NAFTA/UNCITRAL ARBITRATION RULES PROCEEDING

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In the Matter of Arbitration Between:

GLAMIS GOLD, LTD.,

Claimant,

and

UNITED STATES OF AMERICA,

Respondent.

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HEARING ON THE MERITS

Tuesday, September 18, 2007

The World Bank
600 19th Street, N.W.
H Building
Eugene Black Auditorium
Washington, D.C.

The hearing in the above-entitled matter came on, pursuant to notice, at 9:02 a.m. before:

MR. MICHAEL K. YOUNG, President

PROF. DAVID D. CARON, Arbitrator

MR. KENNETH D. HUBBARD, Arbitrator

Also Present:

MS. ELOÏSE OBADIA,
Secretary to the Tribunal

MS. LEAH D. HARHAY

Assistant to the Tribunal

Court Reporter:

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C O N T E N T S

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P R O C E E D I N G S

PRESIDENT YOUNG: Good morning. Welcome. We are ready to turn the time to Respondent.

Mr. Bettauer, Ms. Menaker.

CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

MR. RONALD BETTAUER: Thank you, Mr. President.

Mr. President, Members of the Tribunal, yesterday we heard the Claimant present its argument. At this point, when seen in view of the pleadings, the evidence, and the arguments presented last month, it is quite clear that Glamis has not presented a convincing case--

As I was saying, it was quite clear to us, and we believe it will be to the Tribunal, that Glamis has not presented a convincing case that the United States breached any obligation under the NAFTA.

First, let me describe to you how we will be instructing our presentations this morning. It will be much the same as we did in the August hearing. We will first address the 1110 claim, and Ms. Menaker, Mr. Feldman, Ms. Thornton, Mr. Sharpe, and Ms. Van

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09:06:37 Slooten will be taking turns addressing various

aspects of that claim. And then we will address the 1105 claim, and Ms. Menaker and Mr. Benes will be speaking to that.

During the course of our presentation this morning, we will respond to questions set out in the Tribunal's September 6th letter to the parties.

So, let me start by focusing on the important interest the United States has in ensuring appropriate protection for foreign investors.

In this role, and in these proceedings, the Department of State represents the United States as a whole including its agencies and its political subdivisions. We are charged equally with assisting U.S. investors in protecting their investments abroad, and protecting the United States Government from unjustified claims. We are fully aware that positions we take in one situation will be cited to us in the other.

Now, yesterday Claimant's counsel suggested that U.S. positions in this proceeding would undermine the protection of foreign investors and that the

09:07:52 United States argues one position abroad and a different one when it defends Chapter Eleven cases. And they argued while other States are required to provide compensation in investment arbitrations, the United States, in effect, seeks an exception from the rules.

Nothing could be further from the truth. We

think all Governments, including the United States, are bound by the applicable Treaty and customary international law rules in this field and should be held to them. But we also don't think that any Government, including the United States, should be required to pay a windfall recovery to an investor where that Government has not violated applicable legal standards.

I submit that that's what would happen here if Glamis's claim is sustained. And if that were to happen, States would be become subject to an increasing number of claims based on regulatory action and would become much more reluctant to take reasonable steps to protect the public health, safety, and the environment. Those results would be extremely

09:09:06 damaging.

Now, each side in this case paints a different picture of the law and the facts. This morning the United States will review why the picture the U.S. paints is sharp and clear and is sustained by the law and the evidence. We will respond to the points Glamis has made showing why its picture is without foundation and, in many cases, a mere exercise in wishful thinking.

Let me remind the Tribunal of a few facts. As you know, this case involves a foreign investor in the United States. That investor established an American subsidiary to take advantage of an 1872 U.S.

law that gives Americans the rights without paying any royalties to extract gold and other valuable minerals from U.S. public lands.

The site where Glamis made its investment was far from ordinary. It is in the California Desert Conservation Area. It is on land designated for limited use in a region that is and historically has been sacred to Native Americans.

Moreover, the activity that Glamis intended

09:10:26 to undertake is often controversial. Glamis proposed to engage in a method of gold extraction, cyanide open-pit heap-leach mining, that is sufficiently harmful to human health and the environment that several jurisdictions in the United States and in other countries have banned it outright.

Glamis proposed to excavate 400 million tons of dirt and rock in order to extract about 1.4 million ounces of gold. Glamis planned to leave forever a gaping mile-long, half-mile-wide, 800-foot-deep hole in this environmentally sensitive conservation area.

Glamis also intended to leave a mile-long, 300-foot-high waste pile or waste piles of that level that would eclipse views that are essential to the Quechan's religious practice. These pits and waste piles would largely prevent the Quechan from ever again using the area for ceremonial or religious purposes.

Now, Glamis is not an unsophisticated

investor that blindly chose to invest without any sense of the laws that protect cultural properties, religious freedoms, and the environment. Despite

Glamis's assertion that it had positive expectations, Glamis must be charged with knowing that California protects by a 1976 statute Native American sacred sites.

Glamis was also aware that California is at the vanguard of environmental protection, and that its 1975 Surface Mining and Reclamation Act addresses reclamation of open-pit mines. Glamis was aware that this act specifically contemplates the possibility of requiring backfilling of open pits. Both of these statutes long predated Glamis's investment.

Nor was Glamis ignorant of the complex regulatory environment in which it planned to operate. Glamis itself has acknowledged that mining is one of the most highly regulated industries in the world, and knows that this is especially so in the United States.

Now, when the Federal Government began processing Glamis's Plan of Operations, it was clear that Glamis proposed a mining plan that was like none that it had seen before. While Glamis contested this yesterday, we showed in August and in our filings--and will briefly review again today--that the extent of

the cultural resources at the site and the opposition to the Project on the grounds that it would interfere with the Quechan Tribe's ability to practice religion were unparalleled.

Dr. Cleland testified that the concerns raised about the Imperial Project were the greatest that he had heard in 30 years, in his 30 years' experience. Faced with this, the Federal Government addressed legal questions of first impression dealing with its authority to deny a Plan of Operation on these grounds; and, after a thorough and thoughtful analysis, the Government determined that it had statutory authority to deny Glamis's plan, and it did that. Glamis has not shown, and cannot show, that that option was not legally available, much less than that the decision was arbitrary.

Nevertheless, only months later, the Federal Government accepted Glamis's arguments, criticizing that very decision, and rescinded it. From that point forward, the Federal Government placed no obstacles in Glamis's way. Instead, the Federal Government worked with Glamis to move the process forward. It made

itself available for numerous meetings with Glamis officials and issued a validity determination in Glamis's favor.

But when California adopted its reclamation measures, it was Glamis that decided to abandon its

pursuit of Federal approval for its Plan of Operation. As Glamis officers testified, Glamis determined at that time that it would have been reckless to proceed after California took the action that it did.

So, really, the only grounds for complaint that Glamis has against the Federal Government's actions is the issuance of the Leshy Opinion and the Record of Decision denying its project. But both of those acts were quickly rescinded, and for a time Glamis then continued to pursue approval of the Project. Glamis chose not to pursue approval of its plan afterwards, not because of anything the Federal Government did or did not do, but because of actions taken by California. The Glamis claim, based on Federal measures, thus has no merit.

I now turn briefly to the claim based on California measures.

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09:16:12 Glamis, in fact, had every reason to know that under the applicable legal framework, more stringent reclamation requirements could be imposed by California, but Glamis made a business decision when it invested in mining claims in the California CDCA. When it made its investment, it presumably hoped that California would not impose additional requirements such as complete backfilling at the Imperial Project.

It gambled that additional cultural resource surveys would not reveal that the area was of particular religious or historic significance to any

Native American Tribe.

These were business risks. In fact, these business risks materialized. The proposed Imperial Project sparked serious public scrutiny. Environmentalists educated public officials about the harm caused by unreclaimed open-pit mining, and the Quechan voiced their strong opposition to a project that would have destroyed sites that are of cultural importance to them and essential to their religious practice.

The unprecedented outcry by environmental and

09:17:36 Native American groups drove California to take action. Glamis asserts that the California measures were aimed at stopping the Imperial Project, but California did not ban mining or even a particular type of mining. Rather, California sought to balance various competing interests and afforded all interested groups a full and fair opportunity to participate in the public decision-making process. Each group received some of what it asked for, but none received everything.

California decided to continue to allow open-pit cyanide heap-leach mining, but to require mine operators to fill in the pits that they otherwise might have left unreclaimed. California assured environmentalists and the public at large that the State would require reclamation of any future open-pit metallic mines in accordance with the 1975 Surface

Mining and Reclamation Act.

California also assured Native Americans that the protections of the Sacred Sites Act would be adhered to by prohibiting severe and irreparable damage to and interference with access to Native

09:18:54 American sacred sites.

But the State denied the requests by Native Americans for a veto over all mining operations that might injure their cultural and religious traditions.

Glamis knew all about the legal regime in place in California. Glamis knew about the important interests at stake, so Glamis could have had no reasonable expectation that California would not apply that regime to the Imperial Project and take into account those interests. Glamis had received no prior assurances from California that measures such as those California adopted would not be put into place. In fact, Glamis had not received assurances of any kind that California would not require complete backfilling of open-pit metallic mines, or that it would not protect Native American sacred sites that might otherwise be destroyed by Glamis's proposed mine.

It rings hollow for Glamis now to complain that it is being asked to bear a burden that ought to be borne by the public as a whole. California did not take anything from Glamis for the public use or for public benefit. Rather, California simply decided to

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09:20:21 require metallic mine operators such as Glamis to repair the environmental damage that they, themselves caused by their own mining operations. Were the California measures to be applied to Glamis, Glamis would only be asked to repair a harm that it intended to foist onto the American public.

So, what happens in this case? Glamis consciously gambled that California would continue giving metallic mine operators a free pass to extract gold while leaving large, unreclaimed open pits and not having to take the measures necessary to remediate the resulting environmental degradation and serious risks to health and safety. Indeed, Glamis gambled that California would never get serious about enforcing the requirements of this previously enacted legislation.

The NAFTA, however, is not an insurance policy to cover such business risks. The American taxpayer should not be required to indemnify investors such as Glamis for business risks freely undertaken. The NAFTA should not be construed to prevent state parties from adopting general regulations that require

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09:21:42 persons and companies, including investors, to clean up the environmental degradation that they cause.

California's reclamation requirements were of

general application, not targeted at Glamis alone, as Glamis claims. Although Glamis's Imperial Project certainly provided the impetus for California to act, California responded to the perceived emergency by enacting laws and promulgating regulations that applied generally to all similarly situated mine operators. To date, these laws and regulations have been applied to only one mining company, and that company is not Glamis. The company is Golden Queen.

Golden Queen sought an exemption from California's complete backfilling requirements, but the request was denied. Golden Queen did not then launch a NAFTA claim. Rather, it redesigned its mine plan and resubmitted its Plan of Operations. Golden Queen has now publicly reported its intention to comply with the California reclamation requirements while anticipating a, "robust rate of return," on its investment.

In our presentations this morning, we will

09:23:07 review the facts that show that the Imperial Project would have continued to be profitable for Glamis at the time the California measures were adopted and that it would be even much more profitable today. If, nevertheless, the Tribunal were now to compensate Glamis for the cost of complying with the regulation uniformly imposed on all other new metallic mine operators, that would constitute an unjust windfall for Glamis, a windfall that companies like Golden

Queen would not obtain.

Glamis could have done what Golden Queen did, but instead it chose to bring a NAFTA claim, but Glamis had no right to have its preferred Reclamation Plan approved. Glamis has failed to prove that the Government measures it challenges destroyed the economic value of its investment, and Glamis has failed to prove that any acts or omissions of the Federal or California Governments violated the international law minimum standard of treatment.

Indeed, all Glamis has shown is that in a democracy, public officials have to make difficult choices, including between encouraging land

09:24:29 exploitation and minimizing the damage that such exploitation may cause to human health, the environment, and the country's cultural heritage.

The fact that Glamis's arguments failed to carry the day in California cannot be an international law violation. California's actions were transparent, legitimate, and fully justified.

Mr. President, Members of the Tribunal, that ends my brief introduction. I would now ask that you call on Ms. Menaker, who will address Glamis's claim that the Federal Government expropriated its investment.

Thank you.

PRESIDENT YOUNG: Mr. Bettauer, thank you.

Ms. Menaker?

MS. MENAKER: Thank you, Mr. President and Members of the Tribunal, and good morning.

As the Tribunal noted at the August hearing and in its questions, Glamis has asked the Tribunal to first consider whether the Federal actions constituted an expropriation and, if not, to then proceed to consider whether later in time State actions

09:25:35 constituted an expropriation.

So, I'll therefore begin this morning by addressing the Federal measures, and then we will begin to address the California measures.

We showed during last month's hearing that nothing the Federal Government did or did not do can be characterized as having expropriated Glamis's property rights. The Record of Decision denying Glamis's Plan of Operations cannot form the basis for that claim because even if that decision was erroneous, which Glamis has failed to prove, any error was quickly corrected by the rescission of that decision. Indeed, Glamis appears to recognize as much.

In its questions that the Tribunal sent to the parties, the Tribunal specifically asked Glamis to, "point to the particular Federal acts and dates that it alleges constituted a taking," and this is in question number two.

Yesterday, Glamis failed to answer that question directly and, instead, essentially repeated

what it had asserted at last month's hearing. Glamis

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argued that the Federal Government's actions constituted an indirect expropriation of its mining claims, and I have put this quotation on the slide, because although there was a, quote-unquote, partial lifting there--you have it in your handouts as well, I think.

There it goes.

They argued that although there was a, quote-unquote, partial lifting, there was never a correction of that act because then the State came in to add further measures on top of that, and so the Federal Government, apparently, couldn't correct fully the original denial by approving the mine.

But there are two problems with this argument. Glamis attributes the fact that there was only a so-called partial lifting of the denial and Glamis's Plan of Operations was never approved to the fact that California adopted the SMGB regulation. But first, as we discussed in our written submissions and at the hearing, California's actions cannot convert nonexpropriatory acts by the Federal Government into an expropriation. In this respect, we discussed the

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Tabb Lakes case which makes clear that a later in time

act cannot convert what was otherwise a nonexpropriatory act into an expropriatory act.

If the issuance of the Record of Decision wasn't expropriatory, which it wasn't, then California's subsequent actions in adopting the SMGB regulation cannot change the nature of the Federal actions into expropriatory acts.

And the second problem with Glamis's argument is that it's factually incorrect. The reason that Glamis's Plan of Operations was not approved or that there was not in Glamis's word any full correction of the original denial is not because California adopted the SMGB regulation. It is because Glamis decided to abandon the process.

At the time that the SMGB adopted its regulation in December 2002, the Federal Government wasn't processing Glamis's Plan of Operations because Glamis had made a request a few days earlier for it to suspend processing. It wasn't until the end of March of the following year that Glamis informed the Government that it could no longer renew its request

09:28:51 for suspension.

Shortly thereafter, Glamis filed its Notice of Intent to pursue this arbitration, advising the Department of Interior that it had chosen to pursue, quote-unquote, new avenues of relief. It thereafter ceased communicating with the Department. Glamis apparently made the determination that at that point

it would have been in the words of its President and CEO reckless to proceed any further with the processing of its Plan of Operations.

Yesterday, Glamis argued that the United States hadn't, "identified a single act that Glamis could have taken that would have had any legal significance or that could in any way compel Respondent to continue processing." But that's simply untrue. Glamis could have simply contacted DOI and affirmatively asked it to continue processing its plan. It never did that.

And, as we noted in our written submissions and at last month's hearing, had Glamis at any time believed that the DOI was not fulfilling its obligation to process its application in a timely

09:29:53 manner in accordance with the law, it could have brought an action under the Administrative Procedure Act. This is an action that would have had legal significance that could have compelled DOI to act.

But in any event, Glamis is attempting to rewrite history. This is not a matter of Glamis not having the ability to compel DOI to continue processing. Glamis clearly chose to abandon seeking approval of its Plan of Operations. When it filed its Notice of Intent to pursue this arbitration, it wrote to DOI thanking it for its assistance, but telling it that it had chosen to pursue other avenues. It stated in its reply that after the California measures were

adopted, it would have been, quote-unquote, futile for it to continue to participate in further administrative processing of the Imperial Plan of Operations. And this is paragraph 291 of its reply.

