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.	)

NON-DISPUTING PARTY SUBMISSION OF THE NATIONAL MINING ASSOCIATION

Harold P. Quinn, Jr.
Katie Sweeney
National Mining Association
101 Constitution Avenue, N.W.
Suite 500 East
Washington, DC 20001
(202) 463-2652

Catherine E. Stetson
Paul A. Werner
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

Counsel for the National Mining Association

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The National Mining Association (NMA) makes this non-party Submission in support of the Claimant, Glamis Gold Ltd. (Glamis), pursuant to the Statement of the Free Trade Commission on Non-Disputing Party Participation, adopted October 7, 2003, and in conformity with this Tribunal's Procedural Order Number Eight, adopted January 1, 2006.

BACKGROUND

In 1987, Glamis Gold Ltd., a publicly held Canadian corporation, acquired interests in mining claims located on federal lands in the California Desert Conservation Area (CDCA), where it had successfully operated two other open-pit gold mines – the Rand Mine, in Kern County, and the Picacho Mine, in Imperial County. *See* Memorial ¶¶ 20, 21, 157. Glamis planned to use these interests as the basis for a heap-leach open-pit gold mine operation that came to be known as the Imperial Project. *Id.* at ¶ 29. That project was expected to last up to 19

years and produce approximately 1.17 million ounces of gold, and would have involved sequential mining and backfilling of two of the three planned open pits. *Id.* at ¶¶ 33, 34, 35. Because the mining interests resided on public federal lands, their development was subject to federal and state regulation. *See id.* at ¶ 30.

The federal Mining Law of 1872, 30 U.S.C. §§ 24-42, promotes the development of the United States' mining resources by providing that "all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase." *Id.* § 22. The U.S. Department of the Interior – through its Bureau of Land Management (BLM) – has administered the Mining Law since its enactment. *See* 43 U.S.C. § 1201. The Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 §§ *et seq.*, confers additional authority on the Interior Department and BLM to manage public lands according to "principles of multiple use and sustained yield," *id.* § 1732(a), and to "take any action necessary to prevent unnecessary or undue degradation of the lands," *id.* § 1732(b). The FLPMA also created the CDCA, where the Imperial Project was located, to conserve unique "cultural" and "economic resources," while preserving valid existing mining claims such as those held by Glamis for the Imperial Project. *Id.* § 1781(a)(1) & (f).

The Interior Department has promulgated regulations implementing the FLPMA. Among other things, its regulations require a mining operator to submit a plan of operations prior to commencing mining activities so that the BLM may evaluate whether the proposed operations would result in unnecessary or undue degradation of the land. *See* 43 C.F.R. §§ 3809.11 & 3809.21. Its regulations defined unnecessary or undue degradation as a "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." *Id.* § 3809.0-5(k) (2000). 1/ In addition, under the National Environmental Policy Act, 42 U.S.C. §§ 4321-47, a federal agency such as the Interior Department must also prepare an Environmental Impact Statement (EIS) before authorizing an action likely to significantly impact the environment in order to consider the anticipated impact and, if necessary, ways to mitigate it. *See id.* § 4332(2)(C); *see also* Memorial ¶ 53 & n.74 (citing NEPA Handbook H-1790-1, Ch. 5(B)(1)(e) (Oct. 25 1998)).

In accordance with the Interior Department's regulations, and after undertaking favorable exploration efforts, Glamis submitted a plan of operations for the Imperial Project in 1994. *See* Memorial ¶ 165. In November 1996, the BLM (in conjunction with Imperial County) issued a Draft EIS/Environmental Impact Report (EIR) that selected the Imperial Project as its "preferred alternative." *See Draft EIS/EIR for the Glamis Imperial Project*, at 2-57 (Nov. 1996), Memorial Ex. 78. After completing further study, BLM reaffirmed in 1997 that the Imperial Project remained its preferred alternative. *See* Memorial ¶ 195.

But in September 2000 – six years after Glamis filed its plan of operations, and with Glamis's total investment in the Imperial Project approaching $18.6 million – BLM issued a final EIS/EIR selecting "*No Action*" as its preferred alternative. *See* Memorial ¶ 216. That edict sought to foreclose further development of the Imperial Project. *See Final EIS/EIR for the Glamis Imperial Project*, at 2-70 (Sept. 2000), Memorial Ex. 210. The BLM's abrupt volte-face followed a legal opinion issued by the Interior Department's Solicitor announcing that the FLPMA's "undue impairment" standard for the CDCA – which previously had been equated to

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1/ Although the FLPMA requires the Interior Department to prevent "undue impairment" of CDCA land, mining operations in that area have been required only to comply with the promulgated regulatory definition of "unnecessary or undue degradation." *See* Memorial ¶ 66 & n.74 (citing BLM, *The California Desert Conservation Area Plan*, at 18 (1980)).

the "unnecessary or undue degradation" standard – supplied the BLM new, expanded authority that effectively required it to deny the plan of operations for the Imperial Project. *See Regulation of Hardrock Mining* at 6, 17-19 (Dec. 27, 1999), Memorial Ex. 205.

