8-9.

by the 1994 CDPA, which was using "an existing withdrawn area as a ground for restricting operations at a site left open for multiple uses."[1345]

650. For additional support of its allegation of discriminatory—and thus arbitrary and nontransparent—treatment, Claimant asserts that the ACHP review was unusual at the least and, at most, predetermined. First, Claimant cites to communications from the ACHP staff person with alleged lead responsibility for reviewing the Imperial Project, Mr. Alan Stanfill, in which Mr. Stanfill wrote regarding the Imperial Project, "I do not foresee any situation wherein I would recommend an MOA [memorandum of agreement] short of moving the project to a wholly … different location."[1346] Based on these and other communications, Claimant argues that the ACHP's review was predetermined and thus its review of the Project's impacts on cultural resources was merely a façade.[1347] Second, Claimant asserts that it was unusual for the ACHP to move so quickly to terminate consultations and make a recommendation directly to the secretary of the Interior. Citing to Dr. Sebastian's testimony, Claimant argues that the Advisory Council "generally works to find negotiated settlement and solutions to adverse impacts on cultural resources. … there was not a similar attempt made at the Imperial Project site to find a set of acceptable mitigation measures …."[1348] Third, Claimant argues that the ACHP's decision to terminate consultations was itself contrary to the "normal" NHPA Section 106 process.[1349] Finally, Claimant argues that both the public hearings and field visit were "unusual" and outside the normal rules of the Section 106 process, and even calls the visit a "sham" as it claims that the ACHP's site visit team failed to visit the actual proposed mine site.[1350]

c. Respondent's Contentions

651. Respondent challenges each of Claimant's characterizations of the measures of the United States federal government as conduct in contravention of international

[1345] Counsel for Claimant, Tr. 82:12-19.
[1346] Claimant's Memorial, ¶ 312, quoting Email from Alan Stanfill to Thomas King (Sept. 21, 1998) [Ex. 145].
[1347] *Id.* ¶¶ 310-317.
[1348] Counsel for Claimant, Tr. 1773:1-7.
[1349] Claimant's Reply Memorial, ¶ 255, citing Sebastian Supplemental Report, pp. 25-26.
[1350] *Id.*

obligations. First, Respondent argues that the M-Opinion was a well-reasoned legal opinion that considered an issue of first impression, was consistent with prior law, was fairly promulgated, and thus was neither arbitrary nor in contravention of reasonable expectations. Second, Respondent asserts that there is no evidence of delay in the processing of the Imperial Project Plan of Operations, and especially no delay that rises to the level that would breach the customary international law minimum standard of treatment. Finally, Respondent argues that the cultural review of the Imperial Project was neither arbitrary nor lacking in transparency.

i. *The M-Opinion Was Consistent with Prior Law, Reasoned and Fairly Promulgated*

652. Respondent argues that Claimant cannot "credibly argue that [Respondent] violated the customary international law minimum standard of treatment by virtue of its agency having issued a reasoned opinion based on preexisting legal authority on the basis of [Claimant's] own assessment that the two different legal terms in two different positions of a statute sound the same."[1351] Respondent asserts 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 static."[1352] Respondent stresses that those tribunals that have found frustration of an investor's expectations to cause a breach of international law have done so only when they were based upon explicit or implicit representations made by the government that later were not honored.[1353]

653. Therefore, in its first argument countering Claimant's characterizations of the federal measures as contravening State obligations per Article 1105, Respondent describes the basis upon which the ROD denying the Imperial Project Plan of Operations was based. Respondent explains that, in January 2001, the U.S. federal government issued the denial, but that it was rescinded within the year.[1354] According to Respondent, this ROD was based on the grounds that the mining plan would cause undue impairment

[1351] Counsel for Respondent, Tr. 1955:8-14; *see also* Respondent's Rejoinder, at 235.

[1352] Respondent's Rejoinder, at 185-86, citing *Saluka v. Czech Republic*, Partial Award, ¶ 305 (Mar. 17, 2006).

[1353] *Id.* at 186, citing *CMS v. Argentina*, Award, ¶¶ 255-58, 266-81 (May 12, 2005); *Azurix*, Award, ¶ 375 (July 14, 2006); *ADC v. Hungary*, Award, ¶¶ 375, 379 (Oct. 2, 2006); *Saluka v. Czech Republic*, Partial Award, ¶ 351 (Mar. 17, 2006); *Tecmed*, Award, ¶ 160 (May 29, 2003).

[1354] Counsel for Respondent, Tr. 1460:11-14.

to resources within the CDCA and relied upon the ACHP's finding that, even after mitigation measures, the Imperial Project would "result in a serious and irreparable degradation of the sacred and historical values of the area that sustained the Tribe."[1355] Secretary Babbitt, Respondent asserts, based his authority to issue the ROD on the 1999 M-Opinion, which was in turn drafted by the solicitor upon BLM's request for legal advice.[1356]

654. With respect to the M-Opinion, Respondent states that the solicitor of the Interior has the authority to issue such opinions under U.S. law and, when they are accepted by the secretary, they are binding on the department.[1357] In this case, Respondent explains, BLM sought the legal opinion of the solicitor in January 1999 "on the question of the parameters of its authority to grant or deny a mining Plan of Operations where that plan would irreparabl[y] damage cultural resources and interfere with religious practices and where those effects could not be mitigated."[1358] Respondent asserts that the department was confronted with an issue of first impression and involving a conflict of alleged constitutional concerns.[1359] According to Respondent, "no previous—or subsequent—EIS for any mining project in the CDCA had found a significant, unavoidable adverse impact to cultural resources and Native American sacred sites," and thus the Department of the Interior ("DOI") had never previously had the occasion to determine the parameters of its authority to deny a mining project in the CDCA in such a situation.[1360]

655. To counter Claimant's assertions that the M-Opinion so departed from the pre-existing regime as to be arbitrary and in contravention of Claimant's reasonable expectations, Respondent discusses the statutory protections for the environment and cultural resources in the CDCA, found in Sections 302(b) and 601 of the FLPMA, the "unnecessary or undue degradation" and "undue impairment" standards, respectively.[1361] Respondent notes that the M-Opinion acknowledges Claimant's argument that never before had the DOI denied a POO on the basis of the unnecessary or undue degradation

[1355] Counsel for Respondent, Tr. 1460:18-1461:5.
[1356] Counsel for Respondent, Tr. 1461:6-9.
[1357] Counsel for Respondent, Tr. 1488:1-4.
[1358] Counsel for Respondent, Tr. 1488:4-10; *see also* Respondent's Rejoinder, at 230.
[1359] Counsel for Respondent, Tr. 1488:10-1489:3.
[1360] Respondent's Counter-Memorial, at 249-50.
[1361] Counsel for Respondent, Tr. 1489:4-19.

standard, quoting the M-Opinion as saying: "Under this portion [Section 302(b)] of the regulations, then, while BLM may mitigate harm to 'other resources', it may not simply prohibit mining altogether in order to protect them."[1362] The M-Opinion continues, however, as Respondent explains, to state that the regulations that allow BLM to prevent such activities that cause undue impairment to the CDCA are separate and apart from BLM's authority to prevent unnecessary or undue degradation.[1363] Respondent argues that the "undue impairment" and "unnecessary or undue degradation" standards were never viewed as equivalent: the definition of "unnecessary or undue degradation" provides that "[w]here 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."[1364]

656. Beyond the content of the M-Opinion, Respondent notes Claimant's argument in which it complains that the M-Opinion was issued without prior publication or the seeking of public notice and comment,[1365] and thus allegedly is behavior effecting a breach by being neither fair nor transparent. Respondent asserts that there is no U.S. law requiring notice and comment with respect to M-Opinions because, in the United States, "no notice and comment is required when agencies issue decisions or opinions clarifying statutory or regulatory language that has not been previously defined."[1366] The undue impairment standard, Respondent argues, had not previously been defined, which is confirmed by reference to the preamble to the 3809 Regulations that indicates that the undue impairment standard would not be defined by further regulation, but would be applied on a case-by-case basis.[1367] That the department later decided not to apply the standard without first promulgating regulations, as it did in the 2001 Solicitor Myers M-

[1362] Counsel for Respondent, Tr. 1491:2-9, quoting Memorandum from John Leshy, Solicitor, DOI, to Acting Director, BLM, p. 9 (Dec. 27, 1999) ("M-Opinion") [Ex. 205].

[1363] Counsel for Respondent, Tr. 1491:9-13.

[1364] Respondent's Counter-Memorial, at 251, quoting 43 C.F.R. § 3809.0-5(k) (1980) (bracketed information added by Respondent).

[1365] Counsel for Respondent, Tr. 1492:9-12.

[1366] Counsel for Respondent, Tr. 1492:16-21; *see also* Respondent's Rejoinder, at 232.

[1367] Counsel for Respondent, Tr. 1492:22-1493:5; *see also* Respondent's Rejoinder, at 174, citing M-Opinion, at 11 [Ex. 205] (explaining that when the DOI promulgated the 3809 Regulations, BLM received several comments urging it to undertake a separate formal rulemaking for the CDCA and the "undue impairment" standard. DOI declined, however, noting that the resources of the CDCA would be adequately protected because any plan of operations in the CDCA would be "evaluated to ensure protection against 'undue impairment' and against pollution of the streams and waters within the Area.").

Opinion ("Myers Opinion" or "2001 M-Opinion"), in no way establishes the unlawfulness of the department's prior conduct, Respondent alleges.[1368] Regardless, Respondent points out that Claimant did have notice of the Leshy Opinion's drafting and was even granted various opportunities to comment on the issues addressed in the M-Opinion prior to its finalization.[1369]

657. Respondent stresses that the 2001 M-Opinion did *not* rescind the Leshy Opinion because it was "adopted in blatant violation of the Administrative Procedure Act [('APA')]," as Claimant asserts.[1370] Rather Respondent explains that, although the 2001 M-Opinion determined that the "undue impairment" standard should be defined through substantive rulemaking prior to its use to deny a plan of operations, this was a finding of "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."[1371] Respondent argues that the 2001 M-Opinion in fact recognized that the 1999 M-Opinion's 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 in the 3809 Regulations.[1372]

658. Respondent concludes that Claimant has failed to assert conduct that violates U.S. law, let alone the customary international law minimum standard of treatment.[1373] Even if the M-Opinion contained legal errors, which Respondent does not concede, Respondent argues that this would not give rise to a violation of the customary

[1368] Counsel for Respondent, Tr. 1493:6-14; *see* Respondent's Counter-Memorial, at 252; *see generally* Memorandum from William G. Myers III, Solicitor, DOI, to Gale A. Norton, Secretary of the Interior, DOI (Oct. 23, 2001) ("2001 M-Opinion") [FA 5 tab 216].

[1369] Counsel for Respondent, Tr. 1493:15-1494:1; Respondent's Counter-Memorial, at 248-49, citing to correspondence and a personal meeting between Claimant and the Solicitor in which Claimant conveyed its concerns with, and its opinions on, the issues in the M-Opinion. *See* Letter from Charles A. Jeannes, Senior Vice President and General Counsel, Glamis Gold, and Gary C. Boyle, General Manager, Glamis Imperial Corp., to Bruce Babbitt, Secretary of the Interior, DOI (Nov. 10, 1999) [FA 7 tab 31]; M-Opinion, at 17 [Ex. 205] (noting that the Solicitor had met directly with Claimant and addressing Claimant's arguments).

[1370] Respondent's Rejoinder, at 175, quoting Claimant's Reply Memorial, ¶ 246.

[1371] *Id.*

[1372] *Id.*

[1373] Counsel for Respondent, Tr. 1492:12-15.

international law minimum standard of treatment.[1374] Respondent contends that any potential errors in the M-Opinion were corrected by the internal domestic system of the United States when it rescinded both the M-Opinion and the Record of Decision that relied upon the M-Opinion.[1375]

ii. *The Processing of Claimant's Plan of Operations Continued Diligently at All Times without Undue Delay*

659. Respondent next challenges Claimant's characterization of the federal government's processing of the Imperial Project Plan of Operations as evidencing intentional and unreasonable delay that supports Claimant's claim of a violation of Article 1105. Respondent argues that there is no evidence of undue delay in its diligent processing of the Imperial Project POO from its first filing through Claimant's turning from the process in favor of seeking remedy through this arbitration. Respondent additionally argues that, in light of what it views as Claimant's abandonment of the review process, it would "hardly [be] arbitrary for an agency to decide not to engage in wasteful proceedings."[1376]

660. To counter the allegation of undue delay, Respondent presented at the hearing a timeline that Respondent claims proves that, from the first submission of the Imperial Project Plan of Operations in December 1994 through July 2003, when Claimant notified DOI that it was pursuing new avenues of relief, the BLM, ACHP and federal government worked diligently and consistently to review and process Claimant's Plan.[1377] In addition, Respondent explains that, as the regulations regarding validity determinations changed in 2001, it was necessary to complete a validity determination after the rescission of the denial and before processing the Plan of Operations; this was completed in September 2002.[1378] Respondent asserts that just 10 weeks after the issuance of the

[1374] Counsel for Respondent, Tr. 1498:22-1499:3; 1503:5-14, citing *ADF Group*, Award, ¶ 190 (Jan. 9, 2003) (an illegality under domestic law does not necessarily rise to a violation of customary international law).

[1375] Counsel for Respondent, Tr. 1500:10-14.

[1376] Respondent's Rejoinder, at 242, citing 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.").

[1377] Counsel for Respondent, Tr. 1359:15-1364:8; Respondent's Rejoinder, at 241-42.

[1378] Respondent's Counter-Memorial, at 258-59, citing 43 C.F.R. § 3809.100 (2001); BLM Mineral Report (Sept. 27, 2002) [Ex. 255].

validity report, however, Claimant requested a suspension of review (which was not granted as Claimant would not agree to relieve BLM of any legal liability for the suspension) and this was then followed by the Notice of Intent in this arbitration on July 21, 2003, at which point review ceased.[1379]

661. With respect to Claimant's assertion that Respondent's failure to continue processing the Imperial Project Plan of Operations after Claimant's submission of its Notice of Intent in this arbitration supports its claims under Article 1105, Respondent contends that, following the rescission of the M-Opinion and the ROD denying the Imperial Project POO, Respondent has not taken any adverse action against the Imperial Project.[1380] Rather, according to Respondent, "it was [Claimant] that elected to abandon the Federal processing of the Imperial Project Plan of Operations."[1381] Respondent asserts that, during 2002, Claimant was working directly with high-level BLM officials to finalize the Imperial Project Mineral Report and Claimant ultimately received a favorable report.[1382] The next step in the process, Respondent explains, would have been to determine what was necessary to finalize the Imperial Project's EIS.[1383] Respondent alleges that Claimant, however, chose to abandon the process and instead file its notice in this arbitration.[1384]

662. Respondent asserts that this abandonment is clear in the July 21, 2003 letter sent from Claimant's counsel to the DOI, in which Claimant allegedly "thanked DOI officials for their attention to the Imperial Project, but stated that it believed that issues surrounding its Plan of Operations had become 'intractable' and that [Claimant] would instead pursue 'new avenues' of redress …."[1385] In addition, according to Respondent, Claimant has never inquired about the status of the review of its plan since the filing of its arbitral claims.[1386] Respondent contrasts this with Claimant's behavior earlier in the

[1379] *Id.* at 259-60; *see also* Factual Summary, *supra* ¶¶ 165, 185.
[1380] Counsel for Respondent, Tr. 1962:1-3.
[1381] Counsel for Respondent, Tr. 1962:3-5.
[1382] Counsel for Respondent, Tr. 1962:10-18.
[1383] Counsel for Respondent, Tr. 1962:18-1963:6.
[1384] Counsel for Respondent, Tr. 1963:7-1964:3.
[1385] Respondent's Counter-Memorial, at 260, citing Letter from Timothy R. McCrum, Counsel for Glamis Gold, to Patricia Morrison, Deputy Assistant Secretary for Land and Minerals, DOI, at 1, 3 (July 21, 2003) [FA 7 tab 47].
[1386] *Id.* at 261.

review process when it had been in frequent contact with DOI officials.[1387] Respondent argues that "[o]nce [Claimant] 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 the Imperial Project Plan of Operations.[1388]

iii. *The Federal Government's Cultural Review of the Imperial Project Was Neither Arbitrary nor Lacking in Transparency*

663. Finally, Respondent challenges Claimant's characterization of the federal cultural review of the Imperial Project as either arbitrary or lacking in transparency. It addresses each of Claimant's assertions—the lack of cultural uniqueness of the Imperial Project, the use of the ATCC, and the ACHP review process—by explaining the cultural studies and information supporting these decisions and arguing that it, as a governmental agency, was not remiss in relying on such evidence. Respondent explains that the process by which the cultural review was carried out was in accordance with Section 106 of the NHPA and included a reasonable and appropriate survey in light of the vast area of land that was described by the Native Americans as sacred. This process led, according to Respondent, to the positive identification of the Trail of Dreams and the determination of the spiritual significance of the Imperial Project area. In addition, according to Respondent, the ACHP review was neither unusual nor predetermined, and thus fails to exhibit, as Claimant contends, characteristics of arbitrariness or lack of transparency. Respondent finally responds to Claimant's contentions that the Imperial Project was treated differently than other projects in the area throughout this review process, by arguing that the circumstances of the Imperial Project taken together necessarily made this Project, and thus its review, unique.