And the Tribunal will recall that Mr. McArthur, President and CEO of Glamis, testified last month that it would have been reckless and not rational for Glamis to continue with the Project after the adoption of the California measures. And

09:31:01 Mr. Jeannes, Glamis's Executive Vice President at the time, confirmed in his testimony that while Glamis had, quote-unquote, ongoing discussions throughout the 10-year period with DOI, he could not recall any further discussions after Glamis filed its claim for arbitration. And, indeed, when asked whether Glamis desired that DOI to continue to process its application after it filed arbitration, Mr. Jeannes answered that he, "didn't recall that Glamis took a position one way or the other."

These facts speak for themselves.

That the Federal Government never had the opportunity to conclude processing of Glamis's plan is neither the Federal Government's fault nor the State of California's fault. It is because Glamis chose not to continue to pursue approval.

Glamis's accusation that the Federal Government expropriated its mining claims by failing to, quote-unquote, correct fully the allegedly

erroneous denial rings hollow because it was Glamis that chose to stop pursuing approval for its Plan of Operations, and the Government never had the

09:32:13 opportunity to complete processing. Its claim that the Federal Government expropriated its mining claims should, therefore, be denied.

I will now turn to begin discussing the expropriation claim as it relates to the California measures.

Glamis has made it very clear that if the Tribunal finds that the Federal Government's actions did not amount to an expropriation, then, "At the latest, the taking took place on the date of the SMGB's regulation," and Glamis said this at last month's hearing. Thus, there can no longer be any doubt that Glamis's claim that Senate Bill 22 expropriated its rights must fail.

The SMGB's regulation was first adopted on December 12, 2002, the date that Glamis has repeatedly offered as the date of expropriation. If its mining claims were expropriated no later than December 12, 2002, then legislation that was enacted in April 2003 cannot be found to have expropriated those same rights.

For this reason alone, Glamis's expropriation

09:33:25 1 claim regarding Senate Bill 22 should be denied.
2 In addition, as the Tribunal noted in its
3 questions to the parties, we submit that if the
4 Tribunal were to find that either the SMGB regulation
5 or Senate Bill 22 was not expropriatory, then Glamis's
6 expropriation claim challenging the California
7 measures fails. So, in other words, the United States
8 needs only to show that one of the California measures
9 is not expropriatory to defeat Glamis's expropriation
10 challenge to the California measures. We note that
11 despite the Tribunal's direction that Glamis in its
12 closing argument indicate whether it disagreed with
13 this proposition and explained any such disagreement,
14 Glamis failed to do so. We can thus assume that
15 Glamis agrees with this proposition, and the Tribunal
16 should therefore accept it as well.
17 Nevertheless, in its questions, the Tribunal
18 also asked us to elaborate on this point, and I'm
19 happy to do that.
20 As the Tribunal is aware, both of the
21 California measures imposed the same types of
22 reclamation requirements on mining operators that are

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09:34:26 1 subject to the measure. Glamis contends that it was
2 subject to these reclamation measures--these
3 reclamation requirements--by virtue of the SMGB
4 regulation which was adopted, as I noted, in
5 December 2002. It argues that its mining claims were

expropriated no later than that date.

If the Tribunal finds that the SMGB regulation is not expropriatory, that is, that requiring Glamis to completely backfill and recontour does not amount to taking of its unpatented mining claims, then Glamis's argument that Senate Bill 22, which was adopted four months later and which imposes the very same reclamation requirements on mines subject to its coverage, could not have expropriated its unpatented mining claims, either.

This is why if the Tribunal finds that the SMGB regulation is not expropriatory, then Glamis's expropriation claim must fail in toto.

And the same result obtains if the Tribunal were to find that the SMGB regulation was expropriatory in nature, but that Senate Bill 22 was not expropriatory. In that case, too, Glamis's

09:35:37 expropriation claim would have to be dismissed, and I will briefly explain why this is the case.

One could assume, for instance, that a Claimant was subjected to an expropriatory measure. Then assume that four months later the Government enacted another measure that was not expropriatory but that had the same exact same effect on the Claimant. And to just offer one example, if you suppose that you can take an example of a Government actor's unlawfully occupying a hotel, then suppose that four months later the Government condemns the hotel pursuant to its

lawful authority and initiates condemnation procedures and pays prompt, adequate, and effective compensation to the hotel owners. In that case, one could argue that there had been a temporary taking for the four month period that the Claimant was unlawfully deprived of its rights to its hotel.

But the same can't be said here. As an initial matter in the example I gave, in one instance compensation was granted and in one instance it was not, and in a case like that, it's easy to see that one measure might have been expropriatory while the

other isn't. But in the case of an alleged regulatory expropriation, it's very difficult to imagine a basis on which a Tribunal could find that one of two regulations that imposed the very same requirements and have the same effect on a Claimant is expropriatory while the other measure is not.

But putting that aside for the sake of argument, and even assuming that the SMGB regulation could be found to be expropriatory while the later time Senate Bill 22 could be found to not be expropriatory, there still could be no finding of expropriation because Glamis's property rights were never impaired during this four-month period. And this is because the SMGB's regulation was not applied to Glamis during this time.

Indeed, the Tribunal will recall that Glamis had directed the Department of Interior to stop

processing its Plan of Operations after the SMGB adopted its regulation, so it would have been impossible for the SMGB's regulation to be imposed on Glamis during this time period. It would be different, of course, if Glamis had been mining and

09:37:55 had been subject to the SMGB's reclamation requirements and had, for example, incurred costs of backfilling and recontouring during those four months, but it didn't incur any such costs. There is nothing that could be found to have been taken from Glamis during this four-month period, and Glamis's attempts to show immediate harm from the emergency regulation rests on its unsupported assertion that the Board's adoption of backfilling and recontouring requirements operated as a de facto ban on all future mining, metallic mining, in the State of California.

But as we discussed, Golden Queen is proceeding with its Soledad Mountain Mining project subject to those very regulations, and Glamis has not shown that the SMGB's regulation operated to bar it from mining during the four-month period after it was enacted, or that it actually incurred any damage during that time frame.

Thus, if Senate Bill 22 is found to be nonexpropriatory, then Glamis's expropriation claim fails, regardless of the nature of the SMGB regulation; and, as I explained earlier, for different

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09:39:00 1 reasons, the converse is also true.
2 Thus, if the Tribunal finds that either the
3 SMGB regulation or Senate Bill 22 is not
4 expropriatory, then Glamis's expropriation claim
5 challenging the California measures must be dismissed
6 in its entirety.
7 I will now ask the Tribunal to call upon
8 Mr. Feldman, who will address our defense that
9 Glamis's challenge to both California measures should
10 be dismissed for lack of ripeness.
11 PRESIDENT YOUNG: Ms. Menaker, thank you.
12 Mr. Feldman?
13 MR. FELDMAN: Thank you, Mr. President,
14 Members of the Tribunal. Good morning.
15 I will be addressing another defect of
16 Glamis's claim, and that is its lack of ripeness.
17 This lack of ripeness is apparent when
18 assessing the impact or, rather, the lack of impact of
19 the challenged measures on Glamis. In our written
20 submissions and at the hearing last month, we showed
21 that the economic impact of the challenged measures on
22 Glamis cannot be calculated when those measures have

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09:39:59 1 not been applied to Glamis. This is most apparent
2 when considering the possibility of a temporary
3 expropriation, as we just did. Ordinarily that

concept does not pose difficulties. If 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 having been subject to an expropriatory measure.

But in this case, that can't be done, and it only serves to highlight the fact that neither of the California measures has ever been applied to Glamis. This lack of ripeness is yet another reason why Glamis's expropriation claim should be denied.

On this issue, I would like to briefly address one of the questions posed by the Tribunal which is whether the final decision ripeness requirement under U.S. law applies to this case with particular reference to the Whitney Benefits decision.

The final decision ripeness requirement clearly does apply here. As we will discuss, this conclusion is not affected by the decision in the

09:41:07 Whitney Benefits case, which involved an outright ban on certain mining activity, unlike the California measures at issue here, which merely imposed certain reclamation requirements for future mining activities.

As stated by the U.S. Supreme Court in the Williamson County case, as you can see on the screen, "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 final decision regarding the application of the regulations to the property at issue."

As the Court in Williamson County further observed, until an administrative agency "has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question," factors critical to a takings analysis, namely the extent of economic impact and interference with reasonable investment-backed expectations, "simply cannot be evaluated."

As we discussed in our Counter-Memorial, the final decision ripeness requirement under U.S. law is

09:42:31 also reflected in international law, including decisions by the Iran-U.S. Claims Tribunal and the United States Panama General Claims Commission, which have found that a cognizable expropriation claim arises upon the actual application of a challenged measure to a Claimant and not upon the mere enactment of such a measure.

Glamis does not challenge this principle under international law, nor does Glamis take issue with the specific final decision requirement under U.S. law. Glamis instead asserts at paragraph 290 of its reply that it, "does not face a mere threat of interference with its property right as it has already been deprived of the value of that right by the California measures." Glamis further asserts at

paragraph 292 of its reply that, "Further processing of a proposed mine that faces insurmountably cost-prohibitive reclamation requirements would be futile."

These arguments reflect Glamis's overall view as stated at paragraph 445 of its Memorial, that the California measures constitute a, "de facto ban on

09:43:46 open-pit metallic mining."

Glamis reiterated these arguments at the hearing yesterday; but the decision on which Glamis heavily relies when responding to the United States's "ripeness" defense, Whitney Benefits, only undermines its assertion that the California reclamation requirements constitute a de facto ban on open-pit metallic mining. In Whitney Benefits, as you can see on the screen, the statute at issue, "expressly provided that no permit shall be approved under conditions precisely descriptive of the Whitney coal estate."

Furthermore, the Court observed that, "The 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."

Here, by contrast, the challenged reclamation requirements do not prohibit the issuance of any mining permit, and the United States has presented extensive evidence demonstrating that Glamis would have been able to mine profitably in December 2002 and

would be able to mine profitably today, even when

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subject to the challenge requirements.

Indeed, given the presentation of this evidence, the United States in no way concedes, as asserted by Glamis at yesterday's hearing, that the California measures were adopted to prevent the only economically viable use of Glamis's property.

In Whitney Benefits, the Court found that from the moment of the statute's enactment, it would have been impossible to obtain a permit to mine the Whitney coal property, and that given such futility, the mining company need not obtain a final administrative determination that mining of the Whitney coal property was prohibited.

Glamis has not shown any such impossibility or such futility here.

Unlike the mining company in Whitney Benefits, Glamis is not subject to a mining ban; rather, it is subject to reclamation requirements, the economic impact of which will turn on the particular facts of the Imperial Project site and on the market conditions in existence when those requirements are applied. Those reclamation requirements clearly are

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not cost-prohibitive for every project as illustrated

by Golden Queen's decision to go forward with its Soledad Mountain mine, notwithstanding the SMGB's ruling that it must comply with the challenged reclamation requirements.

And the time at which those requirements are applied clearly affects the extent of their economic impact, as illustrated by the doubling of gold prices between December 2002 and today.

Given that Glamis's pursuit of an approved Reclamation Plan for the Imperial Project would not be futile, it remains obligated to ripen its claim. Without the concrete application of California's reclamation requirements to the particular facts of the Imperial Project at a particular time, the impact of those requirements on Glamis's mining claims, to use the language of the Supreme Court in Williamson County, simply cannot be evaluated.

Notably, at the hearing yesterday, Glamis appeared to suggest that ripeness demands were greater in cases of, "actual" expropriation which, according to Glamis, typically required the transfer of title

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09:47:34 for bringing a claim. But the ripeness issue in this matter, namely whether the economic impact of the challenged measures on Glamis can be evaluated absent their actual application to Glamis, applies with particular force to an indirect expropriation claim such as Glamis's, where the relationship between the challenged measure and its impact on the Claimant is,

by definition, indirect.

We also would like to briefly respond to the baseless assertion made by Glamis yesterday that the Department of Interior has, "refused to process its Imperial Project application," because DOI concluded that, "The California measures killed the Project."

As we discussed at the August hearing and a moment ago by Ms. Menaker, in July 2003, Glamis informed DOI of its intent to file a NAFTA arbitration claim, thanked the Department for its efforts, and stated that it would be pursuing new avenues of relief. Since is that time, Glamis has not contacted DOI in connection with its Imperial Project application, in sharp contrast with its persistent approaches to DOI prior to July 2003.

09:48:54 Indeed, as Mr. McArthur testified at the August hearing, in Glamis's view it would have been reckless for the company to continue with the Imperial Project following the adoption of the California reclamation requirements. Plainly, Glamis abandoned its Imperial Project application years ago and has offered no evidence to support any assertion concerning the Department of Interior's views on the futility of Glamis's ongoing pursuit of approval of its mining project Plan of Operations. Glamis's claim is not ripe and should be dismissed.

At this point, we will turn to our "background principles" defense, which Ms. Menaker

will address.

PRESIDENT YOUNG: Mr. Feldman, thank you.

Ms. Menaker.

MS. MENAKER: Thank you.

Mr. President, Members of the Tribunal, the parties agree that this case is to be decided under international law and that the Tribunal has to examine U.S. domestic law in order to determine the nature of Claimant's property right. We have to agree with the

09:49:56 statement from the Tribunal's first question that in evaluating an Article 1110 claim, the Tribunal must, "ascertain the scope of the property interest at issue by reference to national law."

We also agree with the statement also in the Tribunal's first question that the Tribunal must, "ascertain whether, in fact, the Government acts or measures claimed to be expropriatory affected the property in question."

In this case, Glamis's property right is defined by the Federal Mining Law as well as preexisting state property law. Both SMARA and the Sacred Sites Act thus circumscribed Claimant's property interest in its unpatented mining claims from their inception. And as we discussed at the August hearing, because the SMGB regulation and Senate Bill 22 reflect objectively reasonable applications of background principles found in SMARA and the Sacred Sites Act, the SMGB regulation and Senate Bill 22

cannot be deemed expropriatory.

Under the background principles at issue, Glamis never had a right to mine in a manner that

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violated the usable condition reclamation standard under SMARA, nor did Glamis ever hold a right to mine in a manner that would violate protections accorded to Native Americans under the Sacred Sites Act, including safeguards against causing irreparable damage to Native American sacred sites and against interfering with Native American religious practices on public property.

The reclamation requirements under the SMGB regulation and Senate Bill 22 which reflect objectively reasonable applications of these background principles thus interfere with no property right held by Glamis.

In its questions, the Tribunal asked the parties to comment upon how Claimant's arguments regarding its expropriation claim leave the Tribunal to question the validity of or the aspects of validity of the SMGB regulation or Senate Bill 22 and whether the Claimant needs to adduce or has adduced sufficient evidence to call into question the domestic validity of those measures.

The Tribunal will recall that this is an

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09:52:05 1 issue that arose at last month's hearing. Claimant
2 had made certain statements which suggested that the
3 California measures could not restrict their federally
4 created property right. In turn, we responded that
5 Glamis's property right was subject to both Federal
6 and State laws, and that in particular States were not
7 prohibited from applying more stringent reclamation
8 measures on Federal mining claims.
9 We noted that for Glamis to argue otherwise
10 would be to suggest that the California measures were
11 preempted, and we observed that the Tribunal ought to
12 accept the presumptive validity of State law as a fact
13 and that Glamis has not and could not demonstrate that
14 either measure was preempted in any event.
15 As it now turns out, the Tribunal need not
16 address this issue any further because yesterday
17 Glamis plainly stated, and I quote, that it has,
18 "never argued in this arbitration that the California
19 measures were preempted."
20 Consequently, Glamis has made clear that it
21 is not arguing that the State of California lacked
22 authority to enact measures such as the SMGB

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09:53:14 1 regulation or Senate Bill 22. As such, the Tribunal
2 should accept these measures as presumptively valid
3 under domestic law.
4 Glamis recognizes that a property owner's
5 interest in its property is restricted by limitations

placed on that property by background principles of law, and Glamis has now made clear that it does not contend that the federally created nature of its property right restricted California's authority to enact the measures at issue. Instead, in response to our "background principles" defense, it raises four arguments.

First, Glamis appears to argue that neither SMARA nor the Sacred Sites Act can include background principles because those measures were purportedly not universally applied.

Second, it argues that the grandfathering provisions in the SMGB regulation and Senate Bill 22 render them incapable of being articulations of background principles of law.

Third, it contends that the SMGB regulation was not an objectively reasonable application of SMARA

09:54:19 because the regulation imposed a statewide reclamation standard which Glamis argues is inconsistent with SMARA's provisions.

And, finally, it asserts that Senate Bill 22 was not an objectively reasonable application of the Sacred Sites Act because that Act does not apply on Federal lands.

I will address the first two arguments and then ask Mr. Feldman to address the issue relating to the SMGB regulation and Ms. Thornton to address the issue relating to the Senate Bill 22.