On January 17, 2001, the Interior Department formally denied approval of Glamis's proposed plan of operation for the Imperial Project. *See Record of Decision for the Imperial Project Gold Mine Proposal*, at 1, 10 (Jan. 17, 2001), Memorial Ex. 212. The denial – and the Solicitor's legal opinion supporting it – were rescinded in October 2001. *See* Memorial ¶¶ 342, 345. Yet the Interior Department has taken no action to approve the Imperial Project, notwithstanding a BLM finding in 2002 that the Imperial Project contains a valuable gold deposit, with a net present value of $61 million. *See* BLM, *Mineral Report*, at 3 (Sept. 27, 2002), Memorial Ex. 255.

After the Interior Department in 2001 rescinded its denial of the Imperial Project, the State of California moved quickly to block it on its own. It first adopted emergency regulations – prompted only by the pending approval of the Imperial Project – that required complete backfilling of open mining pits. *See* Memorial ¶ 370 (citing State Mining & Geol. Bd., *Executive Officer's Report*, at 4 (Dec. 12, 2002)). Then, on December 2, 2002, the California Legislature introduced SB 22 – which reincarnated the complete backfilling requirements of an earlier bill (SB 483) – specifically to make the Glamis Imperial Project infeasible. Cal. S. Natural Res. Wildlife Comm., Summary of S.B. No. 22 (Jan. 14, 2003), Memorial Ex. 273. In the press release following his signing of SB 22 into law, Governor Gray Davis emphasized its "reclamation and backfilling requirements . . . would make operating the Glamis Gold Mine *cost prohibitive*." *See* California Office of the Governor, Press Release (Apr. 7, 2003) (emphasis added), Memorial Ex. 284. This new requirement was intended to "only affect one mine" –

Glamis's Imperial Project. *Enrolled Bill Memorandum to Governor re SB 22* (Apr. 4, 2003), Memorial Ex. 283. And the permanent regulations implementing it were later promulgated in reliance on "[n]o technical, theoretical, empirical studies, reports or documents." Final Statement of Reasons for 14 CCR § 3704.1, at 4, Memorial Ex. 304.

A valuation of the Imperial Project prepared in April 2006 confirms that SB 22 achieved its aim. *See* Behre Dolbear & Co., Inc., *Valuation of Glamis Gold Ltd.'s Imperial Gold Project Imperial County, California* (Apr. 2006) [Dolbear Valuation]. In light of the reclamation costs that it imposes, the Imperial Project now has a negative value of $11.56 million; "[n]o prospective purchaser would consider acquiring" it. *Id.* at 4.

PRELIMINARY STATEMENT

"Mineral resources, the very basis of our lives and technology, are a part of the earth. This leads to one inescapable consequence: to use them we must mine them." THE CALIFORNIA DESERT, WHY MINING IS IMPORTANT 15 (Mineral Res. Div., BLM Apr. 1991) [WHY MINING IS IMPORTANT]. But the Respondent's actions under review necessarily make doing so in the United States a far riskier – and thus far more difficult – task. By turning its permitting process into a "marathon round of administrative keep-away," *In re American Rivers & Idaho Rivers United*, 372 F.3d 413, 420 (D.C. Cir. 2004), and by imposing a dubious complete backfilling reclamation measure, the United States and California have broken faith with the core objectives of NAFTA to promote and protect foreign investments. Their actions have injected considerable uncertainty into the legal regime applicable to mining projects that inevitably chills the climate for capital investments in domestic mining projects, to the serious detriment of the United States' economy and national security. And their actions will produce predictable – and predictably bad

– consequences for NMA's members hopeful of securing investment capital to pursue mining operations in the United States.

ARGUMENT

I. THE RESPONDENT'S ACTIONS TO BLOCK THE IMPERIAL PROJECT WILL PREDICTABLY DAMPEN INVESTMENT IN DOMESTIC MINING PROJECTS.

A. NAFTA Is Designed To Promote Foreign Investments And Protect Them From Unlawful And Confiscatory Actions By The Host Party.