664. To begin, Respondent asserts that the decisions made during the cultural review were supported by the work of distinguished professionals; there is, argues Respondent, "substantial evidence in the record supporting these conclusions" and BLM properly relied on that work.[1389] As an example, Respondent points to the numerous cultural surveys and the fact that KEA "stands by the very professional work that it has done" to

[1387] *Id.* at 261-62, citing Letter from Earl E. Devaney, Inspector General, DOI, to Senator Barbara Boxer, at 1-3 (Mar. 11, 2003) [Ex. 277].
[1388] Respondent's Rejoinder, at 242.
[1389] Counsel for Respondent, Tr. 1479:20-22.

dissuade examination by the Tribunal of the cultural findings and especially the exact location of the Trail of Dreams.[1390] Respondent points to the substantial expertise of the federal and state agencies involved on the question of the impact on cultural resources and argues that review of these determinations is not the proper role of a domestic court or an international tribunal.[1391]

665. Respondent contends that, even assuming that the evidence was somehow in error, which Respondent argues there is no reason to believe, "there is no evidence whatsoever that BLM knew or should have known" of such errors.[1392] Nor, contends Respondent, "can the … Government's actions in this regard be considered arbitrary. They were fully transparent, and they could not have upset an investor's legitimate expectations."[1393]

666. Specifically, with respect to the cultural findings and the methodologies for arriving at these findings, Respondent argues that, as with any undertaking on federal lands, BLM was required by Section 106 of the NHPA to take into account the effect of the Imperial Project on properties that were included on or eligible for the National Register of Historic Places ("NRHP").[1394] Because of this requirement, Respondent explains, KEA conducted a cultural resource study of the Imperial Project in 1997 and, due to concerns about possible deficiencies in a previous ASM Affiliates, Inc. ("ASM") survey, KEA was retained to study the Project area again in 1998.[1395] The KEA survey, according to Respondent, confirmed the presence of "a significant concentration of archeological features" in the area.[1396]

667. This survey did utilize the new concept of an ATCC but, contrary to Claimant's argument that it was harmed by the novel and discriminatory use of the ATCC to review the Imperial Project and its environs, Respondent asserts that this new approach was both appropriate and cost effective, benefiting Claimant. Respondent argues that the ATCC

[1390] Counsel for Respondent, Tr. 1479:3-1480:4.
[1391] Respondent's Rejoinder, at 213.
[1392] Counsel for Respondent, Tr. 1479:22-1480:4.
[1393] Counsel for Respondent, Tr. 1480:9-13.
[1394] Counsel for Respondent, Tr. 1464:4-9.
[1395] Counsel for Respondent, Tr. 1465:3-1466:1. *See* Factual Summary, *supra* ¶ 89, *et seq.* for further discussion of the various cultural surveys and studies.
[1396] Counsel for Respondent, Tr. 1472:13-19.

and the "more intensive survey interval" used in the survey of the Imperial Project "accorded with standard archeological practice, which calls for a reduction in that survey interval when a number of archeological features in a given area are identified."[1397] Respondent asserts that, when deciding on which and how large an area to survey, KEA and BLM talked to the Quechan, who stressed that the Project area was "a key component that exists within a larger culturally sensitive region of extreme sensitivity to the Tribe."[1398] This larger area, Respondent explains, encompassed approximately 500 square miles, an area of which a survey would be too onerous a burden for Claimant to pay.[1399] Therefore, Respondent alleges that KEA, with the approval of BLM and the California State Historic Preservation Officer ("SHPO"), considered the area defined as the ATCC.[1400] Respondent argues that Claimant made no complaint about this decision and, at the time, was appreciative of the cost reductions.[1401] Respondent asserts, in addition, that the argument over the ATCC is less important, as numerous cultural resource inventories conducted before the definition of the ATCC clearly indicate that the Imperial Project threatened archaeological sites.[1402]

668. According to Respondent, these studies reasonably led to the positive identification of the Trail of Dreams within the proposed Project site,[1403] which enabled KEA to confirm the adverse impact that the Imperial Project would have on a segment of the Quechan sacred trail network.[1404] "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."[1405] Respondent also alleges that this

[1397] Counsel for Respondent, Tr. 1467:15-19.
[1398] Counsel for Respondent, Tr. 1469:3-9; *see also* Respondent's Counter-Memorial, at 255, citing WHERE TRAILS CROSS, at 285 [FA 9 tab 83].
[1399] Counsel for Respondent, Tr. 1469:10-17.
[1400] Counsel for Respondent, Tr. 1469:17-21; Respondent's Counter-Memorial, at 255, citing Kaldenberg Declaration, ¶ 17, and Cleland Declaration, ¶ 27.
[1401] Counsel for Respondent, Tr. 1471:14-21; Respondent's Counter-Memorial, at 255-56, citing Kaldenberg Declaration, ¶ 18, and Cleland Declaration, ¶ 30.
[1402] Respondent's Counter-Memorial, at 254-55, citing Kaldenberg Declaration, ¶ 14.
[1403] Counsel for Respondent, Tr. 1473:16-20. *See also* Factual Summary, *supra* ¶¶ 99-101.
[1404] Counsel for Respondent, Tr. 1478:2-4.
[1405] Respondent's Rejoinder, at 214 (footnote omitted).

location of the Trail of Dreams was confirmed again years later when archeologist Boma Johnson provided his maps of the area.[1406]

669. Secondly, with respect to the ACHP, Respondent argues that its review followed a normal course, was not predetermined, and utilized effective and customary public hearings and site visits. Respondent asserts that through the process of a site tour, the hearing of testimony, and consultations with the BLM, the ACHP was able to reasonably conclude that the Imperial Project would cause "significant unmitigatable impacts" to the cultural resources of the area, as the location was of continued importance as a religious and cultural teaching area to which the area's scenic qualities contributed and that no substantial development had previously infringed.[1407] According to Respondent, Claimant has failed to show that consultations are normally longer prior to termination and that this therefore fails to prove any failure of the ACHP to act in an unlawful manner or even an unusual manner.[1408]

670. The cultural review process began in 1998, according to Respondent, when given the findings of the cultural surveys, the BLM requested the ACHP's comments on the proposed Imperial Project in accordance with Section 106 of the NHPA.[1409] Such referral is required, Respondent asserts, under the nationwide programmatic agreement which calls for the ACHP's review in "controversial undertakings."[1410] Respondent explains that the Part 800 regulations governing the ACHP's review specifically provide for public information meetings and authorize the ACHP to terminate consultations and issue comments directly to the head of the relevant government agency.[1411] Respondent therefore argues that the ACHP's decision to terminate consultation and issue a recommendation directly to the secretary of Interior was authorized by regulation.

671. Specifically, with respect to Claimant's characterization of the ACHP review process as predetermined and therefore lacking in transparency and arbitrary, Respondent challenges this description. To begin, Respondent argues that the informal email of

[1406] Counsel for Respondent, Tr. 1478:5-9.
[1407] Counsel for Respondent, Tr. 1485:6-1486:19; *see also* Respondent's Rejoinder, at 228-29.
[1408] Counsel for Respondent, Tr. 1481:21-1482:10.
[1409] Counsel for Respondent, Tr. 1480:18-21.
[1410] Counsel for Respondent, Tr. 1480:22-1481:2; *see also* Respondent's Rejoinder, at 225-26, citing Declaration of John M. Fowler, ¶ 17 (Sept. 18. 2006) ("Fowler Declaration").
[1411] Respondent's Rejoinder, at 226, citing 36 C.F.R. §§ 800.5(e)(3),(6) (1998).

ACHP staff member Alan Stanfill—who was not a decision-maker—merely responding to one of many comment letters received by the ACHP, offers no evidence that the ACHP process was somehow predetermined and therefore a sham.[1412] Next, with respect to the ACHP's site visit of the Imperial Project, Respondent argues that it also was not a sham even though the visitors failed to walk around the Imperial Project site and directly examine the archeological evidence.[1413] Respondent argues that there is no dispute that the tour traveled along Indian Pass Road and that it was not going to take a caravan of a dozen vehicles off-roading through the very cultural resources they were looking to protect.[1414] In addition, according to Respondent, the working group did visit two sites in the area of the Imperial Project: one trail segment in the southwest corner of the Project site, and the western portion of the Project area on Indian Pass Road.[1415] Finally, Respondent asserts that, through this tour, the ACHP Working Group was able to get a clearer understanding of the overall impacts of the Imperial Project and see firsthand the disruption it would cause to the viewsheds and solitude.[1416]

672. Finally, Respondent stresses Claimant's participation in this review process contending that Claimant presented its views directly to the ACHP Working Group at the March 1999 public meeting,[1417] subsequently met directly with the group and BLM representatives on July 14, 1999,[1418] and later exchanged correspondence with the group.[1419] Based on this level of review and party involvement, Respondent argues that the decision of the ACHP Working Group can "hardly be deemed 'arbitrary and capricious.'"[1420]

[1412] Counsel for Respondent, Tr. 1482:11-1483:3; Respondent's Counter-Memorial, at 257.
[1413] Counsel for Respondent, Tr. 1483:4-1485:5.
[1414] Counsel for Respondent, Tr. 1483:8-1484:2.
[1415] Respondent's Rejoinder, at 227.
[1416] Counsel for Respondent, Tr. 1484:14-1485:2.
[1417] Respondent's Counter-Memorial, at 256, citing Fowler Declaration, ¶ 19, Transcript of Advisory Council on Historic Preservation Public Hearing (Holtville, CA) (Mar. 11, 1999) [FA 10 tab 115].
[1418] *Id.*, citing Letter from Edward M. Green, Crowell & Moring, LLP, to John M. Fowler, Executive Director and General Counsel, ACHP (July 15, 1999) (thanking Mr. Fowler for arranging the meeting with the working group and representatives from BLM) [FA 7 tab 28].
[1419] *Id.* at 256-57, citing Letter from Charles A. Jeannes, Counsel, Glamis Gold, and Gary C. Boyle, Project Manager, Glamis Imperial Corp., to John M. Fowler, Executive Director and General Counsel, ACHP (Aug. 13, 1999) [Ex. 198].
[1420] Respondent's Rejoinder, at 28.

673. In conclusion, Respondent responds to Claimant's contentions that the Imperial Project was treated differently than other projects in the area, by arguing that the circumstances of the Imperial Project taken together made this review unique. Respondent presented at the hearing a chart in which it compared the Imperial Project with other mining projects and undertakings in the area with respect to four characteristics described by Respondent:

> [T]hese characteristics are the density of the archeological features discovered in and around the Imperial Project area, particularly those evidencing extensive past ceremonial or religious use. The second characteristic is the strong, the exceedingly strong, Native American concerns expressed about the effect of the Project on that area. Three is the convergence of the concerns expressed by the Native Americans and the archeological evidence, and … fourth, … that this Project was in a place that they found to be substantially undeveloped and had not been subject to any significant historic mining activity.[1421]

Respondent spent significant time at the hearing and in its submission detailing how, with respect to these four characteristics, the Imperial Project differed significantly from the Picacho Mine, the Rand Mine, the American Girl Mine, the Mesquite Mine, the Briggs Mine, the Castle Mountain Mine, the Soledad Mountain Mine, and the Mesquite Landfill.[1422] Respondent concluded that these characteristics, when taken together, presented the unique circumstances that the department confronted with the Imperial Project.[1423]

674. The unusual nature of the Imperial Project area therefore required special protection, Respondent argues. According to Respondent, the Quechan had indicated that the Project vicinity is a "strong area and likely the final resting place for their ancestors," representing a critical learning and teaching center; "this was the highest level of concern ever expressed by Native Americans for a location and for the impacts of a project."[1424] Respondent therefore asserts that Dr. Sebastian's testimony and Claimant's allegations

[1421] Counsel for Respondent, Tr. 1508:4-17.
[1422] Counsel for Respondent, Tr. 1512:19-1526:19; 1940:10-1952:2; 1959:2-1961:8; Respondent's Rejoinder, at 237-241.
[1423] Counsel for Respondent, Tr. 1508:1-3.
[1424] Counsel for Respondent, Tr. 1949:22-1950:19.

that the cultural resources in the Imperial Project area were identical to those in other project areas "is simply not borne out by the evidence."[1425]

675. Based upon this comparison, Respondent explains that this uniqueness illustrates the lack of arbitrariness of this process in that any different treatment accorded to Claimant in relation to neighboring projects was solely because the Imperial Project differed significantly from these projects:

> Now, in light of all of this, the Department's processing [of] the Imperial Project cannot be considered arbitrary or contrary to legitimate expectations when compared to past or contemporaneous CDCA projects because none of those projects exhibited the same density of archeological resources associated with ceremonial and religious use, and … none of those projects exhibited a convergence of that archeological evidence with the statements of Native American Tribes regarding the ceremonial and religious importance of the area, and none of those projects were in an area that was substantially undeveloped without any significant disturbance from historic mining activity.[1426]

676. Finally, Respondent argues that, even if it is correct that the true importance of the area to the Quechan Tribe was in terms of the Tribe taking a last stand, or that other tribes merely did not complain about other projects, this does not matter as what is important is what was known to the federal government.[1427] Respondent stresses that the U.S. government has an obligation to consult with Native Americans and, starting in the 1990s, "typically speaking, Native American tribes were much more vocal in letting their concerns be known to the Federal Government":[1428]

> Now, whether this was because Native Americans became more familiar with their legal rights, whether it was because they saw the destruction that was occurring all around them and decided to take a last stand, or whether it was because they had finally had the economic means to hire attorneys who could inform them of their legal rights, we don't know, but it doesn't matter. The fact is that the Government can only act on information which it is told. And regardless of what the Tribe's motivations were, the fact is that here they did express these concerns, and that these concerns were unlike concerns raised with respect to any of the other projects.[1429]

[1425] Counsel for Respondent, Tr. 1950:20-1951:1.
[1426] Counsel for Respondent, Tr. 1526:6-19.
[1427] Counsel for Respondent, Tr. 2110:5-2111:2.
[1428] Counsel for Respondent, Tr. 2110:5-10.
[1429] Counsel for Respondent, Tr. 2110:11-2111:2.

2. FACTUAL CONTENTIONS WITH RESPECT TO THE ALLEGED VIOLATION OF ARTICLE 1105 BY THE ACTIONS OF THE GOVERNMENT OF THE STATE OF CALIFORNIA

a. Issue Presented

677. Claimant argues that each of the California measures—Senate Bill 22 ("SB 22") and the State Mining and Geology Board ("SMGB") Regulations—were "motivated by this mine and this mine only," and were therefore "clearly discriminatory."[1430] In addition, Claimant contends that the measures were drafted in an arbitrary fashion without a rational relationship to their respective goals, and that these characterizations illustrate a lack of transparency and an upset of Claimant's reasonable, investment-backed expectations, in violation of Article 1105 of the NAFTA. Respondent attacks each of these contentions in turn and disputes Claimant's characterizations of these actions as being violative of the Article 1105 standard.

678. In combination with the above arguments on the federal measures and Claimant's contentions that those actions contributed to a violation of Respondent's obligations under Article 1105 of the NAFTA, the Tribunal must assess the arguments made regarding SB 22 and the SMGB Regulations and determine whether this series of measures taken by the California state government, either alone or in concert with those taken by the federal government, fall short of the obligations required under the fair and equitable treatment standard of Article 1105, as articulated above.

b. Claimant's Contentions

679. Claimant asserts that the California measures—both SB 22 and the SMGB Regulations—lack transparency and are arbitrary in that their sudden enactment of complete and mandatory backfilling requirements is not consistent with the existing legal framework regulating mining in the State of California and could not have been predicted by Claimant.[1431] This arbitrariness is further exhibited, according to Claimant, in the targeted nature of the measures, the unexplained distinction between metallic and non-

[1430] Counsel for Claimant, Tr. 82:21-83:5.
[1431] Claimant's Reply, ¶ 261, *et seq*.

metallic mines, and the failure of the SMGB to rely on scientific or technical data.[1432] Claimant additionally argues that the two California measures—Senate Bill 22 and the SMGB Regulations—were designed to, and effectively succeeded in, working together to render the Imperial Project permanently infeasible.[1433]

680. Claimant, in its arguments, asserts that SB 22 and the SMGB Regulations, individually and together, denied it a transparent and predictable framework, and it supports this contention with various explanations as to how both contributed to a breach of Article 1105(1). It also, as described above, explains various complaints with respect to each of the measures individually. For clarity of analysis, the Tribunal assesses the Parties' contentions for each of the two measures, with a final section assessing the asserted strategic relationship between the two measures.

i. *Senate Bill 22*

a. Senate Bill 22 Was Specifically Designed to Make the Imperial Project Infeasible

681. Claimant first argues that the legislative history leading to the passage of Senate Bill 22 illustrates that the bill was specifically targeted at the Imperial Project with the goal of making it economically infeasible,[1434] thus proving that the bill was discriminatory and arbitrary. During the course of the hearings, Claimant highlighted in particular four indications of such targeting. First, Claimant points to the veto message of Governor Davis of an earlier version of the Bill (SB 483), in which the governor directs the Resources Agency "to seek urgency clean-up legislation when the Legislature convenes in December to allow this important Native American sacred site protection to become law."[1435] Second, Claimant cites a summary of SB 22 written by the Senate Natural Resources and Wildlife Commission in which the commission wrote that "[t]hese changes to statute are urgently needed to stop the Glamis Imperial mining project in

[1432] *Id.*, ¶ 271, *et seq*.
[1433] Counsel for Claimant, Tr. 1780:21-1781:17; 1782:15-1783:4; 1789:3-14.
[1434] Claimant's Memorial, ¶¶ 552-53.
[1435] Counsel for Claimant, Tr. 83:11-17, citing Governor Gray Davis, Signature Message for SB 483 (Sept. 30, 2002) [Ex. 257] (Governor Davis actually signed SB 483 but, as it was joined to SB 1828 which the governor vetoed, it did not become operative).

Imperial county proposed by Glamis Gold, Ltd., a Canadian-based company."[1436] This bill summary also notes that "[t]he author believes the back-filling requirements established by SB 483 make the Glamis Imperial project infeasible."[1437] Third, Claimant points to notes from a hearing on SB 22 of the Assembly Committee on Natural Resources in which it is noted that, "[i]n California, one site would qualify, Glamis Imperial Mining Project (Glamis)."[1438] Finally, Claimant cites to Governor Davis' press release of the SB 22 passage, which reads: "SB 22 … specifically addresses the controversial Glamis Gold Mine. Mining operators have been attempting to get a permit for an open-pit, cyanide gold mine on 1,500 acres of federal land. The reclamation and backfilling requirements of this legislation would make operating the Glamis Gold Mine cost prohibitive."[1439]

682. According to Claimant, the documents produced subsequent to the hearing pursuant to *Procedural Order No. 13* also demonstrate that the purpose of the California measures was to render the Imperial Project economically infeasible.[1440] Claimant notes an explanation in a memorandum to file from the director of the Department of Conservation ("DOC") that states: "The Quechan Indian Tribe does not believe that backfilling in and of itself will return to the site its traditional sanctity, but they do believe that placing this requirement on the mining operation in this location creates so

[1436] Counsel for Claimant, Tr. 84:12-19, quoting Senate Natural Resources and Wildlife Committee, Summary of SB 22 (Jan. 14, 2003 Hearing) [Ex. 273].

[1437] Counsel for Claimant, Tr. 84:20-85:2, quoting Senate Natural Resources and Wildlife Committee, Summary of SB 22 (Jan. 14, 2003 Hearing) [Ex. 273].

[1438] Counsel for Claimant, Tr. 85:3-7, citing Assembly Committee on Natural Resources, SB 22 (Mar. 3, 2003 Hearing) [Ex. 276].

[1439] Counsel for Claimant, Tr. 85:8-17, citing Office of the Governor Press Release, Governor Davis Signs Legislation to Stop Proposed Gold Mine Near "Trail of Dreams" Sacred Site (Apr. 7, 2003) [Ex. 284].

[1440] Claimant's Letter to the Tribunal, p. 4 (Sept. 3, 2008). As discussed above in the procedural history, as part of its initial determinations regarding documents withheld based on claims of privilege during the document production phase of this Arbitration, the Tribunal deferred final determination of several documents held under qualified privileges until such time as it became apparent by the presentation of other evidence that such documents might so aid in the determination of an essential decision as to justify overcoming the privilege. In March of 2008, during deliberations, the Tribunal determined that Claimant had raised sufficient factual support to persuade the Tribunal that there was a need for it to review the six documents detailing communications involving the California Office of the Governor and the Department of Conservation, among others, and withheld by the State of California. The Tribunal therefore requested the production of these six additional documents for which Claimant had renewed its request at the final arbitral hearing (the only documents for which Claimant had done so). *See* Procedural Order No. 13 (Mar. 21, 2008). The six documents were produced by Respondent on August 13, 2008. *See* Procedural History, *supra* ¶ 248, *et seq*.

high [an] economic barrier as to ensure that these types of open pit operations cannot occur."[1441] According to Claimant, this same memorandum explains the purpose of SB 22 as: "More specifically, … this law will help stop the pending Glamis Gold Mine Imperial Project located on BLM land from becoming operational."[1442] Claimant argues that this language exhibits the reason why the State adopted mandatory backfilling requirements: to create an "economic barrier" to the Imperial Project's development and operation.

683. This intent is confirmed, asserts Claimant, in another memorandum to file from the DOC director via the secretary of legislation from the California Office of the Governor in which it is noted, "SB 22 does not ban the Glamis mining proposal, impossible under current federal law, but the reclamation requirements under the bill would be costly and make the Glamis project economically infeasible."[1443] Finally, Claimant raises email correspondence involving staff to the governor's office, Resources Agency and DOC that allegedly attached (at an earlier point) photographs of various mines that were "the type of mine that will not be created under the new mining regs."[1444] The correspondence appears to attach pictures of various mines, of which Claimant notes several that it asserts are "like the Imperial Project" including the Picacho and Rand mines which were recently operated by Claimant, and the Mesquite Mine, also in Imperial County.[1445]

684. Finally, an earlier version of the bill, Claimant asserts, was rejected because it was deemed overly broad in that it unnecessarily expanded the local situation—that of the Imperial Project—to a statewide issue.[1446] Claimant argues that the Enrolled Bill

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[1441] Claimant's Letter to the Tribunal, p. 4 (Sept. 3, 2008), quoting Memorandum to File from Darryl Young re: Backfilling Mines – SB 22 (Sher) and State Mining Board Regulations, attached to Email from Carol Dahmen to Darryl Young re: FW: DRAFT ... (Apr. 4, 2003) [Respondent Doc. 192].

[1442] *Id*.

[1443] Claimant's Letter to the Tribunal, p. 4 (Sept. 3, 2008), quoting Memorandum to File from Darryl Young via Linda Richards re: SB 22 (Sher) and State Mining Board Regulations, p. 1 (Apr. 4, 2008) [Respondent Doc. 208].

[1444] Claimant's Letter to the Tribunal, p. 4 (Sept. 3, 2008), quoting Email from Carol Dahmen to Darryl Young re: Gold Mine Pics (Apr. 4, 2003) [Respondent Doc. 194].

