

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

GLAMIS GOLD LTD.,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

**STATEMENT OF DEFENSE OF
RESPONDENT UNITED STATES OF AMERICA**

Mark A. Clodfelter

*Assistant Legal Adviser for International
Claims and Investment Disputes*

Andrea J. Menaker

*Chief, NAFTA Arbitration Division, Office
of International Claims and Investment
Disputes*

David A. Pawlak

Mark S. McNeill

Jennifer I. Toole

*Attorney-Advisers, Office of International
Claims and Investment Disputes*

UNITED STATES DEPARTMENT OF STATE

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In accordance with Procedural Order No. 1, dated March 3, 2005, and Articles 19 and 21(3) of the UNCITRAL Arbitration Rules, respondent United States of America respectfully submits this Statement of Defense to the claims of Glamis Gold Ltd., which it submitted on behalf of its enterprises, Glamis Gold, Inc. and Glamis Imperial Corporation (together with Glamis Gold Ltd., referred to herein collectively as “Glamis”).

PRELIMINARY STATEMENT

1. Claimant in this case complains about the United States Department of the Interior’s (“DOI”) handling of its application to develop a cyanide heap leach gold mine in Imperial County, California (“Imperial Project”) and measures adopted by the California State Mining Geology Board (“SMGB”) and California legislature. Glamis’s claims lack legal and factual support.
2. In Section I, below, the United States highlights the regulatory context for mining on federal lands and describes the Glamis Imperial Project that is the focus of this dispute. Section II.A. sets forth the reasons that the Tribunal lacks jurisdiction (i) over Glamis’s claims brought under

NAFTA Article 1105(1) with respect to certain U.S. federal measures; and (ii) over the entirety of Glamis's NAFTA Article 1110 expropriation claim with respect to California state measures.

3. Section II.B sets forth the United States' merits defenses with respect to Glamis's Article 1105(1) minimum standard of treatment claim and its Article 1110 expropriation claim. In Section II.C., the United States demonstrates that the losses that Glamis alleges to have suffered are without support. Finally, in Section III, the United States requests that the Tribunal issue an award dismissing Glamis's claims in their entirety and awarding the United States its costs in this arbitration.

I. FACTUAL BACKGROUND

A. Regulatory Context For Mining On Federal Lands

4. A complex statutory and regulatory framework governs the mining of hardrock minerals, such as gold, copper and other precious metals, on federal lands in the United States. The mining claims location system established by the General Mining Law of 1872, as amended (30 U.S.C. §§ 21-54) ("1872 Mining Law" or "Mining Law"), remains a cornerstone of that framework. In the 1960s and 1970s, Congress adopted other statutes to accommodate environmental protection, multiple uses and the management of federal land generally. Prominent among those statutes is the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 ("1976 FLPMA" or "FLPMA"). These statutes, together with their implementing regulations, as well as state laws and regulations, and numerous judicial and administrative decisions that have interpreted them, make up the body of the mining law system.

1. General Mining Law Of 1872

5. The 1872 Mining Law provides citizens of the United States the opportunity to explore for, discover, and develop certain valuable mineral deposits on federal lands that are open for that

purpose. The Mining Law also sets general standards and guidelines for claiming the possessory rights to valuable minerals discovered during exploration. The Bureau of Land Management (“BLM”), a bureau within the U.S. Department of the Interior (“DOI”), administers the Mining Law.

6. The Mining Law acknowledges the existence and applicability of state and local laws and regulations to the extent they are not in conflict with federal law. *See* 30 U.S.C. § 26. Most states maintain laws that address the manner of locating and recording mining claims and mill sites on federal lands within their boundaries.

7. There are federally administered lands in 19 states, including California, where mining claims or sites may be located. Prospecting for and locating claims and sites is permitted only on lands open to mineral entry. Claims may not be staked in areas that have been closed to mineral entry by a special act of Congress, regulation, or public land order. These areas are withdrawn from the operation of the mining laws. Such withdrawals restrict the use or disposition of public lands and may preclude locating mining claims on those lands.

8. On federal lands where mining is permitted, the federal government receives no rents or royalties from mining operations conducted under the Mining Law. To hold a claim on federal land, however, prospectors must pay an annual maintenance fee of \$100 per mining claim.

9. The Mining Law does not contain any direct environmental controls, but mining claims are subject to certain environmental laws that may affect or act as a precondition for mine development.

2. Federal Land Policy And Management Act Of 1976

10. Under FLPMA, the Secretary of the Interior has broad authority to manage public lands, including those lands containing mining claims located under the Mining Law. While FLPMA

recognized the ongoing vitality of the Mining Law, it amended that law in two relevant respects. First, in adopting FLPMA, Congress created the California Desert Conservation Area (“CDCA”). In doing so, Congress determined that lands within the CDCA were in need of special attention due to their “historical, scenic, archeological, environmental, biological, cultural, scientific, educational, recreational, and economic resources.” *Id.* § 1781(a)(1). Congress further recognized that “the California desert environment is a total ecosystem that is extremely fragile, easily scarred, and slowly healed.” *Id.* § 1781(a)(2). Thus, mining claims within the CDCA may be subjected to reasonable regulations with the goal of protecting the CDCA “against undue impairment.” *Id.* Second, FLPMA provides that in “managing public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1781(b).