That NAFTA in general – and its Chapter Eleven in particular – advances the twin objectives of promoting and protecting investments by one Party's nationals in the territories of other Parties is hardly subject to dispute. *See* NAFTA, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 605. This is manifest from NAFTA's text and structure, and has been acknowledged by prior tribunals and commentators on international law alike. 2/ As one prior tribunal established under NAFTA observed, for example, "[a]n underlying objective of NAFTA is to promote and increase cross-border investment opportunities and ensure the successful implementation of investment initiatives." *Metalclad Corp. v. Mexico*, ICSID Award, NAFTA Ch. 11 Arb. Trib. (2000), 40 I.L.M. 36, ¶ 75 (2001).

These objectives are immediately apparent from NAFTA's Preamble, which provides that the Parties resolve to "CREATE an expanded and secure market for the goods and services produced in their territories" as well as to "ENSURE a predictable commercial framework for business planning and investment." NAFTA pmbl. In its first Chapter, NAFTA further provides explicitly that one of its Objectives is to "increase substantially investment opportunities in the territories of the Parties." *Id.* art. 102(1)(c); *see S.D. Myers, Inc. v. Canada*, Partial Award,

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2/ *See, e.g., S.D. Myers, Inc. v. Canada*, Partial Award (Nov. 13, 2000) (liability), 40 I.L.M. 1408, ¶¶ 196-198 (2001) (noting objectives); Barton Legum, *The Innovation of Investor-State Arbitration Under NAFTA*, 43 HARV. INT'L L.J. 531, 534 (Summer 2002) ("A principal purpose of the regime established by Chapter Eleven is to promote and protect investments of the nationals of one NAFTA State Party in the territory of another State Party.").

NAFTA Ch. 11 Arb. Trib. (2000) (liability), 40 I.L.M. 1408, ¶ 198 (2001). In recognition of these clearly articulated objectives, the *Metalclad* tribunal concluded that the Parties "specifically" sought to promote both "the substantial increase in investment opportunities" as well as "transparency" in the administration of laws. 40 I.L.M. 36, ¶ 70.

Chapter Eleven reinforces NAFTA's dual objectives of removing obstacles to – and protecting – foreign investments in two ways. The Chapter first outlines standards according to which foreign investors must be treated by a host government. *See* NAFTA arts. 1101-14; David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States – Chile Free Trade Agreement*, 19 AM. U. INT'L L. REV. 679, 683 (2004) ("NAFTA's Chapter 11 . . . provides a set of mandatory standards for treatment of foreign investments and investors by host countries."). And second, Chapter Eleven "create[s] effective procedures . . . for the resolution of disputes." NAFTA art. 102(1)(e); *id.* art. 1120. 3/

The actions taken by the Respondent against the Imperial Project that are the subject of this arbitration subvert these core objectives.

B. The Stability And Predictability Of A Country's Regulatory Environment Are Critical Considerations Informing Any Decision Whether To Invest In A Mining Project In That Country.

Risk of capital influences any mining investment decision. Mining projects – from exploration to extraction to reclamation – are time- and capital- intensive undertakings, often requiring years of development before investors see positive cash flows. 4/ As the BLM has

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3/ *See also Ethyl Corp. v. Canada*, NAFTA Ch. 11 Arb. Trib. Award, 38 I.L.M. 708, ¶ 56 (1999); Gantz, *supra*, at 683 ("NAFTA provides for binding arbitration of disputes between foreign investors and their host governments.").

4/ *See* SURFACE MINING OF NON-COAL MINERALS, A STUDY OF MINERAL MINING FROM THE PERSPECTIVE OF THE SURFACE MINING CONTROL AND RECLAMATION ACT 69 (Nat'l Academy of Sciences 1979) ("Projects in the mining industry are characterized by large capital investments," "require 3 to 10 years of construction before production can begin" and "[t]he return on investment may not be realized for another 10 years") [NON-COAL

recognized, "[m]ining activities represent extensive exploration efforts, planning and long-term, high-risk investments of considerable funds." WHY MINING IS IMPORTANT 3.

Given their large scale and long life cycle, mining projects thus typically require project finance and special-purpose financing structures to proceed. Project finance, as distinguished from other lending arrangements, depends "primarily on the cash flow of the project itself for repayment, and to a lesser degree on the assets of the project, rather than relying primarily upon the creditworthiness of the investors or project sponsors." Robert Prichard, *Safeguards For Foreign Investment in Mining*, at 4, *reprinted in* INTERNATIONAL & COMPARATIVE MINERAL LAW & POLICY (Kluwer Law Int'l, The Hague 2005). The reliance on cash flows stems from the fact that, "[i]n mining projects . . ., the value of the physical assets of the project prior to commissioning will almost always be only a fraction of the monies advanced." *Id.*

The "necessary reliance on the cash flow" from the project significantly impacts the ability of mining firms to obtain project financing, for it presents "a whole series of potential risks to all parties involved." *Id.* at 5. Chief among these risks is "whether the projected cash flows will ever commence," which leads directly to "the most pervasive legal risk" inherent in mining projects – "the risk of adverse change of law." *Id.* at 5-6.