Glamis argues that neither SMARA nor Senate Bill 22 can be background principles because they have not been universally applied. In its closing argument yesterday, Glamis erroneously argued that the American Pelagic case supported this conclusion, but Glamis has misconstrued the facts of that case. As the Tribunal will recall, in American Pelagic the Federal Circuit held that the operator of a commercial fishing vessel was not entitled to compensation under the Takings Clause when Congress passed an appropriations bill revoking its previously issued permit.

09:55:27 Glamis attempts to distinguish the background principle at issue in that case from those at issue here by arguing that in American Pelagic there was "no suggestion that the law at issue, which was a Federal statute that abrogated the right to fish in a particular zone, applied to some fishermen and not to others."

But as Glamis itself acknowledges, the background principle in that case, the Magnuson-Stevens Fishery Conservation and Management Act, established a discretionary permit regime pursuant to which the National Marine Fisheries Service could authorize or deny access to the economic zone at certain times and subject to certain conditions.

American Pelagic alleged in the lower court that the National Marine Fisheries Service indicated

that, when issuing future fishing permits, preference would be given to northeast regional vessels, and preference would be given based on historical participation in the Atlantic mackerel fishing industry.

09:56:35 Thus, that case clearly involved allegations that the agency in charge of operating the scheme was applying the Magnuson-Stevens Act to commercial fishing operators differently. But nevertheless, the Federal Circuit held the statute to be a valid background principle of Federal law which made Congress's later rescission of American Pelagic's permit non-compensable.

And, furthermore, as we explained in our Rejoinder and at the hearing last month, the fact that the challenged measure in that case, the congressional appropriations bill, revoked only American Pelagic's permits but allowed other fishing vessels to continue fishing in the EEZ, provided no basis for concluding that the later in time specification of the background principle was not objectively reasonable. As observed by Professor Sax, 'An owner remains subject to a background principle, even when the principle is not applied to that owner in a particular instance." In this case, all owners who acquired their property interests after the enactment of SMARA and the Sacred Sites Act remained subject to those statutes, even if

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those statutes are not applied to a particular owner in a particular instance.

Glamis also argues that Senate Bill 22 and the SMGB regulation cannot implement background principles because they include grandfather provisions which, in Glamis's view, treat similarly situated mines differently. As observed by Professor Sax in his rebuttal statement, Glamis seizes on language from the Lucas decision in support of this proposition and states--and that language states the restriction is not ordinarily a background principle, if, "other landowners similarly situated are permitted to continue the use denied to the Claimant."

As Professor Sax further noted, this similarly situated language appeared in the context of determining the existence of common law rather than statutory background principles.

In response at the hearing yesterday, Glamis asserted that the United States cited no authority for discounting the relevance of the similarly situated language in Lucas when statutory background principles are at issue. But to the contrary, such authority is

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found in the very language of the Lucas decision itself, which states that permitting similarly situated landowners to continue a use denied to the

Claimant, "ordinarily imports a lack of any common law prohibition."

As stated by Professor Sax, this similarly situated language was provided, "as evidentiary guidance on when certain facts, such as the continued nonconforming uses of similarly situated landowners, would suggest the absence of an applicable common-law rule."

Statutory rules, by contrast, do not present the same evidentiary issues because their content is clear.

Even assuming that the similarly situated language remains relevant for determining the existence of statutory background principles, however, that single factor would in no way be dispositive on the issue. To the contrary, the Lucas decision sets out multiple guiding factors when considering the existence and application of background principles. These factors include the degree of harm to public

10:00:07 lands or adjacent property posed by the Claimant's proposed activities, the social value of the Claimant's activities, the suitability of those activities to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the Claimant and the Government.

Lucas cannot be interpreted to stand for the proposition that a measure containing a grandfather

provision cannot implement background principles.

Moreover, as we have discussed, in American Pelagic, the Federal Circuit recognized the valid application of the background principle, even though that principle had been applied only to one commercial fishermen while the activities of other commercial fishermen in the same fishing zone were left undisturbed, and here, too, California's decision to impose reclamation requirements on applications for, but not holders of, approved mining reclamation plans does not preclude the operation of background principles, particularly given that owners that have received formal governmental permission to engage in

10:01:09 certain activities cannot be seen as similarly situated with owners who are merely seeking such permission.

Now, I would ask the Tribunal to now call on Mr. Feldman, who will discuss the particular issue as it relates to the SMGB regulation.

PRESIDENT YOUNG: Thank you.

Mr. Feldman.

MR. FELDMAN: Thank you, Mr. President, Members of the Tribunal.

I will briefly address Glamis's argument that the SMGB regulation could not have implemented SMARA background principles because the regulation, "ignored SMARA's directive that reclamation be site-specific," and this argument was made at the hearing yesterday.

In support of this assertion, Glamis cites Section 2773(a) of SMARA, which requires that reclamation plans establish site-specific criteria for evaluating compliance with a given Reclamation Plan.

While SMARA directs that each Reclamation Plan be site-specific, it does not direct that reclamation standards be site-specific. To the

10:02:19 contrary, the very next provision of the statute, Section 2773(b), provides that the Board must adopt, "minimum verifiable, statewide reclamation standards," which shall include statewide backfilling and recontouring standards.

SMARA directs the Board to adopt statewide policy for the reclamation of mined lands, while site-specific decisions on individual reclamation plans are primarily undertaken by local lead agencies.

Glamis's assertion that the Board can adopt only site-specific measures when adopting state policy, particularly when adopting statewide backfilling and recontouring standards is baseless.

As we have discussed in our written submissions and at the August hearing, SMARA's reclamation requirements mandate the restoration of mined lands to a usable condition which does not threaten public health and safety and specifically contemplate the use of backfilling to help achieve such reclamation. The SMGB's regulation merely clarified that in the case of open-pit metallic mines,

22 complete backfilling is required in order to comply

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10:03:38 1 with those standards. That regulation is an
2 objectively reasonable application of SMARA's
3 standards. Glamis never held a property right that
4 was not limited by those statutory requirements and
5 its claim that the SMGB regulation expropriated its
6 property must, therefore, be dismissed.
7 My colleague, Ms. Thornton, will now address
8 Glamis's argument concerning the applicability of the
9 Sacred Sites Act to Federal Lands.
10 PRESIDENT YOUNG: Thank you, Mr. Feldman.
11 Ms. Thornton?
12 MS. THORNTON: Mr. President, Members of the
13 Tribunal, good morning. I will now address Glamis's
14 other attack on the United States's background
15 principles argument which is equally unavailing.
16 Glamis continues to assert erroneously that
17 the Sacred Sites Act is not a background principle of
18 California property law capable of redefining the
19 property interest it holds in its unpatented mining
20 claims because it is not applicable on Federal land.
21 In support of this contention, Glamis argued
22 yesterday for the first time that the application of

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10:04:51 1 any such State law to Federal land, which it

inaccurately characterized as a prohibition, would be an unconstitutional violation of the property clause. This argument is simply wrong. The ability of States to impose their criminal and civil laws on Federal land is long settled, and the Granite Rock case makes clear that States can impose reasonable environmental regulations on Federal mining claims. While a State's outright prohibition of mining activity on Federal land might run afoul of the property clause, the United States has never suggested that that is an outcome the Native American Heritage Commission, which I will refer to as the NAHC, could have achieved under the Sacred Sites Act. Rather, in the event that Imperial County approved an Imperial Project Reclamation Plan that did not ensure future access to the Imperial Project area by the Quechan Tribe, the NAHC could have invoked the injunctive provisions of the Sacred Sites Act to prevent that agency from issuing a permit without the imposition of adequate mitigation measures.

This would not have prohibited mining on

10:06:12 Federal land, but rather ensured that Glamis's Reclamation Plan was consistent with the State's Environmental and Historic Preservation policy. Thus, there is no inconsistency between the property clause and the Sacred Sites Act's application to Federal lands.

While Glamis can point to nothing in the

language or the legislative history of the Sacred Sites Act, which precludes its application on Federal land, it asserts that, "Proof of its interpretation can be found if the Tribunal draws inferences from the following facts."

First, Glamis relies on the Supreme Court's holding in Lyng versus Northwest Indian Cemetery Protection Association. If the Tribunal will recall, that case was brought by the NAHC to challenge the U.S. Forest Service's decision to permit timber harvesting and the construction of a service road on Federal forest land traditionally used by Native American religious practitioners. Glamis argues that because the NAHC chose to assert the constitutional and Federal law rights of Native Americans in that

case rather than invoke the provisions of the Sacred Sites Act, that is somehow evidence that the Sacred Sites Act does not apply on Federal land, but the case provides no such evidence.

It was perfectly reasonable for the NAHC to bring the case on constitutional grounds and not pursuant to the Sacred Sites Act because not only the NAHC, but other Native American advocacy groups joined in that proceeding in an effort to obtain a ruling that would have application nationwide and not just in California where the Sacred Sites Act applies.

And although the Sacred Sites Act was not the grounds on which the case was brought, as we noted in

our written and oral submissions, California's brief before the United States Supreme Court in that proceeding cites the Sacred Sites Act as charging the Native American Heritage Commission with protecting Native American religious practice on public land in the State.

Furthermore, as we noted in last month's hearing, the very fact that the NAHC brought the Lyng Case at all undermines Glamis's assertion that the

Sacred Sites Act does not apply on Federal land. The party bringing a claim must have standing to represent the Claimant's interests. The sacred site at issue in Lyng was on Federal land, and the NAHC brought that claim representing the interest of Native Americans with respect to that land. The NAHC's jurisdiction emanates from the Sacred Sites Act; thus, the fact that the NAHC--that the NAHC standing to bring the Lyng action was not challenged in that proceeding is evidence that it was the proper party in interest to represent the claims of Native American tribes for access to sacred sites on Federal land within the State.

Second, Glamis is incorrect when it suggests that the fact that the Sacred Sites Act was not specifically mentioned in the various Environmental Impact Statements prepared for the Imperial Project provides evidence that the State of California believed that the Sacred Sites Act was inapplicable.

As we have noted, the various Environmental Impact Statements prepared for that project all clearly reference California's Environmental Quality Act, and

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California courts have interpreted that statute to trigger compliance with the Sacred Sites Act.

Yesterday, Glamis's counsel suggested that, "The first time anyone had ever heard of the Sacred Sites Act as being specifically applicable to the Imperial Project or, indeed, any other mining project on Federal lands was in this arbitration."

This simply is not consistent with the record. As the United States explained in its Rejoinder, one of the principal criticisms leveled against Senate Bill 1828, the legislation that was initially joined to the bill that became Senate Bill 22, was that existing provisions of CEQA and the Sacred Sites Act were adequate to achieve its ends.

In an Enrolled Bill Report recommending that Governor Davis veto Senate Bill 1828, the California Business, Transportation, and Housing Agency surveyed existing Federal and State law designed to minimize adverse impacts to Native American sacred sites and noted that both CEQA and the Sacred Sites Act already provided for the preservation of Native American historic, cultural, and sacred sites in the State.

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10:11:21 A similar Enrolled Bill Report prepared by the Governor's Office of Planning and Research also recommended veto of Senate Bill 1828 noting that although the Sacred Sites Act, "appears to provide adequate protections for Native American sacred sites," in the State, "because most agencies have no formal process for notifying Tribes when a project is taking place, affected cultural resources may not be identified until it is too late."

Both of these reports thus discuss the need for Senate Bill 1828 in the context of the Sacred Sites Act's preexistent provisions, and both of those reports specifically considered the proposed Bill's impact on Glamis's Imperial Mine as well as other projects.

Both Glamis Gold, Inc., and Glamis Imperial Corp., are listed among Senate Bill 1828's opponents.

Again, even if ignorance of the law were a defense, which it clearly is not, it is simply not credible for Glamis to suggest that the first time it ever heard of the Sacred Sites Act was in this arbitration.

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10:12:34 Finally, Senate Burton's letter to Gray Davis suggesting that Senate Bill 1828 was necessary because no preexisting Federal and State legislation specifically protected Native American sacred properties is evidence of nothing more than Senator

Burton's opinion because the Senator's statement is quite clearly contradicted by the bill reports I have just discussed. These bill reports are referenced in the United States's Rejoinder in this proceeding at page 30, note 101.

Third, Glamis argued last month that if the Sacred Sites Act applied on Federal lands, the United States should have obtained an opinion from California's Attorney General to that effect. This argument has no merit whatsoever. As an initial matter, as Mr. Bettauer pointed out, just as the United States is responsible for the Acts of California in this arbitration, the United States has the authority to speak for the entirety of its Government in these proceedings. The position taken by the United States in these proceedings, namely that the Sacred Sites Act applies on Federal lands, is the

10:13:47 position of the Federal Government and all of its agencies, as well as that of California and its respective agencies.

There is no need for a State official to provide this Tribunal with that State's interpretation of its law when the United States is charged with presenting to the Tribunal the proper interpretation of the laws of the United States, as well as those of each of its constituent entities.

In any event, the intent of the California Assembly regarding the statute scope is discernible

from the statute's plain language. When adopting the statute, the California Legislature applied its prohibitions to anyone using, "public property," under certain conditions within the State. It thus used the broadest possible language to define the category of property to which it would apply, and it specifically exempted certain classes of municipal and county land from its reach.

Had the Legislature wanted to exempt Federal lands in a similar fashion, it could have done so explicitly. The fact of the matter is that it did

10:14:58 not, and there is no basis for this Tribunal to read such an exemption into the statute's provisions.

Finally, Glamis argues that the adoption of Senate Bill 22 somehow demonstrates that California could not have required Glamis to adopt the same reclamation requirements through an injunctive proceeding pursuant to the terms of the Sacred Sites Act. But as we noted in our opening argument last month, the very nature of an application of a background principle requires that the same result could have been achieved by the courts. However, availability of relief in the courts does not preclude a legislature or an agency from specifying a background principle in a statute or regulation. As Professor Sax explained, the specification of nuisance principles, for example, can be accomplished either through the courts or the legislature. In fact, the

California Supreme Court has noted a preference under California law for specification of such principles to be articulated by statute rather than by common law.

The fact that the California Legislature chooses to specify a background principle by statute

rather than enforce it through the courts, therefore, is not evidence of its inapplicability.

In any event, as a factual matter, Glamis simply misapprehends how the statute works. The Sacred Sites Act only empowers the NAHC to initiate legal proceedings to enjoin damage to Native American sacred sites if the relevant public agency approves the project after rejecting mitigation measures that the NAHC had proposed. Because the public agency charged with reviewing the Imperial Project Reclamation Plan, Imperial County, had not issued an approval of Glamis's Reclamation Plan at the time that Senate Bill 22 was adopted, the NAHC could not have initiated the injunctive provisions of the Sacred Sites Act at that time.

For all of these reasons, as well as those United States offered in its previous written and oral pleadings, the Tribunal should find that the Sacred Sites Act to be an applicable background principle of California property law.

MS. MENAKER: Thank you, Mr. President, Members of the Tribunal.

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10:17:27 1 The United States will now discuss the three
2 factors that are typically evaluated by a tribunal in
3 assessing an indirect expropriation claim; that is,
4 the impact of the economic--the economic impact of the
5 measure and the reasonable, the investor's reasonable
6 expectations, and the character of the measure. And,
7 again, we remind the Tribunal that the Tribunal need
8 only look into these factors if it finds--if it
9 rejects basically our "ripeness" defense, which we
10 just discussed, and also if it rejects our "background
11 principles" defense. So only if it finds that there
12 has--excuse me. I will leave it at that. Only if it
13 rejects those two defenses.
14 So now I would ask the Tribunal to just call
15 on Mr. Sharpe, who will begin by discussing the
16 economic impacts of the measures.
17 PRESIDENT YOUNG: Thank you.
18 Mr. Sharpe?
19 MR. SHARPE: Thank you, Mr. President,
20 Members of the Tribunal.
21 I would just note initially that I think my
22 presentation will go beyond the scheduled break, so

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10:18:37 1 I'm happy to be interrupted at the appropriate time.
2 I will now discuss Glamis's failure to prove
3 that the Government measures it challenges destroyed

all or virtually all of the value of its investment. In this respect, the United States agrees with the views set forth in the third item of the Tribunal's first question to the parties; that is, the United States agrees that to prove an expropriation, Glamis must show that the Government measures it challenges radically diminished the value of its investment. Indeed, absent a showing that the measures deprived the Claimant of whole or virtually all of the economic value of its investment, there can be no finding of expropriation.

This is abundantly clear from arbitral jurisprudence. The Pope & Talbot Tribunal, for instance, explained that an expropriation can succeed on--an expropriation claim can succeed only if the, "interference is sufficiently restrictive to support a conclusion that the property has been taken from its owner."