11. Regulations found at 43 C.F.R. Subpart 3809 (“3809 Regulations”), which were first promulgated in 1980 and amended in 2000 and 2001, govern the BLM’s surface management of mining activities on lands subject to the mining laws. The purpose of the 3809 Regulations is to (i) prevent unnecessary or undue degradation of public lands by operations authorized by the Mining Laws; and (ii) provide for coordination with appropriate State agencies to prevent unnecessary or undue degradation of public lands. *See* 43 C.F.R. § 3809.1 (2004) & 43 C.F.R. §§ 3809.0-1, 3809.0-2 (1981). These regulations require that mining operators obtain an approved plan of operations prior to commencing (i) operations that would cause surface disturbances exceeding five acres and (ii) operations in certain sensitive areas, including the CDCA.

12. BLM’s current 3809 Regulations include a provision addressing the interaction between BLM’s regulations and certain state laws: “If State laws or regulations conflict with this subpart regarding operations on public lands, you must follow the requirements of this subpart. However,

there is no conflict if the State law or regulation requires a higher standard of protection for public lands than this subpart.” 43 C.F.R. § 3809.3 (2004). That provision previously stated, “[n]othing in this subpart shall be construed to effect a preemption of State laws and regulations relating to the conduct of operations or reclamation on federal lands under the mining laws.” *See* 43 C.F.R. § 3809.3-1(a) (1981).

3. Other Relevant Federal And State Laws

13. In most circumstances, mining operators’ proposed plans must undergo further analysis pursuant to the National Environmental Policy Act (“NEPA”), the National Historic Preservation Act (“NHPA”), and the Endangered Species Act (“ESA”). *See* 43 C.F.R. § 3809.1-6. NEPA requires federal agencies to evaluate the environmental effects of federal agency action, identify mitigation measures and inform the public of the effects of its decision. *See* 42 U.S.C. § 4321. NEPA also directs federal agencies to prepare a detailed environmental impact statement for “major Federal actions significantly affecting the quality of the human environment” *Id.* § 4332(2)(C). Section 106 of the NHPA, 16 U.S.C. § 470d, sets forth a process by which “[f]ederal agencies [are required] to take into account the effects of their undertakings on historic properties and afford the [Advisory Council on Historic Preservation] a reasonable opportunity to comment on such undertakings.” 64 Fed. Reg. 27071 (May 18, 1999). The Section 106 process involves consultations with states, Indian tribes and local governments. *See* 36 C.F.R. Part 800. Finally, in certain circumstances, consultation obligations may be triggered under the ESA. *See* 16 U.S.C. § 1536.

14. In addition, federal and state laws accord protections to Tribal sacred sites and other Tribal resources. For example, in 1988, Congress amended the Archaeological Resources Protection Act of 1979 to address protection of Native American archaeological sites. *See* 102 Stat. 2983 (1988)

(amending 16 U.S.C. §§ 470aa-470mm (1988)). In 1990, Congress adopted the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001 *et seq.* (1990). In 1992, Congress amended the National Historic Preservation Act to address Native American sites. *See* 106 Stat. 4600, 4753-65 (1992) (amending 16 U.S.C. §§ 470-470x-6 (1988)). Likewise, numerous federal agencies have adopted regulations addressing Native American sacred sites or providing for consultation with Tribes and consideration of Tribal interests. *See, e.g.*, 25 C.F.R. § 262 (1994) (“BIA regulations”); *see also* Executive Order 13,007 (1996), 61 Fed. Reg. 26,771 (providing, *inter alia*, that federal actions shall avoid affecting integrity of Tribal sacred sites). California law has developed similarly over this period. *See, e.g.*, CAL. PUB. RES. CODE § 5097.94 (protections for Native American grave sites).

4. California’s Surface Mining And Reclamation Act Of 1975

15. Historically, like other states, the State of California has adopted laws and regulations, including environmental, public health and safety laws and regulations, to protect the public from the harmful effects of mining operations within its borders.

16. Certain mining activities within California are governed by the Surface Mining and Reclamation Act of 1975 (“SMARA”). California enacted SMARA to ensure that significant adverse impacts of mining to the environment are prevented or mitigated and public health and safety are protected. Surface mining operators are required to submit to relevant state agencies for approval (i) a plan for reclaiming mined lands; and (ii) financial assurances that those lands will be reclaimed in accordance with the approved plan. The relevant state agencies are responsible for ensuring that surface mining operators are in compliance with permit and reclamation requirements.