In light of the threat it poses, it is no coincidence that investors in mining projects are closely attuned to the risk of adverse and arbitrary changes in applicable laws and regulations that devalue their investments. Their significant attention to this risk has in fact not escaped the notice of legal commentators, 5/ and is in fact confirmed by recent independent studies. Since

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MINERAL MINING STUDY]; *Fraser Institute Annual Survey of Mining Companies 2005/2006* at 9 ("Miners spend years pumping money into the ground before they start making money out of the ground.") [*Fraser Survey*].

5/ *See, e.g.*, Juan Carlos Urquidi Fell, *The Legal Mining Framework of Panama & the Proposal to Recast the 1963 Code of Mineral Resources & to Improve the Investment Climate for the Mining Industry: Juridical & Mining Policy Principles*, 24 J. LAND, RESOURCES & ENVTL. L. 293, 294 (2004) (explaining that "countries with a long-standing and successful mining tradition have implemented economic and legal mechanisms" that provide "the

1997 the Fraser Institute, a Canadian research and educational organization, "has conducted an annual survey of metal mining and exploration companies to assess how mineral endowments and public policy factors such as . . . regulation affect exploration investment." *Fraser Survey* at 5. The results of its survey are drawn from "the opinions of executives and exploration manages in mining and mining consulting companies operating around the world," and are used to create a composite "Policy Potential Index" that "serves as a report card to governments on how attractive their policies are from the point of view of the exploration manager." *Id.* In creating the Index, the survey identifies "[u]ncertainty concerning the administration, interpretation, and enforcement of existing regulations" *as the number one factor* "contribut[ing] to the ability of jurisdictions to attract exploration investment." *Id.* at 21.

Another well-known annual study further highlights the gravity of the risk of adverse changes in law for investors. Since 1999 Behre Dolbear & Company, Inc., a preeminent international consulting firm to the mining industry, has published an annual "political risk assessment of countries of import to the mining industry," entitled *Ranking of Countries for Mining Investment: "Where Not To Invest."* Dolbear focuses exclusively on factors related to "political risk" affecting mining investments in 25 countries "which are host to major exploration or mineral development efforts and/or mining operations." *Where Not To Invest* at 2. Among the factors the company considers are "the country's political system," "the degree of social issues affecting mining in the country," and "delays in receiving permits due to bureaucratic and other delays." *Id.* In its evaluation of a county's political system, Dolbear considers the "security of tenure . . ., the county's mining law, and the country's prior history of

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degree of legal certainty and institutional protection required for the development of business initiatives aimed at developing existing resources"); Sandra Orihuela, *Latin America: A New Era for Mining Investment*, 30 INT'L LAWYER 21, 51-52 (Spring 1996) (noting "radical changes" in Peruvian law that have "provided a legal framework that offers . . . increased assurances for foreign mining investors," including by permitting "legal stability agreements to guarantee a stable foreign investment climate").

nationalization of mining operations." *Id.* at 3. Thus, "[t]he higher ranking countries are those . . . which provide protection against governmental or other arbitrary takings of property and possess well established and tested mining legislation." *Id.* And in the category of "permitting delays," Dolbear evaluates "the timeframe involved in obtaining permits." *Id.* at 5.6/

In a global economy in which both capital and mining opportunities are highly mobile, the significance of this risk means that investors react to unexpected and adverse legal changes by channeling investments to projects in countries with stable regulatory environments. Indeed, "[m]ost international mining companies consider a country's legal and fiscal framework for private investment in mineral exploration and mining to be *the key determinant* of the kind and amount of capital investment in a country's mining industry." 7/ Accordingly, "in today's globally competitive economy where mining companies may be examining properties located on different continents, a region's policy climate has taken on increased importance in attracting and winning investment." *Fraser Survey* at 5.