The Tribunal in CMS v. Argentina similarly

10:19:44 concluded that, "The essential question is, therefore, to establish whether the enjoyment of the property has been effectively neutralized."

The GAMI v. Mexico Chapter Eleven Tribunal concurred with this reasoning including that the, "affected property must be impaired to such an extent that it must be seen as taken." It thus held that, "GAMI's investment in GAM is protected by Article 1110 only if the shareholding was taken."

Finally, the LG&E Tribunal recently confirmed that, "In many arbitral decisions, compensation has been denied when the challenged Government measure has not affected all or almost all of the investment's economic value." Although the LG&E Tribunal faulted Argentina for the emergency economic measures that it adopted, it nonetheless declined to find an expropriation concluding, "Without a permanent severe deprivation of LG&E's rights with respect to its investment or almost complete deprivation of value of LG&E's investment, the Tribunal concludes that these circumstances do not constitute expropriation."

Now, Glamis has come nowhere near close to

10:21:08 proving that the Government measures it challenges destroyed the economic value of its investment. The evidence, we submit, conclusively proves the opposite. The Imperial Project retains significant value, even with complete backfilling. Glamis's own contemporaneous documents confirm this fact.

Glamis's January 9, 2003, valuation memo which we examined during the August merits hearing, which is crucial to this case, states that the fair market value of the Imperial Project with complete backfilling is $9.1 million at least. That is, accounting for the California reclamation requirements and accounting for two of the three pits at the Imperial Project, Glamis's own contemporaneous document shows that the Imperial Project retained

significant value on the alleged date of expropriation, December 12, 2002.

As you can see, this is based on a 10 percent discount rate. Glamis argued yesterday that it uses a 5 percent discount rate for internal company planning purposes and that BLM uses a 5.5 percent risk-free discount rate when determining valid existing rights.

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10:22:28 But those figures are legally irrelevant. The Tribunal's task here is to determine the project's fair market value, which cannot be derived from the generic discount rate that Glamis uses internally to evaluate all of its U.S. properties.

Nor can it be derived from the risk-free discount rate that BLM uses. Rather, the fair market value necessarily is based on a project-specific analysis and a project specific discount rate.

Both parties' experts calculated a 9.28 percent discount rate for determining the Imperial Project's fair market value, although Behre Dolbear erroneously reduced that rate by a third to 6.5 percent to account for corporate taxes.

Now, in a few minutes I will discuss why that is wrong.

But even if this Tribunal were to accept a 5 percent discount rate, then according to Glamis's January 9, 2003 valuation memo, the Imperial Project would be worth not $9.1 million, but $17.2 million, even with complete backfilling; but because the

appropriate discount rate is near 10 percent and not 5

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10:23:42 percent, the Imperial Project should be valued at $9.1 million at least.

Now, as we showed in the August hearing, this $9.1 million figure is for a two pit mine and doesn't include the value of the third pit, the Singer Pit, which Behre Dolbear estimated at $6.4 million. Nor does it include the value, the $6 million strategic value arising from the fact that the Singer Pit delays by two years the costs incurred for backfilling the large used pit. The total value of the Imperial Project on the alleged date of expropriation is thus $21.5 million, the $9.1 million recognized for the two pit plus the $12.4 million added by the Singer Pit mineralization.

This figure, as it turns out, is precisely what Navigant independently calculated as the fair market value of the Imperial Project on that date; and, of course, the figure is very far from Behre Dolbear's valuation of a negative $8.9 million on that date.

Glamis, as you heard, asks this Tribunal to ignore its own contemporaneous valuation based on

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10:24:56 three arguments:

First, in its written submissions, Glamis claimed that the January 9, 2003, valuation memo reflected preliminary back-of-the-envelope calculations, but as we showed, that is manifestly incorrect. The valuation is expressly based on the company's computer valuation model. The valuation contains two detailed spreadsheets evidencing its methodology and conclusions, and the valuation was prepared by and sent to Glamis's top executives in the ordinary course of business. In fact, unlike other documents, Glamis valuations, it is not labeled draft or preliminary, and it contains no indication that it is anything other than what it purports to be, which is an ordinary business document.

Second, Glamis has suggested it didn't know what it was doing when it calculated the costs of complying with the California reclamation requirements. Well, that's simply not credible. In fact, it directly is directly contradicted by Mr. Jeannes's testimony to the United States Congress concerning Glamis's vast experience estimating

10:26:10 reclamation costs which he said is, "quite simple."

Yesterday, Glamis argued that the January 9, 2003, valuation memo, "did not account for respreading the heap-leach pad," but that's plainly false, as you can see from the text. Let me read it.

To meet the requirements of Section 3704.1, Title 14, California Code of Regulations, not only are

pits required to be backfilled, but all other mined materials are to be graded and contoured to a surface consistent with the original topography with a height restriction of 25 feet above the original contour elevations. The document clearly contemplates the cost of spreading all of the mined material above 25 feet.

And third, at the hearing last month Mr. McArthur claimed that the January 9, 2003 valuation memo actually confirmed Glamis's claim that the Imperial Project was uneconomic with complete backfilling, pointing to the column on the memo calculating the Imperial Project's value based on a $300 gold price.

As a legal matter, Mr. McArthur's claim is

irrelevant. Both parties' experts agree that the correct gold price for determining the Project's fair market value in December 2002 is $325 to $326 per ounce, not $300.

As a factual matter, moreover, Mr. McArthur's claim is simply wrong. The January 9, 2003, valuation memorandum is a sensitivity analysis; and, like every sensitivity analysis, it states a base case, an optimistic case, and a pessimistic case. $300 is the pessimistic case, not the base case, and that's made clear by the spreadsheets that follow which state the base case as $325 to $350 per ounce. And $375 is the optimistic case.

In addition, the economic model that both parties' experts use for determining the Imperial Project's fair market value is not called the $300 gold model. It's called the 339-dollar gold model, which falls right between the base case figures of 325 and $350; and this, of course, is Glamis's own valuation model.

Thus, each of Glamis's arguments fails. On the basis of Glamis's own contemporaneous document,

10:28:39 the Tribunal should find that its mining claims retained significant value on the alleged date of expropriation and thus dismiss its claim.

As the Tribunal is aware, the United States has also conducted an independent valuation of the Imperial Project which confirms that Glamis's claims retained significant value on the alleged date of expropriation. During the weeklong hearing, Glamis failed to address any of the important valuation issues addressed in these reports. Instead, it opted for a strategy of obfuscation of the principal issues.

Instead of addressing the disputed valuation issues, Glamis chose merely to repeat its officers' testimony that the Governor's statement somehow rendered its mining claims uneconomic, as if Glamis's officers' current testimony were somehow evidence of the Project's actual value.

Glamis tries to buttress the officers' testimony by claiming that no one has offered to buy

the Imperial Project since 2002, but there are three major problems with this argument.

First, as we've discussed a length and as

Navigant has explained, the absence of an unsolicited offer to purchase property is not evidence that the property is worthless.

Second, the testimony of Glamis's officers contradicts their very claim. When asked whether Glamis had received an offer to purchase the Imperial Project in the last five years, Mr. Jeannes responded, "Not just the last five years. We never have." That's at page 224, line 12.

Well, if lack of an unsolicited offer were actual proof that the property had no value, then, according to Glamis's own testimony, the Imperial Project never had any value because no one has ever offered to purchase it. That can't be correct.

And third, Glamis's factual proposition is not even correct. When questioned, Mr. Jeannes admitted that just weeks prior to the hearing, Glamis had received an unsolicited inquiry concerning a possible purchase of the Imperial Project. Mr. Jeannes furnished the inquirer, a gold mining company, with the relevant information and directed him to the information about this arbitration on the

10:30:50 1 State Department Web site. And yet, undaunted by
2 Glamis's repeated insistence that the Project is
3 worthless, and fully aware of the so-called stigma
4 attached to the Imperial Project, the inquirer
5 dispatched a representative to Vancouver to meet
6 Glamis face-to-face for confidential discussions
7 concerning a possible purchase of the Project. That
8 meeting we learned took place just a few weeks before
9 the August hearing.
10 The Tribunal we submit should direct Glamis
11 to go forward to inform the Tribunal and the United
12 States about the status of this and any other offers
13 or inquiries to purchase the Imperial Project mining
14 claims. This inquiry concerning a possible purchase
15 of the Imperial Project shows that Glamis's
16 expropriation arguments are contradictory at best.
17 I will now turn to the swell-factor issue
18 which illustrates Glamis's efforts to create confusion
19 wherever possible and to avoid discussing important
20 valuation issues.
21 PRESIDENT YOUNG: This seems an appropriate
22 moment to take the break. We are fascinated by the

10:31:56 1 swell factor, of course. Deeply interested in it, but
2 we will prepare ourselves for the next half hour for
3 this exciting part of the hearing.
4 We will meet again at 11:00.
5 (Brief recess.)

PRESIDENT YOUNG: Mr. Sharpe, are you ready to proceed?

MR. SHARPE: Yes.

PRESIDENT YOUNG: Thank you.

MR. SHARPE: I will turn now to the swell factor issue which we submit illustrates Glamis's efforts to create confusion and to avoid discussing important valuation issues.

The Tribunal will recall that Behre Dolbear's initial report accompanying the Memorial relied on a 35 percent swell factor for the material at the Imperial Project. Behre Dolbear tangentially derived this figure from loader productivity numbers in the 1996 final Feasibility Study.

Curiously, though, only yesterday did Glamis introduce that evidence into the record.

With the Counter-Memorial the United States

11:06:17 introduced three contemporaneous Glamis documents that explicitly state a 23 percent weighted average swell factor for the Imperial Project. These included a detailed memorandum and a letter prepared by Glamis's own Project Geologist, Dan Purvance.

In its reply report, Behre Dolbear claimed that the document that the United States relied on was not part of Mr. Purvance's data sheet, but had been improperly attached to those documents. Behre Dolbear claimed to have learned this information from a, "personal communication with Mr. Purvance," but

Mr. Purvance himself declined to corroborate this information in his witness statement that he submitted with Glamis's reply.

The united States subsequently discovered and produced four additional contemporaneous Glamis documents, each of which stated 23 percent weighted average swell factor. These documents span nearly a decade from 1994 to 2003. Glamis thereafter dropped its assertion that the document previously produced by the United States was not what it purported to be and was inadvertently attached to those other documents.

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11:07:27 At the hearing, Glamis sought to avoid the clear implications of these documents by producing a single core sample and asking witnesses to opine on the type of rock and the rock's possible swell factor. But as Mr. Houser testified and is quite obvious, a single core sample tells us nothing about the weight average swell factor of the various rock, gravel, and ore at the Imperial Project. That core sample was simply a distraction.

At the hearing, in fact, Glamis relied on the data underlying the very contemporaneous documents that state a 23 percent weighted average swell factor for the Imperial Project. The Tribunal will recall that when asking various witnesses about the core sample, counsel repeatedly referred to the data that Mr. Purvance prepared to show that the swell factor for the particular core sample was higher than

23 percent.

Glamis simply ignores the fact that Mr. Purvance also calculated the swell factor not from a single core sample, but from more than 400 drill samples.

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11:08:25 On the basis of all of available data, Mr. Purvance calculated a weighted average swell factor of 23 percent. How can Glamis ask this Tribunal to reach a different conclusion by relying on one of Mr. Purvance's data points while ignoring the rest of his analysis? Glamis's mining expert, Mr. Guarnera, refused even to engage on this point during cross-examination.

And only when pressed by the Tribunal at the hearing at the very end of the hearing, did Glamis offer any explanation claiming reluctantly that Glamis's own Project Geologist had made a fundamental error when calculating the swell factor in 1994, and that he sent this erroneous information to Glamis's top executives and that Glamis's top executives then included this erroneous information in the company's bankable Feasibility Study, the 1998-1999 budgets, and in the 2003 valuation model.

But that's simply not plausible. There came a time when Glamis realized that its swell factor calculation was fundamentally wrong. Where is the data supporting its revised figure? Where is the

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11:09:28 1 Glamis document acknowledging that its bankable
2 Feasibility Study, its budgets, and its executive
3 level planning documents were all based on
4 fundamentally flawed information?
5 Incidentally for the first time yesterday,
6 Glamis argued that its bankable Feasibility Study
7 isn't actually a bankable Feasibility Study, despite
8 the fact that it's called bankable Feasibility Study,
9 but this, of course, is part of Glamis's modus
10 operandi in this arbitration, which is simply to
11 disclaim any contemporaneous Glamis document it finds
12 inconvenient to its current arbitration claims.
13 Glamis also claims that the WESTEC study in
14 the 1996 Feasibility Study disproved a 23 percent
15 weighted average swell factor for the Imperial
16 Project. In fact, they do nothing of the sort.
17 Neither the WESTEC study nor the Final Feasibility
18 Study state any swell factor. And if there was
19 anything in the WESTEC study that would have cast
20 doubt on the 23 percent swell factor calculated by
21 Mr. Purvance, then presumably Glamis would have taken
22 that into account and updated its earlier conclusions.

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11:10:31 1 The WESTEC Report was issued in 1996. Glamis
2 circulated documents containing its 23 percent swell
3 factor in 1998, 1999, and even into 2003.

The fact remains that the record contains not a single Glamis document predating this arbitration that states a 35 percent swell factor. The only Glamis document actually stating a 35 percent swell factor is dated December 2, 2003, which is several months after Glamis filed its Notice of Intent in this arbitration. Glamis has suggested this document was attached to the January 9, 2003, valuation memo, but obviously that's impossible, as the document is dated almost a year later.

To reiterate, the two pre-arbitration documents that Glamis relies on to support its 35 percent swell factor, the 1996 Feasibility Study, and the January 9, 2003 valuation memorandum, do not state any swell factor at all.

Now, even though the January 9, 2003 valuation memo does not state a swell factor, Glamis argues that the memo somehow casts doubt on the contemporaneous Glamis documents that do state a swell

11:11:43 factor.

The reason we are told is that California's backfilling requirements elevated the importance of the swell factor issue, causing Glamis for the first time to carefully assess the swell factor's economic impact on the Project.

But even if that's true, it doesn't help Glamis. That is, even if Glamis assumed a 35 percent swell factor in its January 9, 2003 valuation memo, it

still calculated reclamation costs of $52 million based on that figure, and it calculated the Project's fair market value at $9.1 million, even with complete backfilling.

Glamis cannot permissibly ask this Tribunal to accept a 35 percent swell factor implicitly derived from the January 9 valuation memo while simultaneously rejecting the cost and valuation conclusions explicitly stated in that very document.

Nor is Glamis helped by the fact that BLM recognizes that swell factors of 30 to 40 percent are common in hardrock mining. What Glamis ignores and as you can see from this slide, BLM itself independently

11:12:51 calculated a 22.3 percent swell factor for the Imperial Project based on its own geotechnical data and secondary sources such as the Church Handbook.

Yesterday, Glamis pointed this Tribunal to BLM documents showing the Imperial Project's detailed geologic cross-section, but it failed to inform the Tribunal of the conclusion that BLM itself drew from the data.

Glamis also makes much of the fact that Behre Dolbear visited the Glamis Imperial Project site while Navigant and Norwest declined to visit the site on the grounds that it would have been pointless. But it's not clear what Glamis thinks Behre Dolbear learned from its site visit or what Navigant and Norwest could have learned from such a tour. Behre Dolbear itself

does not claim to have based any of its valuation determinations on the site visit. That is, its site visit did not produce the data supporting the amount of gold, the grade of gold, the cost of backfilling, or even the swell factor which Behre Dolbear tangentially derived from the 1996 Final Feasibility Study.

11:13:53 Both parties' experts, in fact, determined these figures from Glamis's own documents, although Behre Dolbear ignores these contemporaneous documents when it suits its purposes. Site visit issue, therefore, is a complete red herring.

Now, as we noted, the swell factor issue is itself not that important to valuation. 15 million tons of material and 25.5 cents per ton, that's about $3.8 million, but as I noted in August, this expense is being incurred only a dozen years into the Project, and so the impact on the Imperial Project's fair market value is less than a million dollars.

Nevertheless, I discussed this because we think it's emblematic of the way that Glamis has presented the valuation evidence in this arbitration. Glamis's principal defense is to obfuscate the critical issues and to denigrate anyone or anything contradicting its current arbitration claims, and that includes denigrating its own documents, its own executive's cost and valuation determinations, and its own Project Geologist's swell factor calculations.