[1445] Claimant's Letter to the Tribunal, p. 4 (Sept. 3, 2008), citing Email from Carol Dahmen to Darryl Young Re: Gold Mine Pics (Apr. 4, 2003) [Respondent Doc. 194]. The other mines included are American Girl, Castle Mountain, Coliseum, CR Briggs, Jamestown, McLaughlin and Morningstar.

[1446] Counsel for Claimant, Tr. 1778:5-9, citing California Environmental Protection Agency, Enrolled Bill Report for SB 1828, at 9 (Sept. 10, 2002) [Ex. 249] (stating "[t]he bill would give Native

Report for SB 483 makes clear its singular purpose: "SB 483 contains narrowly-crafted language intended to prevent approval of a specific mining project for an Imperial Valley location by [Claimant]."[1447] Claimant asserts that Respondent has not even attempted to argue that SB 22 affected any other mine.[1448]

b. The Adoption of SB 22 Belies a Transparent and Predictable Framework

685. Claimant agrees with Respondent that SB 22 was enacted in a lawful manner: "They noticed it. There was [a] comment period. They promulgated the emergency."[1449] Claimant disputes, however, Respondent's interpretation of Claimant's statements that the California measures were enacted lawfully as proof that Claimant believed these measures were adopted in a transparent manner. The lawfulness of the process does not detract, Claimant argues, from the fact that, "having followed … procedure, it still could have an illegal impact, a violation of the international law, and particularly the fair and equitable treatment standard encompassed in 1105."[1450] Claimant asserts that Respondent would have the Tribunal believe that, as Claimant participated in the legislative and regulatory processes, it should accept the results of those processes, regardless of the outcome.[1451]

686. Claimant also disputes Respondent's interpretation of Claimant's involvement in the legislative and regulatory processes as attesting to their transparency.[1452] According to Claimant, simple participation in a democratic process does not necessarily make that process transparent or its results less arbitrary.[1453] Claimant argues that, in the United States, government agencies must follow two overriding principles when developing new rules or regulations: (1) "They must provide fair notice and due process to the regulated

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American tribes the ability to stop any project by making a simple declaration. The bill is too broad and does not limit this authority to Native American property, but extends it to all private and public lands in California, thereby giving Native American tribes land-use authority throughout the State.").

[1447] Counsel for Claimant, Tr. 1779:7-13, quoting Governor's Office of Planning and Research, Enrolled Bill Report for SB 483, at 5 (Sept. 18, 2002) [Ex. 253].

[1448] Counsel for Claimant, Tr. 86:3-6.

[1449] Counsel for Claimant, Tr. 1563:3-15.

[1450] Counsel for Claimant, Tr. 1563:16-21.

[1451] Claimant's Reply Memorial, ¶ 270.

[1452] *Id.*

[1453] *Id.*

community about proposed changes in the law, and [(2)] those proposed changes must bear some rational relationship to a stated and legitimate governmental purpose."[1454]

c. Mandatory Complete Backfilling Is Arbitrary in that It Does Not Protect Cultural Resources and May Cause Greater Environmental Degradation

687. Claimant argues that Senate Bill 22 is not rationally related to its stated purpose of protecting cultural resources and thus is arbitrary.[1455] Claimant asserts that, "[o]nce you take the material out [of] the ground and if there are cultural resources on the surface, they're destroyed. Putting the dirt back in the pit actually doesn't protect those resources."[1456] Claimant additionally contends that the requirement of recontouring actually would increase the amount of land disturbance by 17% over the acreage assessment currently contained in the Final EIS/EIR, leading to the burial of more artifacts.[1457]

688. In addition, Claimant asserts that complete backfilling may not improve environmental protection, and may actually *increase* environmental degradation.[1458] Claimant cites to the 1990 EIS/EIR for the Castle Mountain Project, in which BLM determined that "'maximum pit backfilling' actually had a 'greater impact' tha[n] traditional open-pit reclamation methods on water resources, wildlife, air quality and visual resources."[1459] Claimant also points to comments of the U.S. Bureau of Mines in 1994 to BLM California State Director Ed Hastey that backfilling "could also present problems with the groundwater."[1460] Finally, Claimant raises the 1999 National Academy of Sciences/National Research Council ("NAS/NRC") study in which it confirmed the findings of an earlier study undertaken by the NRC Committee on Surface

[1454] *Id.*, citing 5 U.S.C. §§ 533(b),(c) (fair notice), Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 42, 48-50, 52 (1983) (rational relationship to a legitimate purpose).

[1455] Counsel for Claimant, Tr. 1790:5-16.

[1456] Counsel for Claimant, Tr. 1790:13-16.

[1457] Claimant's Reply Memorial, ¶¶ 284-85.

[1458] *Id.* ¶ 281.

[1459] *Id.*, citing Castle Mountain Project, Final EIS/EIR, at 3-37 to 3-38 (Aug. 17, 1990) [Ex. 31]. Castle Mountain Project is an open-pit heap leach mine in San Bernardino County, California. BLM Record of Decision, Castle Mountain Project, at 1-2 (Oct. 31, 1990) [Ex. 32].

[1460] *Id.*, quoting Letter from Richard B. Grabowski, Chief, Western Field Operations Center, Bureau of Mines, DOI, to Ed Hastey, BLM California State Director, regarding Backfilling of Open Pit Mines (June 11, 1990) [Ex. 29].

Mining and Reclamation, finding that "backfilling of a large open pit would be of uncertain environmental and social benefit …."[1461]

ii. *The SMGB Regulations*

a. The Requirement of Mandatory Backfilling Was Unprecedented and Completely Unexpected

689. Claimant first argues that the complete backfilling requirements of the SMGB Regulations were completely unprecedented, and thus were arbitrary and upset Claimant's legitimate expectations. It points out that, during the first 25-plus years under the California Surface Mining and Reclamation Act ("SMARA"), there were no mandatory complete backfilling regulations.[1462] Before December 2002, Claimant explains, complete backfilling and recontouring of open-pit mines had not been required in California, and had never been required of any major mine in the state.[1463]

690. Complete backfilling had long been considered uneconomical, Claimant argues, making this action by the SMGB completely unexpected and questionable as to its rationality. Claimant asserts that "[c]omplete backfilling generally was and is recognized as infeasible by the [NAS]."[1464] Two reports by the NAS/NRC are cited by Claimant to show recognition by the NAS/NRC that the restoration of mining land to its original contours generally is not feasible for non-coal minerals and that such measures are impractical, inappropriate and economically unsound.[1465] According to Claimant, even Dr. Parrish acknowledged that the SMBG Regulations were contrary to the recommendations of the National Research Council, which advised that backfilling be considered on a case-by-case basis.[1466]

691. With respect to the Imperial Project specifically, Mr. Leshendok testified that he had reviewed the 2002 Mineral Report in which the BLM used economic analysis to address the backfilling question.[1467] Mr. Leshendok explained that, taking into account

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[1461] *Id.*, quoting HARDROCK MINING ON FEDERAL LANDS 82 (1999) [Ex. 169].
[1462] Parrish, Tr. 497:6-10.
[1463] Claimant's Reply Memorial, ¶ 264.
[1464] Counsel for Claimant, Tr. 1735:22-1736:2.
[1465] Claimant's Memorial, ¶ 554, quoting HARDROCK MINING ON FEDERAL LANDS 82 (1999) (quoting NAS/NRC, SURFACE MINING OF NON-COAL MINERALS xxviii (1979)) [Ex. 169].
[1466] Counsel for Claimant, Tr. 1736:9-17.
[1467] Leshendok, Mining Operations Expert for Claimant, Tr. 464:18-465:6.

many factors, the BLM determined that it was not economical to backfill the East Pit.[1468] Claimant argues that earlier mining operations also had considered complete backfilling but rejected it as it shut down the future potential of mined minerals.[1469]

692. Mr. Leshendok additionally testified to his experience in the rulemaking process of the 3809 Regulations in which, he explained, backfilling was seriously considered but it was determined that it was best to require complete backfilling only on a site-specific basis:

> In the rulemaking process, the first draft, the draft regulations looked at a strong presumption of backfilling, even though most of it was still considered on a site-specific basis. That strong presumption of backfilling was reviewed. We looked at public comments. And, then based on the public comments and a 1999 National Research Council report, decided to change the final regulations to … look at backfilling on a site-specific basis considering economics, technical, and safety factors.
>
> The 1990 report by the National Resource [sic] Council looked at Hardrock Mining across the United States and came to conclusions that the best method for dealing with backfilling was on a site-specific basis. They then said it was very advisable to take that practice of backfilling and apply it to the 3809 regulations. BLM was required by Congress to take a look at that report, consider its recommendations, and that was a major factor in determining that the final 2001 regulation should be made on a site-specific basis for backfilling.[1470]

Mr. Leshendok stated that, during his review, he did not find any past history of a regulatory requirement of mandatory complete backfilling in the United States.[1471]

693. Claimant additionally points to several of the documents produced pursuant to *Procedural Order No. 13*, to argue that even the State of California viewed the measures as new reclamation standards.[1472] The previously mentioned memorandum to file from the DOC director, for instance, explains that, "[u]nder current California law, the only requirement for reclamation is that the local government ... approve a post-mining reclamation plan that can best be described as a barren, man-made Moonscape topography of fake valleys and unnatural ridges."[1473] While Claimant asserts that this is

[1468] Leshendok, Tr. 465:6-10.
[1469] Counsel for Claimant, Tr. 1788:5-13 (citing the Rand Mine).
[1470] Leshendok, Mining Operations Expert for Claimant, Tr. 465:16-466:15.
[1471] Leshendok, Tr. 468:19-469:3.
[1472] Claimant's Letter to the Tribunal, p. 5 (Sept. 3, 2008).
[1473] *Id.*, quoting Memorandum to File from Darryl Young Re: Backfilling Mines – SB 22 (Sher)

a dismissive view of the standard reclamation practices, it argues that it confirms Claimant's position that the Imperial Project conformed to pre-existing law and would have been able to proceed but for the California measures.[1474]

694. The novelty and unexpected nature of these measures is also confirmed, Claimant asserts, in this internal memorandum. The memorandum further explains that "[t]his will be the first such regulation in the United States"; and "[t]his action is the first requirement anywhere in the United States to require backfill of metallic mineral surface mines ...."[1475]

b. The Emergency Basis for the Regulations Was Unprecedented

695. Claimant next argues that the use of emergency status for this regulation also was unusual, unprecedented, and improperly targeted at the Imperial Project. Claimant explains that the procedures for enactment of emergency regulations must include a specific description of the emergency.[1476] The need for the emergency must be supported by substantial evidence, and all technical reports upon which the board relied for this support must be identified.[1477] The emergency cannot be based upon "expediency, convenience, best interest, general public need, or speculation."[1478] In addition, if the emergency was well known at the time, the board must explain why it could not adopt the regulation through normal procedures.[1479]

696. According to Claimant, the SMGB had previously received requests to address particular mining projects, but it had never used emergency rules to address this line of projects.[1480] In response to Tribunal's questions, Dr. Parrish confirmed that he did not

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and State Mining Board Regulations, p. 2, attached to Email from Carol Dahmen to Darryl Young re: FW: DRAFT ... (Apr. 4, 2003) [Respondent Doc. 192].

[1474] Claimant's Letter to the Tribunal, p. 5 (Sept. 3, 2008).

[1475] *Id.* at 5-6, quoting Memorandum to File from Darryl Young re: Backfilling Mines – SB 22 (Sher) and State Mining Board Regulations, pp. 1, 3, attached to Email from Carol Dahmen to Darryl Young re: FW: DRAFT ... (Apr. 4, 2003) [Respondent Doc. 192].

[1476] Counsel for Claimant, Tr. 1783:9-13.

[1477] Counsel for Claimant, Tr. 1783:13-17.

[1478] Counsel for Claimant, Tr. 1783:21-1784:2, quoting CAL. GOV'T CODE § 11346.1(b)(2).

[1479] Counsel for Claimant, Tr. 1784:2-5.

[1480] Counsel for Claimant, Tr. 1784:6-17.

recall the board adopting any other regulation by the emergency method, other than the setting of mining fee schedules.[1481]

c. There Is No Rational Relationship between the SMGB Regulations and Their Stated Objectives

1. *There Is No Rational Reason to Distinguish Between Metallic and Non-Metallic Mines*

697. There is also no rational basis, Claimant contends, to distinguish metallic open-pit mines from other open-pit mines, "whether for safety or for restoration to future unspecified uses."[1482] The vast majority of mines regulated under SMARA in California are non-metallic, Claimant points out, and none of these is subject to complete backfilling requirements.[1483] This distinction between metallic and non-metallic mines is not rational, Claimant contends, as many non-metallic mines present the same, if not greater, concerns than those subject to regulations. For instance, Claimant cites to the U.S. borax/boron project that leaves a pit of 1.5 by 1.5 miles wide and 1,250 feet deep, as well as overburden piles of between 500 and 600 feet and extensive tailings ponds.[1484] This mine, Claimant stresses, is not subject to the backfilling requirements.[1485] Citing to Mr. Leshendok, Claimant argues that "the California landscape is dotted with open-pit non-metallic mines."[1486]

698. If the stated concern for backfilling is safety and recontouring to enable subsequent use, Claimant argues that there is no rational explanation as to why this particular provision could not be applied to all open-pit mining in California.[1487] Claimant asserts that the variance exempting mines with insufficient waste materials to fill their pits could apply equally to aggregate, as well as open-pit, mines.[1488]

699. Claimant additionally asserts that there is no evidence in the administrative record showing that the board performed comparative analysis of metallic and non-

[1481] Parrish, Tr. 599:20-600:2.
[1482] Counsel for Claimant, Tr. 88:8-11.
[1483] Parrish, Tr. 498:5-13. Dr. Parrish does state, however, that such requirements may be placed by local authorities.
[1484] Leshendok, Mining Operations Expert for Claimant, Tr. 470:20-471:16.
[1485] Leshendok, Tr. 471:21-472:4.
[1486] Claimant's Reply Memorial, ¶ 275, citing Leshendok Report, ¶ 114.
[1487] Counsel for Claimant, Tr. 1796:11-16.
[1488] Counsel for Claimant, Tr. 1796:16-18; Claimant's Reply Memorial, ¶ 274.

metallic mines.[1489] Claimant points out that "no scientific analysis or report of non-metallic mining practices was consulted during the rulemaking process."[1490] Although Dr. Parrish testified as to what Claimant characterizes as "post hoc rationalizations" as to why these mines are different, Claimant contends that there is no record to support these rationalizations.[1491]

700. In conclusion, Claimant stresses that it does not challenge the lawfulness of these regulations, but that it "bore the brunt of this extraordinary change in reclamation standards."[1492] The regulations apply only to metallic mines, Claimant explains, which includes only eight of the 955 mines in California.[1493]

2. *The Lack of Rational Relation Also Is Evidenced by the Board's Complete Failure to Engage in Scientific Study to Support Its Conclusions*

701. Claimant asserts that its claim that the regulations are without a rational relationship to their goals and thus arbitrary is supported by the failure of California to engage in any scientific study to support the distinctions made in the regulations.[1494] In cross-examination, Claimant confirmed with Dr. Parrish of the SMGB that "the Final Statement of Reasons says that no technical, theoretical, empirical studies, reports or documents were prepared or relied upon by the SMGB in its consideration of this rulemaking."[1495] Claimant also questioned Dr. Parrish about the 25-foot restriction for recontouring, in response to which Dr. Parrish explained his belief that the level was a recommendation of the Department of Conservation's Office of Mine Reclamation ("OMR") and was "sort of a compromise between what could be done out there feasibly without interfering with the natural environment," but that it did not rely on studies.[1496] Finally, Claimant confirmed with Dr. Parrish that the SMGB did not prepare technical

[1489] Counsel for Claimant, Tr. 1795:3-11.
[1490] Claimant's Reply Memorial, ¶ 274.
[1491] Counsel for Claimant, Tr. 1795:12-18.
[1492] Counsel for Claimant, Tr. 83:6-10.
[1493] Leshendok, Mining Operations Expert for Claimant, Tr. 469:11-21.
[1494] Counsel for Claimant, Tr. 88:12-17; Claimant's Memorial, ¶ 554.
[1495] Parrish, Tr. 538:2-8.
[1496] Parrish, Tr. 548:9-21.

studies justifying the imposition of complete backfilling on metallic mines as opposed to non-metallic mines.[1497]

702. Claimant asserts that "California's failure to rely on any scientific or technical report or study in support of the mandatory backfilling regulations resulted in the development of a reclamation standard that cannot withstand objective and careful scrutiny, particularly because that standard applies to only a small fraction of the open-pit mines in the state."[1498] In addition, Claimant contends that, "[i]n the end, it is obvious that the State Mining Board, at the urging of the Secretary of Resources on behalf of Governor Davis, provided a pre-determined and arbitrary justification for the complete mandatory backfilling regulation without any data or scientific evidence in support."[1499]

iii. *The Relationship between SB 22 and the SMGB Regulations: Claimant's Contention that the California Measures Worked Together to Target the Imperial Project and Make It Infeasible*

703. Claimant thus argues, in its final argument with respect to the California measures, that "the two California measures were closely related avenues to accomplish a single objective—stop the Imperial Project from ever proceeding while seeking to avoid payment of compensation it knew to be required had it proceeded transparently and directly through eminent domain."[1500]

704. For support of the assertion, Claimant argues that, shortly after Governor Davis instructed the secretary of Resources "to pursue all possible legal and administrative remedies that will assist in stopping the development of the Glamis gold mine,"[1501] a California Senate staffer and lawyer for the governor began communicating about the feasibility of SMGB Regulations to shut down the Imperial Project, while the state legislature worked with the DOC to draft legislative proposals to the same effect.[1502] Within a few days, according to Claimant, the secretary of Resources sent a letter to the State Mining and Geology Board requesting that the board consider "adopting state

[1497] Parrish, Tr. 560:20-561:2; 592:15-593:5.
[1498] Claimant's Reply Memorial, ¶ 273.
[1499] *Id.* ¶ 282.
[1500] Claimant's Letter to the Tribunal, p. 7 (Sept. 3, 2008).
[1501] Claimant's Reply Memorial, ¶ 268, quoting Governor Gray Davis, *Signature Message for SB 483* (Sept. 30, 2002) [Ex. 257].
[1502] *Id.*, citing Email from Jeff Shellito to Rich Thalhammer (Oct. 15, 2002) [Ex. 258].

regulations that would alter current state reclamation policies and consider the formal adoption of regulations to achieve these purposes at the very earliest opportunity."[1503] According to Claimant, State Senators Sher and Burton later wrote to the SMGB chairman urging the SMGB to adopt the proposed regulations on an emergency basis "because the federal government is racing to complete an environmental analysis of the Glamis Imperial Project, and the Secretary of the Interior may take action allowing the mine to move forward before the end of the year."[1504] Claimant asserts that the SMGB then, within a month, placed the topic on its agenda and, one month later, it adopted the emergency backfilling regulations.[1505]

705. Claimant additionally argues that several of the documents produced pursuant to *Procedural Order No. 13* further support this position. Specifically, Claimant contends that a memorandum to file from the DOC director via the California Governor's Office regarding SB 22 and the SMGB Regulations focuses on the Imperial Project and provides reasons for "why the project should be targeted for prohibition, including why the targeted action was needed on an emergency basis."[1506] That memorandum states:

> In response to the possible pending action of the Bush Administration to approve the mine, the State Mining and Geology Board adopted a 90-day emergency regulation (set to expire April 18th) which required any new precious metal mine to be backfilled as part of its required reclamation plan. Concurrently Senator Sher introduced SB 22 to kill the Glamis project.
>
> There are two separate efforts to stop the Glamis mine and protect sacred sites from future threats of precious mines.[1507]

Claimant points to this language as an example of what it describes as "close coordination between the California Governor's Office and the SMGB" and to assert that these were not independent regulatory actions, but instead worked concurrently to target

[1503] Counsel for Claimant, Tr. 1782:15-1783:1, quoting Letter from Mary Nichols, Secretary for Resources, to Allen M. Jones, Chairman, SMGB (Oct. 17, 2002) [Ex. 259].