One of the *Fraser Survey*'s central findings well illustrates this point. While it polled participants on the attractiveness of jurisdictions' existing regulatory environments to create its Policy Potential Index, the Fraser Institute also asked participants to evaluate the mineral potential of the same jurisdictions assuming that their regulatory policies tracked "best practices." *See id.* at 13 & Figs. 1 & 3. The two inquiries produce "stark differences" that, when viewed together, underscore the importance of regulatory certainty for investment decisions. *Id.* at 13. For example, while Indonesia was found to have the "third worst policy environment," the

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6/ Dolbear's findings have become so influential that the United States Congress has asked the company to testify before it on issues related to the domestic mining industry. *See Minerals and Energy: Outsourcing American Jobs Overseas, Oversight Hearing Before the Subcomm. on Energy & Mineral Resources of the H. Comm. of Resources*, 108th Cong. 1-3 (2004) (prepared testimony of Donald K. Cooper) at http://resourcescommittee.house.gov/archives/108/testimony/2004/donaldcooper.htm [Cooper Testimony].

7/ KOH NAITO ET AL., REVIEW OF LEGAL AND FISCAL FRAMEWORKS FOR EXPLORATION AND MINING 1 (Mining Journal Books Ltd. 2001) (emphasis added).

jurisdiction "would rank in the world's top 10 in investment attractiveness under a 'best policy' regime." *Id.* The stability of a jurisdiction's regulatory regime thus trumps the richness of its mineral potential in the eyes of investors. *See id.* at 13 & Fig. 4.

C. Respondent's Actions Will Chill Future Investments In Domestic Mining Projects.

Because investors are closely attuned to, and make investment decisions based on, the degree of risk that a mining project will fall short of completion, Glamis's experience with the Imperial Project undoubtedly dampens the investment climate for mining projects located in the United States. Glamis's pursuit of approval for the project was marked by an extraordinary, decade-long permitting process – punctuated by not one but two government changes in direction – that delivered the Imperial Project into an administrative purgatory that lasted long enough for California to block the project with unprecedented reclamation measures directed only at *that project*. With the regulatory process culminating as it did – in the targeted imposition of regulations that made the Imperial Project economically infeasible – Glamis's reasonable expectations were finally and totally frustrated, its more than $15 million sunk investment was lost, and the substantial value of its mining interests – totaling nearly $50 million – was completely destroyed. On a broader, national scale, the consequence of these events is unmistakable. Despite the importance of mineral resources to the United States' economy and national security, promising domestic mining projects will simply not receive the crucial funding they need to proceed.

That the sort of indefinite, erratic and ultimately fatal regulatory process to which the Imperial Project was subjected has frightened investors away from mining projects in the United States is clear from testimony before the Congress. Years after the Imperial Project was derailed, Donald K. Cooper, then-President of Behre Dolbear & Company (USA), told Congress in 2004

that "[t]here is ample evidence that, internationally, mining industry investors are now and have for some time been, avoiding the U.S. as a target for new mining projects." Cooper Testimony at 2. As evidence of this trend, he pointed to Dolbear's own experience. *See id.* While 70 to 80 percent of Dolbear's revenues used to flow from consulting on mining projects in the United states, he offered that "[l]ast year, approximately 70% of our revenues were associated with mining projects outside the U.S." *Id.* at 2. This was because "[s]ome of our strongest U.S. based mining companies have been focusing their exploration and development efforts (and their investment monies) on properties outside the U.S." *Id.*

The actions taken against the Imperial Project also significantly impacted Glamis's own investment decisions. Glamis's Senior Vice President and General Counsel, Chuck Jeannes, explained in Congressional testimony that as a result of the Imperial project's demise, "100 percent of [Glamis's] grass-roots exploration budget . . . is directed toward Mexico and Central America," a result he noted was "typical" of the "movement of exploration and mining capital out of the United States." *Effect of Federal Mining Fees & Mining Policy Changes on State & Local Revenues & the Mining Industry, Oversight Field Hearing Before the Subcomm. on Energy & Mineral Resources of the H. Comm. on Resources*, 107th Cong. 34 (2001). As Jeannes put it, Glamis's "experience at Imperial must frighten any mining company considering a new investment on public lands in the United States." *Id.* at 33.

II. CALIFORNIA'S UNPRECEDENTED COMPLETE BACKFILLING RECLAMATION REQUIREMENTS ARE UNSOUND AND WERE ADOPTED INTENTIONALLY TO EXPROPRIATE GLAMIS'S INVESTMENT IN THE IMPERIAL PROJECT.

A. Mandatory Complete Backfilling Requirements Have Long Been Recognized As Technically Infeasible, Economically Unsound And Of Dubious Benefit For Open-Pit Mining Operations Like Those Planned For The Imperial Project.