22 It also, of course, includes denigrating

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11:14:57 1 Navigant and Norwest credentials, but the quality and
2 rigor of Navigant and Norwest Reports, we submit,
3 speak for themselves.
4 Yesterday, Glamis repeated the claim that
5 because Mr. Kaczmarek has admitted he is not a
6 qualified mineral appraiser under the CIMVal
7 standards, his conclusions cannot be consistent with
8 those standards. But, of course, Glamis has not shown
9 how Navigant's reports diverge in a single instance
10 from the CIMVal standards' substantive provisions.
11 That's not surprising as Navigant observed in its
12 March 2007 report. International mining standards
13 such as the CIMVal have expressly sought to align
14 themselves with generally accepted valuation
15 principles.
16 Navigant further explained that valuing a
17 mineral property such as the Imperial Project is no
18 different from valuing any other income-producing
19 investment, say, for the technical input for the
20 valuation which, in this case, Navigant obtained from
21 Glamis itself or, in some instances, from Norwest.
22 Rather than challenging Navigant and Norwest

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11:15:57 1 conclusions, Glamis apparently found it easier to

denigrate their credentials, but Glamis is the Claimant in this case, and it must prove its case with evidence. Casting aspersions is not enough.

Now, before leaving the issue of valuation, I will briefly summarize the evidence before the Tribunal on the issues that actually do have an important impact on valuation and which Glamis failed to deal with. There really are only three issues that account for the principal differences in the parties' experts' determination of the project's fair market value on the alleged date of expropriation. One, financial assurances; two, the Singer Pit gold; and three, the cost per ton of backfilling the East Pit. On each of these critical issues, Navigant and Norwest introduced ample evidence supporting their conclusions and Behre Dolbear introduced little or no evidence at all.

First, the issue of financial assurances. Behre Dolbear's valuation model assumes that Glamis would be required to post a 61.1 million dollar cash bond in year one of the Project to meet California's

11:17:04 financial assurance obligations. But as Navigant pointed out, Behre Dolbear has managed to find the most expensive way for Glamis to meet this obligation, and simply substituting a Letter of Credit for a cash bond would increase the Project's net present value by some $12 million.

Mr. Jeannes baldly asserted that Glamis could

not have obtained a noncash-backed Letter of Credit for the Imperial Project. But there are two serious problems with this claim.

First, all of the evidence in the record indicates that Glamis could have obtained a noncash-backed Letter of Credit in 2002 or 2003. Navigant introduced documentary evidence showing that many companies, including Glamis itself, have used noncash-backed Letters of Credit to meet their financial--to meet their reclamation obligations.

I put this slide up on the screen at the earlier phase of this hearing, so I won't read it, but just to remain the Tribunal, Kinross Gold obtained a 125 million dollar noncash-backed facility.

Cameco Corporation obtained a noncash-backed

294 million dollar Letter of Credit, and Agnico-Eagle obtained a 125 million credit facility in 2004 for reclamation.

Today, in fact, Goldcorp, which has acquired Glamis, reports that of the $135.5 million in outstanding Letters of Credit for reclamation costs, only 8 percent or $11.9 million was collateralized by cash. That evidence remains unrebutted. It's from Goldcorp's financial statements.

Yesterday, Glamis argued that this evidence was somehow dependent on the database that Mr. Craig produced, but that clearly is not the case. Mr. Craig, the Tribunal will recall, produced a

database showing that mining companies typically provide an instrument other than a cash bond to secure reclamation costs for more than a million dollars. Mr. Craig stated he had no way of knowing by looking at the database whether those instruments were or not were not cash backed.

But the evidence produced by Navigant on this issue is entirely separate from the evidence that Mr. Craig introduced, and Navigant has clearly shown

11:19:08 that other companies, including Glamis itself, have secured noncash-backed Letters of Credit to meet their financial assurance obligations. Glamis has introduced no evidence whatsoever to support Mr. Jeannes's self-serving assertion that Glamis could not have obtained a noncash-backed Letter of Credit in 2002 or 2003.

Second, Glamis's own January 9, 2003, valuation memo makes no mention of a 61.1 million dollar cash bond or the cost of obtaining such a bond. Although Glamis touts its experience estimating reclamation costs, it asks this Tribunal to accept that its top executives simply overlooked the single greatest expense that Glamis would ever incur over the entire life of the mine. Well, that's simply not plausible.

In addition, we pointed out there is a second further serious--second serious problem with Behre Dolbear's assumptions. Even if Glamis had been

required to post cash, it would not have been required to post the full amount in year one. Rather, California requires that mining companies post

financial assurances only for the cost of disturbances for that particular year, less the amount of any reclaimed disturbances. That's what the regulations clearly require, which we introduced, and that's what Mr. Craig confirmed in his written and oral testimony in August.

Glamis has offered no response. It has simply ignored this additional problem with its expert's valuation. Adjusting for this single error of the financial assurance cost in Behre Dolbear's valuation puts the Imperial Project significantly in the black. That is, this Tribunal can find that the mining claims retain significant value on the alleged date of expropriation on the basis of this single issue and thus can dispose of Glamis's expropriation claim on this ground alone.

The second principal valuation issue is the Singer Pit mineralization. In its first report, Behre Dolbear converted the Singer Pit's 500,000 ounces of estimated gold resources into 250,000 ounces of probability adjusted additional gold reserves. Behre Dolbear then valued these additional gold reserves at

$6.4 million. But when it came time to value these additional gold reserves in the post-backfill scenario, Behre Dolbear claimed that they were too speculative to value.

But as Navigant pointed out, once Behre Dolbear converted the Singer Pit resources into probability-adjusted gold reserves, there was no valid basis for ignoring them in the post-backfill scenario. Navigant produced ample documentary evidence supporting its valuation conclusions; Behre Dolbear produced nothing in response and provided no justification at last month's hearing for its action.

As noted earlier, the Singer pits adds another $12.4 million in value to the Project in the post-backfill scenario. Again, without changing anything else in Behre Dolbear's valuation model, the value of the Singer Pit alone puts the Imperial Project in the black. Thus, again, the Tribunal can dispose of Glamis's expropriation claim on the basis of this single issue.

The third principle of valuation is the cost of backfilling the pit. The parties' experts

approached this issue very differently. Norwest performed its own detailed bottom-up engineering calculation in order to independently determine the costs of backfilling. Norwest calculated 25.5 cents per ton for backfilling and recontouring with total

reclamation costs of $55.4 million.

Now, as you can see from the slide, this figure is very close to approximately $52 million that Glamis contemporaneously estimated based on 25 cents per ton.

It's also close to the $47.8 million that BLM independently calculated for backfilling the East Pit.

Behre Dolbear, by contrast, simply made an order of magnitude estimate of reclamation costs. Behre Dolbear assumed that reclamation costs are equal to excavation costs less blasting and drilling costs. That is, for the single most important cost calculation in this arbitration, Behre Dolbear simply made a rough estimate. Based on a simplistic and erroneous assumption, Behre Dolbear calculated backfilling costs of 35.3 cents per ton with total reclamation costs of $95.5 million.

11:23:37 This 95.5 million dollar estimate is nearly twice as high as Glamis's own contemporaneous estimate of $52 million as well as BLM's independent calculation of $47.8 million.

Behre Dolbear also expressly relied on Glamis's own excavation, drilling, and blasting cost figures, but then somehow calculated reclamation costs vastly in excess of Glamis's own contemporaneous calculation. Either of these discrepancies should have led Behre Dolbear to realize that its rough estimate was highly inflated and unreliable and that

it needed to actually spend the time calculating reclamation costs from the available data.

But even without these discrepancies, given that Behre Dolbear has offered no evidence whatsoever supporting its assumptions, there is no reason to credit its rough estimate over Glamis and BLM's contemporaneous estimates or over Norwest's detailed bottom-up calculations.

Yesterday, Glamis argued that the Tribunal should find that it would have cost Glamis 80 to $100 million to comply with the reclamation

11:24:41 regulations relying on a statement found in the EIS. There is, however, no reason for the Tribunal to disregard the evidence that the United States has produced on this point and Glamis's contemporaneous documents in favor of this figure.

The number in the EIS was based on figures supplied by Glamis's own paid consultant, Mr. Smith of Sage Engineering. Mr. Smith did not actually calculate reclamation costs based on any available data for the Imperial Project. He simply made a rough estimate of his own from figures that he'd heard at a conference in Nevada concerning a single mine. And I would invite the Tribunal to read Mr. Smith's letter--it's Navigant's Exhibit 50--in order to assess the quality of Navigant's consultant's guesswork.

Once again, correcting for this single error of backfilling costs in Behre Dolbear's methodology

puts the Imperial Project in the black; and thus, once again, the Tribunal can dispose of Glamis's expropriation claim on the basis of this single issue.

Although these are the three main valuation issues, several other valuation issues follow this

same pattern which Behre Dolbear has made unsupported allegations that contradict Glamis's own contemporaneous documents, as well as the documentary evidence produced by Norwest and Navigant.

For example, Behre Dolbear criticized Norwest's proposed dumping of waste material from the pit crest while simply ignoring the fact that Glamis's own Plan of Operations contemplated precisely such end dumping. Behre Dolbear criticized Norwest's conclusion that long-term settlement of the East Pit would total 4.4 feet, not 56 feet as Glamis erroneously suggested yesterday, but Behre Dolbear simply ignored the evidence Norwest cited to support its conclusion.

Behre Dolbear criticized the various transactions that Navigant used to calculate a transaction multiple of $20.02, but Behre Dolbear itself refused to reveal any of the transactions that it relied on in reaching its transaction multiple of $25.71. The united States and Navigant repeatedly criticized Behre Dolbear for failing to produce its secret database, but Behre Dolbear never produced it

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11:26:47 into evidence, and it is still not in evidence.

Behre Dolbear also discounted its discount rate to account for corporate taxes, but it ignored the voluminous documentary evidence in the record proving that discount rate calculations are inherently after corporate tax. Navigant showed that in every case project owners only have access to the cash flow of the business after corporate taxes have been paid. Producing a discount rate for corporate taxes assumes that the investors' return is on the pre-tax cash flow, which, of course, is never the case.

Yesterday, Glamis claimed that the United States had provided no evidence contradicting the claim that Behre Dolbear's risk buildup method produces a pre-tax discount rate. But that's simply wrong. At the August hearing, in fact, I quoted from one of the many documents in the record contradicting Behre Dolbear's claim. That industry white paper states--I already read it, but let me just read the last line.

"It is crucial that the discount rate derived from the buildup model be applied to the appropriate

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11:27:48 income stream; i.e., after-tax cash flow. By applying a tax adjustment to the discount rate calculated from the buildup model, Behre Dolbear has made an obvious

and crucial error in its valuation."

Yesterday, Glamis also criticized Navigant's use of the Capital Asset Pricing Model in this case claiming that the CAPM is used only to value companies and not individual properties. But again, that's simply wrong. In fact, even Behre Dolbear acknowledges the appropriateness of valuing the Imperial Project by the CAPM. At page A6-4 of its April 2006 report, Behre Dolbear stated that the buildup model was it is preferred method for determining a discount rate for a property like the Imperial Project, but it then stated: "Other methods of developing a discount rate can be used most frequently involving the Capital Asset Pricing Model, which requires an estimate of the corporate cost of capital for the owner or the industry."

I will now spend just a few minutes addressing the Tribunal's question about the relevance of the present value of Glamis's gold mining rights to

11:28:56 its Article 1110 claim. The current value, we submit, is relevant in four respects.

First, this issue evidences certain fundamental errors pervading Behre Dolbear's valuation analysis and provides further reason for the Tribunal to disregard those reports. It was Behre Dolbear, Glamis's own expert, that introduced the issue of the Imperial Project's current value into this arbitration In its initial report, Behre Dolbear argued, without

providing any evidence, that the Imperial Project continues to decrease in value to this day, despite the more than doubling of gold prices. In reaching its conclusion, Behre Dolbear used a 10-year historic gold price, but current mining costs. This mixed method approach appears deliberately designed to produce an artificially low valuation.

The method Behre Dolbear used to determine gold prices in this arbitration clearly contradicts the method the company has used in valuations performed outside this arbitration. That is, in both publicly available recent valuations that Navigant was able to obtain, Behre Dolbear has looked to current

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11:30:05 gold price averages, as well as historic averages, precisely because gold prices have been skyrocketing in recent years.

Similarly, BLM does not simply rely on historic averages when determining valid existing rights. Rather, BLM uses the average of three averages. 36-month historic averages, current month averages, and 36-month futures price averages. Not surprisingly, this approach often leads to a figure very close to the current spot price which Navigant used in its current valuation scenario.

Indeed, in December 2002, the BLM price was 95 percent of the spot price, and in 2006 it was about 91 percent of the spot price.

Glamis itself places even less emphasis on

historic prices than BLM. In an April 2002 letter to the Interior Department, Mr. Jeannes stated that, "A gold company sells its product either at the prevailing spot price or pursuant to a variety of forward sales arrangements, primarily the standard forward sales contract. Development investment decisions by mining companies today are based upon due

consideration of price trends, historical price fluctuations, and the forward sales market."

Later in the letter it says, "The BLM pricing policy would improperly assign great weight to that three-year period, notwithstanding that spot gold prices are currently moving upward, and forward sales contracts are readily available to gold producers at prices which substantially exceed the current spot price and the Comex futures prices."

Mr. McArthur similarly acknowledged that, "An average of $40 to $50 over spot market price is readily achievable over long-term mine lives such as Imperial."

Behre Dolbear's use of 10-year historical averages finds no support from either BLM or Glamis.

Behre Dolbear's cost figures are also erroneous. Although Behre Dolbear failed to state any cost inflation figures in its first report, Navigant was able to determine that Behre Dolbear had used virtually the same published inflation factors that Navigant itself had obtained from the Western Mining

Engineering Cost Index; that is, 26 percent inflation

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for operating costs and 18 percent inflation for capital costs. In its second report, however, Behre Dolbear stated that mining costs had increased 85 percent since 2002. When Mr. Guarnera was asked during cross-examination why Behre Dolbear had introduced no evidence whatsoever supporting its cost assumptions, he stated that everybody in the industry knows this information.

Navigant also pointed out that if Behre Dolbear were correct that costs had increased 85 percent since 2002, the Imperial Project would be worth a negative $119.8 million in 2006, as you can see from the bottom of this slide, even if California reclamation requirements had never been promulgated. And if costs had truly increased 85 percent, then Behre Dolbear should have valued the Imperial Project in 2006--sorry, the earlier one was 2002, and 2006 at a negative $242.5 million and not a negative $23.8 million.

The current valuation scenario serves to prove Behre Dolbear's tendency to invent numbers to arrive at predetermined outcome rather than to conduct

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a supportable and independent valuation.

The second reason why the current valuation scenario is relevant is because the California reclamation requirements have never been applied to Glamis, and thus the alleged date of expropriation, December 12, 2002, is artificial. To prove an indirect expropriation, the Claimant must prove that the challenged Government measures affected a full or very nearly full deprivation of the property and that the measures were permanent and not merely ephemeral. Even if the California reclamation requirements actually destroyed the value of Glamis's investment in 2002, Glamis still could not prove an expropriation as the value of the Imperial Project would have rebounded with doubling of gold prices.

Glamis's January 9, 2003 valuation memo shows how even small increases in gold prices can significantly increase the Imperial Project's net present value. At $300, as you can see, the Project was deemed worthless. At $325, the project was valued at $9.1 million. At 350, the Project was valued at $22.9 million, and at 375, $36.8 million.

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11:34:27 Now, here is a chart showing the Imperial Project's valuation trajectory, based on Glamis's contemporaneous sensitivity analysis. As you can see, given Glamis's own projections for a two pit mine, Navigant's 159 million-dollar valuation for a three pit mine based on a gold price of $635 per ounce is conservative. In fact, now that gold is trading above

$715 per ounce, the value of the Imperial Project would be off the chart.

It's important for this Tribunal, like other arbitral tribunals, to consider current market conditions to determine whether the challenged Government measures actually caused a permanent deprivation of the Claimant's investment. The LG&E Tribunal, for instance, stated, "In the circumstances of this case, although the State adopted severe measures that had a certain impact on Claimant's investment, especially regarding the earnings that Claimants expected, such measures did not deprive the investors of the right to enjoy their investment. As in Pope & Talbot, the true interests at stake here are the investment's asset base, the value of which has

11:35:33 rebounded since the economic crisis of December 2001 and December 2002."

The S.D. Myers NAFTA Chapter Eleven Tribunal held similarly including, "In this case the challenged Government measures were designed to and did curb Claimant's initiative, but only for a time. Claimant realized no benefit--sorry, Canada realized no benefit from the measure. The evidence does not support a transfer of property or benefit directly to others, and opportunity was delayed."