[1504] Claimant's Reply Memorial, ¶ 269, quoting Letter from State Senators Burton and Sher to Allen M. Jones, at 1 (Dec. 10, 2002) [Ex. 266].

[1505] Counsel for Claimant, Tr. 1783:2-4.

[1506] Claimant's Letter to the Tribunal, p. 3 (Sept. 3, 2008), citing Memorandum to the File From Darryl Young via Linda Richards, Re: SB 22 (Sher) and State Mining Board Regulations (Apr. 4, 2008) [Respondent Doc. 208].

[1507] *Id.*, quoting Memorandum to File From Darryl Young via Linda Richards, Re: SB 22 (Sher) and State Mining Board Regulations, p. 1 (Apr. 4, 2008) [Respondent Doc. 208].

the Imperial Project.[1508]

706. Claimant asserts that, "considering the significant role the Governor's April 7, 2003 press release and related speech ... played in this case, in which the Governor declared the purpose of SB 22 was to 'stop the Glamis mine proposal dead in its tracks,' the internal processes relating to the publicity of the Governor's actions are highly relevant."[1509] In addition, Claimant believes that there was close coordination and intersection between the passage of SB 22 and the SMGB Regulations, coordination that it believes could be further proven by the redacted portions of three of the documents produced pursuant to *Procedural Order No. 13*, which contain communications involving the California Office of the Governor and the Department of Conservation, among others.[1510]

707. Claimant argues that these redactions are tantamount to a lack of production in the face of an order for production.[1511] In addition, Claimant asserts that, in such a situation, "the adjudicatory body should invoke an adverse inference that the documents support the position of the party seeking production of the documents."[1512] Claimant therefore argues:

> Accordingly, in this case, Claimant Glamis Gold Ltd. is entitled to an inference that the redacted portions of these documents would support Claimant's position that the two California measures were closely related avenues to accomplish a single objective—stop the Imperial Project from ever proceeding while seeking to avoid payment of the compensation it knew to be required had it proceeded transparently and directly through eminent domain.[1513]

708. In response to Respondent's arguments as to why an adverse inference is not warranted in this situation, Claimant argues that "[i]nternational arbitral tribunals [are] free to make presumptions or inferences based on what the parties offer or fail to offer."[1514] It counters each of Respondent's arguments in turn.

[1508] *Id.*
[1509] *Id.* at 7, citing Exs. 284 and 285.
[1510] *Id.*, referring to Respondent's Document Nos. 162, 192 and 197.
[1511] *Id.*
[1512] *Id.* (internal citations omitted).
[1513] *Id.* at 7-8.
[1514] Claimant's Letter to the Tribunal, p. 2 (Oct. 2, 2008), quoting Charles N. Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules*, 28 INT'L LAW 47, 56 (1994).

709. First, Claimant asserts that Respondent's argument that the documents are within the control of California is not helpful to Respondent as internal governmental structures provide no excuse under international law, which provides that States are responsible for the acts of State organs.[1515] Claimant additionally argues that such a designation also is not an excuse under the NAFTA, which at Article 105 provides: "The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance ... by state and provincial governments."[1516]

710. Second, Claimant argues that Respondent's claim that a party is protected from the drawing of an adverse inference if "any" credible evidence is provided in the record in rebuttal "is as extraordinary as it is wrong."[1517] Such a rule, Claimant asserts, would allow a party to avoid an adverse inference by the presentation—with impunity—of only favorable evidence, while withholding damaging evidence.[1518] Claimant contends that Respondent also is wrong about what picture is drawn by the record.[1519] According to Claimant, it is "indisputable" that "Governor Gray Davis' own public directive to his Secretary of Resources of September 30, 2002 called for legislative and executive actions to block the Glamis mine."[1520] This directive was followed, Claimant argues, by a letter from the secretary of Resources to the SMGB on October 17, 2002, "seeking unprecedented backfilling requirements for metallic mines, which led directly to the adoption of the December 2002 emergency regulations and then the April 10, 2003 final SMGB regulations."[1521] In addition, according to Claimant, the idea of the emergency regulations originated as early as October 11, 2002 in discussions between representatives of the California Attorney General's Office, the Resources Agency, and the California Legislature.[1522] Claimant asserts that the SMGB members are appointed by the governor and "are obviously influenced by the Governor's publicly declared directives, as demonstrated by the chain of events in this case."[1523]

[1515] *Id.*, citing Procedural Order No. 13 (Mar. 21, 2008).
[1516] *Id.*
[1517] *Id.* at 3.
[1518] *Id.*
[1519] *Id.*
[1520] *Id.*, citing Governor Gray Davis, SB 1828 Senate Bill Veto (Sept. 30, 2002) [Ex. 256].
[1521] *Id.*
[1522] *Id.*, citing Email from Rick Thalhammer to Jeff Shellito (Oct. 15, 2002) [Ex. 258].
[1523] *Id.*

711. Third, Claimant argues that Respondent has not provided a valid explanation for the redactions, asserting that the Tribunal ordered the documents' production and the redactions violate that order.[1524] Claimant contends that the fact that Mr. Kahn felt "compelled" as custodian to make the redactions is conclusory.[1525] Claimant argues that, "in any event," Respondent has not explained how a list of names and meeting participants is privileged information when that list includes members of the environmental community.[1526]

712. Finally, Claimant argues that the redactions themselves "support the reasonableness of the [sought] inferences" asserting, for example, that Mr. Kahn, in his second affidavit, "admits that, in fact, one of the redacted bullet points expressly '*refers to the signing of SB 22 and the announcement of mining regulations.*'"[1527] Another redacted bullet point, according to Claimant, discusses the signing of SB 22 and the "announcement" of the mining regulations three days prior to the SMGB's finalization of those regulations.[1528] In addition, Claimant contends that the redacted list of names in email correspondence from the governor's office staff to the director of the DOC and others "certainly identifies the very non-governmental interest groups that Governor Davis was seeking to appease ... and may well reveal the government participants—such as the SMGB Board Members—as well."[1529]

713. Although Claimant continues to argue for such an adverse inference and objects to Respondent's arguments to the contrary, it turned down the Tribunal's request of an *in camera* review of the documents in question.[1530] Noting the "Tribunal's assurance that it would conduct an *in camera* review 'with great haste,'" Claimant explained that it was "less sanguine that Respondent will actually produce the documents in a timely fashion; so far it offered only to 'work with' the State of California in furtherance of an *in camera*

[1524] *Id.* at 4.
[1525] *Id.*
[1526] *Id.*
[1527] *Id.*, quoting Second Affidavit of Michael A. Kahn, ¶ 5 (Aug 25, 2008) (emphasis added by Claimant).
[1528] *Id.*, citing Respondent's Document 162.
[1529] *Id.*
[1530] Claimant's Letter to the Tribunal (Oct. 15, 2008). In response to these arguments and those made by Respondent, the Tribunal in its letter to the Parties of October 9, 2008, explained that it was, at that time, "not entirely persuaded that it should draw the requested adverse inference." It therefore offered to conduct an *in camera* review, if Claimant so wished.

review of the documents, and similar assurances previously have met with extended delays spanning many months."[1531] Therefore, Claimant requested the Tribunal to instead "make its ruling on the redactions and proceed with the issuance of the decision on the merits in this dispute based on the extensive evidence of record in this case, including the documents belatedly produced by the Respondent."[1532]

c. Respondent's Contentions

714. Respondent stresses that the political process in the United States, and the legislation and regulations it produces, are the subject of compromise among numerous conflicting interests. The result is that the agreed-upon solution may not be the one that is "purportedly best suited to address the problem" and answer each and every one of the concerns of the varying groups interested in the outcome.[1533]

715. Without compromise, Respondent argues that governments would grind to a halt without any legislation being enacted.[1534] "All a disappointed investor would need to do would be to identify a problem that has gone unaddressed or to find fault with the compromised solution that was adopted to sustain a claim. Liability would attach for every regulation as there are always constituents that are dissatisfied with legislation no matter how well considered."[1535]

716. This is not to say that an investor cannot challenge legislation that clearly lacks any rational basis. Respondent argues that arbitrariness could be found in legislation bearing no rational relationship to the purported aims, but that this is not the case with the California measures:

> Legislation that bears no rational relationship to its purported aims might be characterized as arbitrary. But even assuming that there was an international law prohibition against such action, the record in this case so clearly evidences a relationship between each of the California measures and their respective objectives that neither measure could be labeled 'arbitrary.'[1536]

Respondent asserts that each of the measures "bears a legitimate, rational relationship to

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[1531] *Id.*
[1532] *Id.*
[1533] Counsel for Respondent, Tr. 1407:7-18.
[1534] Counsel for Respondent, Tr. 1969:6-8.
[1535] Counsel for Respondent, Tr. 1969:8-14.
[1536] Counsel for Respondent, Tr. 1409:7-14.

its respective purposes, and each was adopted in accordance with due process."[1537]

717. Finally, Respondent asserts that Claimant's argument that the California measures upset its legitimate, investment-backed expectations must fail.[1538] First, Respondent argues that Claimant "could not have reasonably expected that California would never impose more specific reclamation requirements including backfilling requirements, for open-pit metallic mines in the State."[1539] Furthermore, according to Respondent, both the legislation and the regulations "merely specified pre-existing statutory standards embodied in the Sacred Sites Act and SMARA."[1540] Therefore, Respondent contends that "[t]he legal principles underlying SB 22 and the SMGB regulations were all in force when [Claimant] made its investment in the Imperial Project, and foreclose any reasonable expectations by [Claimant] that California would not legislate to accommodate Native American religious practices, legislate to protect sacred sites from irreparable harm, or regulate to ensure compliance with SMARA's reclamation standard."[1541]

718. Respondent then turns to each of the California measures to dispute Claimant's allegations that they violate Article 1105.

i. *Senate Bill 22*

a. Senate Bill 22 Was Adopted to Address a Broad Goal of Cleaning Up California Mines and Was Not Targeted at the Imperial Project

719. Respondent writes that "SB 22's purpose is to protect Native American sacred sites from irreparable damage caused by open-pit mining."[1542] It bears, according to Respondent, a "legitimate, rational basis to its ... purpose[]."[1543] The Bill attempts to mitigate the potential harm from all open-pit mining projects in the vicinity of sacred

[1537] Respondent's Counter-Memorial, at 235.
[1538] *Id.* at 244-45.
[1539] *Id.* at 244.
[1540] *Id.*
[1541] *Id.* at 245.
[1542] *Id.* at 235.
[1543] *Id.*

Native American sites,[1544] such as that projected in the Imperial Project Plan of Operations.[1545]

720. In addition, Respondent argues that the legislation effectively limited the waste piles at the Project site that would have obstructed the view from the Running Man to Indian Pass, a view characterized by the Quechan as one of the most important resources that would be adversely affected by the Imperial Project.[1546] The waste piles envisioned in the Imperial Project POO would have "completely obstructed the line of sight from Running Man to Indian Pass, which is critical to the Quechan's cultural and religious use of the area," according to Respondent.[1547] Respondent concludes that SB 22, which requires backfilling of the pits and recontouring of the waste piles, "is a rational means to mitigate the harm otherwise caused to Native American sacred sites by open-pit mining."[1548]

721. Respondent notes that several of the documents produced subsequent to the hearing pursuant to *Procedural Order No. 13* support this position that "while the Imperial Project may have served as the impetus for the adoption of SMGB Regulations and SB 22, California's efforts were targeted at open-pit mining generally, not the Imperial Project specifically."[1549] According to Respondent, several of the documents "make clear" that it was a "clear concern in the Governor's Office and the Department of Conservation ... to ensure that operators of open-pit metallic mines—rather than taxpayers—cover their own clean up costs."[1550] Specifically, Respondent points to the same memorandum to file from the DOC director that Claimant highlighted, which reads, " ... SB 22 ... provides important protection for Native American sacred sites from the significant, negative environmental and aesthetic impacts caused by the failure to reclaim

[1544] *Id.* at 236.
[1545] *Id.* at 235-36.
[1546] Counsel for Respondent, Tr. 1423:9-13.
[1547] Respondent's Counter-Memorial, at 236, citing Letter from Ed Hastey, California State BLM Director to Cherilyn E. Widell, State Historic Preservation Officer (Feb. 26, 1998) [Ex. 106] (explaining that the Quechan "have indicated that a sense of solitude and viewsheds are important to exercising their religion and other aspects of their culture").
[1548] *Id.*
[1549] Respondent's Letter to the Tribunal, pp. 1-2 (Sept. 3, 2008).
[1550] *Id.* at 2.

open pit mining operations."[1551] According to Respondent, this memorandum explains the general need for this legislation:

> Open pit mining techniques have, for nearly a hundred years, been a [sic] particularly destructive of the land surface. ... modern metallic mineral mining operations can result in pits that have surface disturbances of thousands of acres and that reach hundreds of feet deep, and leave millions of cubic yards of waste rock in miles long piles several hundred feet high on the land surface.[1552]

Another memorandum from the office of the California governor to the DOC director reiterates that SB 22 will "require the 'restoration' of sacred sites as closely as possible to pre-mining conditions."[1553]

722. Respondent argues that the California measures do not prevent the approval of mining projects that cover their own clean-up costs, though "[r]equiring mining operators to cover their own clean-up costs may reduce the likelihood that operators will pursue 'marginally profitable' project proposals."[1554] Respondent cites again to the memo from the office of the governor to the DOC for support of this position, which reads:

> While SB 22 does not outright ban the Glamis mining proposal, something impossible under current federal law, its implementation makes it much less likely that marginally profitable gold mining proposals will go forward because of the added costs associated with backfilling, and in all events will at least require the 'restoration' of sacred sites as closely as possible to pre-mining conditions.[1555]

Respondent asserts that this is appropriate, however, as the mining companies, not the California taxpayers, would be the parties responsible for the costs of cleaning up damage from mining operations.[1556] Respondent cites again to the above-mentioned memorandum to file from the director of the DOC for its statement that "[t]he California

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[1551] *Id.*, quoting Memorandum to File from Darryl Young Re: Backfilling Mines – SB 22 (Sher) and State Mining Board Regulations, attached to Email Correspondence from Carol Dahmen to Darryl Young Re: FW: DRAFT ... , p. 1 (Apr. 4, 2003) [Respondent Doc. 192].

[1552] *Id.*, quoting Memorandum to File from Darryl Young Re: Backfilling Mines – SB 22 (Sher) and State Mining Board Regulations, attached to Email Correspondence from Carol Dahmen to Darryl Young Re: FW: DRAFT ... , p. 2 (Apr. 4, 2003) [Respondent Doc. 192].

[1553] *Id.* at 2, quoting Memorandum to File from Dana Williamson RE: Environmental Group call, p. 2, attached to Email Correspondence from Dana Williamson to Darryl Young Re: Take a look at this (Apr. 4, 2003) [Respondent Doc. 162].

[1554] *Id.* at 3.

[1555] *Id.*, citing Memorandum to File from Dana Williamson RE: Environmental Group call, p. 2, attached to Email Correspondence from Dana Williamson to Darryl Young Re: Take a look at this (Apr. 4, 2003) [Respondent Doc. 162].

[1556] *Id.*

taxpayer is the one who, ultimately, will be saddled with the costs of cleaning up environmental damage to the state caused by these mining operations."[1557]

b. Senate Bill 22 Was Adopted in a Sufficiently Transparent Manner

723. Senate Bill 22, Respondent argues, was adopted in accordance with California law, which Claimant does not dispute.[1558] Respondent cites to Claimant's participation and that of the California Mining Association in the legislative process as proof of the process' transparency.[1559] According to Respondent, Claimant was "one of the most active participants" in the legislative process.[1560] Respondent alleges that Charles A. Jeannes, then Claimant's Executive Vice President and General Counsel, testified at a California Senate committee hearing on SB 1828.[1561] In addition, according to Respondent, Claimant played an active and instrumental role in the lobbying efforts of the California Mining Association against SB 22 and its predecessors.[1562]

724. Respondent also cites to Claimant's agreement that the legislation was promulgated in accordance with the law to argue that the bill was thus adopted in a fully transparent manner.[1563] According to Respondent, SB 22 was discussed in public committee hearings prior to its enactment,[1564] and was enacted in accordance with the California Administrative Procedures Act ("APA").[1565] Respondent asserts that "making laws and regulations publicly available, and granting the public the opportunity to make

[1557] *Id.*, quoting Memorandum to File from Darryl Young Re: Backfilling Mines – SB 22 (Sher) and State Mining Board Regulations, attached to Email Correspondence from Carol Dahmen to Darryl Young Re: FW: DRAFT ... , p. 3 (Apr. 4, 2003) [Respondent Doc. 192].

[1558] Counsel for Respondent, Tr. 1438:1-5.

[1559] Counsel for Respondent, Tr. 1438:6-12.

[1560] Respondent's Counter-Memorial, at 243.

[1561] *Id.*, citing Jeannes Statement, ¶ 15.

[1562] *Id.*, citing California Secretary of State, Lobbying Activity: California Mining Association [FA 10 tab 102] (revealing that the California Mining Association ("CMA") spent over $40,000 between June 2002 and March 2003 lobbying against SB 1828, 483 and 22 and the emergency regulations); Memorandum from Adam Harper, California Mining Association (Oct. 1, 2002) [FA 7 tab 37] (thanking Claimant for its assistance with the public relations efforts opposing SB 1828); Email from Denise M. Jones, Executive Director, CMA, to Charles A. Jeannes, Senior VP, Glamis Gold Ltd. (Aug. 13, 2002) [FA 7 tab 36] (detailing the Association's public relations efforts).

[1563] Counsel for Respondent, Tr. 1967:3-10.

[1564] Respondent's Rejoinder, at 171-72.