17. SMARA defines “reclamation” as follows:

‘Reclamation’ means the combined process of land treatment that *minimizes water degradation* . . . and other adverse effects from surface mining operations, . . . 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.*

CAL. PUB. RES. CODE § 2733 (emphasis added).

5. California State Mining And Geology Board Regulations

18. Under SMARA, the California State Mining and Geology Board (“SMGB”) is empowered to adopt state policy for surface mining operations, including measures to be employed in specifying backfilling and other reclamation requirements. *See id.* §§ 2755-56. In regulations that became effective January 15, 1993, the SMGB adopted into state policy its reclamation standards, including a provision that states, “[w]here backfilling is required for resource conservation purposes . . . fill material shall be backfilled to the standards required for the resource conservation use involved.” CAL. CODE REGS. tit. 14 § 3704.

19. Pursuant to its authority under SMARA, in December 2002, the SMGB adopted further regulations regarding backfilling “necessary for the immediate preservation of the public general welfare.”¹ Those regulations were set to expire on April 18, 2003, 120 days after their entry into force. As a result, at its regular business meeting held on April 10, 2003, the SMGB re-adopted its backfilling and recontouring regulation on an emergency basis. On May 30, 2003, following an opportunity for public comment, the regulations went into effect on a permanent basis.

20. SMGB’s regulations establish that lands disturbed by open pit surface mining for “metallic minerals shall be backfilled to achieve not less than the original surface elevation.” *Id.* § 3704.1(a). The requirement to backfill an open pit excavation to the surface shall not apply “if there remains an insufficient volume of materials to completely backfill the open pit excavation to the surface.”

¹ STATE MINING AND GEOLOGY BOARD, EXECUTIVE OFFICER’S REPORT at 4 (Dec. 12, 2002).

Id. § 3704.1(h). Among other requirements, the regulation mandated that “[b]ackfilling shall be engineered, and backfilled materials shall be treated, if necessary, to meet” the requirements of California’s mining waste management laws and applicable water quality control plans. *Id.* § 3704.1(b). “All fills and fill slopes shall be designed,” *inter alia*, “to protect groundwater quality [and] to prevent surface water ponding.” *Id.* § 3704.1(d).

21. SMGB’s regulation does not apply to any surface mining operation for which a final approval of a reclamation plan and a financial assurance had been issued prior to December 18, 2002. *See id.* § 3704.1(i).

6. California Senate Bill 22

22. Before SMGB adopted its regulation, the California legislature had begun to consider amendments to SMARA to guard against adverse impacts of surface mining activities. Senate Bill (“SB”) 483, for example, proposed that the California legislature amend SMARA to address reclamation of abandoned mined lands. Introduced in early 2001, by mid-year the bill had been amended to include protection for Native American sacred sites. Although then-Governor Gray Davis signed SB 483 on September 30, 2002, it did not become operative because it had been joined to another bill, SB 1828, which Governor Davis vetoed.

23. Introduced as an emergency bill on December 2, 2002, SB 22 de-coupled the vetoed SB 1828 from the approved SB 483, thereby allowing for the amendment of SMARA to include provisions to protect Native American sacred sites from the environmental degradations associated with cyanide heap leach mining. The California legislature adopted SB 22 by a two-thirds majority. Governor Davis signed SB 22 into law on April 7, 2003. Its provisions overlap with the SMGB’s regulations, but are narrower in their scope of application.

24. SMARA thus provides that California authorities may not approve a reclamation plan for surface mining of metallic minerals if the operation is located within one mile of any Native American sacred site and is located in an area of special concern, as defined by reference to the CDCA Plan of 1980, unless all excavations are backfilled and graded to achieve the approximate original contours of the land prior to mining. *See* CAL. PUB. RES. CODE § 2773.3. The provision does not apply to any surface mining operation in existence on January 1, 2003, for which California had issued final approval of a reclamation plan prior to September 1, 2002. *See id.* § 2773.3.

B. The Imperial Project And Site

25. In December 1994, Chemgold Inc. filed with the BLM a proposed plan of operations for “an open pit, [cyanide] heap leach gold mine,” to be developed in Imperial County, California within the CDCA. 64 Fed. Reg. 8398 (Feb. 19, 1999). In the proposed plan, Chemgold Inc. described its ultimate owner, Glamis Gold, Ltd., as a “publicly-owned *U.S. corporation*.”² A notice of public hearing issued by the BLM regarding the mine describes the proposal further:

The proposed project area would encompass approximately 1,625 acres of public lands administered by the BLM, of which 1,392 acres would be disturbed.

The proposed Imperial Project would be operated by the Glamis Imperial Corporation, formerly known as Chemgold Corporation. Approximately 150 million tons of [f] ore and 300 million tons of waste rock would be mined from three open pits during the operation of the mine, which would conclude in the year 2018.

The site for the proposed mining project is eligible for the National Register of Historic Places. Archaeological and cultural inventories indicate the site has scientifically important archaeological, cultural, and spiritual value. The proposed mine could adversely [a]ffect [all] or part of the land.