Glamis has staked its case on the proposition that the alleged wrong done to it destroyed the value of its investment, but that proposition is wrong, and

thus its current expropriation claim fails.

The third reason for the relevance of the current valuation scenario is that it shows the practical application of the Imperial Project's Real Option Value. That is, even if the California reclamation requirements rendered the Project economically infeasible in December 2002, there still could be no expropriation as the Project could become readily economical with small changes in gold prices,

11:36:45 improvements in technology, and so forth.

Although Behre Dolbear has denigrated the applicability of real options to gold mining claims, Behre Dolbear has never addressed the documentary evidence produced by Navigant demonstrating the importance of real options. This concept is not something that Navigant invented for this arbitration. In fact, the developments of options valuations, Black and Sholz were awarded the Nobel prize in economics for their work, and their methods have been specifically applied to gold mining claims for more than 25 years.

It's not a question then of Behre Dolbear's word against Navigant's. It's a question of Behre Dolbear's unsupported arguments against Navigant's fully documented conclusions.

We invite the Tribunal to review the relevant articles introduced into evidence as Navigant Exhibits 15 to 16 and 171 to 173 which show the importance of

Real Options Value to mining claims such as the Imperial Project.

The final reason for the relevance of the

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current valuation scenario relates to Glamis's Article 1105 claim. That is, the evidence showing that the Imperial Project retains significant economic value is relevant not only to the Article 1110 claim, it's relevant to Glamis's minimum standard of treatment.

The Article 1105 issue is if the California reclamation requirements actually were applied to the Imperial Project, what damage would Glamis suffer? The answer is none. The Imperial Project today, even with complete backfilling, is worth more than it ever was, even without complete backfilling. Simply put, Glamis has suffered zero damage. Any award to Glamis of any kind would therefore constitute a windfall that no other operator in California would obtain, and that would hardly be fair or equitable.

Indeed, in the few short weeks since the close of the August hearing, the price of gold has risen another $60 per ounce to over $717. With an estimated 1.43 million ounces of gold for the Imperial Project, that translates to $85 million in additional revenue just since August 17. The total cost of complying with California's reclamation requirements

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11:38:54 1 is only $55.4 million, and that expense would not be
2 incurred until a dozen years into the Project.
3 Glamis's own CEO correctly predicted that gold would
4 exceed $700 an ounce in 2007, and anticipates further
5 gains to over $1,000 per ounce by 2009.
6 Mr. President and Members of the Tribunal,
7 there are three facts that we consider beyond dispute.
8 First, Glamis continues to hold its mining claims. It
9 stills pays annual fees to the U.S. Government to
10 maintain those claims, and it could sell or exploit
11 those claims at any time. In fact, it may be in the
12 process of selling those claims as we speak.
13 Second, Glamis's own contemporaneous document
14 proves that the Imperial Project retained significant
15 value on the alleged date of expropriation.
16 And third, the Imperial Project is worth
17 today more than it ever was. On the basis of the
18 valuation evidence, the Tribunal cannot, we submit,
19 find a violation of Article 1110 or 1105.
20 Thank you.
21 I would now ask the Tribunal to call on
22 Ms. Van Slooten, who will address the second prong of

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11:40:03 1 the Penn Central Case.
2 PRESIDENT YOUNG: Thank you very much.
3 Ms. Van Slooten?
4 MS. VAN SLOOTEN: Thank you. Good morning,
5 Mr. President and Members of the Tribunal.

I will now address the reasonable investment-backed expectations factor.

As we've discussed, only if the economic impact of the measure were significant enough that a measure could be deemed to have taken the property would the Tribunal even consider this factor. If that were the case, and only if that were the case, we agree with the Tribunal's statement that an investor's reasonable investment-backed expectations become relevant and that it is appropriate to examine whether the investor acquired the property in reliance on the nonexistence of the challenged regulation.

In a highly regulated industry, an investor cannot reasonably rely on the nonexistence of a regulation, unless it has received specific assurances from the Government that the regulatory scheme would not be extended in the manner that it was.

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11:40:58 To be clear, this does not mean that because the regulation at issue did not exist at the time that the investor made its investment, that the investor necessarily made its investment in reliance on the nonexistence of the regulation.

As the U.S. Supreme Court has explained in its Concrete Pipe and Products decision, and this is on the slide, those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.

If that were not the case, then the reasonable investment-backed expectations prong would weigh in favor of a finding of expropriation every time a new regulation was created, and that clearly is not correct.

In fact, the converse is true. Investors must expect that Governments may change the regulations. And as the Supreme Court has also recognized in its Connolly decision, our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise

11:42:00 settled expectations.

Nor does the reasonable expectations factor involve consideration whether an investor could have reasonably foreseen the particular facts that gave rise to the regulation. Rather, it asks whether the regulatory climate at the time should have led a reasonable investor to conclude that a State might act to protect certain values in the event that they were discovered to be threatened.

Absent specific assurances, investors can have no reasonable expectation that regulations will not be strengthened. This was recognized by the Tribunal in the Methanex case as well as in several other cases that we have cited at pages 90 to 99 of our Rejoinder.

Indeed, Glamis's own legal expert, Professor Wälde, stated that, "The investor has also to accept a

natural evolution of host State regulation. If no special stabilization guarantee is obtained and possibly even then, he/she is not protected from changes in the host State's law if they express a normal evolution of the law."

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When courts and tribunals find that investors have made their investments on the nonexistence of the regulations, they do so because an investor received a specific assurance that in its case, the regulations would not be changed in that particular manner. But where an investor operates in a highly regulated industry and receives no such assurances, its reasonable expectation must be that the regulations may be expanded.

We have shown in our written submissions and in our--at the August hearing that Glamis received no assurances that the California measures would not be imposed on it. Yet Glamis has persisted in arguing that the California Desert Protection Act's no-buffer zone provision served as a specific assurance, although, in light of its closing argument yesterday, it's no longer clear whether Glamis argues that the no-buffer zone provision provided an assurance that the Federal Government would not deny its Plan of Operations, as it appears now to submit, or whether it provided an assurance that California would not impose its backfilling requirements, as it argued in its

written submissions.

But, in either case, this argument is confused. None of the actions taken by the Federal Government or the State of California were measures that were intended to create a buffer zone or to expand the protected area around the wilderness areas. Yesterday, Glamis accused the United States of erroneously asserting that the wilderness areas in the CDCA were not designated for Native American cultural purposes, but the United States did not so err. The fact of the matter is that protection of Native American cultural resources was not the purpose of the wilderness areas. The presence of Native American cultural values in an area will not necessarily preclude that area from being designated as a wilderness area. As we have noted, provisions for access may be made for Native Americans for traditional cultural and religious purposes. In the case of the CDCA, in fact, they were.

But this was not the impetus for the wilderness designation. I will not belabor this point as we've explained it in length in our written

submissions and at the August hearing, but the essential point is that none of the measures was enacted to expand the wilderness area. That is not

the purpose of the Federal or the State measures. Consequently, Glamis's argument regarding the buffer zone language is irrelevant.

Glamis also cites as a specific assurance an alleged statement made in July 1998 by BLM's California State Director Ed Hastey that was made to Kevin McArthur to the effect that the Imperial Project would eventually be approved. There are two problems with this argument.

First, what is relevant is whether Glamis had reasonable investment-backed expectations. By the time Mr. Hastey made this alleged statement in July 1998, Glamis had already made substantially all of its investments in the Imperial Project. Because the statement occurred after Glamis made its investments, it could not have shaped Glamis's expectations with respect to its investment.

Second, a statement made by a BLM official regarding Federal plan approval could not confirm, to

use Glamis's language, Glamis's expectations with respect to the State of California's legislative and regulatory decisions.

There are two other statements contained in the CDCA Plan and the preamble to the BLM's 3809 regulations, respectively, that Glamis also seems to rely on as evidence that it received specific assurances. And again, because Glamis has conflated its reasonable expectations argument with respect to

the Federal and the California measures, it's unclear whether Glamis is arguing that these statements constitute assurances with respect to the State or the Federal Government actions or both.

But, in any event, neither statement could have given Glamis any expectation that California would not take the action that it did.

First, the 1980 CDCA Plan provides that, "Mitigation subject to technical and economic feasibility will be required." The CDCA Plan also expressly states that SMARA applies on public lands, including the CDCA and that mining operators will have to meet the more stringent of the Federal or State

11:47:16 requirements.

So, even assuming arguendo that Glamis could not comply with the Federal measures because of technical or economic feasibility--infeasibility, rather--that would still not give rise to any reasonable investment-backed expectation on Glamis's part that California would not adopt the measures at issue. This is because, as we've noted in August, Glamis's argument conflates regulations and mitigation measures. Mitigation measures are site-specific measures imposed on a particular project during the mine permitting process by the BLM and the local lead agencies in California. Regulations, by contrast, are statewide standards, such as the SMGB regulation and S.B. 22, and they apply generally.

If regulations were the same as mitigation measures, under Glamis's argument those regulations could only be enforced when it was technically or economically feasible to do so, but there can be no argument that mining operators are required to comply with all State and Federal regulations. If they cannot do so, they cannot mine.

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11:48:20 Suppose, for example, that a mining operator could not mine at a profit if it had to comply with, for example, the Clean Water Act. The fact that a particular mining operator under a particular Plan of Operations could not afford to comply with this regulation does not transform that regulation into a mitigation measure that was not technically or economically feasible. It's simply a regulation. And compliance is mandatory for all operators, regardless of cost.

This is also clearly illustrated by the voter initiative in Montana imposing a ban on the use of cyanide in mining. As a practical matter, cyanide is currently the only technically or economically feasible way to extract this low-grade gold ore.

Nevertheless, as we have noted, the BLM has expressly concluded that the Montana cyanide ban is an environmental regulation that applies on Federal lands; thus, mining operators in the State must comply with it regardless of the cost.

Both the SMGB regulation and S.B. 22 are

regulations that impose reclamation requirements.

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They're not mitigation measures. Consequently, the language in the CDCA plan could not have given rise to any reasonable expectation on Glamis's part that California would not adopt these measure, even assuming for the case of argument that those reclamation measures rendered its Project technically or economically infeasible.

Second, Glamis relies on language not in the regulations themselves, but in responses to comments made to the 3809 regulations apparently to support its argument that it had a reasonable expectation that California would not enact the backfilling requirements. In those explanatory comments in the regulations' preamble, the BLM wrote, "If upon compliance with the National Historic Preservation Act, the cultural resources cannot be salvaged or damage to them mitigated, the plan must be approved.

As an initial matter, I note that this language is not in the regulations themselves, and, therefore, it does not have any independent legal effect, but may only be used to provide interpretive guidance.

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But moreover, as is the case with the

language in the CDCA Plan, nothing in the language of the preamble to the 3809 regulations precludes States from imposing reclamation regulations on mining operators to protect cultural resources. The case of La Fevre v. Environmental Quality Council before the Supreme Court of Wyoming illustrates this point. And that case is available at 735 P.2d 428.

In that case the Wyoming Environmental Quality Council denied a permit to operate a pumice mine on BLM lands on the ground that there was no evidence that the area could be, "reclaimed to its archeological, historic, wildlife and recreational use."

The Court found that the State agency had acted properly by taking into consideration the effects of the proposed mine on the archeological and other use of the land, citing Section 3809.3-1 of the BLM's regulations. Any restriction on BLM's authority was simply irrelevant to the State's authority to deny a permit to protect cultural resources. And here, of course, California did not deny a Reclamation Plan on

11:51:33 these grounds. It merely enacted a measure, S.B. 22, that required a certain level of reclamation to protect those resources. Glamis could have had no reasonable expectation that it would not take this action.

As the Federal Circuit in Commonwealth Edison v. United States explained, the reasonable

expectations test does not require that the law existing at the time of the processing would impose liability or that liability would be imposed only with minor changes to then-existing law. The critical question is whether extension of existing law could be foreseen as reasonably possible. Given the broad scope of the regulation in that case, which I believe was CERCLA, and the common law, we have no doubt that such an extension was easily foreseen, not necessarily as a certainty, but as a reasonable possibility.

Here, we have described in our written and oral submissions that Glamis had ample notice that the California measures in question were a reasonable possibility. SMARA had long provided that lands be restored to a usable condition and that backfilling

might be required to achieve this.

The SMGB regulation merely required backfilling to ensure that SMARA's objectives were met.

And the Sacred Sites Act provided that action could be taken by the State to protect Native American sacred sites from irreparable damage. S.B. 22 merely ensured that damage to Native American sites would be minimized by requiring reclamation measures for hardrock mining in the vicinity of such sites.

Glamis does not contest that mining is a heavily regulated industry. Nor has it plausibly argued that it received any assurances that California

would freeze the regulatory scheme in place at the time it made the investments. As such, the California measures could not have frustrated a reasonable investor's expectations.

I ask that you now call on Ms. Menaker, who will address the character of the California measures.

PRESIDENT YOUNG: Thank you.

MS. MENAKER: Thank you, Mr. President and Members of the Tribunal.

11:53:39 I will now discuss the last of the three factors that tribunals consider when assessing an indirect expropriation claim, which is the character of the measures.

The Tribunal identified in subpart five of its first question the following proposition. It stated--it questioned whether the parties agreed with the proposition that its task, when assessing the character factor, was to apply a, "balancing test by assessing whether the measures are reasonable with respect to their goals, the deprivation of economic rights, and the legitimate expectations of those who suffered such deprivation, and paying attention to the right of Governments to regulate in the public interest, but with the general prohibition of Governments to discriminate or act arbitrarily."

The United States does not agree that this is a proper assessment of the character of the measure.

In our view, the objective of the inquiry as

to the character of the measure is to determine whether the measure is regulatory in nature, in which case the character factor weighs against a finding of

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expropriation, or whether the character of the measure is more akin to a physical invasion of property, in which case the factor weighs in favor of an expropriation finding.

Now, that is not to say that a regulation can never be deemed expropriatory. Regulations can be, but ordinarily they are not. As the S.D. Myers NAFTA Chapter Eleven Tribunal concluded, and I quote, "The general body of precedent usually does not treat regulatory action as amounting to expropriation."

And the U.S. Model BIT also provides, and I quote, "Except in rare circumstances, nondiscriminatory regulatory actions by a party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."

Thus, if the measure is found to be regulatory in nature, then this one factor weighs against a finding of expropriation. The issues of discrimination or arbitrariness may be relevant, but only in order to assist the Tribunal in determining

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11:55:51 whether the measure is or is not regulatory in nature. That is, if a measure is found to be discriminatory and arbitrary, that may mean that the measure is more likely to be a disguised expropriation and not a bona fide regulation. But that's not the case here.

As we explained at length in our written submissions and at the August hearing, both of the California measures are nondiscriminatory regulations of general application. Glamis yesterday argued that because its project was the impetus for the measures, that somehow proved that they were discriminatory. But as we have explained, legislatures typically act in response to specific problems that arise as they arise, and that this does not make legislation or regulations discriminatory.

The very fact that the California measures apply and in the case of the SMGB regulation have been applied to persons other than Glamis goes very far in proving that the measures are, indeed, regulatory in nature. In this regard, the United States disagrees with the way in which the Tribunal has formulated in its question the inquiry into the character of the

11:57:01 measure. Assessing the character of the measure is not a matter of balancing the Government's right to regulate against any so-called prohibition on discriminatory or arbitrary conduct. The inquiry, rather, is to determine whether the measure is

regulatory.

In addition, the United States disagrees that there is any so-called prohibition against discriminatory or arbitrary conduct in international law that is relevant to this particular inquiry. Domestic or international law may, under certain circumstances, condemn such behavior, but that is misplaced in an expropriation analysis.

And the Fireman's Fund NAFTA Chapter Eleven case is instructive in this regard. That Tribunal noted that Article 1110 sets forth conditions for a lawful expropriation. Expropriations are permissible if done in a nondiscriminatory manner in accordance with Article 1105 and upon payment of compensation.

The lack of any one of those conditions may render an expropriation unlawful, but it cannot prove the fact that an expropriation has occurred.

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11:58:05 As the Fireman's Fund's Tribunal noted, and I quote, "A purely discriminatory nationalization is illegal and wrongful under international law; however, that presupposes the presence of a nationalization or an expropriation. In the present case, the question is whether there was an expropriation. It cannot be argued that because there is discrimination there is expropriation."

Indeed, in the Fireman's Fund's case, the Tribunal found that it was a, "clear case of discriminatory treatment of a foreign investor," yet

it denied Claimant's expropriation claim.