The type of complete pit backfilling reclamation measure that California imposed on the Imperial Project has long been viewed skeptically by U.S. regulators and the experts on whom they rely. Consistent with that skepticism, not a single United States jurisdiction until now has seen fit to adopt such a reclamation measure, and the BLM in fact has specifically rejected one. But in its hurry to stop the Imperial Project – and unencumbered by any scientific study or technical support – California nevertheless rejected these authorities' considered judgment that such a requirement is uneconomical, technically infeasible, exacts considerable environmental costs and frustrates an important resource management objective.

Complete backfilling imposes an economic burden that renders many open-pit mining operations cost-prohibitive. In 1979, the Committee on Surface Mining and Reclamation of the National Academy of Sciences (COSMAR) published a report at the direction of Congress "to match environmental objectives of the [Surface Mining Control and Reclamation Act] with current and foreseeable mining practices in light of . . . engineering and economic constraints" for non-coal minerals. NON-COAL MINERAL MINING STUDY xviii. With regard to reclamation, COSMAR recognized that "[a]s long as marginal benefits of reclamation exceed marginal costs, the additional investment in reclamation is justified," *id.* at xxvi, but "[w]hen marginal benefits no longer exceed marginal costs, further investment in reclamation is no longer economically justified." *Id.* at 63. That approach, it explained, "is a reliable way to determine an appropriate level of reclamation." *Id.*

Under this approach, COSMAR concluded that requiring complete backfilling as a reclamation measure for non-coal minerals was unjustified, explaining that it was "generally not technically feasible for non-coal minerals, or has limited value because it is impractical, inappropriate or economically unsound." *Id.* at xxviii. In its view, "where massive ore bodies have been mined by the open-pit method" mining operations would be required to "incur costs roughly equal to the original cost of mining" which, in turn, would make it "economically impractical to mine some deposits under the current cost structure." *Id.* at xxviii. The "assumption of backfilling to original contour leads to some of the highest estimates of cost," it found, because it "would require doubling the cost of loading and hauling, the largest component of mining costs." *Id.* at 69-70. COSMAR thus deemed complete backfilling of open pits "an enormous economic burden of uncertain benefit." *Id.* at 136.

This conclusion has been repeatedly reaffirmed. In response to Congress's request, the Committee on Hardrock Mining on Federal Lands appointed by the National Research Council prepared a report "assess[ing] the adequacy of the regulatory framework for hardrock mining on federal lands." HARDROCK MINING ON FEDERAL LANDS 1 (Nat'l Academy Press 1999) [HARDROCK MINING REPORT], Memorial Ex. 169. The Committee declined to "contradict the COSMAR conclusion on backfilling," as it had no "basis to establish a general presumption either for or against backfilling in all cases." *Id.* at 82. The U.S. Bureau of Mines also has recognized that complete backfilling "could make an otherwise profitable mine uneconomic to develop and operate." 8/

Complete backfilling requirements also pose technical feasibility problems. As the Hardrock Mining Committee explained, "backfilling of large open pits for hardrock mines is

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8/ *See* Letter from Rickard Grabowski, Chief, Western Field Operations Center, Bureau of Mines, to Ed Hastey, BLM State Director, re Backfilling of Open Pit Mines, at 1 (June 11, 1990), Memorial Ex. 29.

generally impractical, because the irregular lateral and vertical extents of the metallic deposits normally preclude them from being strip mined as simply as coal deposits, wherein the overburden and waste rock can be recycled as backfill while mining proceeds from one area to the next." HARDROCK MINING REPORT 138. COSMAR also recognized that, because "waste rock and tailings resulting from mining and processing expand an average of about 30 to 40 percent, and very few mines take out enough ore to leave space in the mine workings to backfill all waste and tailings," "even if the huge cost of backfilling were incurred, waste and tailings would still remain on the surface at many mines." NON-COAL MINERAL MINING STUDY 70.

Even were complete backfilling technically feasible, moreover, it leads to irresponsible husbandry of mineral resources by creating an obstacle to future mineral recovery. As COSMAR explained, "[c]hanging economics often dictate that portions of ore bodies left behind in the past because they were uneconomic become economically available at some future time." *Id.* at 68. There are multiple reasons for this, including "increased demand due to economic growth as supplies are diminished through depletion of the highest quality, most easily available deposits," and "the development of new mining or metallurgical technology that improves the efficiency of recovery or diminishes production costs." *Id.* at 68. Thus, "[i]f the lower grade materials left behind are buried due to . . . backfilling requirements, . . . the cost of recovering them in the future may be so high that they become entirely lost as a domestic resource." *Id.*. The Hardrock Mining Committee also identified this adverse result. *See* HARDROCK MINING REPORT 82-83 (federal land management agencies should assess "the impact of backfilling on the potential availability of mineral resources that may become economical in the future"). 9/

9/ Complete backfilling measures also impose significant environmental burdens in their own right. Complete backfilling requirements may cause "negative environmental impacts," including "delayed reclamation and habitat development" as well as "the degradation of groundwater quality." *Id.* at 83; *see also* Grabowski Letter, *supra* note 8, Ex. 29.