[1565] *Id.* at 172, citing California Administrative Procedure Act, CAL. GOVT. CODE §§ 11346-365 (1980).

known its view concerning proposed laws and regulations before they are adopted, more than exceeds most treaty-based transparency obligations under international law."[1566]

c. Senate Bill 22 Is Rationally Related to a Policy Objective and Does Not Create Greater Environmental Degradation

725. Respondent argues that there is no merit to Claimant's argument that Senate Bill 22 is not rationally related to its goals, which Respondent describes as protecting cultural sites and Native American religious practices from irreparable damage caused by open-pit mining.[1567] Respondent contends that "[i]t cannot be disputed that cultural, historical, and archeological sites will be damaged if the land on which they are found is mined."[1568] The record also is clear, according to Respondent, that the Imperial Project's proposed Plan of Operations, which would have left an 800-foot-deep pit over one mile long and 300-foot-high waste piles, would have resulted in irreparable harm to an area of traditional cultural importance to the Quechan.[1569]

726. Respondent asserts that Claimant, "in essence, argues that anything short of eliminating all harm from an identified problem makes a legislature's actions arbitrary, but this is not and cannot be the case."[1570] Respondent argues that governments, and specifically legislatures, must compromise all the time.[1571] With the passage of Senate Bill 22, Respondent argues that the legislature was attempting "to reconcile competing interests by addressing the threat to Native American sites in the CDCA while recognizing mining companies' rights to mine there."[1572] Respondent argues that this type of compromise is necessary in government, and especially in the United States, quoting *Methanex* for the contention that investors in the United States ought to "appreciate[] that the process of regulation in the United States involve[s] wide participation of industry groups, non-governmental organizations, academics and other individuals, many of these actors deploying lobbyists."[1573] Respondent cites to *Methanex*

[1566] *Id.* at 173.
[1567] Counsel for Respondent, Tr. 1420:9-14; Respondent's Counter-Memorial, at 235.
[1568] Counsel for Respondent, Tr. 1420:13-17.
[1569] Respondent's Counter-Memorial, at 235-36.
[1570] Counsel for Respondent, Tr. 1420:18-22.
[1571] Counsel for Respondent, Tr. 1421:1-2.
[1572] Counsel for Respondent, Tr. 1977:10-14.
[1573] Respondent's Counter-Memorial, at 242, quoting *Methanex*, Final Award, Part. IV, Ch. D, ¶ 9 (Aug. 3, 2005).

for the additional proposition that "decrees and regulations may be the product of compromises and the balancing of competing interests by a variety of political actors."[1574] Respondent explains that there is no doubt that the Quechan would prefer a complete ban on mining in sensitive areas, while Claimant would have liked to mine without incurring additional reclamation expenses, and the legislature compromised between the two.[1575] According to Respondent, "that some resources will be damaged, notwithstanding compliance with the legislation does not make the legislation arbitrary. It may not be perfect, but it certainly was not irrational or arbitrary …."[1576]

727. With respect to Claimant's argument that mandatory backfilling would actually cause greater land disturbance, Respondent argues that this is not the case with the use of the proper swell factor.[1577] Using the correct rate, Respondent contends, not only would not cause additional land disturbance, but in fact actually would *reduce* the total land disturbance.[1578] Regardless, Respondent argues that this argument does not present a basis for the Tribunal to second-guess the factual findings of the state legislature.[1579] "The legislature's belief that backfilling would reduce surface disturbance was rational."[1580]

728. Additionally, Respondent asserts that in any case this is legally irrelevant, however, as even if it were true that backfilling of the East Pit would result in greater land disturbance, Claimant has not proven that this would necessarily be the situation with every single open-pit metallic mine in California.[1581] As SB 22 is of general application, Respondent contends that showing that the legislation might possibly have one adverse effect on one particular project cannot render the bill arbitrary.[1582] In

[1574] Counsel for Respondent, Tr. 1421:2-6, citing *Methanex*, Final Award (Aug. 3, 2005).
[1575] Counsel for Respondent, Tr. 1421:13-1422:6.
[1576] Counsel for Respondent, Tr. 1422:16-20.
[1577] Counsel for Respondent, Tr. 1425:20-1426:13.
[1578] Respondent's Counter-Memorial, at 238.
[1579] Respondent's Rejoinder, at 203.
[1580] *Id.*, citing Hodel v. Indiana, 452 U.S. 314, 331-33 (1981) [LA 11 tab 75] (reversing 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 varying topographical locations, and therefore violated due process. The Court concluded that it was sufficient that "Congress acted rationally" and chided the lower court for substituting its policy judgment for that of Congress and "act[ing] as a superlegislature" thus "exceed[ing] its proper role.").
[1581] Counsel for Respondent, Tr. 1426:14-1427:2; Respondent's Counter-Memorial, at 237.
[1582] Counsel for Respondent, Tr. 1427:3-6.

addition, as discussed above by Respondent, the Native American religious and spiritual practices place high value on the viewsheds and the use of the site as one of four key teaching areas, which these measures protect.[1583] There is nothing irrational or arbitrary, Respondent argues, in a legislature making some sacrifices to achieve other objectives.[1584]

ii. *The SMGB Regulations*

a. The Requirement of Mandatory Backfilling Was Rational and Foreseeable

729. Mining, according to Respondent, is a highly regulated industry, and therefore any reasonable investor would have anticipated the possibility of regulatory changes. Respondent asserts that several states have taken even more extreme measures to mitigate the harm of open-pit mining, with some completely banning the use of cyanide heap leach mining, and some prohibiting the use of all open-pit mining.[1585] In California, by contrast, Respondent contends that Claimant still can mine in the manner in which it was originally planned.[1586]

730. Specifically, Dr. Parrish explained the rationale for the regulations as follows:

> [T]he testimony revealed that there had been—there was a litany of metallic mines in the State which had not been reclaimed, according to the basic tenet of the surface mining and reclamation, and they were, in effect, in violation of that Act; and that, although there was nothing that could be done retrospectively, the issue that came before the Board was how would the Board ensure that there would not be another one of a dozen or so of these large pits that were not reclaimed according to the basic requirements of the Act.[1587]

Several of the mines, according to Dr. Parrish, had been approved by the local lead

[1583] Counsel for Respondent, Tr. 1427:7-16; Respondent's Rejoinder, at 202-03.
[1584] Counsel for Respondent, Tr. 1428:5-13.
[1585] Counsel for Respondent, Tr. 1405:20-22.
[1586] Counsel for Respondent, Tr. 1406:8-10.
[1587] Parrish, Tr. 571:14-572:2, citing SMARA; *see* CAL. PUB. RES. CODE § 2733 ("'Reclamation' means the combined process of land treatment that minimizes water degradation, air pollution, damage to aquatic or wildlife habitat, flooding, erosion, and other adverse effects from surface mining operations, including adverse surface effects incidental to underground mines, so that mined lands are reclaimed to a usable condition which is readily adaptable for alternate land uses and create no danger to public health or safety. The process may extend to affected lands surrounding mined lands, and may require backfilling, grading, resoiling, revegetation, soil compaction, stabilization, or other measures.").

agencies despite their being in violation of the Act.[1588]

731. Respondent argues that the regulations were rationally related to the problem at hand, in that "[t]he SMGB sought to ensure that lands that were used for mining were reclaimed to a condition where they could later be used. They were also adopted to ensure that there remained no danger to public health and safety after mining was completed."[1589] The SMGB had ample evidence, Respondent asserts, indicating that land left with large unreclaimed pits was not adaptable to alternative uses.[1590] Citing to Dr. Parrish, Respondent argues that the SMGB was in fact presented with no evidence that land with un-backfilled pits had been or could be converted to an alternate use.[1591] Respondent asserts that, in contrast, backfilled land can be used again, and other problems associated with large pits—such as the formation of pit lakes and dangers to humans and wildlife—are eliminated with backfilling.[1592]

732. Respondent also attacks Claimant's argument that the backfilling regulations were not rationally related to their goal in that they had the potential to cause more environmental degradation than partial backfilling, specifically with respect to water quality standards. Respondent confirmed with Dr. Parrish at the hearing that the board's regulations require the honoring of all other agencies' regulations, which included water quality standards.[1593] Dr. Parrish explained that a water quality problem, for instance, was not one of backfilling but of the particular rock and the climate: "The issue is not backfilling being an environmental problem. The issue is if you are going to excavate a metallic mine in a particular climate or a particular area, you must take into account the environmental effects the climate will have on the mine site itself."[1594]

733. In response to Respondent's questions, Dr. Parrish confirmed that "[t]he Board had no intention or actions specific to either [Claimant] as a corporation or, in particular, an animus toward the Imperial Project."[1595] Dr. Parrish explained that the board was

[1588] Parrish, Tr. 572:3-7; Respondent's Counter-Memorial, at 239.
[1589] Counsel for Respondent, Tr. 1410:7-11.
[1590] Counsel for Respondent, Tr. 1410:12-15.
[1591] Counsel for Respondent, Tr. 1410:16-19; Respondent's Counter-Memorial, at 239.
[1592] Counsel for Respondent, Tr. 1410:20-1411:3.
[1593] Parrish, Tr. 578:2-11; Respondent's Rejoinder, at 201.
[1594] Parrish, Tr. 579:15-20.
[1595] Parrish, Tr. 582:11-13.

tasked with seeing that all future metallic mines would be in compliance with the basic tenets of SMARA and reclaimed to a condition that was readily adaptable to a beneficial second use.[1596] Dr. Parrish testified that it was not the board's intention to make all open-pit metallic mining forever economically infeasible in California.[1597]

b. The Emergency Basis for the Regulations Was Warranted, Substantiated and Determined in a Transparent Manner

734. According to Respondent, the "regulation was first adopted on an emergency basis in December 2002 in a manner that was fully consistent with regulatory practice under the California Administrative Procedure Act."[1598] This action was preceded by the placing of the item on the agenda for the November 2002 meeting, at which the board received both written and live testimony.[1599] Based on this evidence, the board then instructed its staff to prepare draft language for possible adoption at the board's next meeting in December 2002.[1600] Respondent contends that, "[f]ollowing further consideration of the issue at [the] December meeting and based on the evidence that had been presented to it, the Board made an express finding of an emergency condition."[1601] This finding was then reviewed and approved by the California Office of Administrative Law as consistent with the California APA, Respondent explains.[1602] This was followed by additional public comment and testimony before the regulations were adopted on a permanent basis in April 2003, after which they were again reviewed and approved by the California Office of Administrative Law.[1603] Claimant itself participated in this rulemaking process by making presentations to the board "a couple of times at least."[1604]

735. Respondent also points to Claimant's, and the California Mining Association's, involvement in the regulatory process to argue that the SMGB Regulations were adopted in a transparent process.[1605] According to Respondent, the CMA proposed specific

[1596] Parrish, Tr. 582:14-20.
[1597] Parrish, Tr. 583:3-9.
[1598] Counsel for Respondent, Tr. 1436:8-11.
[1599] Counsel for Respondent, Tr. 1436:15-21.
[1600] Counsel for Respondent, Tr. 1436:22-1437:3.
[1601] Counsel for Respondent, Tr. 1437:4-7.
[1602] Counsel for Respondent, Tr. 1437:12-15.
[1603] Counsel for Respondent, Tr. 1437:16-22.
[1604] Parrish, Tr. 575:3-9.
[1605] Respondent's Counter-Memorial, at 243.

regulatory language to then-SMGB Executive Officer Parrish, which was accepted and incorporated into both the emergency and permanent regulations.[1606] Claimant also made its views directly known to the SMGB at public hearings.[1607]

736. Dr. Parrish explained that the "triggering mechanism was the Imperial Project, which was at that time believed to be on the verge of being approved by the Imperial County."[1608] However, he added that the reason for the emergency status of the regulation also was "that there may be other unknown mines that are in the permitting stage that [were] at that time unknown to the Board."[1609] Dr. Parrish reiterated that the Board "did not act specifically with regard to [Claimant] … at that time. The request was to look into these issues."[1610] As Dr. Parrish testified:

> The Board had been approached to see if it had an action within its authority that it could take to ensure that future metallic mines in the state would be reclaimed in accordance with the requirements of the Surface Mining and Reclamation Act, and the Board was asked to consider this in light of the fact that there had been a number of large metallic mines in the state that had not been reclaimed, according to the Act, and, in fact, were in an un-reclaimed condition.[1611]

737. Finally, Respondent cites to Claimant's agreement that the SMGB Regulations were promulgated in accordance with the law to argue that the regulations thus were adopted in a reasonable and fully transparent manner.[1612]

c. The SMGB's Distinction between Metallic and Non-Metallic Mines Was Not Arbitrary

738. Respondent argues that there are three rational reasons why the SMGB included a distinction between metallic and non-metallic mines, thus proving that the backfilling regulations were not arbitrary: (1) The Board was specifically requested to consider the

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[1606] *Id.*, citing Email from Jim Good, Gresham, Savage, Nolan & Tilden, LLP (attorney for Golden Queen Mining Company & Glamis) to Adam Harper, Policy Analyst, California Mining Association (Dec. 9, 2002) [FA 7 tab 41] (discussing the Grandfather Clause that was later adopted into CAL. CODE REGS. tit. 14, § 3704.1(i) (2003)).

[1607] *Id.*, citing State Mining and Geology Board, Executive Officer's Report (Jan. 16, 2003) [FA 10 tab 113], Comments of Glamis Chief Operating Officer James S. Voorhees before the State Mining and Geology Board (Nov. 14, 2002) [FA 10 tab 104], and Charles A. Jeannes, Senior Vice President Administration, Glamis Gold Ltd., Comments Before the State Mining and Geology Board (Dec. 12, 2002) [FA 6 tab 268].

[1608] Parrish, Tr. 504:3-5.

[1609] Parrish, Tr. 506:17-21.

[1610] Parrish, Tr. 513:18-20.

[1611] Parrish, Tr. 503:11-20.

[1612] Counsel for Respondent, Tr. 1967:3-10.

effect of *metallic* mines; (2) there are significant and obvious distinctions between metallic and non-metallic mines; and (3) the regulations were designed to tackle a serious and immediate problem, not to address every problem from every mine.

739. First, according to Dr. Parrish, the board was "specifically tasked to look at open-pit metallic mines. It was not asked to look at other types of mines."[1613] In his declaration, Dr. Parrish explains: "On October 17, 2002, California Resources Agency Secretary, Mary Nichols sent a letter to SMGB Chairman Allen Jones, expressing an urgent concern regarding the environmental impacts associated with open-pit metallic mines."[1614] Dr. Parrish notes that Secretary Nichols was specifically concerned about the "vast unfilled excavations" and "equally vast piles of waste," and she requested Chairman Jones to take appropriate actions to address these concerns "at the earliest possible opportunity."[1615]

740. Second, Respondent argues that the administrative record for the rule-making clearly evidences consideration of whether the regulations should be applied to non-metallic as well as metallic mines.[1616] According to Respondent, these "significant distinctions" between the two types of mines were highlighted by, among others, the Construction Materials Association of California and Techart, Inc.[1617] It was additionally discussed by Mary Nichols, secretary of Resources, at the April 2003 public hearing at which she stated: "We understand that metallic mining is unique and that unlike aggregate mining where the product is essentially all used at the time leaving relatively little in the way of waste around compared to the amount of product that is extracted, that open-pit mining has a unique impact on the environment."[1618] The Final Statement of Reasons, Respondent concludes, also expressly addressed and rejected the inclusion of aggregate mines within the definition of metallic mines under the regulation.[1619]

[1613] Parrish, Tr. 579:22-580:6.
[1614] Parrish Declaration, ¶ 7.
[1615] *Id.* ¶ 8.
[1616] Counsel for Respondent, Tr. 1970:11-14.
[1617] Counsel for Respondent, Tr. 1970:18-22; 1971:11-20.
[1618] Counsel for Respondent, Tr. 1971:21-1972:7.
[1619] Counsel for Respondent, Tr. 1973:1-14, citing Final Statement of Reasons, CAL. CODE REGS. tit. 14, § 3704.1 [Ex. 304].

741. Respondent argues that Claimant "ignores the obvious differences between the different types of mines."[1620] Aggregate and other non-metallic mines do not leave the same massive waste piles as those created by open-pit, metallic mines because so much of the material is hauled away and sold as product.[1621] As Dr. Parrish testified:

> But the second reason is, from a practical standpoint—and reclamation needs to be practically applied—is that large open-pit mines have millions of tons of waste material piled up next to the mine. An aggregate mine, in effect, the entire mined material is product and has been exported from the site. To require an aggregate mine to be re-backfilled would require digging a hole someplace else to cart the material in to backfill the original mine. It's sort of defeating the original purpose.[1622]

Respondent adds that the open pits at non-metallic mines usually are smaller than those at metallic mines, as metallic mining normally involves low-grade ores requiring extensive excavation.[1623] Therefore, Respondent asserts that these types of mines do "not pose the same environmental and public health and safety concerns" as do open-pit, metallic mines.[1624]

742. Third, the SMGB Regulations were not designed to address every problem arising from every mine, Respondent reiterates, but rather "to tackle the problem which appeared most serious and immediate, which was the environmental harm result[ing] from open-pit metallic mines."[1625] Respondent quotes the U.S. Supreme Court as holding that there is "no requirement of equal protection that all evils of the same genus be eradicated or none at all."[1626] Respondent asserts that reform may take one step at a time, or address itself to the phase of the problem which appears most acute to the legislature; or the legislature may elect to remedy one field and neglect others.[1627]

743. In conclusion, Respondent argues that the SMGB Regulations were a "rational response to the problems posed by open-pit metallic mines that were not fully

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[1620] Respondent's Counter-Memorial, at 240.
[1621] *Id.*
[1622] Parrish, Tr. 580:7-16.
[1623] Respondent's Rejoinder, at 195-96.
[1624] Respondent's Counter-Memorial, at 240.
[1625] Counsel for Respondent, Tr. 1416:7-12.
[1626] Counsel for Respondent, Tr. 1416:13-19, quoting Railway Express Agency v. New York, 336 U.S. 106, 110 (1949).
[1627] Counsel for Respondent, Tr. 1417:5-9.

reclaimed."[1628] "The reclamation requirements imposed by the regulation meet[] the regulation's objectives of ensuring that the land is available for alternate use and doesn't pose dangers to the public, and there is no evidence that even remotely suggests that the regulation was irrational or arbitrary."[1629]

d. Scientific and Technical Studies Were Not Required to Ascertain the Need for These Regulations and Address That Need

744. Respondent asserts that the SMGB's lack of reliance on specific environmental or technical reports does not exhibit arbitrariness as such studies were not necessary: testimony based on first hand observation was sufficient and no persuasive contrary evidence was provided. Dr. Parrish describes that:

> In adopting these regulations, the Board did not commission or rely upon technical reports because the issue was whether SMARA's reclamation standard, i.e., to reclaim the land to a usable second purpose, was being met in the context of open-pit metallic mines. The testimony at the Board hearings and evidence in the rulemaking record clearly demonstrate 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.[1630]

Respondent argues that "scientific or technical reports aren't required to determine that open pits pose dangers or that land with large open pits and massive waste piles is not readily adaptable for alternative uses post-mining. Empirical evidence can demonstrate that."[1631]

745. In addition, Respondent asserts that much evidence was received and reviewed by the board. Dr. Parrish explained: "The Board received considerable testimony from, well, the mining industry; it received testimony from the Department of Conservation's Office of Mine Reclamation; it received testimony from several experts in the field; and there were a number of organizations that provided information to the Board."[1632] Citing

[1628] Counsel for Respondent, Tr. 1417:10-12.
[1629] Counsel for Respondent, Tr. 1417:12-18; Respondent's Counter-Memorial, at 239-40.
[1630] Parrish Declaration, ¶ 18.
[1631] Counsel for Respondent, Tr. 1411:7-12.
[1632] Parrish, Tr. 571:7-12.

to Dr. Parrish, Respondent asserts that the SMGB also received information at its hearings from Claimant and the California Mining Association.[1633]

746. According to Respondent, however, parties opposing the Regulations "did not present any persuasive evidence" to counter the board's conclusions.[1634] The OMR staff, on the other hand, reviewed several "reclaimed" open-pit metallic mines in California that had developed toxic pit lakes.[1635] Respondent confirmed that the board did consider, though did not rely upon, all evidence that was presented to it and that this evidence included technical or scientific reports or studies.[1636]

747. Dr. Parrish explained the lack of reliance by noting, "[t]he Board's consideration was the basic tenet of SMARA, is that the lands shall be reclaimed to a condition which is readily adaptable to an alternate use."[1637] None of the previous mines offered as examples had been reclaimed to this standard and thus "they were, in essence, unreclaimed," and not helpful.[1638] Dr. Parrish reiterated that "[t]he technical standards of backfilling in the scientific studies and so forth were not what the Board's objective was. It was to ensure there would be no future mines that would be left in an unreclaimed condition."[1639]

iii. *The Relationship between SB 22 and the SMGB Regulations: The California Measures Were Independent Actions Responding to Different Concerns*

748. Finally, Respondent disputes that the California measures—SB 22 and the SMGB Regulations—were "inextricably intertwined."[1640] Respondent points to the above-quoted memorandum to file from the DOC director, which states:

> The Legislature's goal [in enacting SB 22] is to protect sacred Indian sites as a part of the heritage of the Indian tribes; the [SMGB's] goal is environmental protection and the protection of the public health and safety by ensuring that

[1633] Counsel for Respondent, Tr. 1411:13-22.
[1634] Respondent's Counter-Memorial, at 241, citing Parrish Declaration, ¶ 12.
[1635] Respondent's Rejoinder, at 198, citing Parrish Declaration, ¶ 11 (explaining that the OMR presented evidence on the Jamestown Mine, the McLaughlin Mine, the Royal Mountain King Mine, and the Castle Mountain Mine).
[1636] Parrish, Tr. 573:6-17.
[1637] Parrish, Tr. 574:9-12.
[1638] Parrish, Tr. 574:12-15.
[1639] Parrish, Tr. 574:16-20.
[1640] Respondent's Letter to the Tribunal, p. 4 (Sept. 3, 2008).