² CHEMGOLD, INC. IMPERIAL PROJECT PLAN OF OPERATIONS, revision of Feb. 17, 1995 (originally submitted Dec. 6, 1994) at 2 (emphasis added).

64 Fed. Reg. 8398 (Feb. 19, 1999).

26. In March 1995, the BLM published a notice of intent to prepare an Environmental Impact Statement (“EIS”) for the Imperial Project. The BLM received over 425 written comment letters and 49 people spoke at two public hearings. The BLM completed its Draft Environmental Impact Statement (“DEIS”) in November 1996, after which time Glamis substantially revised its proposed plan. As a result, the BLM collected more environmental data and analyzed the revised plan, issuing a second DEIS in November 1997, and recommending additional mitigation measures. During the 135-day comment period for the 1997 DEIS, the BLM received 541 comment letters.

27. Following issuance of the second DEIS, the Secretary of the Interior proposed to withdraw the land on which Glamis proposed its mine from operation of the mining laws. The purpose of the withdrawal was to “protect the archaeological and cultural resources in the Indian Pass Area of Critical Environmental Concern and Expanded Management Area (collectively, the ‘Indian Pass Area’).” 63 Fed. Reg. 58,752 (Nov. 2, 1998). The notice proposing the withdrawal stated that the Quechan people consider the Indian Pass Area to be a sacred site. *Id.* On October 27, 2000, the Secretary withdrew the Indian Pass Area, on which the Glamis mine was proposed, from entry under the mining laws for a period of twenty years. *See* 65 Fed. Reg. 64,456 (Oct. 27, 2000). The withdrawal was made subject to Glamis’s mining claims to the extent they were determined to be valid at the time the withdrawal was proposed. The withdrawal precluded Glamis from expanding its Imperial Project beyond any valid claims it was determined to have.

28. Because of the growing controversy over the cultural resources located on the Imperial Project site, the BLM requested the Advisory Council on Historic Preservation to

review the likely effects of the Glamis project. In October 1999, the Advisory Council concluded that Glamis's proposed mine "would result in irreparable degradation of the sacred and historic values" of the land.³ It further advised the BLM to "take whatever legal means available to deny the proposal for the project."⁴ The National Trust for Historic Preservation also determined that the Imperial Project site is located on one of the eleven most endangered historic places in the United States.⁵

29. Responding in part to the Advisory Council's recommendations, former DOI Solicitor John Leshy issued a December 1999 opinion advising the BLM that the "undue impairment standard" in § 601 of FLPMA may permit the denial of a plan of operations if the impairment of other resources is particularly "undue" and there are no reasonable methods available to mitigate the harm.

30. On April 14, 2000, Glamis challenged Solicitor Leshy's opinion in U.S. District Court. In that lawsuit, Glamis asserted that "Glamis has already been harmed . . . by the Solicitor's legal review and issuance of" the opinion.⁶ The district court dismissed Glamis's suit in October of 2000 for lack of ripeness.

31. During this period, the BLM continued to review the Imperial Project. Upon its completion of the Final Environmental Impact Statement ("FEIS"), the BLM specified on November 17, 2000, that a no-action alternative was preferred, meaning it recommended

³ Letter dated October 19, 1999 from the Advisory Council On Historic Preservation to Bruce Babbitt, Secretary of the Interior at 3.

⁴ *Id.*

⁵ See National Trust for Historic Preservation, America's 11 Most Endangered Historic Places 2002, available at <http://www.nationaltrust.org/11Most/2002/index.html>.

⁶ Plaintiff's Opposition to Defendant's Motion to Dismiss, dated July 11, 2000, at 11, *Glamis Imperial Corp. v. Bruce Babbitt*, No. CV-N-00-0196-DWH-VPC (D. Nev. filed April 14, 2000); see also *id.* at 10 (Glamis "has been injured by the delays occasioned by waiting for the [December 27, 1999] Solicitor's Opinion."); Plaintiff's Opposition to Defendant's Motion to Dismiss, dated Oct. 23, 2000, at 2, *Glamis Imperial Corp. v. Bruce Babbitt*, No. 00CV1934W(POR) (D. So. Cal. Oct. 31, 2000) (same).

that there be no development of the mine, as proposed. Two months later, on January 17, 2001, former Secretary of the Interior Bruce Babbitt issued a Record of Decision (“ROD”) denying the proposed plan of operations for the Imperial Project. A change in administration followed shortly thereafter.

32. The new DOI Solicitor, William Myers, issued on October 23, 2001, a new legal opinion concluding that the DOI could not apply the “undue impairment” provision of § 601 of FLPMA to deny a plan of operations absent a rulemaking to establish the meaning of that term (“Myers Opinion”). In light of the Myers Opinion, on November 23, 2002, the new Secretary of the Interior, Gale Norton, rescinded the ROD issued by former Secretary Babbitt and remanded Glamis’s plan of operations to the BLM for its reconsideration.