In view of these harms, it is unremarkable that the BLM declined to adopt a presumption in favor of some measure of pit backfilling in a rulemaking proceeding to amend its mining regulations. *See Mining Claims Under the General Mining Laws; Surface Management*, 65 Fed. Reg. 69,998, 70,051 (final rule Nov. 21, 2000). It concluded that site-specific backfilling determinations in light of " 'economic, environmental, and safety concerns,' " is more "consistent with current BLM management policies" than a mandatory level of required backfilling. *Id.* at 70,051-70,052. This conclusion also fit with Congress's instruction to it to ensure that its regulations were not inconsistent with the Hardrock Mining Committee's findings. *See* Pub L. No. 106-113 § 357, 113 Stat. 1501A-210 (1999).

B. Open-Pit Mining Operations Like Those Proposed By Glamis Have Been Routinely Approved In The United States Without Imposing Mandatory Complete Backfilling As A Reclamation Requirement.

Regulators in the United States have consistently declined to impose complete backfilling reclamation measures for the reasons outlined above. California's requirement is indeed a novelty within the United States, and even beyond its borders. 10/ And it is also flatly inconsistent with the traditional regulation of open-pit mines located in the CDCA.

No fewer than seven other open-pit mines within the time frame that the Imperial Project was proposed were approved to operate in the CDCA without a complete backfilling reclamation measure. *See* Leshendok Report, ¶ 132. The VCR Mine located in Imperial County, and approved in 1987, is one example. After noting that "open pit mines, such as those proposed for the VCR orebodies, generally are not suitable for backfilling from both operational and economics standpoints," the BLM concluded that imposing such a requirement on the VCR mine

10/ Leshendok Report, ¶ 165, attached to Memorial ("There was no past history prior to December 2002 of regulatory agencies in the United States applying complete mandatory backfilling requirements to gold or metallic ore mines."); Dolbear Valuation at 5 (stating that it "is aware of no other requirements such as those specified in the [California] Mandatory Backfill Regulation for base and precious metals in the United States, Canada or Mexico – or even globally at the time the regulation was enacted.").

would negatively impact "conservation of mineral resources and energy conservation." *Final EIR/EA for the VCR Mining Project*, at 3-30 (Oct. 28, 1987), Memorial Ex. 19. It therefore rejected the "backfilling alternative," because "the potential loss of natural resources and economic disadvantages of backfilling are greater than potential environmental advantages."

Other mines in the CDCA likewise were approved for operation without complete backfilling reclamation measures. No complete backfilling requirement was imposed on the Castle Mountain mine, which is located in the CDCA on land with the same use class designation as the Imperial Project and was allowed to go forward in 1990. As to that mine, the BLM concluded that "[m]aximum backfilling would not provide any substantial improvement in wildlife habitat or benefit for other possible secondary uses of the site," Record of Decision, *Castle Mountain Project*, at 8 (Oct. 31, 1990), Memorial Ex. 32, and the additional project activity occasioned by it "would result in a greater impact in the resource categories of water use, wildlife, air quality, and the operational activities of visual resources," *Final EIS/EIR for the Castle Mountain Project*, at 3-41 (Aug. 17, 1990), Memorial Ex. 31. Similarly, Glamis's Rand mine was approved in 1995 without such a requirement because it would have led to mineral loss, imposed environmental burdens and doubled the cost of handling materials. 11/

C. Both The United States And California Recognized The Adverse Effects Of Imposing Mandatory Complete Backfilling As A Reclamation Requirement For The Imperial Project.

The Respondent well understood the devastating effect that a complete backfilling measure would have on the Imperial Project. For its part, the BLM concluded that imposing such a requirement would render the project economically infeasible. Because complete backfilling would require additional costs totaling as much as $100 million and more than four

11/ Record of Decision, *Rand Project*, at 6 (June 9, 1995), Memorial Ex. 67; *see also Final EIS/EA for the Rand Project*, at 3-19 (Apr. 1995) (concluding "the potential loss of natural resources and economic disadvantages of maximum pit backfilling appear to be substantially greater than the potential environmental advantages").

years after mining operations ceased to complete, the BLM recognized that requiring it would render the Imperial Project not "economically viable" and would thwart "the objective of profitably mining the precious metals." *See Draft EIS/EIR for the Imperial Project*, at 2-61 – 2-63 (Nov. 1997), Memorial Ex. 90. Consequently, the BLM selected the proposed action – not the "Complete Pit Backfill Alternative" – as its "Preferred Alternative."