> open pits are refilled rather than left as gaping holes next to huge piles of waste rock.[1641]

Respondent asserts that in early documents produced, and as specifically described in a memorandum to file from the DOC director via the secretary for legislation, California Office of the Governor, the policy proposal put to the governor was to "sign" SB 22 and "support[]" the SMGB's adoption of permanent regulations.[1642] Respondent argues that the governor's actions are limited to *supporting* the SMGB Regulations because the SMGB is "an administrative body that operates independently of the Governor's Office and the Department of Conservation."[1643]

749. Dr. Parrish supported this position, denying any knowledge of the actions of the office of Governor Davis or cooperation between the SMGB and his administration. He explained at the hearing that the board was "not privy to" the background at the governor's office and the statements of the governor. He reiterated that "[a]ll that [he knows] is that the Board received a letter from the Secretary of Resources, asking the Board to take some action within its authority, including regulatory action, if it could, to address metallic mines which were not in compliance with the State Mining Act."[1644]

750. Respondent objects to Claimant's request that an adverse inference be drawn from the redactions of three of its documents and its argument that "the redacted portions of these documents would support Claimant's position that the two California measures were closely related avenues to accomplish a single objective—stop the Imperial Project from ever proceeding while seeking to avoid payment of the compensation it knew to be required had it proceeded transparently and directly through eminent domain."[1645] Respondent asserts that, when determining whether to draw an adverse inference, international tribunals consider multiple factors, including whether:

[1641] *Id.*, quoting Memorandum to File from Darryl Young Re: Backfilling Mines – SB 22 (Sher) and State Mining Board Regulations, attached to Email Correspondence from Carol Dahmen to Darryl Young Re: FW: DRAFT ... , p. 3 (Apr. 4, 2003) [Respondent Doc. 192].

[1642] *Id.*, quoting Memorandum to File from Darryl Young via Linda Adams, Re: SB 22 (Sher) and State Mining Board Regulations, p. 2 (Apr. 4, 2003) [Respondent Doc. 208].

[1643] *Id.*, citing CAL. PUB. RES. CODE § 671 (providing that the Director of Conservation "shall have no power to amend or repeal any order, ruling, or directive" of the SMGB); Parrish, Tr. 488:11-13, 502:17-21 (stating that the governor does not have authority to remove members from the SMGB and that the SMGB, although statutorily within the Department of Conservation, remains "autonomous").

[1644] Parrish, Tr. 513:10-16.

[1645] Claimant's Letter to the Tribunal, pp. 7-8 (Sept. 3, 2008).

> (i) the party has possession of, or control over, the documents in question; (ii) the party has provided any evidence that is contrary to the adverse inference sought; (iii) the party has provided a reason for its non-disclosure; and (iv) a logical nexus exists between the probable nature of the non-disclosed information and the inference to be drawn.[1646]

Respondent argues that, in this situation, none of the factors supports Claimant's request for an adverse inference to be drawn.

751. Respondent begins by citing to numerous authorities that it claims support the view that "an adverse inference is improper when the documents sought are not within a party's possession or control."[1647] Respondent argues that, as it has previously acknowledged, it does not have possession of or control over California's documents.[1648] Respondent explains that California is not a party to this arbitration and, acting in a "spirit of voluntary cooperation," California has made a significant effort by releasing "thousands of documents" for production, "including over a dozen privileged documents pursuant to a confidentiality agreement."[1649]

752. Second, Respondent cites to *Feldman* for the position that findings of adverse inferences are based on a party's failure to introduce "*any* credible evidence into the record" on the issue in question.[1650] Respondent argues that in this case, "by contrast, the United States has produced extensive evidence addressing the issue ... whether the SMGB Regulation and SB 22 were 'inextricably intertwined' efforts to 'stop the Imperial Project from ever proceeding.'"[1651] Respondent contends that it has demonstrated both the independence of the SMGB from the California governor's office,[1652] and that "the challenged measures would *not* stop the Imperial Project specifically, 'from ever proceeding.'"[1653]

[1646] Respondent's Letter to the Tribunal, p. 1 (Sept. 26, 2008).

[1647] *Id.* (internal citations omitted).

[1648] *Id.* at 1-2, citing Response to Glamis's Request for Production of Privileged Documents, p. 4, footnote 10 (Sept. 29, 2005) ("In order to maintain its attorney-client privilege, the California state agencies and Governor's office did not permit counsel for the United States in this arbitration to view the documents over which it is claiming privilege").

[1649] *Id.* at 2.

[1650] *Id.* at 3, citing *Feldman*, Award, ¶ 177 (Dec. 16, 2002) (emphasis added).

[1651] *Id.* at 2, quoting Claimant's Letter to the Tribunal, p. 7 (Sept. 3, 2008).

[1652] *Id.* at 3, citing Parrish Supplemental Declaration, ¶ 4 (Mar. 14, 2007); Parrish, Tr. 488:11-13; Parrish Declaration, ¶ 17 (Sept. 16, 2006).

[1653] *Id.* at 4, citing Respondent's Rejoinder, at 87 (noting Golden Queen Mining Company's

753. Third, Respondent asserts that tribunals, when assessing a request to draw an adverse inference, consider whether a party has provided a satisfactory explanation for its failure to provide the evidence.[1654] As an example, Respondent cites to the *Feldman* award, in which the tribunal noted that the respondent "never explained" the lack of evidence on an issue.[1655] Respondent asserts that it has not suffered a similar failure; instead it points to the affidavits of Mr. Kahn, one of the trustees of the Gray Davis Gubernatorial Papers, to show that the redactions made were "not substantive in nature," concerning only "internal procedural operations of the Gray Davis Administrations, such as logistics or publicity directives to gubernatorial staffers."[1656] These redactions, Mr. Kahn explained in a sworn affidavit, were "in [his] professional judgment, compelled by [his] duties as Trustee of the Gray Davis Gubernatorial Papers."[1657] In addition, Respondent points out that the redactions were "very narrow," consisting of "twelve sentences, five bullet points of topics to be discussed, and a list of names of persons, including their organizational affiliations, who were attending a meeting."[1658]

754. Finally, Respondent argues that a claimant must provide "a logical nexus between the probable nature of the documents withheld and the inference derived therefrom" in order to secure an adverse inference.[1659] Respondent asserts that the disputed redactions consist of a limited number of non-substantive references to internal procedural operations.[1660] Respondent therefore contends that Claimant's request to infer the conclusion of the intertwined nature of the California measures is sweeping and should be rejected.[1661] Claimant makes "an attempt to show some nexus between Mr. Kahn's redactions and its 'inextricably intertwined' theory," according to Respondent,[1662] by arguing that "a directive ... to issue emergency backfilling regulations pertains to the internal processes and logistics of implementing the governor's desire to shut down the

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intention to move forward with its Soledad Mining project despite the application of the backfilling regulations to it).

[1654] *Id.* at 5 (internal citations omitted).

[1655] *Id.*, citing *Feldman*, Award, ¶ 178 (Dec. 16. 2002).

[1656] *Id.*, citing Affidavit of Michael A. Kahn, ¶ 2 (Aug. 11, 2008).

[1657] *Id.*, citing Second Affidavit of Michael A. Kahn, ¶ 3 (Sept. 25, 2008).

[1658] *Id.*, citing Second Affidavit of Michael A. Kahn, ¶ 4 (Sept. 25, 2008).

[1659] *Id.* at 6, quoting W.L. CRAIG, W. PARK & J. PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 451 (3d ed. 1998) (additional citations omitted).

[1660] *Id.*, citing Affidavit of Michael A. Kahn, ¶ 2 (Aug. 11, 2008).

[1661] *Id.*

[1662] *Id.* at 7, quoting Claimant's Letter to the Tribunal, p. 7 (Sept. 3, 2008).

Glamis Imperial Project."[1663] Respondent argues, however, that Respondent's Documents 162, 192 and 197 all concern directives occurring in April 2003, months after the SMGB's December 2002 passage of the emergency regulations.[1664] Moreover, according to Respondent, Claimant's speculation that the redactions "would reveal the Governor's 'desire' to 'shut down' the Imperial Project is simply a rejection of Mr. Kahn's sworn assertions that the redactions do not refer substantively to Glamis or the Imperial Project."[1665] Respondent concludes that, "notably," Claimant has failed to support its inference theories "with the thousands of documents—including highly sensitive, privileged documents—that have been released by California for production in this arbitration."[1666]

755. Having objected to each of Claimant's arguments for the drawing of an adverse inference and argued that Claimant's request for such is meritless, Respondent explained that, "[n]evertheless, if the Tribunal were to conclude that an *in camera* review of unredacted versions of Documents 162, 192, and 197 would be helpful in resolving this matter, and if Glamis were to consent to such review, the United States would be willing to coordinate with the State of California in arranging for an *in camera* production to the Tribunal."[1667]

C. THE TRIBUNAL'S HOLDING WITH RESPECT TO CLAIMANT'S CLAIM UNDER ARTICLE 1105 OF THE NAFTA

756. To begin its application of the above-defined standard to the facts presented by the Parties, the Tribunal notes Claimant's request that, in the words of *GAMI*, "[t]he record as a whole—not isolated events—determines whether there has been a breach of international law."[1668] Despite this request, Claimant has presented its argument with respect to each of the individual governmental actions that make up the whole, arguing why each contravenes Article 1105, and then asserting that, taken as a whole, they violate the customary international law minimum standard of treatment accorded under Article 1105. The Tribunal also notes that Respondent has not objected to this approach and

[1663] *Id.*, quoting Claimant's Letter to the Tribunal, p. 7 (Sept. 3, 2008).
[1664] *Id.*
[1665] *Id.*, citing Kahn Affidavit, ¶ 2.
[1666] Claimant's Letter to the Tribunal, p. 8 (Sept. 3, 2008).
[1667] *Id.* As noted above, at ¶ 713, Claimant refused this offer.
[1668] Claimant's Memorial, ¶ 556, quoting *GAMI*, Final Award, ¶ 97 (Nov. 15, 2004).

instead adopts Claimant's methodology that focuses on the analysis of each individual action.[1669] In addition, with respect to Claimant's assertion that all of the measures should be evaluated as a whole, Respondent neither endorses nor disputes this view.

757. The Tribunal therefore utilizes this approach employed by the Parties, first reviewing each individual action by the federal and state governments and assessing each against the Tribunal's legal standard, and then analyzing the actions together as a collective whole to determine whether, viewed together, the combined acts violate the obligations of the United States pursuant to the customary international law minimum standard of fair and equitable treatment articulated in Article 1105(1).

1. THE COMPLAINED-OF ACTS OF THE UNITED STATES FEDERAL GOVERNMENT

a. The M-Opinion and Record of Decision

758. To begin its review of the 1999 M-Opinion and subsequent Record of Decision ("ROD") denying the Imperial Project Plan of Operations ("POO"), the Tribunal acknowledges that it appears indisputable that, under the decades-long rule of the "unnecessary or undue degradation" standard, mining operators developed expectations that the discovery of Native American artifacts at a mining site could necessitate mitigation, but would not lead to denial of the project's POO. The Tribunal notes, for instance, that it is Claimant's belief that, because of the "unique vested rights" that accompany valid mining claims, it was entitled to reliance on the "preexisting legal regime for the operation and reclamation of mining activities on Federal lands."[1670] These rights, Claimant asserts, mean that, should Claimant employ economically foreseeable mitigation, it was entitled to approval of its POO even if such approval resulted in the damage or destruction of sacred Native American sites.[1671]

759. The Tribunal also agrees that the shift in the 1999 M-Opinion to a definition of "undue impairment" that allowed for the denial of a POO represented a significant change from settled practice and, arguably, surprised Claimant. Indeed, Claimant argues

[1669] *See, e.g.,* Respondent's Counter-Memorial, at 235-62; Respondent's Rejoinder, at 171-77, 185-87, 194-243; Counsel for Respondent, Tr. 1460:6-1507:8.
[1670] Counsel for Claimant, Tr. 49:4-9.
[1671] Counsel for Claimant, Tr. 49:9-17.

that the redefinition of "undue impairment" to allow for "a new discretionary mine-veto authority" that could alter the above-mentioned rights disregarded "decades of settled law and practice."[1672]

760. The Tribunal also recognizes, however, Respondent's argument that the M-Opinion was a "reasoned opinion based upon preexisting legal authority" and drafted upon the BLM's request for legal advice.[1673] Respondent explains the shift in governmental policy by the fact that the department was confronted with an issue of first impression and one that potentially raised constitutional concerns: "no previous—or subsequent—EIS for any mining project in the CDCA had found a significant, unavoidable adverse impact to cultural resources and Native American sacred sites."[1674]

761. The Tribunal is of the view that both of these positions are indeed correct: the 1999 M-Opinion was a reasoned, complicated legal opinion on an issue of first impression that changed a decades-old rule and century-old regime upon which Claimant had based reasonable expectations. The issue presented to the Tribunal therefore is whether a lengthy, reasoned legal opinion violates customary international law because it changes, in an arguably dramatic way, a previous law or prior legal interpretation upon which an investor has based its reasonable, investment-backed expectations.

762. To begin addressing this question, the Tribunal first notes that it is not for an international tribunal to delve into the details of and justifications for domestic law. If Claimant, or any other party, believed that Solicitor Leshy's interpretation of the undue impairment standard was indeed incorrect, the proper venue for its challenge was domestic court.[1675] In the context of this claim, this Tribunal may consider only whether the M-Opinion occasioned "a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons."[1676] The Tribunal finds that it does not.

[1672] Claimant's Memorial, ¶ 547.

[1673] Counsel for Respondent, Tr. 1955:8-14, 1461:6-9; *see also* Respondent's Rejoinder, at 235.

[1674] Respondent's Counter-Memorial, at 249.

[1675] *See supra* ¶¶ 147-48. Claimant also implicitly recognized that domestic courts were the proper forum for a challenge of the substance of the M-Opinion in that it responded to the issuance of the M-Opinion by filing suit in federal court in Nevada challenging the M-Opinion on April 13, 2000. This suit was subsequently dismissed for lack of subject matter jurisdiction.

[1676] *See* Tribunal's Holding, *supra* ¶ 616.

763. First, the M-Opinion was not arbitrary: it was requested by BLM when BLM was faced with a difficult situation of competing interests about which it knew many parties were interested and, in the context, as indicated by the evidence, that it was thought by the government that litigation was likely, as indeed it was. In addition, the M-Opinion interpreted existing statutory and regulatory language, an act arguably within the scope of Solicitor Leshy's powers and foreseeable actions.

764. Second, the M-Opinion did not exhibit a manifest lack of reasons: the 1999 M-Opinion consists of 19 pages of factual and legal analysis, detailing the factual and statutory background, the issue of the Quechan tribal religion and the First Amendment, the "unnecessary and undue degradation" standard, and the "undue impairment" standard.[1677]

765. Third, the M-Opinion does not exhibit blatant unfairness or evident discrimination to this particular investor; although the M-Opinion resulted in the delay of this particular project, the M-Opinion is one of general applicability. Whether anyone might disagree with Solicitor Leshy's opinions or conclusions is not the issue; the M-Opinion does not rise to the level of a violation of the requirement of fair and equitable treatment under international law.

766. Fourth, as the Tribunal has explained in its discussion of the 1105 legal standard, a violation of Article 1105 based on the unsettling of reasonable, investment-backed expectation requires, as a threshold circumstance, at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment.

767. The Tribunal does not find these circumstances in the facts of this case. First, Claimant was operating in a climate that was becoming more and more sensitive to the environmental consequences of open-pit mining. Second, although the M-Opinion and ROD came to a different result than a reasonable investor might expect under the mining regulatory regime as it stood, the federal government did not make specific commitments to induce Claimant to persevere with its mining claims. It did not guarantee Claimant

[1677] Solicitor's Opinion, Regulation of Hardrock Mining (Dec. 27, 1999) [Ex. 205]. The M-Opinion focuses primarily on the statutory and regulatory issues, devoting only one and a half pages to the potential First Amendment issue.

approval of its claims, nor did it offer Claimant any benefits to pursuing such claims beyond the customary chance to exploit federal land for possible profit. There did not exist, therefore, the quasi-contractual inducement that the Tribunal has found is a prerequisite for consideration of a breach of Article 1105(1) based upon repudiated investor expectations.

768. The final issue therefore is whether the 1999 M-Opinion evidences a complete lack of due process. Claimant asserts that the M-Opinion was procedurally deficient, a "blatant violation of the Administrative Procedure Act,"[1678] and the fact of Claimant's minimal participation in this process did not make it transparent. Claimant argues that, in effect, the interpretation of the M-Opinion "changed the legal standards" upon which Claimant had relied and created a "new discretionary denial authority ... without following the legally required notice and comment rulemaking procedures."[1679]

769. Respondent disputes this, arguing that there is no U.S. law requiring notice and comment with respect to solicitors' opinions.[1680] Respondent additionally asserts that this is confirmed by the fact that, although the 2001 M-Opinion determined that the "undue impairment" standard should be defined through substantive rulemaking prior to its use to deny a POO, this was a finding of "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."[1681]

770. The Tribunal finds that this discussion of domestic United States procedural law does not aid this analysis. Although it is generally agreed that the unlawfulness of an action according to municipal law will not necessarily entail a violation of international law,[1682] the converse also is true: the legality of an act under domestic law does not presuppose its legality under international law. This Tribunal instead must look to the customary international law minimum standard of treatment and determine whether the

[1678] Claimant's Reply, ¶ 246.
[1679] *Id.* ¶ 245
[1680] Counsel for Respondent, Tr. 1492:16-21; Respondent's Rejoinder, at 232.
[1681] Respondent's Rejoinder, at 175.
[1682] *ELSI*, Judgment, ¶ 124 (July 20, 1989) (holding that, "it 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.").

failure of the solicitor to first promulgate regulations prior to the issuance of his M-Opinion exhibits "a complete lack of due process."

771. It is possible that the issuance of the 1999 M-Opinion without the promulgation of regulations and the opportunity for notice and comment by interested parties could rise to the level of a violation of customary international law. It is also possible that Claimant could prove that the process was so unusual and non-transparent as to be manifestly arbitrary and completely lacking in due process. Perhaps, if the 1999 M-Opinion had stood, these hypotheticals might be questions for the Tribunal. However, as any deficiency in the 1999 M-Opinion was remedied so quickly by the 2001 M-Opinion, there is no outstanding issue for this Tribunal. If there was a procedural error, it was corrected quickly and effectively through domestic channels, a process that does not evince "a complete lack of due process."

i. *Final Disposition with respect to the M-Opinion and ROD*

772. The Tribunal therefore holds that, when viewed as an individual act, the 1999 M-Opinion does not violate the customary international law minimum standard of treatment articulated in Article 1105 of the NAFTA. As the Record of Decision denying the Imperial Project was based on this M-Opinion, the Tribunal determines that it too does not fall short of Respondent's obligations pursuant to Article 1105.

b. The Delay of Review of the Imperial Project

773. Claimant's arguments concerning the delay in the government's review of the Imperial Project Plan of Operations can be divided into two periods of time. The first period of time begins December 6, 1994, with the submission of the POO for review and ends on July 21, 2003, when Claimant both filed its Notice of Intent in this arbitration and delivered its letter to the DOI informing it of this action.[1683] The second period of time begins where the first ends, and continues through the course of these proceedings. The issue of the first period turns on whether there was an unreasonable delay in the review process given the circumstances of this project; the second period concerns the

[1683] Respondent's Counter-Memorial, at 260, citing Letter from Timothy R. McCrum, Counsel for Glamis Gold, to Patricia Morrison, Deputy Assistant Secretary for Land and Minerals, DOI, at 1, 3 (July 21, 2003) [FA 7 tab 47].

issue of whether, by virtue of its Notice of Intent and subsequent correspondence to the DOI, Respondent could reasonably believe that Claimant had abandoned its claims.

774. The Tribunal finds that, based upon the extensive evidence provided by Respondent as to the efforts made to review the Imperial Project, the process was proceeding diligently, albeit perhaps a little slowly, until July 2003.[1684] The Tribunal recognizes that the review efforts were perhaps somewhat more protracted than is customary, especially when compared with the described two- to three-year average time for such review;[1685] nevertheless it is equally clear that this was a particularly complicated, contested issue in which numerous parties took an interest and the federal government was quite aware of the likelihood, if not imminence, of litigation and therefore its need to be extraordinarily careful in its review and decision-making processes.