33. As part of the reconsideration process, the BLM completed in September 2002 a Mineral Report for the purpose of determining whether “[t]he requirements of the mining laws of the United States have been satisfied for these mining claims on the critical dates of November 1998 and April 2002.”⁷ The report advised that it “*should not be used for any purpose other than that for which it was prepared.*”⁸ The report also made clear that it “*is not an appraisal of property for valuation.*”⁹ Shortly thereafter, on December 9, 2002, Glamis requested that the BLM “suspend all ongoing efforts to process the Imperial Project Plan of Operations.”¹⁰

⁷ U.S. DEPT. OF INTERIOR, BUREAU OF LAND MANAGEMENT, MINERAL REPORT at 3 (Sept. 2002).

⁸ *Id.* at 4 (emphasis in original).

⁹ *Id.* at 4 (emphasis in original).

¹⁰ Letter dated Dec. 9, 2002, from C. Kevin McArthur, President and CEO, Glamis Gold Ltd. to Mike Pool, California State Director, Bureau of Land Management.

34. The BLM responded that it would suspend the processing of Glamis's plan upon confirmation from Glamis that DOI would be held harmless for the suspension.¹¹ In a "belated response" of March 31, 2003, Glamis emphasized its desire for a buyout, but stated that it "cannot reaffirm" its "request . . . to suspend the Glamis plan of operations when we have no reasonable expectation that an alternative resolution for the Imperial Project is likely."¹²

35. A few months later, Glamis submitted its notice of intent to submit a claim to arbitration, asserting that the California measures adopted between December 12, 2002 and April 10, 2003 "essentially destroy the economic value of the Imperial Project." Notice of Intent, dated July 21, 2003, ¶ 23.

II. POINTS AT ISSUE

A. Preliminary Objections

36. Pursuant to Article 21 of the UNCITRAL Arbitration Rules, respondent United States of America respectfully objects to the jurisdiction of the Tribunal over Glamis's claims brought under NAFTA Article 1105(1) with respect to certain U.S. federal measures on the ground that those claims are time-barred and over Glamis's claim brought under NAFTA Article 1110 with respect to California state measures on the ground that it is not ripe.

1. Glamis's Claims That Certain Federal Actions Violated Article 1105(1) Are Time-barred

37. NAFTA Article 1117(2), pursuant to which Glamis has submitted its claim to arbitration, imposes a limitations period of three years: "An investor may not make a claim on behalf of an

¹¹ See Letter dated Jan. 7, 2003, from Mike Pool, California State Director, Bureau of Land Management to Kevin McArthur, President and CEO, Glamis Gold Ltd.

¹² Letter dated March 31, 2003, from Charles A. Jeannes, Senior Vice President, Administration, Glamis Gold Ltd. to Mike Pool, California State Director, Bureau of Land Management.

enterprise . . . 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.”

38. Glamis submitted its claim to arbitration on December 9, 2003. In its Notice of Arbitration, Glamis identifies “[t]he offending measures” to include several federal government actions: (i) an “October 19, 1999, [] federal Advisory Council on Historic Preservation recommend[ation],” (ii) a “legal opinion dated December 27, 1999” and (iii) BLM’s “Final EIS/EIR dated November 17, 2000.” See NOA ¶ 14. More than three years have elapsed between the dates of these actions and Glamis’s filing of its Notice of Arbitration on December 9, 2003. Indeed, more than three years before Glamis filed its NOA, Glamis complained in filings before the U.S. District Court that it “has already been harmed . . . by the Solicitor’s legal review and issuance of the [December 27, 1999 Solicitor’s Opinion].”¹³ Accordingly, to the extent Glamis complains of federal actions that pre-date December 9, 2000, and to the extent those actions constitute “measures” under NAFTA Article 201, Article 1117(2) precludes this Tribunal from asserting jurisdiction over Glamis’s claims challenging those measures.

2. Glamis’s Expropriation Claim Is Not Ripe

39. NAFTA Article 1117(1) provides in pertinent part as follows:

An investor of a Party, on behalf of an enterprise of another Party . . . may submit to arbitration under this Section a claim that the other Party has breached an obligation under Section A [and certain provisions of Chapter Fifteen], . . . and that the enterprise *has incurred* loss or damage by reason of, or arising out of, that breach.

¹³ Plaintiff’s Opposition to Defendant’s Motion to Dismiss, dated July 11, 2000, at 11, *Glamis Imperial Corp. v. Bruce Babbitt*, No. CV-N-00-0196-DWH-VPC (D. Nev. filed April 14, 2000); see also *id.* at 10 (“Glamis has been injured by the delays occasioned by waiting for the [December 27, 1999] Solicitor’s Opinion.”); Plaintiff’s Opposition to Defendant’s Motion to Dismiss, dated Oct. 23, 2000, at 2, *Glamis Imperial Corp. v. Bruce Babbitt*, No. 00CV1934W(POR) (D. So. Cal. Oct. 31, 2000) (same).