The same is true for arbitrariness. As we have noted, the United States Supreme Court has expressly rejected an approach where the effectiveness or lack of arbitrariness of a measure is assessed in evaluating a claim for expropriation. In the Lingle v. Chevron case, the Court stated, and I quote, "Whether a regulation is effective in achieving some legitimate public purpose is not a valid method of discerning whether private property has been taken."

So, for this reason, the United States

11:59:14 disagrees that as part of its expropriation analysis the Tribunal ought to engage in a quote-unquote balancing test by assessing whether the measures reasonable with respect to their goals.

It may be the case that if a measure is not reasonable in achieving its goals, some legal systems may provide a remedy, but that does not make the measure more or less likely to have amounted to an expropriation.

And again, the Fireman's Fund's Tribunal recognized as much in addressing similar arguments that were made in that case, and this is a rather long quote, so I've placed it there on the screen. There the Tribunal stated the following: "FFIC," which is the Claimant, Fireman's Fund's Insurance Company, "further argues that international tribunals have recognized that in expropriation cases it is

significant whether the Government's acts or omissions are unfair or inequitable. Fireman's Fund makes that proposition by relying on paragraph (C) of Article 1110(1) of the NAFTA which prohibits expropriation except, 'in accordance with due process of law and

Article 1105(1).'" Article 1105(1) concerns minimum standard of treatment. Fireman's Fund's argument must fail since, as mentioned before, it must be determined first whether an expropriation has occurred, while paragraphs (a) through (d) specify the parameters as to when a State would not be liable under Article 1110. Moreover, Fireman's Fund's argument would conflate an Article 1110 claim with an Article 1105 claim. And we submit engaging in the type of analysis that I just discussed would also conflate an Article 1105 claim with an Article 1110 claim.

In sum, there can only be an expropriation if the Claimant shows that a Government measure has denied it all or substantially all economic value of its property. Generally speaking, regulations are not expropriatory, although they can be. When dealing with a claim of indirect expropriation and assuming that there has been a finding that a measure does indeed affect a property right held by the Claimant, the principal determination is the economic impact of the measure on the Claimant. If the economic impact is not severe enough, the property cannot have--cannot

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12:01:32 1 be said to have been taken, and the expropriation
2 claim cannot succeed.
3 The purpose of looking at factors such as the
4 investors' reasonable investment-backed expectations
5 and the character of the measure is to ascertain
6 whether something has been taken from the investor.
7 In analyzing the character of the action, the question
8 is whether the measure is more akin to a physical
9 taking and, therefore, expropriatory or more akin to a
10 regulation and, therefore, presumptively not
11 expropriatory.
12 Whether the measure is arbitrary or
13 discriminatory may assist in determining whether the
14 measure is truly regulatory in nature, but it is of no
15 independent relevance for an expropriation analysis.
16 Discriminatory, arbitrary, or just plain bad
17 legislation may give rise to a cause of action,
18 depending on the forum and the governing law, but such
19 a finding cannot make an otherwise nonexpropriatory
20 measure that does not deprive the property owner of
21 virtually all economic use of its property
22 expropriatory.

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12:02:30 1 With that, the United States concludes its
2 closing arguments on Glamis's expropriation claim, and
3 we'd suggest that we now begin our closing arguments

with respect to Glamis's minimum standard of treatment claim.

PRESIDENT YOUNG: Thank you. That's fine.

MS. MENAKER: Thank you.

And with respect to Glamis's minimum standard of treatment claim, I will make some introductory remarks, and then I'll ask the Tribunal to call on Mr. Benes, who will deal with our defense to the claim that we have violated the minimum standard of treatment with respect to the Federal measures, and then I will come back and address our defenses to Glamis's claim that the California measures violated the minimum standard of treatment.

For the first time yesterday, we heard Glamis assert that, "Claimant does not agree 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

12:03:40 accordance with international law."

This is both surprising given that Claimant had not taken this position before, and is also wrong.

Glamis's new position is, indeed, surprising given that in its Reply at paragraph 204 it stated, and I quote, "Glamis and Respondent agree that the standard of treatment for foreign investors under Article 1105(1) is defined by customary international law."

Glamis's new position is also wrong as it expressly contravenes the authoritative interpretation that the NAFTA parties themselves have given to Article 1105 through their cabinet level Free Trade Commission. Article 1131(2) of the NAFTA provides the governing law for these proceedings. It states, and I quote, "An interpretation by the Commission of a provision of this agreement shall be binding on a tribunal established under this section." And as you know, on July 31, 2001, the Free Trade Commission issued an interpretation of Article 1105(1), and I've put it on the screen for your convenience. That interpretation provides, Article 1105(1) prescribes

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the customary international law minimum standard of treatment to be afforded to investments of investors of another party. The concepts of fair and equitable treatment and full protection and security do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment."

This could not be clearer. The requirement under Article 1105(1) is to provide the customary international law minimum standard of treatment. An investor is barred from claiming that the fair and equitable treatment language in Article 1105(1) entitles it to treatment that is different from or greater than that which is required by customary international law.

For Glamis to now suggest that the obligation to provide fair and equitable treatment in Article 1105(1) is not restricted by customary international law flies in the face of the express terms of the Treaty. It is contrary to the express consent of the NAFTA parties, and the Tribunal would exceed its authority were it to interpret Article 1105(1) in the

12:05:53 manner now suggested by Glamis.

But perhaps it's not surprising that Glamis has made this argument now because it has come nowhere close to proving the existence of a rule of customary international law that has been breached by the United States in this case. Instead, it has chosen to rely on stray phrases from various arbitral decisions, despite the fact that first, many of those tribunals were not interpreting an obligation like Article 1105 that requires the customary international law minimum standard of treatment; and, second, the facts of cases before those tribunals bear no resemblance to those present here.

Yesterday, Glamis asserted that, and I quote, "The fair and equitable treatment standard under Article 1105 is not less protective than the treatment required under most similar investment treaties." And that "BIT jurisprudence has converged with customary international law in this area," and that the United States has "no basis to argue that the 1105 standard is different and somehow less protective."

Glamis is correct when notes that the United

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States has consistently maintained that, "From its first use in investment treaties"--investment agreements, excuse me--"fair and equitable treatment was no more than a shorthand reference to elements of the developed body of customary international law and that it was, in this sense, that the United States incorporated fair and equitable treatment into its various bilateral investment treaties."

But to the extent that tribunals interpreting provisions in U.S. BITs that provide for fair and equitable treatment have interpreted that provision as being something other than a shorthand reference to customary international law, in other words, to the extent they have interpreted the provision as what we call an autonomous standard, then those tribunals are not interpreting the provision 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.

In looking at the decisions that have been issued, it is clear that some tribunals have

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interpreted the fair and equitable standard of

treatment as an autonomous standard that is not tied to the minimum standard of treatment under customary international law. Those decisions thus cannot guide this Tribunal's interpretation of Article 1105, given the Free Trade Commission's specific determination that NAFTA Article 1105, "prescribes the customary international law minimum standard of treatment to be afforded to investments of investors of another party."

Some arbitral tribunals, in fact, have expressly recognized that the NAFTA provides a different standard of treatment from that found in other investment treaties. The Saluka Tribunal that Glamis mentioned yesterday, for instance, sharply distinguished between the "customary and treaty standards of fair and equitable treatment." That Tribunal concluded, and I quote again, "The interpretation of the fair and equitable treatment provision at issue does not therefore share the difficulties that may arise under treaties such as the NAFTA which expressly tie the fair and equitable

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12:09:00 treatment standard to the customary minimum standard."

Here, the fair and equitable treatment standard is tied to the customary international law standard, and Glamis has failed to prove that any rule of customary international law has been breached. Although Glamis appears to accept that rules of customary international law are formed through the

general and consistent practice of States acting out of a sense of legal obligation, it fails to recognize the necessary corollary of this rule, which is that proof of consistent State practice arising out of a sense of legal obligation is sine qua non of any rule of customary international law.

Glamis rests its entire Article 1105 argument on a handful of arbitral decisions that have been rendered in the past few years applying a fair and equitable treatment standard that is often different from that which is contained in Article 1105 of the NAFTA. In addition to being non-precedential, the cases cited by Glamis for the most part do not even purport to base their findings on State practice, let alone the consistent practice of States that is

12:10:06 required to prove a rule of customary international law.

In its opening argument last month, Glamis characterized the United States's view of its obligations under NAFTA Article 1105 as idiosyncratic because the United States insists that the Article must be interpreted differently from the autonomous fair and equitable treatment obligations contained in numerous other bilateral investment treaties. But the NAFTA parties agreed to extend to foreign investments in their territory only the customary international law minimum standard of treatment, including fair and equitable treatment and full protection and security.

By insisting that Glamis demonstrate that the United States violated a norm of customary international law, the United States is not attempting to, "carve out a special place for itself that is unique among States." To the contrary, the United States submits that Glamis must demonstrate the violation of a rule or norm of conduct at international law which all States would recognize as binding and follow out of a sense of legal obligation.

12:11:08 As Professor Roth explained, the minimum standard is based on the, "common standard of conduct," observed by States. As such, any conduct which violates Article 1105 must be recognized universally as a violation of international law. The standard the United States asks this Tribunal to apply is thus the opposition of idiosyncratic.

Claimant invites this Tribunal to ignore the express stands of the Treaty which obligate it to provide--to interpret the fair and equitable treatment standard as a reference to the customary international law minimum standard of treatment, and thus incur the risk of exceeding its authority. It is Glamis that bears the burden of proving the existence of a rule of customary international law that has allegedly been breached by the United States, and Glamis bears the burden of proving that breach as well, and it has failed on both counts.

I now ask that you now call on Mr. Benes, who

will address Glamis's Article 1105 claim as it relates to Federal measures and then, as I mentioned, I will return and address that claim as it relates to the

12:12:10 California measures.

PRESIDENT YOUNG: Thank you Ms. Menaker.

Mr. Benes.

MR. BENES: Mr. President, Members of the Tribunal, I will discuss Glamis's 1105 claim with respect to the Federal Government actions as Ms. Menaker mentioned.

Glamis complains that the Government's processing of its Plan of Operations was arbitrary and frustrated its expectations. It primarily points to the fact that other projects in the CDCA were approved while its Imperial Project plan was temporarily denied. And Glamis argues that the 1999 M-Opinion contradicted well settled law.

As we discussed in August, the Imperial Project was unique because of the four factors discussed at length during that hearing, and those are the density of the archeological resources, the degree of Native American concern, the convergence between those expressions of concern and the archeological resources, and the fact that the Project was to be located in an area that had not been subject to any

12:13:11 1 extensive previous mining activities or modern
2 development.
3 And we also explained that by convergence of
4 the archeological and Native American concerns at the
5 Imperial Project site, we meant that the archeological
6 evidence indicated extensive past ceremonial use and
7 that the concerns expressed by the Quechan related
8 largely to the importance of the Imperial Project area
9 as an area for ceremonial and religious uses.
10 I have reproduced the table that we discussed
11 in August, with one modification. I've reorganized
12 the mines in the order of approval date that either by
13 the approval from the final environmental impact
14 statement or the Record of Decision to give the
15 Tribunal a better sense of the chronology of how these
16 mines were approved in relation to the treatment of
17 the Glamis's Imperial Project.
18 We notice that the Project's initially
19 approved before 1994, which is when Glamis submitted
20 its Plan of Operation for the Picacho Mine, the
21 Mesquite Mine, the American Girl Mine, the Castle
22 Mountain Mine, and the Rand Mine.

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12:14:19 1 As we have previously demonstrated when these
2 undertakings were approved, the Government either was
3 not aware of any specific current Native American
4 concerns about the impacts of those mines on
5 archeological or cultural resources or, as was the

case with the Castle Mountain Mine, those concerns did not converge with the archeological evidence at the site.

Now, Glamis has emphasized repeatedly that the American Girl Mine and the Picacho Mines were in areas previously designated by BLM as areas of very high Native American concern and high Native American concern respectively. And while these two mines are located in such areas, there was no specific statements of concern voiced about the impacts of those mines when those projects were approved or during their operation, as confirmed by Mr. Purvance who worked at both mines and testified at the hearing last month that he was unaware of any concerns expressed by Native Americans.

Now, yesterday Glamis also suggested it was inaccurate for the United States to state that when

12:15:22 the Mesquite Mine was approved, there were no known Native American concerns, but then Glamis immediately began discussing the comments submitted by the Quechan regarding the Mesquite Mine expansion approved in 2002. This is a point we had clarified for the Tribunal in August, when we stated that there were no known Native American concerns about the Mesquite project when it was approved, we were referring to the initial approval in 1985. We were not referring to the Mesquite expansion approved 17 years later in 2002, and, indeed, it is accurate that when that mine

was initially approved in 1985, there were no known Native American concerns.

Now, yesterday Glamis pointed to the express Native American concerns in three projects: The Castle Mountain Mine, the Mesquite Landfill, and the Mesquite Mine expansion, to challenge our characterization of the other CDCA projects as either not evidencing the same degree of Native American concern or not evidencing a convergence between the specific concerns expressed in the archeological evidence.

But again, the concerns expressed about those projects were not of the same magnitude or character as the concerns expressed about the Imperial Project, nor did they demonstrate the convergence between the concerns expressed and the archeological evidence.

Now, I would also note that Glamis did not take any specific issue with the remainder of our classifications of these mines illustrated on the chart; that is, the relative density of archeological resources found at the various mines compared to the Imperial Project or the fact that the Imperial Project was the only mine located on a site that had not experienced any previous significant mining activity or modern development.

Now, as we noted previously, the concerns expressed about the Castle Mountain Mine project appeared to be based, at least in part, on a

misunderstanding as to the location of the Project. Yesterday, Glamis challenged this assertion, saying that there was no evidence in the record to support that assertion and relying on a document, a comment letter written by the Fort Mohave Tribe's that is not

in the record.

Now, we requested the Tribunal to disregard that document, as with--we think it's inappropriate to introduce a new document at this late stage, particularly since the arguments that we are talking about here were made in our Memorial and in our Rejoinder and the sources that we relied upon were cited in both of those filings.

But with the instance of this particular document, in any event, the content of that comment letter was part of the record, along with the responses to the comments to that comment letter issued by BLM, and that letter is in the record at 13 F.A. Tab 140, cited in our Rejoinder at page 241. And I've put it up on the screen.

This is from the Castle Mountain Project final Environmental Impact Statement in 1990. The comments there are the transcribed comments of the letter of the Fort Mohave Tribe's. The responses are the response of the BLM.

So, in response to the Fort Mohave Tribe's that, "In light of the sacred nature of the Castle

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12:18:32 1 Peaks, objects of antiquity collected from the Project
2 area may be of religious importance to our Tribe."
3 And BLM responded that, and I quote again,
4 "The proposed action is located in the southern Castle
5 Mountains, not in the Castle Peaks. The Project site
6 is it about seven miles south of the Castle Peaks
7 which are located in the northern New York Mountains,
8 thus no impact to the Castle Peaks area is therefore
9 expected from the proposed action."
10 Now, Glamis also argues that the Fort Mohave
11 Tribe's expressed concerns about the effect of the
12 Castle Mountain project on particular important view
13 sheds to the Tribe, and implies that these concerns
14 were treated differently than the concerns for views
15 of Picacho Peak and Indian Pass as expressed by
16 Quechan at the Imperial Project site. But BLM did
17 consider this concern that the Fort Mohave Tribe had
18 expressed about the views and noted, and I quote
19 again, "The location of the Project in Lanfair Valley
20 is such that views from the east and north from U.S.
21 95 in Piute Valley would be interrupted by the
22 topography of the southern Castle Mountains as shown

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12:19:35 1 in the Draft EIS/EIR, figure 5.8.1, visual analysis
2 viewpoints. No visual impact would therefore occur
3 from the eastern perspective in Piute Valley,

including views from along U.S. 95." In other words, it appeared that some of the comments were based on a misunderstanding about the location of the mine or the impacts of the mine or a misunderstanding of the impact of the mine on the views that they had said were important.

Now, when we turn to look at the Mesquite Landfill, we see that the record simply doesn't bear out Glamis's argument that the Project raised concerns like those raised at the Imperial Project. Glamis yesterday noted that after the Record of Decision for the Mesquite Landfill was issued in 1996, the Quechan wrote a protest letter challenging that decision and expressing concern about the archeological and cultural resources there. That's accurate. But as we noted, the concerns expressed by the Tribe in that protest letter were focused primarily on the possibility of a past settlement in the area, and were not based on the Tribe's assertions of any known

12:20:43 cultural or religious use of the area by the Quechan as were their concerns with the Imperial Project.