775. Regarding the second time period, the issue of delay centers upon Respondent's decision to discontinue the government's review of the Imperial Project Plan of Operations. With respect to this determination, the Tribunal notes Claimant's argument that it did not request a suspension of review: "nothing in the NAFTA Claim Notice of Intent in July of 2003 reflected a suggestion that Interior stop processing the Plan of Operations. If anything, the Notice should have galvanized Interior to address its failures to treat the Imperial Project Plan of Operations fairly and equitably. Sadly, it did not."[1686] The Tribunal also acknowledges Respondent's argument that Claimant's abandonment of the review process is manifest in its July 21, 2003 letter to the DOI,[1687] and its subsequent change in behavior from diligent reminders to complete lack of contact.[1688]

776. Indeed, there is some logic to Claimant's argument that its actions might have encouraged Respondent to act more hastily in resolving the underlying issues of this

[1684] *See* Counsel for Respondent, Tr. 1359:15-1364:8; Respondent's Rejoinder, at 241-42.

[1685] Claimant's Reply Memorial, ¶ 258, citing Leshendok Report, ¶ 95, Tbl. 1; *see also* Counsel for Claimant, Tr. 2022:20-2023:4;

[1686] Claimant's Reply Memorial, ¶ 260 (footnote omitted).

[1687] Respondent's Counter-Memorial, at 260, citing Letter from Timothy R. McCrum, Counsel for Glamis Gold, to Patricia Morrison, Deputy Assistant Secretary for Land and Minerals, DOI, at 1, 3 (July 21, 2003) [FA 7 tab 47]. For discussion of this letter, *see supra* ¶ 662.

[1688] Respondent's Counter-Memorial, at 261-62, citing Letter from Earl E. Devaney, Inspector General, DOI, to Senator Barbara Boxer, at 1-3 (Mar. 11, 2003) [Ex. 277].

dispute. Nevertheless, the Tribunal does not find that such a failure of a governmental body to diligently pursue administrative review while also defending an arbitration with respect to that same review is manifestly arbitrary, completely lacking in due process, exhibiting evident discrimination, or manifestly lacking in reasons.

777. Nor does the Tribunal find that Claimant is asking it to determine whether this is a violation of international law. Rather Claimant comments that, "[w]hile we wouldn't contend that deliberate delay by itself would be enough to violate customary and international law, ... it does inform what transpired and support[s] [Claimant's] claim of a denial of justice."[1689] The Tribunal views this statement to mean that Claimant is not arguing that the delay in reviewing the Imperial Project Plan of Operations, by itself, would occasion a breach under Article 1105. The Tribunal therefore considers that Claimant's arguments with respect to this asserted delay are to be evaluated solely when the Tribunal assesses the acts of the federal and state governments together, as part of a possible pattern of practice. Claimant asserts: "It was purposefully put on ice while they undertook the other measures which culminated in the other acts which culminated in the measure of the January 2001 Record of Decision."[1690] This, however, will be considered later in the Award in the Tribunal's review of the governmental actions as a whole.

c. The Cultural Review of the Imperial Project

778. With respect to the cultural review of the Imperial Project and its asserted deficiencies, the Parties presented extensive arguments and evidence. In reviewing closely these arguments and the record, the Tribunal has identified three main contentions and addresses these in turn: (1) that the Imperial Project, though treated differently than other mining operations, was not in fact unique in its cultural characteristics; (2) that the Imperial Project was discriminated against and harmed by the "novel" use of the ATCC;[1691] and (3) that the ACHP review process was unusual, if not predetermined.[1692]

779. In evaluating each of these arguments, the Tribunal is mindful of Respondent's statement that "[i]t is simply not this Tribunal's task to become archaeologists and

[1689] Counsel for Claimant, Tr. 76:5-9.
[1690] Counsel for Claimant, Tr. 2024:2-5.
[1691] *See supra* ¶¶ 649, 667-68.
[1692] *See supra* ¶¶ 650, 671-72

ethnographers and to draw a definitive conclusion as to the location of the Trail of Dreams."[1693] The Tribunal agrees with this statement. It is not the role of this Tribunal, or any international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency. Indeed, our only task is to decide whether Claimant has adequately proven that the agency's review and conclusions exhibit a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons so as to rise to the level of a breach of the customary international law standard embedded in Article 1105.

780. With this standard in mind, the Tribunal examines the conclusions made with respect to the unique cultural characteristics of the Imperial Project. To begin, the Tribunal notes the arguments of Claimant and its experts that the Imperial Project contained no cultural attributes that would differentiate it from other projects in the area, and certainly nothing that would have placed Claimant on notice that this particular site contained exceptional and unique cultural sites.[1694]

781. Respondent counters these arguments, asserting that: (1) the conclusions of the cultural survey were based on the knowledge at hand which was acquired in a professional and reasonable manner, and there was no reason for the BLM to doubt the truthfulness of this information;[1695] and (2) there were indeed cultural artifacts present in the area of the Imperial Project.[1696] Specifically, the Tribunal notes Respondent's extensive argument and fact presentation that the Imperial Project was, in fact, unique among its neighbors with respect to cultural significance.[1697] Without delving into the veracity of the facts and conclusions presented by Respondent and its witnesses, the Tribunal notes that Respondent submitted evidence that the decisions were reached based upon Section 106-mandated cultural studies and the guidance of professional archeologists and researchers. The Tribunal holds that Claimant did not prove that these processes and the decisions based upon them were either arbitrary or manifestly lacking in reasons. The Tribunal therefore finds that Respondent's determination that the

[1693] Counsel for Respondent, Tr. 1479:3-6.
[1694] *See supra* ¶¶ 647-48.
[1695] *See supra* ¶¶ 663-65.
[1696] *See supra* ¶ 666.
[1697] *See supra* ¶¶ 673-75.

Imperial Project was indeed culturally unique does not violate any of the obligations inherent in Article 1105's fair and equitable treatment standard.

782. Second, with respect to the use of the ATCC, the Tribunal notes that the methodology employed with respect to this review had, in fact, never been previously used and was specifically designed and utilized for the Imperial Project. The Tribunal also notes Claimant's argument that this methodology did exactly what was forbidden by the 1994 CDPA, which was using "an existing withdrawn area as a ground for restricting operations at a site left open for multiple uses."[1698] Respondent, however, supplied substantial evidence that, in this particular situation, the culturally sensitive area of concern identified by the Quechan Indian Tribe was enormous—over 500 square miles—and thus required a new, cost-effective way to survey and that, at the time, Claimant was appreciative of the cost savings.[1699]

783. The Tribunal finds that ATCC was, again, based on the advice of qualified professionals and involved the cooperative review of KEA, the BLM and the SHPO.[1700] It is professionals such as these, with their technical background and expertise, not this Tribunal, who are the proper parties to determine whether, as Respondent argues, the use of the ATCC "accorded with standard archeological practice, which calls for a reduction in [the] survey interval when a number of archeological features in a given area are identified."[1701] The professionals who studied this situation and made recommendations for its effective cultural review concluded that their decision was technically accurate. The Tribunal notes that Claimant also produced experts to the contrary. After review, the Tribunal holds that Respondent was justified in relying upon the opinion of the professionals it engaged in the way that it did, as these professionals appear quite qualified for the task and they provided substantial evidentiary support for their conclusions. Thus, the Tribunal holds that the "novel" use of the ATCC does not breach Respondent's obligations pursuant to the customary international law minimum standard of treatment.

[1698] Counsel for Claimant, Tr. 82:12-19.
[1699] *See supra* ¶ 667.
[1700] *Id.*
[1701] Counsel for Respondent, Tr. 1467:15-19.

784. Third and finally, the Tribunal addresses Claimant's assertions that the ACHP was at least unusual, and possibly predetermined. The Tribunal will address each of the four illustrations presented by Claimant to support this allegation: (1) the correspondence of Mr. Stanfill; (2) the quick termination of consultations by the ACHP; (3) the fact that the ACHP terminated consultations at all; and (4) the public hearings and site visit.

785. First, with respect to the correspondence of Mr. Stanfill, the Tribunal finds that Respondent establishes a prima facie case that Mr. Stanfill was not a decision-maker, but was a staff member expressing his personal views. The Tribunal finds Claimant's arguments to the contrary insufficient to alter this conclusion. Although Mr. Stanfill does appear to have been the ACHP employee with lead responsibility for the review of the Imperial Project, he does not appear to have been the final decision-maker in this review, especially as, due to the "complexity" and "significance" of the review, three ACHP members were designated to advise the chair and her staff.[1702] In addition, the Tribunal doubts the harm occasioned by a personal point of view expressed in an isolated, non-public incident, even if by a decision-maker.

786. Second and third, the Tribunal finds that Claimant has not proven that the ACHP's choice to terminate consultations and make a direct recommendation to the secretary of Interior was manifestly arbitrary, was a gross denial of justice, or exhibited a manifest lack of reasons. At most, Claimant has assured the Tribunal that quick termination is not the norm; Respondent, however, has supplied sufficient reasons to account for this fact, including that the nationwide programmatic agreement calls for varied procedures in the case of "controversial undertakings."[1703] Once again, it is not for this Tribunal to assess the veracity of evidentiary support for domestic governmental decisions; the Tribunal may assess only whether there was reasonable evidence, and thus the government's reliance on such was not obviously and actionably misplaced.

787. Finally, the Tribunal does not view the public hearings or site visits as "shams." They may have been different from that to which Claimant was accustomed, but

[1702] ACHP Hearing Transcript, p. 8 (Mar. 11, 1999) [Ex. 185]; *accord* Memorandum from Don Klima to Ray Soon; Richard Moe, National Trust for Historic Preservation; and Dick Sanderson (Environmental Protection Agency) re Imperial Mine Project, Imperial County, California (Nov. 18, 1998) [Ex. 157].

[1703] *See supra* ¶ 670.

Respondent has established a prima facie case as to why this was necessary and reasonable under the circumstances and the Tribunal has no cause to doubt this evidentiary support. The Tribunal therefore holds that Respondent acted without arbitrariness, with sufficient reasons, and fairly in designing the public meetings regarding the Imperial Project Plan of Operations and the site visit to the Imperial Project itself.

i. *Final Disposition with respect to Cultural Review of the Imperial Project*

788. The Tribunal will reevaluate the cultural review as part of the whole of the governmental measures to which Claimant argues it was subjected. For the above-stated reasons, however, the Tribunal holds that the extensive evidence adduced in this case does not prove that the cultural review of the Imperial Project, when viewed in isolation, exhibits "a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons," necessary for a violation of Article 1105.

2. THE COMPLAINED-OF ACTS OF THE CALIFORNIA STATE GOVERNMENT

a. Senate Bill 22

789. With respect to Senate Bill 22, the Tribunal addresses what it views as Claimant's three primary contentions regarding the manner in which the California measures violated the standard of fair and equitable treatment: (1) it targets the Imperial Project and was specifically designed to make the Project infeasible; (2) the process by which SB 22 was adopted disturbed a transparent and predictable framework in that it occasioned radical change and undue surprise; and (3) the requirement of mandatory backfilling is arbitrary in that it does not protect cultural resources and may even cause greater environmental degradation.[1704]

[1704] The Tribunal notes that there was an additional fourth argument presented by Claimant of the retroactive application of the California measures. *See* Claimant's Reply Memorial, ¶ 262 ("The California measures at issue here had the effect of applying retroactively to Glamis in that they completely changed the legal and business framework governing the Imperial Project, after Glamis had invested over $15 million to ensure profitable operation under the law as it existed prior to December 2002.") Respondent counters, "Neither of the California measures applies retroactively. Both the SMGB regulation and Senate Bill 22 apply only to mines that do not have an approved Reclamation Plan with a financial assurance in

790. At the outset, the Tribunal notes that SB 22 and the SMGB Regulations had the same effect on Claimant—they, individually and collectively, required complete backfilling of the Imperial Project—and, therefore, either measure could have occasioned the complained of loss by itself and without the other. As the two distinct measures led to identical results, the Tribunal need only determine that one of the measures was in compliance with international obligations and therefore the common result does not breach Respondent's obligations under Article 1105. Claimant therefore must establish that both measures constituted a breach of Article 1105 to prove that the result independently reached by each measure violates the customary international law minimum standard of treatment.[1705] The Tribunal finds, however, that Claimant has not proved to the satisfaction of the Tribunal a violation of Article 1105's obligations by *either* SB 22 or the SMGB Regulations, much less both of them as it is required to do.

i. *The Assertion of Targeting of the Imperial Project*

791. First, with respect to the purported targeting of the Imperial Project by SB 22 with the goal of making the Project infeasible, the Tribunal notes that it is clear to the Tribunal that the Imperial Project was indeed on the minds of the legislators drafting Senate Bill 22. However, determining whether this circumstance should be taken as proof of targeting of the Imperial Project is a complicated task.

792. To describe one example of the complexity in ascertaining legislative intent, the Tribunal looks to see if the California state legislature was attempting to address a larger

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place as of the date of their enactment." Counsel for Respondent, Tr. 1433:15-20. The Tribunal finds this argument not properly developed and therefore Claimant's burden of proof unmet, and, in any event, disputed by the application of the SMGB Regulations to the Golden Queen mine, whose reclamation plan and mining permit at the time of passage had been approved, though its financial assurances were not, thus confirming Respondent's assertions. *See supra* footnote 539.

[1705] The Tribunal notes that, in response to the Tribunal's Questions to the Parties for the Second Session of the Hearing on the Merits (Sept. 6, 2007), Respondent used this argument with respect to the expropriation analysis under Article 1110. *See* Respondent, Tr. 1828:3-16:

> [W]e submit that if the Tribunal were to find that either the SMGB regulation or Senate Bill 22 was not expropriatory, then Glamis's expropriation claim challenging the California measures fails. So, in other words, the United States needs only to show that one of the California measures is not expropriatory to defeat Glamis's expropriation challenge to the California measures. We note that despite the Tribunal's direction that Glamis in its closing argument indicate whether it disagreed with this proposition and explained any such disagreement, Glamis failed to do so. We can thus assume that Glamis agrees with this proposition, and the Tribunal should therefore accept it as well.

The Tribunal, however, finds it equally applicable to this analysis under the fair and equitable treatment standard.

class of projects or a general problem beyond that of the Imperial Project. The Tribunal acknowledges that discerning legislative intent is always a difficult endeavor, however. If one legislator speaks, it is hard to know whether he or she speaks for the legislature as a whole, or just for him or herself. It is even more difficult to ascertain whether an individual speaks for the legislature when that individual is not a member of the legislature. In addition, even if an individual did single out the Imperial Project, it could be in the nature of describing a symbol that has come to represent the harm that the legislature is striving to remedy. Symbols often can serve as a rallying call for expedited action; if, however, this symbolic project is merely a very visible member of a larger class of projects that are viewed as harmful by the legislature, and which also are addressed by the subsequent litigation, it cannot be said that this project alone was "targeted."

793. Therefore, the Tribunal determines it necessary to turn directly to the language and drafting history of the bill and the realities of the mining industry in California, in addition to the statements of individuals. To begin, the Tribunal sees that, with respect to the Imperial Project and SB 22, there could be two possible forms of discrimination: (1) because Claimant is Canadian, and (2) regardless of nationality, because it is a class of one. The former does not seem to be the case, nor does Claimant argue that it is. The question therefore is whether SB 22 is a bill of general application, both in form and effect. This, of course, begs the question: what are the requirements to be a bill of general application? Although not delving into the intricacies of domestic law and lawmaking, the Tribunal determines that likely characteristics of a law of general application would be that it is not strictly limited in time or geographic scope, and it is not crafted so as to exclude from its regulation all, or most, other similarly situated actors.

794. The Tribunal determines that, *on its face*, SB 22 appears to apply to potentially several mines, if not yet at present, then in the future. For instance, SB 22 temporally eliminates from its scope only those mining operations "in existence on January 1, 2003, for which the lead agency has issued final approval of a reclamation plan and the financial assurances prior to September 1, 2002," and any reclamation plan or financial assurances that must be amended for continued operation or expansion of a mining

operation in existence on January 1, 2003.[1706] In addition, it applies for the broad goal of preventing "the imminent destruction of important Native American sacred sites threatened by proposed strip mining and ... ensur[ing] these mining activities are adequately mitigated through implementation of new state reclamation requirements at the earliest opportunity ...."[1707]

795. In making this determination, one quote from an internal State of California memo to the file regarding an "Environmental Group call" appears particularly salient to the Tribunal:

> While SB 22 does not outright ban the Glamis mining proposal, something impossible under current federal law, its implementation makes it much less likely that marginally profitable gold mining proposals will go forward because of the added costs associated with backfilling, and in all events will at least require the 'restoration' of sacred sites as closely as possible to pre-mining conditions.[1708]

The Tribunal interprets this statement to illustrate the general concern that the California state legislators had regarding the potential damage to sacred sites caused by present *and future* open pit mines in general, and the Imperial Project specifically, and the hope that this legislation, at a minimum, would repair some of that damage.

796. Whether, *in reality*, this bill will only serve to limit the operation of the Imperial Project, this Tribunal cannot say. The Tribunal notes that it appears that it might affect solely the Imperial Project at present, but the Tribunal is not prescient and cannot look to the future to see that such a condition will continue for the life of the bill.

797. In light of these findings, the Tribunal holds that Claimant has not established that Senate Bill 22 targets solely the Imperial Project.

[1706] California Senators Sher and Burton, *Senate Bill 22* (introduced Dec. 2, 2002) [Ex. 263].

[1707] *Id.*

[1708] Memorandum to File from Dana Williamson RE: Environmental Group call, p. 2, attached to Email Correspondence from Dana Williamson to Darryl Young Re: Take a look at this (Apr. 4, 2003) [Respondent Doc. 162].

ii. *The Assertion that the Process by which SB 22 Was Adopted Disturbed a Transparent and Predicable Framework in that It Occasioned Radical Change and Undue Surprise*

798. With respect to Claimant's second argument, that the process by which Senate Bill 22 was enacted lacked transparency, the Tribunal has studied Claimant's assertion that, despite the fact that the promulgation of SB 22 followed domestic administrative procedures, "it could still have an illegal impact, a violation of the international law, and particularly the fair and equitable treatment standard encompassed in [Article] 1105."[1709] This illegal impact is described by Claimant in terms of the "fundamental shift in the legal framework surrounding open pit metallic mining in the State of California [that] marked a departure from the existing legal and scientific framework that Glamis was expert in navigating,"[1710] thus denying Claimant a "transparent and predictable framework."[1711] Therefore, the Tribunal finds Claimant's argument with respect to transparency to be one that, despite the outward procedural transparency of the passage of SB 22, the actual *effect* of the bill illegally deprived Claimant of a transparent and predictable framework that upset its reasonable, investment-backed expectations.

799. In its promulgation of the 1105 standard above, the Tribunal explained that, with respect to reasonable investor relations, a State Party's duty under Article 1105 arises only when the State has induced these expectations in a quasi-contractual manner.[1712] In this way, a State may be tied to the objective expectations that it creates *in order to induce* investment. Such an upset of expectations thus requires something greater than mere disappointment; it requires, as a threshold condition, the active inducement of a quasi-contractual expectation.

800. The Tribunal therefore turns to the determination of whether Claimant's reasonable expectations may have been induced by California's specific assurances. To begin, the Tribunal notes that Respondent has presented a prima facie showing that California is a particularly highly regulated environment with respect to environmental

[1709] *See supra* ¶ 685, quoting Counsel for Claimant, Tr. 1563:16-21.
[1710] Claimant's Reply, ¶ 264.
[1711] *Id.* ¶ 261.
[1712] *See* Tribunal's Holding, *supra* ¶ 627.

measures in general, and mineral exploration in particular.[1713] It presented additional evidence that SMARA contemplated that backfilling and recontouring could be necessary.[1714] From this atmosphere of regulation, Respondent argues that Claimant could not infer any specific inducements of its investment.[1715] Claimant counters these arguments by asserting that, although it was aware of the location of the Imperial Project within the CDPA, the Imperial Project remained subject to mineral exploration and was protected by the "Congressional promise to Glamis that there would be no 'buffer zones' around those areas that Congress had chosen to exclude from development."[1716]

801. The Tribunal holds that Claimant has not rebutted Respondent's prima facie showing of the lack of specific assurances. The "no buffer zone" language cited by Claimant is not a specific inducement of investment in mineral exploration and exploitation. It states solely that the fact that mineral activity, or any activity, can be seen or heard within a wilderness area "shall not, of itself, preclude such activities or uses up to the boundary of the wilderness area."[1717] It makes no assurance that such activities will not be regulated for other reasons, irrespective of their impact on wilderness areas.