(emphasis added). Thus, to submit a claim to a NAFTA Chapter Eleven Tribunal under Article 1117, an investor must establish that (i) an obligation under Section A has been breached, and (ii) its enterprise has incurred loss or damage (iii) by reason of, or arising out of, that breach.

40. Glamis bases its NAFTA Article 1110 claim on actions by “the State of California which in 2002 initiated a series of measures that individually and together have resulted in the expropriation of the Investor’s investment in the Imperial Project.” NOA ¶ 18. However, Glamis was never in a position in which those measures could have applied to it, much less resulted in an expropriation of its investment. As Glamis itself has acknowledged in its submissions to the U.S. District Court, it cannot proceed with the development of the Imperial Project absent the BLM’s approval of its plan of operations. Glamis had not obtained such approval as of the dates – December 12, 2002, to April 10, 2003 – of the adoption of any of the California measures that Glamis now asserts resulted in a taking of its property rights in the mining claims and mill sites that comprise the Imperial Project. Indeed, just three days prior to the SMGB’s December 12, 2002, adoption of its emergency regulation, Glamis requested that the BLM suspend processing of its plan of operations. The California measures of which Glamis complains have not been applied to it. As a result, Glamis’s claim challenging those measures is not ripe.

41. Furthermore, various circumstances may have resulted in Glamis’s not *ever* being in a position in which the California measures would apply to its Imperial Project. For example, in the event that the BLM denied Glamis’s plan of operations, the California measures never would be applied to Glamis. To similar effect, the BLM may have requested that Glamis revise its plan in ways that would have rendered the Imperial Project insufficiently attractive to Glamis, prompting Glamis to abandon the project.

42. Glamis itself had made clear to the investing public that “[n]o development activities will be carried out on the project until the *final* production permits are issued.”¹⁴ In September 2002, at least three months before California adopted any of the measures of which Glamis complains here, Glamis advised the investing public that the Imperial Project had not been included in the Company’s five-year operating plan at that time because “[v]arious regulatory and legal hurdles remain[ed].”¹⁵

43. Even assuming Glamis had obtained the BLM’s approval of its plan of operations and thus was in a position to seek the necessary California permits, application of the measures to Glamis still would be uncertain and contingent. Glamis, for example, has opined that California’s “backfilling mandate, if applied to federal lands . . . would be preempted by federal law.”¹⁶

Furthermore, litigation by private third parties could have resulted in an injunction against Glamis’s proceeding with the Imperial Project.

44. Glamis is not – and has not been – in a position to have the California measures applied to it. Glamis, therefore, is not in a position to assert, as required by Article 1117(1), that it has incurred a loss as a result of the California measures. Accordingly, Glamis’s expropriation claim is not within the jurisdiction of this Tribunal.

B. There Is No State Responsibility For The Acts Alleged

1. The Measure Does Not Breach Any Customary International Law Standard Of Treatment

45. Glamis’s claim under Article 1105(1) is meritless because it fails to identify – because there is none – any customary international law standard of treatment incorporated into that Article that

¹⁴ GLAMIS GOLD, LTD., QUARTERLY REPORT (Sept. 1996) at 3 (emphasis added).

¹⁵ GLAMIS GOLD, LTD., FOREIGN ISSUER REPORT FORM 6-K (Sept. 2002) at 11.

¹⁶ Letter dated April 2, 2003, from R. Timothy McCrum, on behalf of Glamis Gold, to Mr. Fred E. Ferguson, Jr., Associate Solicitor, U.S. DOI.

is applicable to the challenged actions. A measure can breach Article 1105(1), entitled “Minimum Standard of Treatment,” only if it fails to accord “treatment in accordance with international law.” Because there is no relevant standard of customary international law implicated by the actions at issue, Glamis’s Article 1105(1) claim fails.¹⁷

46. Glamis complains about the handling of its Imperial Project proposal by the DOI, and the adoption by the State of California of measures regulating the reclamation of lands disturbed by surface mining operations within its borders.

47. With respect to the challenged federal measures, Glamis asserts that the BLM “ignored its own regulations” in recommending that DOI deny Glamis’s plan of operations for the Imperial Project. NOA ¶ 14. Glamis also complains that DOI’s January 17, 2001 decision denying its plan of operations was “[c]ontrary to both law and regulation.” *Id.* ¶ 15. Glamis, however, has not identified – because it cannot – how the BLM’s purported disregard of unspecified regulations or the now rescinded decision denying its plan of operations implicates any standard of customary international law that is incorporated into Article 1105(1).¹⁸ Glamis’s complaints about the DOI’s supposedly “illegal actions” with respect to its plan of operations are not cognizable under customary international law.

48. With respect to the California measures, Glamis’s claims also lack merit. Glamis asserts that the California backfilling and recontouring requirements are “extraordinary,” but fails to identify any substantive standard incorporated into Article 1105(1) that is implicated by

¹⁷ Glamis has asserted its claim of expropriation under NAFTA Article 1110, which is the provision of Chapter Eleven that addresses expropriation.