California also knew that a complete backfilling measure would render the Imperial Project not "economically viable." Indeed, the state adopted SB 22 precisely for that reason. The bill's authors "believe[d] the backfilling requirements . . . make the Glamis Imperial project infeasible," Cal. S. Natural Res. Wildlife Comm., Summary of S.B. No. 22, at 4 (Jan. 14, 2003), Memorial Ex. 273, because the requirements "would make operating the Glamis Gold Mine *cost prohibitive*." Cal. Dep't of Finance, *Enrolled Bill Report of SB 22*, at 1 (Jan. 21, 2003) (emphasis added), Memorial Ex. 218. Governor Gray Davis's press release following his signing of SB 22 into law also highlighted this result. *See* California Office of the Governor, Press Release (Apr. 7, 2003), Memorial Ex. 284. And that result was intended "only [to] affect one mine": The Imperial Project. *Enrolled Bill Memorandum to Governor re SB 22* (Apr. 4, 2003), Memorial Ex. 283.

D. Glamis Is Entitled To Compensation For California's Targeted And Unjustified Mandatory Complete Backfilling Requirements That Rendered Its Imperial Project Worthless.

California's complete backfilling requirement aimed to stop one proposed mine – the Imperial Project – and it accomplished that aim by entirely negating its value. But NAFTA protects foreign investors against such targeted regulatory measures that are "tantamount to . . . expropriation." NAFTA art. 1110. As a prior NAFTA tribunal explained, a measure tantamount to expropriation is one where there may be no "loss of property . . . but rather an effect on

property which makes formal distinctions of ownership irrelevant." *Waste Management, Inc. v. United Mexican States*, Award, ¶ 143, NAFTA Ch. 11 Arb. Trib., ICSID Arb. (AF)/98/2 (2000). Such an effect includes an "interference with the use of property which . . . deprive[es] the owner, in whole or in significant part, of the use or reasonably to be expected economic benefit of property even if not necessarily to the obvious benefit of the host state." *Metalclad*, 40 I.L.M. 36, ¶ 103. 12/

In the same vein, it has long been settled constitutional law that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1992). Thus, "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (emphasis in original).

California's complete backfilling measure clearly "goes too far"; it wholly deprives Glamis of all economically beneficial uses of its mineral interests. Before California imposed its complete backfilling requirement, the Imperial Project unquestionably was a valuable mining investment. *See Mineral Report*, at 68-70; *see also* Dolbear Valuation at 4-5 (valuing project anywhere from $49 million to upwards of $60 million). After California imposed its complete backfilling requirement, the Imperial Project has no fair-market value – its value is in fact *less* than zero. *See* Dolbear Valuation at 19. 13/

12/ *See also Techmed v. Mexico*, ICSID ARB (AF)/00/2, Award (2003), 43 I.L.M. 133, ¶ 116 (2004) (governmental action constitutes expropriation where "the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed").

13/ The complete backfilling measure imposes an additional $63.3 million in reclamation costs, which reduces the Imperial Project's value to negative $11.56 million. *See id.* App. 4-11, 4-16.

California's measure has thus wholly deprived Glamis of the economically beneficial use of its mining interests by preventing the company from exploiting them. As in *Whitney Benefits, Inc. v. United States*, the property interest involved here is the right to mine (gold in this case; coal in *Whitney Benefits*), the only possible use of that right is to mine by the open-pit method, and California's backfilling measure prohibits Glamis from doing so by making that method totally "cost prohibitive." *See* 926 F.2d 1169, 1172 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991). Accordingly, California "did not merely regulate, it took, all the property involved in this case." *Id.* And because it has clearly "go[ne] too far" in doing so, Glamis is entitled to compensation. *See* NAFTA Art. 1110.

CONCLUSION

For the foregoing reasons, and for those offered by the Claimant, the NMA respectfully requests this Tribunal to award Glamis compensation for the Respondent's expropriation of its valuable mining property interest in its Imperial Project.

Respectfully submitted,

Harold P. Quinn, Jr.
Katie Sweeney
National Mining Association
101 Constitution Avenue, N.W.
Suite 500 East
Washington, DC 20001
(202) 463-2652

Catherine E. Stetson
Paul A. Werner
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

Counsel for the National Mining Association

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