802. In addition, this is not the type of specific inducement necessary to create the duty that is a prerequisite to any breach of Article 1105 by repudiation of investor expectations. The asserted assurances made to Claimant are not equivalent to the assurances in *Metalclad,* which were found to be "definitive, unambiguous and repeated" and thus were sufficient to create the threshold State obligation.[1718] They do not even

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[1713] Respondent's Counter-Memorial, at 193-94, citing Behre Dolbear Expert Report (Apr. 2006), at A6-6 (explaining that it had to use a higher risk increment in its analysis because of its location in California, whereas it would have used a zero risk increment for Nevada).

[1714] Respondent's Counter-Memorial, at 192, citing CAL. PUB. RES. CODE §§ 2712(a), (c) (2001); *see also* CAL. PUB. RES. CODE § 2733 ("'Reclamation' means the combined process of land treatment that minimizes water degradation, air pollution, damage to aquatic or wildlife habitat, flooding, erosion, and other adverse effects from surface mining operations, including adverse surface effects incidental to underground mines, so that mined lands are reclaimed to a usable condition which is readily adaptable for alternate land uses and create[s] no danger to public health or safety. The process may extend to affected lands surrounding mined lands, and may require backfilling, grading, resoiling, revegetation, soil compaction, stabilization, or other measures.").

[1715] Respondent's Counter-Memorial, at 185.

[1716] Claimant's Memorial, ¶ 326 (citation omitted); *see also* Claimant's Reply, ¶ 145.

[1717] *Id.* ¶ 114, quoting California Desert Protection Act of 1994, Pub. L. 103-433, § 103(d), 108 Stat. 4471, 4481 (1994).

[1718] *Feldman*, Award, ¶ 148 (Dec. 16, 2002) [Ex. 12], citing United Mexican States v. Metalclad, Reasons for Judgment of the Honorable Mr. Justice Tysoe, ¶¶ 28-29 (S.C. B.C. May 2, 2001) ("The Tribunal found that Metalclad had been led to believe by federal authorities that the federal and state

approximate the promises of tax rebates in *Feldman*, which were found insufficient as a basis even for a breach of the lower standard of Article 1110.[1719]

iii. *The Assertion of Arbitrariness*

803. To begin its assessment of Claimant's argument that SB 22 is actionably arbitrary in that it does not protect cultural resources and may even cause environmental harm, the Tribunal notes the standard articulated above as to when an act is so manifestly arbitrary as to breach a State's obligations under Article 1105: this is not a mere appearance of arbitrariness—a tribunal's determination that an agency acted in way with which the tribunal disagrees or a State passed legislation that the tribunal does not find curative of all the ills presented; rather, this is a level of arbitrariness that, as *International Thunderbird* put it, amounts to a "gross denial of justice or manifest arbitrariness falling below acceptable international standards."[1720] The act must, in other words, "exhibit a manifest lack of reasons."[1721] The Tribunal finds that Respondent has presented a prima facie showing that SB 22 was rationally related to its stated purpose and reasonably drafted to address its objectives. It is Claimant's burden to prove a manifest lack of reasons for the legislation, and the Tribunal holds that it has not met this burden.

804. It is clear from the record that the bill addresses some, if not all, of the harms caused to Native American sacred sites by open-pit mining. The Tribunal agrees with Respondent's assertion that governments must compromise between the interests of competing parties and, if they were bound to please every constituent and address every harm with each piece of legislation, they would be bound and useless.[1722]

805. It is possible, as Claimant argues, that some cultural artifacts will indeed be disturbed, if not buried, in the process of excavating and backfilling.[1723] The sole inquiry

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permits issued to COTERIN allowed for the construction and operation of the landfill, and it made reference to Metalclad's position (which the Tribunal appeared to have implicitly accepted) that it was also told by federal officials that if it submitted an application for a municipal construction permit, the Municipality would have no legal basis for denying the permit.")

[1719] *Id.* ¶ 111.
[1720] *See supra* ¶ 625.
[1721] *See supra* ¶ 627.
[1722] *See supra* ¶¶ 742-43.
[1723] *See supra* ¶ 687.

for the Tribunal, however, is whether or not there was a manifest lack of reasons for the legislation. In these circumstances, it appears to the Tribunal that the government had a sufficient good faith belief that there was a reasonable connection between the harm and the proposed remedy and that Claimant is using too narrow a definition of artifacts. Respondent points out that there are, in addition to pot shards, spirit circles, and the like, sight lines, teaching areas and viewsheds that must be protected and would be harmed by significant pits and waste piles in the near vicinity. The fact that SB 22 mitigates some, but not all, harm does not mean that it is manifestly without reason or arbitrary; it more likely means that it is a compromise between the conflicting desires and needs of the various affected parties.

806. This is also the conclusion with respect to Claimant's argument that SB 22 is so arbitrary as to be in contravention of international law because more land will actually be disturbed by the complete backfilling measures. Such a result, even if it were assured, does not preclude the Bill from protecting sacred sight lines and viewsheds. The Tribunal also recognizes, however, that this is legislation of general application, and even if more land is disturbed in this situation—of which the Tribunal is not certain—Claimant has not proven that this will be the situation with each mine that falls under SB 22's purview.

iv. *Final Disposition of the Tribunal with respect to SB 22*

807. For the above-stated reasons, the Tribunal finds that Claimant has not satisfied the Tribunal that Senate Bill 22 is manifestly arbitrary, is evidently discriminatory, or exhibits a complete lack of reasons. In addition, although the bill may have surprised Claimant, no specific assurances were provided to Claimant by the State of California so as to create a duty on behalf of the State to not upset Claimant's reasonable expectations.

b. The SMGB Regulations

808. With respect to the SMGB Regulations, Claimant argues that the SMGB Regulations denied it a transparent and predictable framework, upset its reasonable expectations, and were arbitrary.[1724] In support of these general assertions, Claimant

[1724] Claimant's Reply, ¶¶ 261-62.

presents three specific arguments: (1) the requirement of mandatory backfilling was unprecedented and unexpected; (2) the emergency basis of the regulations also was unexpected and unprecedented; and (3) there is no rational relationship between the regulation and its stated objectives.

i. *The Assertion that the Requirement of Mandatory Backfilling Upset Claimant's Reasonable Expectations*

809. The inquiry as to whether the California's requirement of mandatory backfilling repudiates Claimant's reasonable, investment-backed expectations turns again on the threshold inquiry of whether or not there were specific assurances from the State of California that it would not enact such a regulation.

810. The Tribunal notes Claimant's arguments that such a requirement was completely novel, wholly unexpected, and even contrary to the recommendations of reputable organizations, such as the NAS/NRC,[1725] and even governmental agencies like BLM.[1726] The Tribunal does not doubt that this imposition of mandatory backfilling surprised Claimant and upset its expectations.

811. Whether these expectations were reasonable or not is not an inquiry that the Tribunal need make, however. The inquiry, as explained above, is solely whether California, or the federal government, made specific assurances to Claimant that such a requirement would not be instituted in order to induce Claimant's investment in the Imperial Project. Also as determined above, Respondent has presented a prima facie showing that no such specific assurances were given to Claimant and Claimant has failed to rebut this showing.[1727] As no duty of the State was thus created ensuring maintenance of Claimant's reasonable expectations, the Tribunal also need not address what level of repudiation of this duty would be required to find such an act a violation of State obligations under Article 1105.

[1725] *See supra* ¶ 690.
[1726] *See supra* ¶ 691.
[1727] *See supra* ¶¶ 801-02.

ii. *The Assertions that the Emergency Basis of the SMGB Regulations Also Upset Claimant's Reasonable Expectations*

812. With respect to the emergency status of the SMGB Regulations, the Tribunal reads this argument to include not only the purported repudiation of Claimant's reasonable expectations, but also an assertion that the emergency status was unwarranted, or perhaps used in order to target Claimant.[1728] Therefore, although the Tribunal determines that, again, there were not specific assurances to Claimant with respect to the emergency regulations that induced quasi-contractual investment, the Tribunal will consider whether Claimant has provided sufficient evidence to prove that the use of the emergency status was unwarranted or used for an ulterior purpose so as to evidence an intent to target the Imperial Project.

813. Assuming there was no quasi-contractual relationship, the Tribunal finds that a claimant cannot have a legitimate expectation that the host country will not pass legislation that will affect it. The issue therefore is whether a State may legitimately anticipate such legislation by adopting interim or emergency regulations that institute the same requirements for the same parties that eventually will be affected by the legislation. Is this within the scope of the State's regulatory power?

814. The finding of an emergency is similar to that of the need for interim measures. Such a determination is different from deciding the merits of a case; it is a temporary measure addressing a pending event while the final determination is made and the permanent regulations can be put into place. With respect to the backfilling requirements, it is undisputed that the primary emergency was that the Imperial Project was pending and the government wanted to freeze the Project until the regulations were finalized; though the SMGB acknowledged its additional intent to prevent any other similarly positioned project that might be in the permitting stage and unknown to the board.[1729] The support for the emergency therefore is that at least one project was known and presented a potential danger to Native American sacred sites, and the possibility

[1728] Counsel for Claimant, Tr. 1783:2-1784:17; 1793:20-1794:5.

[1729] The Tribunal notes testimony of Dr. Parrish that, although "the reason for the emergency regulation was that there may be other unknown mines that are in the permitting stage that are at that time unknown to the Board," he acknowledged that the Imperial Project was the only project specifically named as a basis for the emergency. Parrish, Tr. 506:14-507:12, citing State Mining and Geology Board, Executive Officer's Report re Emergency Backfilling Regulation, p. 4 (Dec. 12, 2002) [Ex. 267].

existed of other potentially disruptive projects yet unknown, and thus the regulation was not speculative.

815. The Tribunal notes that it is possible that preceding regulations—whether interim or emergency—could violate international law even when subsequent final legislation would not. This might happen, for instance, if the temporary regulations eliminated all foreign businesses of one kind or another, and the subsequent measures addressed the problem without such an adverse result. If the regulations are largely connected to the subsequent legislation, however, it is difficult to see how they could independently violate international law. In this case, the Tribunal holds that Claimant has failed to prove that there was insufficient factual and scientific basis for either the preliminary or the permanent regulations.

iii. *The Assertion that There Is No Rational Relationship between the SMGB Regulations and Their Stated Objectives*

816. The Tribunal will address each of Claimant's supporting arguments for the fact that the SMGB Regulations are arbitrary in that they are not rationally related to their objectives: (1) the exclusion from regulation of non-metallic mines; and (2) the asserted failure of the SMGB to engage in scientific study.

817. First, with respect to the exclusion of non-metallic mines from the requirement of mandatory backfilling, the Tribunal asks whether there is a manifest lack of reasons in distinguishing between the two. The Tribunal holds that Claimant has not proven that this is the case: there was sufficient evidence provided to the Board that there was a difference between the two types of mines. On balance, the SMGB had legitimate concerns that there were distinct and greater problems with metallic, as opposed to non-metallic, mines. In addition, the Tribunal finds that there was a prima facie showing that only the issue of metallic mines was presented to the SMGB and it is the customary practice of the board to address solely the issue of the petition before it and not broaden its scope.[1730] Therefore, a focus on the one and not the other does not appear to be manifestly without reason. As discussed above, States cannot be held to a standard that

[1730] Parrish, Tr. 594:12-595:6.

requires the remedy of all ills at once; a State is not necessarily acting manifestly without reason, or arbitrarily, if it addresses one aspect of a problem and not another.

818. With respect to Claimant's second argument, the Tribunal holds that Claimant has also not met its burden to prove that there is a requirement that the SMGB engage in scientific study to support its conclusions. Dr. Parrish testified that the rulemaking record evinces testimony that sufficiently demonstrated that leaving large open pits and mounds of waste material was not consistent with SMARA and that no persuasive evidence was presented to the contrary.[1731] This testimony, according to Dr. Parrish, included that from experts, the mining industry and the Department of Conservation's Office of Mine Reclamation.[1732] The Tribunal determines that such an inquiry was sufficient to achieve the stated goal of the board: "to ensure that there would be no future mines that would be left in an unreclaimed condition."[1733]

c. The Asserted Intertwining of the California Measures

819. Finally with respect to the Claimant's assertions that the California measures violate Respondent's obligations under Article 1105(1)—either individually or viewed together with each other or the federal measures—the Tribunal addresses Claimant's argument that the "the two California measures were closely related avenues to accomplish a single objective—stop the Imperial Project from ever proceeding while seeking to avoid payment of the compensation it knew to be required had it proceeded transparently and directly through eminent domain."[1734]

820. The Tribunal holds that it need not make the determination as to whether the drafters of Senate Bill 22 and the SMGB Regulations consciously worked together to target and prohibit the Imperial Project. Even if the Tribunal were to view the measures as "working together," Claimant has not met its burden of proving to the Tribunal that the SMGB Regulations unfairly target the Imperial Project. Not only are the regulations of general application, but they have in fact been applied to another project: the Golden

[1731] *See supra* ¶ 744.
[1732] *See supra* ¶ 745.
[1733] *See supra* ¶ 747.
[1734] Claimant's Letter to the Tribunal, pp. 7-8 (Sept. 3, 2008).

Queen Soledad Mountain Project.[1735] The fact that the Imperial Project may not be able to avail itself of the same economic opportunities as Golden Queen to be economically profitable even with the requirement of complete backfilling[1736] does not diminish the fact that the regulations still were applied to Golden Queen and thus they are proven of general application.

821. With the finding that the SMGB Regulations were not designed to target and prohibit the Imperial Project, it is moot whether SB 22 had such an intent because, even if it did, the two California measures could not then be working *together* to target the Imperial Project.[1737] The Tribunal notes, however, that it has already held above that Claimant also has not established that SB 22 targeted solely the Imperial Project.

822. In making this determination, the Tribunal also holds that it will not grant Claimant's request for the drawing of an adverse inference that the redacted portions of three documents containing communications involving the California Office of the Governor and the Department of Conservation, among others (Respondent's Document Nos. 162, 192 and 197) illustrate "that there was close coordination and intersection between passage of SB 22 and adoption of the SMGB regulation …."[1738] The Tribunal does not believe that it is likely that the limited redactions of these three documents would provide sufficient evidence to refute the entire rest of the record in this case and prove that SB 22 and the SMGB Regulations were in fact coordinated efforts to halt the Imperial Project, especially in light of the determination above.

823. To the extent that the Tribunal signaled this holding to the Parties in prior correspondence and offered Claimant the opportunity for an *in camera* review should it wish to further pursue the matter,[1739] the Tribunal notes that Claimant in fact turned down the opportunity for such a review, requesting the Tribunal to instead "make its ruling on the redactions and proceed with the issuance of the decision on the merits in this dispute

[1735] Norwest Rejoinder Report (Mar. 2007), ¶ 14.
[1736] Leshendok, Mining Operations Expert for Claimant, Tr. 477:11-478:19.
[1737] *See supra* ¶ 790.
[1738] Claimant's Letter to the Tribunal, p. 7 (Sept. 3, 2008).
[1739] Tribunal Letter to the Parties (Oct. 9, 2008).

based on the extensive evidence of record in this case, including the documents belatedly produced by the Respondent."[1740]

3. THE RECORD AS A WHOLE AND THE DETERMINATION OF WHETHER IT FALLS SHORT OF RESPONDENT'S OBLIGATIONS UNDER ARTICLE 1105(1)

824. The Tribunal holds that Claimant has not established that the individual measures taken by the federal and California state governments fall below the customary international law minimum standard of treatment and constitute a breach of Article 1105 in that they are not egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons. The question then put to the Tribunal by Claimant is whether, when taken together as one comprehensive effort by the various governmental bodies to address the Imperial Project, does the entirety of Respondent's conduct violate Claimant's right of fair and equitable treatment?

825. The Tribunal determines that, for acts that do not individually violate Article 1105 to nonetheless breach that article when taken together, there must be some additional quality that exists only when the acts are viewed as a whole, as opposed to individually. It is not clear, in general terms, what such quality would be in all circumstances.

826. In this factual situation, however, the Tribunal holds that it cannot see that the conduct as a whole would be a violation of the fair and equitable treatment standard when the individual acts comprising that whole are not, without a finding of intent. The intent of the federal and California state governments to work together to halt the Imperial Project would be a powerful element in the Tribunal's determination of a violation of Article 1105. The Tribunal will not foreclose that, in other situations before other tribunals, such intent may be found and may elevate individually non-violative acts into a record as a whole that breaches international treaty obligations. Even with the confluence of all of the various elements here, however, the Tribunal finds that Claimant has not established such intent.

[1740] Claimant's Letter to the Tribunal (Oct. 15, 2008).

827. The two sets of actions—the federal measures and the California measures—are indeed coincident in time, but the Tribunal holds that Claimant has not succeeded in proving that they are part and parcel of the same story or otherwise causally connected. Although one set of events definitely appears to pick up where the other left off, they appear to the Tribunal more as separate factual clusters, factual groupings that on their own do not breach Article 1105 and also do not when viewed together.

828. Thus addressing the record as a whole, the Tribunal holds that Claimant has not established that the acts complained of fall short of the customary international law minimum standard of treatment. The complained-of acts were not egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons. There was no specific inducement of Claimant's expectations. There was no causal focus on the nationality of the investor. There was no corruption exhibited at any level of government. The Imperial Project, although certainly highlighted as a triggering event for some of the measures, was not the subject of discriminatory targeting.

829. There is simply not the egregiousness necessary to breach the fair and equitable treatment standard of Article 1105 as it currently stands. The State Parties to the NAFTA can always choose to negotiate a higher standard against which their behavior will be judged. It is very clear, however, that they have not yet done so and therefore a breach of Article 1105 still requires acts that exhibit a high level of shock, arbitrariness, unfairness or discrimination.

4. FINAL DISPOSITION OF THE TRIBUNAL WITH RESPECT TO CLAIMANT'S CLAIM UNDER ARTICLE 1105(1) OF THE NAFTA

830. For the above-stated reasons, the Tribunal dismisses Claimant's claim for damages under Article 1105 of the NAFTA.

VII. COSTS

831. As the Tribunal therefore dismisses both of Claimant's claims against Respondent, there is no award of damages. There is, however, the issue of costs to resolve. As is the case in almost all arbitrations, both Parties seek their costs associated

with this proceeding, including attorneys' fees and expenses and arbitral fees and expenses.[1741]

832. With respect to costs, the UNCITRAL Arbitration Rules in Article 40(1) and (2) provide:

> 1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
>
> 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph *(e)*, the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

In these articles, both a general principle and arbitral discretion can be found. Article 40(1) adopts the general principle that the unsuccessful party should bear arbitration-related costs, though, in light of the circumstances of the case, the tribunal has the discretion to otherwise apportion the costs. Complete discretion, however, is provided to the Tribunal to apportion the costs of legal representation and assistance in light of case circumstances under Article 40(2).

833. The Tribunal notes that, under the UNCITRAL Rules, the costs of the arbitration, if not those of representation, would shift to Claimant as it has indeed failed with respect to both of its claims. The Tribunal finds, however, that Claimant raised difficult and complicated claims based in at least one area of unsettled law, and both Parties well argued their positions with considerable legal talent and respect for one another, the process and the Tribunal. The Tribunal therefore determines that Claimant shall bear two-thirds of the arbitral costs and Respondent shall bear the remaining one-third. Each Party shall bear its own costs of representation.

[1741] Claimant's Memorial, ¶ 570; Respondent's Counter-Memorial, at 263.

VIII. AWARD AND ORDER

834. For the foregoing reasons, the Tribunal awards and orders as follows:

835. Denies Claimant's claim under Article 1110 of the NAFTA;

836. Denies Claimant's claim under Article 1105 of the NAFTA;

837. Orders Claimant to pay 2/3 of the arbitral costs and Respondent to pay 1/3 of the arbitral costs; this results in a reimbursement of funds expended by Respondent to ICSID to be determined by ICSID and paid by Claimant; and each Party to bear to its own costs of representation;

838. Denies all other claims for compensation.

Done in Washington, D.C.

Michael K. Young
President
Date: May 14, 2009

Professor David D. Caron
Arbitrator
Date: May 7, 2009

Kenneth D. Hubbard
Arbitrator
Date: May 7, 2009

Subject to the Separate Statement Included in the Award (Footnote 1044)