¹⁸ In a suit filed against the DOI and BLM in March 2001 for declaratory and injunctive relief, Glamis challenged, *inter alia*, the January 17, 2001 Record of Decision signed by Secretary Babbitt denying Glamis’s proposed Imperial Project. Following the change in administration, Glamis stated in its notice of dismissal that “[t]he vast majority of [its] claims were rendered moot by the Rescission of Record of Decision for the Imperial Project Gold Mine Proposal Issued by Secretary of the Interior Gale A. Norton on November 23, 2001.” Plaintiff’s Notice of Dismissal, dated Dec. 5, 2001, at 1, *Glamis Imperial Corp. v. U.S. Dep’t of the Interior*, No. 01-530 (RMU) (D.D.C. filed March 21, 2001).

California's adoption of those requirements. *Id.* ¶¶ 20, 23. Moreover, it has not alleged – because it cannot under the circumstances present here – that it has been accorded any “treatment” pursuant to those measures. Glamis has never been, and may never be, in a position in which the California measures could apply to it.

49. Accordingly, Glamis's Article 1105(1) claim should be rejected on the merits.

2. There Has Been No Expropriation Of Glamis's Investments

50. The claim brought before this Tribunal is not one of a direct nationalization or confiscation of Glamis's investments in the United States. Rather, Glamis asserts that “California . . . in 2002 initiated a series of measures that individually and together have resulted in the expropriation of the Investor's investment in the Imperial Project.” NOA ¶ 18. Essentially, Glamis charges that the California backfilling and recontouring requirements constitute a regulatory taking of its rights to develop the mining claims that comprise the Imperial Project. For the reasons stated below, Glamis's claims are without merit.

51. First, the measures of which Glamis complains have not resulted in a taking of anything of value from Glamis. The financial viability of Glamis's proposed project has long been in question. For example, Glamis reported to the investing public that its April 1996 feasibility study for the project relied on \$400 per ounce as the price per ounce of gold.¹⁹ Similarly, in a 1994 news release, Glamis stated, “[p]reliminary studies indicate the operation could be economically feasible at a gold price above US\$420 per ounce.”²⁰ It was not until December 2003 and October 2004, however, that the average monthly gold price reached \$400 and \$420 per ounce, respectively. Thus, up to and including the dates of the purported expropriatory measures, based on Glamis's

¹⁹ GLAMIS GOLD, LTD., QUARTERLY REPORT at 10 (June 1996).

²⁰ See Press Release, Glamis Gold Ltd., Glamis Purchases 100% Interest in Imperial County Claims, California (Jan. 31, 1994).

own feasibility assessments, its Imperial Project was not economically feasible. As a result, the California measures that Glamis complains of did not deprive Glamis of anything of value.

Accordingly, Glamis's claim of expropriation fails.

52. Second, the complexity of the federal and state regulatory context into which Glamis invested should have been well known to Glamis. To stake the mining claims at issue here, the original locator of the claims entered onto federal lands in California within the CDCA, which in 1976 Congress declared to be part of a "total ecosystem that is extremely fragile, easily scarred, and slowly healed." 43 U.S.C. § 1781(a)(2). Moreover, SMARA, which was adopted in 1975, long before Glamis acquired any rights at the site, provides that the process of reclamation "may extend to affected lands surrounding mined lands, *and may require backfilling, grading, resoiling, revegetation, soil compaction, stabilization, or other measures.*" CAL. PUB. RES. CODE § 2733 (emphasis added). In addition, during periods relevant to Glamis's acquisition of and alleged investments in the Imperial Project, federal and state laws have accorded increasing protection to Tribal cultural resources and sacred sites. It was in this context that Glamis acquired its alleged property rights at the Imperial Project site.

53. The California regulations at issue here and the "substantially equivalent" legislation are consistent with the regulatory authority provided to California officials under SMARA's long-standing definition of "reclamation." NOA ¶ 21. Similarly, since at least January 1993, California's surface mining regulations included a provision that states, "[w]here backfilling is required for resource conservation purposes . . . , fill material shall be backfilled to the standards required for the resource conservation use involved." CAL. CODE REGS. tit. 14 § 3704. The

measures at issue also are designed to control “mine wastes that potentially pose a threat to water quality.”²¹

54. California’s backfilling requirements target the conservation of at least two types of resources the importance of which Glamis should have understood upon embarking on its investment at the Imperial Project site. First, it has long been established that “[t]he site for the proposed mining project is eligible for the National Register of Historic Places” and that “[a]rchaeological and cultural inventories indicate the site has scientifically important archaeological, cultural, and spiritual value.” 64 Fed. Reg. 8398 (Feb. 19, 1999). Second, California’s climate and geography heighten concerns regarding water resources in the state. The stated intent of the California measures of which Glamis complains is to protect these types of resources.

55. Under the circumstances of this case, given the resource conservation concerns and California’s regulatory context, Glamis did not have – and should not have had – reasonable investment-backed expectations that its rights to develop its mining claims on the Imperial Project site would not be subjected to backfilling and recontouring requirements, or other BLM requirements. Consequently, because Glamis has not been deprived of any reasonably-to-be-expected economic benefits, its expropriation claim fails.

56. Third, the type of regulatory measures at issue here – ones intended to protect the public health and the environment – are not, absent rare circumstances not present here, of the type that can be deemed expropriatory. Customary international law recognizes that, as a general matter, States are not liable to compensate aliens for economic loss incurred as a result of nondiscriminatory environmental regulatory measures to protect, *inter alia*, the public health.

²¹ CAL. STATE MINING AND GEOLOGY BD., EXECUTIVE OFFICER’S REPORT at 7 (Dec. 12, 2002).

57. The SMGB deemed the regulations it promulgated “necessary for the immediate preservation of the public general welfare.”²² Its regulations are intended to protect the public against the “contamination problem when residual cyanide (or any other processing solution) not removed by rinsing is exposed to precipitation through the pile and flushing the processing solution into surface waters.”²³

58. California’s actions were taken to protect public health and are not discriminatory. The adoption of measures to control (i) “waste rock . . . piles which will contain residual harmful solutions and be up to a mile or more in total length,” (ii) “residual cyanide [from reaching] surface waters” and (iii) “mine wastes that potentially pose a threat to water quality” cannot be deemed expropriatory.²⁴

59. Glamis’s Article 1110 claim fails on the merits because (i) the measures of which Glamis complains deprived Glamis of nothing of value; (ii) Glamis lacked reasonable investment-backed expectations in making its investment in mining claims on the Imperial Project site; and (iii) California’s measures are intended to protect, *inter alia*, the public health.

C. Glamis Has Not Suffered The Losses It Alleges

60. Glamis has not suffered the losses that it alleges. Glamis alleges to have invested “a total as of December 12, 2002 of approximately \$15 million [] in the acquisition, exploration and development of the Imperial Project.” NOA ¶ 10. Nevertheless, Glamis claims “not less than U.S. \$50 million in compensation.” *Id.* at 11. Glamis’s sole apparent basis for its damages calculation is its reference to a discounted cash flow analysis prepared by the BLM in connection with its September 2002 Mineral Report. *See id.* ¶ 24. However, the Mineral Report “*is not an appraisal*

²² *Id.* at 4.

²³ *Id.* at 3.

²⁴ *Id.* at 3-4, 7.

of property for valuation,” but essentially a pre-feasibility study.²⁵ It reflects the results of an examination under the Mining Law of the project as proposed for any marginal economic viability and “*should not be used for any purpose other than that for which it was prepared.*”²⁶

61. Further, Glamis’s claim for damages disregards obvious permitting and operational risks, and fails to account adequately throughout the relevant period for the ownership of the investments alleged to have suffered injury.

62. For the avoidance of doubt, the United States denies each and every allegation of the Statement of Claim not specifically and unambiguously admitted in this Statement of Defense. The United States also holds Glamis to its burden of proving each and every element of its claims, including, but not limited to, (i) that it has the nationality required to maintain a claim under NAFTA Chapter Eleven; (ii) that there was no viable alternative use for its investment; and (iii) that the challenged measures proximately caused any loss or damage purportedly suffered.

²⁵ U.S. DEPT. OF INTERIOR, BUREAU OF LAND MANAGEMENT, MINERAL REPORT at 4 (Sept. 2002) (emphasis in original).

²⁶ *Id.* at 4 (emphasis in original). In a letter, dated March 31, 2003 – well after the date of the Mineral Report – Glamis wrote, “[a]s you know, to date, the Interior Department has taken no initiative to conduct an appraisal of the Glamis property interest.” Letter dated March 31, 2003, from Charles A. Jeannes, Senior Vice President, Administration, Glamis Gold Ltd. to Mike Pool, California State Director, Bureau of Land Management.

III. RELIEF SOUGHT

63. For the foregoing reasons, the United States respectfully requests that this Tribunal render an award: (a) in favor of the United States and against Glamis, dismissing Glamis's claims in their entirety and with prejudice; and (b) pursuant to paragraphs 1 and 2 of Article 40 of the UNCITRAL Arbitration Rules, ordering that Glamis bear the costs of this arbitration, including the United States' costs for legal representation and assistance.

Respectfully submitted,

Mark A. Clodfelter

*Assistant Legal Adviser for International
Claims and Investment Disputes*

Andrea J. Menaker

*Chief, NAFTA Arbitration Division, Office
of International Claims and Investment
Disputes*

David A. Pawlak

Mark S. McNeill

Jennifer I. Toole

*Attorney-Advisers, Office of International
Claims and Investment Disputes*

UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

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