In addition, as we noted, BLM concluded that the archeological evidence did not evidence any past use of the area as a settlement because of the great distance necessary to obtain drinking water and the relative paucity of cleared circles, rock rings, finished tools, or other artifacts that would indicate permanent settlement. Thus, the BLM in reliance on

their archeologist, went with the conclusion that it was evidence of only temporary habitation.

I would also note that in the conclusion of their protest letter, the Quechan stated that they wished to work with BLM to preserve and study this ancient settlement, and the final decision that denied the protest noted that there would be further consultation to define the role of the Tribal representatives could play in the cultural resources plan where they may have an opportunity to do what they had requested there.

Now, this evidence that I'm referring to--I haven't put up the documents, but it's from the

12:21:47 Quechan protest letter and from subsequent intern a document reflecting internal consideration of that letter by BLM and of the decision denying the protest. We discussed and cited these documents at page 239 of our Rejoinder and the relevant documents are 13 F.A. Tab 119, which is the Quechan protest letter; 13 F.A. Tab 120, which is the decision denying the protest; and 13 F.A. Tab 148, which is the internal BLM analysis of the points raised in that protest letter.

Now, this is in stark contrast to the voluminous evidence demonstrating the Imperial Project's ceremonial use and the fact that that evidence at the Imperial Project was consistent with the Quechan stated concerns for the area as an area important for cultural, ceremonial, and religious

uses.

And it's also another distinguishing factor between the Quechan's concerns as reflected there between the Imperial Project area and the Mesquite Landfill, at least as reflected in that protest letter is that in the Imperial Project area, the Tribe just wasn't just expressing concern about preserving

12:23:02 archeological resources or just about the historic value of the resources there, but their concerns were fueled by several additional factors, and these additional factors are the ones that made the--contribute to making the Imperial Project uniquely important to the Quechan. The Baksh report identified these factors, and we could put up that slide, and this is from the summary of the Baksh report. This is just a few quotes from the summary section of that report. First quote: "A major explanation discussed by the Quechan that accounts for the extreme importance they attribute to the cultural resources in the project area is related to the trail system. That is the Trail of Dreams that we discussed, their use of it for train travel and spiritual uses."

Next, disruption of the current views of the skyline from the Running Man area would prevent any future religious use of this site which from the Tribe's perspective would be detrimental to their religious beliefs and practices."

Another concern, another principal concern

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offered by some Quechan tribal members is that the project vicinity is a "strong area and likely the final resting place for their ancestors."

And a final major important reason that the Quechan are opposed to disturbance of the project area is that it represents a critical learning and teaching center, and it went on to describe this in more detail. The Project area was defined as one of four key teaching areas where religious leaders and others can study, learn, and subsequently teach the younger generation aspects of religion and history that are critical for cultural survival.

And as Dr. Cleland testified, in his 30 years of experience in the California Desert, in his career and in the projects he had worked on, this was the highest level of concern ever expressed by Native Americans for a location and for the impacts of a project. Notice he's referring to those concerns expressed by the Quechan.

Now, Dr. Sebastian's testimony that the cultural resources in the Imperial Project area were identical to those found in other project areas is

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simply not borne out by the evidence. Most

importantly, Dr. Sebastian has conceded that looking solely at the archeological resources and factors such as the NRHP eligibility of those resources gives an incomplete picture of the significance of the cultural resources because it ignores, "the qualitative importance of places that Native Americans consider to be of cultural and religious significance," and yet Dr. Sebastian makes numerous statements about the relative importance of various cultural resources in areas including asserting that the Quechan expressed concern only for their traditional cultural territory and never specifically for the Imperial Project area. But, unlike individuals and professional archeologists such as Dr. Cleland, Dr. Baksh, Mr. J. von Werlhof, who worked directly on review of the Imperial Project site and had decades of experience in the California Desert in dealing with the Quechan and the other Tribes there, Dr. Sebastian, to our knowledge, has never even spoken to the Quechan or addressed with them their concerns about the Imperial Project area versus the other areas, so she would be in no position

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12:26:18 to assess the importance of the various resources to the Tribe.

Now, these unique characteristics of the Imperial Project that led the BLM to seek clarification regarding its legal obligations regarding the decision-making parameters and legal responsibilities that it had when faced with the

situation where there was an irreconcilable conflict between the development of a particular mine and Native American cultural and religious values in that area, and we had noted previously that this was an issue of first impression for the Department.

Now, yesterday Glamis challenged that assertion and argued that the issue had been addressed by a report regarding the implementation of the Executive Order, the Executive Order that required greater Native American consultation issued in 1996, and Glamis indicated that this report showed that this issue had been considered before by BLM.

Now, this is an incorrect interpretation of that report.

First, the report simply considered the

general issue of compliance with the Executive Order, and it makes no reference to the Government's obligations in the CDCA in particular and offers no analysis of the undue impairment standard in FLPMA. Thus, when the DOI was faced with Glamis's Plan of Operations, it was, indeed, the first time that it had to consider the parameters of its authority in the context of a project presenting a specific conflict and applying a specific statutory authority other than just the generally applicable, unnecessary, or undue degradation standard. And, of course, the specific statutory authority here was the impairment standard applicable on the CDCA.

Now, the 1999 M-Opinion, as we discussed, noted that the undue impairment standard, which is contained in Section 601(f) of FLPMA and applicable to undertakings in the CDCA, was a separate standard than the unnecessary or undue degradation standard contained in Section 302(b) of FLPMA. It also noted that neither FLPMA nor the 1980 3809 regulations defining the unnecessary or undue degradation standard were intended to equate the unnecessary or undue

12:28:35 degradation standard with the undue impairment standard.

After conducting a thorough legal analysis, the Solicitor determined that a Plan of Operations could be denied under the undue impairment standard if it caused irreparable damages to cultural resources and interfered with the practice of religion, such that it caused undue impairment.

Now, Glamis asks this Tribunal to conclude that the temporary denial of the Imperial Project plan based upon this interpretation of undue impairment was so clearly contrary to established legal authority that it was arbitrary and in violation of Glamis's legitimate expectations. And yet Glamis has not cited any actual legal authority that supports its interpretation of these things, of the undue impairment standard. For example, Glamis stated that BLM had, "chosen to subsume and equate undue impairment with the unnecessary and undue

degradation"--"the unnecessary and undue degradation standard," but it provided absolutely no evidence that policeman had ever done that. It had no citation to

any legal authority that had made that equation that had subsumed it.

And, in fact, the Solicitor's Opinion establishes that the DOI has not before ever equated the two standards, and that Glamis stated that equating the two standards was, "imminently reasonable since they do sound and mean the same thing."

Glamis can't credibly argue that the United States 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 Glamis's own assessment that the two different legal terms in two different positions of a statute sound the same.

Now, Glamis has repeatedly cited the preambular language in the 3809 regulations regarding the undue--the unnecessary or undue degradation standard, and this is the same section that Ms. Van Slooten already discussed, and up on the slide I put the full quote of that language. It says, "In response to comments about whether the Endangered Species Act or NHPA could preclude a mining plan," and

12:30:54 BLM's response was, "If there is an unavoidable conflict with an endangered species habitat, a plan could be rejected based not on a Section 302(b) of the Federal Land Policy and Management Act, but on Section 7 of the Endangered Species Act."

But you will notice that this language specifically references Section 302(b) of FLPMA, which is the provision dealing with unnecessary or undue degradation. It does not mention the undue impairment standard contained in Section 601(f) of FLPMA. It thus provides no support for Glamis's argument that Solicitor Leshy's opinion in 1999 was contrary to established legal authority.

As we also demonstrated during last month's hearing, although the Department later rescinded that 1999 M-Opinion on the grounds that the undue impairment standard should not be applied without first promulgating regulations defining that standard, the 2001 M-Opinion that recommended that rescission specifically addressed the 1980, 3809 regulations and in particular looked at two places in the preamble that specifically mentioned the undue impairment

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12:32:07 standard. If you could put up that slide.

So again, on the slide is the 2001 M-Opinion, and it examines--as we mentioned, Glamis always cites this one part of the preambular language. The 2001 M-Opinion took a look at two different parts of the

preambular language that actually did specifically mention the undue impairment standard, and the conclusion in 2001 was, "The Department thus appears to have intended to apply this generally applicable statutory provision on a case-by-case basis without defining the pertinent terms of the provision."

Thus, both the 1999 M-Opinion issued by Solicitor Leshy and adopted by Secretary Babbitt and the 2001 M-Opinion issued by Solicitor Meyers and adopted by Secretary Norton concluded that the regulatory regime in place since 1980 indicated that the undue impairment standard was to have been applied on a case-by-case basis without further regulatory definition. And Glamis has produced no actual legal authorities that contradicts the interpretation of those--of that preambular language offered by those two M-Opinions.

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12:33:21 Now, although Glamis disagrees with the 1999 M-Opinion that the Department had the authority to deny a Plan of Operations if that plan will irreparably damage cultural resource, as we explained, the only court to have even addressed this issue, the court in the Mineral Policy Center versus Norton, stated that the DOI had the authority and perhaps even the obligation to deny a Plan of Operations if it caused undue degradation, even if that degradation was necessary, meaning that it might have the authority to deny a Plan of Operations even if there was no

economically feasible way to avoid causing the undue degradation.

Now, if the only court have to reviewed the authority under--of the Department to deny a Plan of Operations under FLPMA has concluded that the Department had such authority under the unnecessary or undue degradation standard, then it cannot be deemed unreasonable or arbitrary for the Department to have concluded that it had the authority under the undue impairment standard to deny such a plan as that standard was created to offer more protection to the

12:34:26 resources in the California Desert Conservation Area.

Finally, Glamis focuses on three developments in projects approved in the CDCA that postdate the rescission of the Imperial Project denial and argues that the treatment of these projects evidences arbitrary treatment of the Imperial Project. And these projects that it mentions are the Mesquite Mine expansion, approved in 2002; the North Baja Pipeline, approved in 2002; and the developments at the Mesquite Landfill after 2002.

Now, as I mentioned at the merits hearing, the Mesquite Mine expansion and the North Baja Pipeline, both approved in 2002, postdate when the Department had rescinded the denial of the Imperial Project in the 1999 M-Opinion. Yesterday Glamis argued that the United States had not accurately represented the concerns expressed about the Mesquite

expansion. That is the concerns expressed by the Quechan about the Mesquite Mine expansion.

And again, Glamis relied on a document that, to my knowledge, is not in the record, and we again note our objection to Glamis having introduced that

12:35:35 document at this late date, and would ask the Tribunal not to accept that document. But if the Tribunal does choose to look at that document, it will see that the two concerns that the Quechan expressed about the Project were nothing like those the Quechan expressed regarding the Imperial Project either in the apparent intensity of the concern or in the substance of the concerns they described, and I will leave it to the Tribunal to determine whether or not it will look at that document or, if it does, to make that comparison to the characteristics of the Imperial Project we have already described.

Now, regarding the Mesquite Landfill, as we noted before, that project was approved in 1996, and the litigation that delayed the landfill development was concerned solely with the valuation of the lands that the BLM had exchanged as part of the landfill project. And when that land valuation issue was resolved in 2002, BLM had obtained no new evidence regarding the impacts of the landfill that required revisiting the EIS and, thus, that Environmental Impact Statement was determined to be adequate, and

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12:36:42 1 the development of the landfill proceeded pursuant to
2 the 1996 final environmental impact and Record of
3 Decision.
4 And Glamis's arguments to the contrary on
5 this point to the--Glamis's arguments that the
6 Department had received such evidence are merely
7 speculative and are not borne out by any evidence in
8 the record.
9 Now, when the Department rescind the Imperial
10 Project Record of Decision in 2001, it determined that
11 it would not deny a planning Plan of Operations on the
12 basis of the undue impairment standard until
13 regulations were promulgated to define that standard.
14 Thus, regardless of the impacts to cultural resources
15 that may result from either the North Baja Pipeline
16 project or more directly the Mesquite Mine expansion,
17 the approval of those projects is irrelevant to
18 evaluating the Department's earlier decision to deny
19 the Imperial Project because in that post-2001 time
20 frame, none of the Projects were in jeopardy of being
21 denied on the basis of the undue impairment standard,
22 including the Imperial Project.

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12:37:49 1 So, to illustrate this, after the rescission,
2 the Federal Government has not taken any adverse
3 action against the Imperial Project. Rather, it was

Glamis that elected to abandon the Federal processing of the Imperial Project Plan of Operations. And when comparing the treatment that the Mesquite Mine expansion or the North Baja Pipeline projects received with that that Glamis received in that post-2002 time frame, this becomes more clear.

So, during 2002, Glamis was working directly with high-level BLM officials to finalize the Mineral Report for the Imperial Project. During the course of that process, Glamis had as many as a dozen meetings with Department officials over a four-month period and supplemented those meetings with numerous phone calls.

Ultimately Glamis received a favorable Mineral Report that concluded it had valuable mining claims. Now, the next step in the process would have been to determine how to finalize the Environmental Impact Statement for the Imperial Project, which would include decisions on how to reformulate responses to the hundreds of comments that had been received about

12:38:52 the final environmental impact statement in light of the fact that the undue impairment standard would not be the basis of the denial, and after December 2002, we evaluate the final environmental impact statement would require determining how to respond or treat the California measures that had been passed.

Now, we don't know how that process would have concluded at that time because rather than pursue further processing of its Plan of Operations, Glamis

chose to abandon that process and, instead, filed this arbitration. And despite Glamis's claims in its written submissions that the United States failed or refused to process its Plan of Operations in 2003 and to the present, and despite its continued insistence on this point, as we have shown earlier today, and as the evidence indicates, it is clear that Glamis abandoned any efforts to process that plan after the California measures were adopted because, in the words of Glamis's CEO, Mr. McArthur, it would have been reckless to proceed after January 2003 with the project. And, as Mr. Jeannes acknowledged, he was unaware that they had taken any position as to whether

12:39:58 or not to contact the Department of Interior after they filed their arbitration notice to pursue further processing of the Project.

So, in summary, Glamis's allegations that the Federal Government violated Article 1105 by temporarily denying the Imperial Project while approving other projects and by issuing that denial in contravention of clearly established domestic law lack merit. The evidence before the Federal Government at the time that each respective project was approved indicated that the area of the Imperial Project was of unique importance, and the processing of the Imperial Project Plan of Operations, including the request for a legal opinion in the Solicitor's Offices of legal review was undertaken to deal with the Imperial

Project's unique impacts. And the temporary denial of that project based upon the undue impairment standard did not contravene or contradict any previous legal precedents regarding the Department's authority, and the Federal Government's subsequent approval of other projects after it had rescinded the Record of Decision and opinion on which that denial had been based and

12:41:06 determined that it would not deny projects on the basis of the undue impairment standard until regulations were promulgated cannot render its earlier actions as arbitrary because, in fact, the record reveals that Glamis received treatment that was no less favorable than that received by the operators for the other projects seeking approval after the Imperial Project denial was rescinded. It was Glamis's decision to abandon the processing of its Plan of Operations on account of the adoption of the California measures and nothing that the Federal Government did that accounts for the fact that its Plan of Operations was never approved.

And the United States thus respectfully requests the Tribunal dismiss Glamis's 1105 claims in their entirety.

And with that, I would ask the Tribunal to call on Ms. Menaker to address the 1105 claims regarding the State measures.

MS. MENAKER: Thank you.

Before I begin, if I may just ask Ms. Obadia,

how much time we have remaining.

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SECRETARY OBADIA: You have 30 minutes left.
MS. MENAKER: Okay.
Mr. President, Members of the Tribunal, I will now address the California measures.
Glamis has failed to show that either of these measures breach the United States's obligation to provide its investment with the customary international law minimum standard of treatment. As we discussed, Glamis has failed to identify any rule of customary international law that has been breached by the United States; but, as we have done before, we will address Glamis's Article 1105 claim as it relates to the California measures in connection with its argument that the United States violated an alleged obligation of transparency, an obligation to refrain from arbitrary conduct, and an obligation to refrain from frustrating an investor's legitimate expectations.
To begin, Glamis concedes that both California measures were adopted in a lawful manner. When questioned about this, Glamis claimed that what it meant by saying this was that neither measure was

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procedurally defective, that both were adopted in

accordance with lawful procedures.

So, then, Glamis's so-called transparency argument clearly has no relevance to its challenge to the California measures. There is no dispute that legislative and administrative rule-making procedures in California are transparent, and if Glamis concedes that the legislation and rule making were promulgated in accordance with law, then clearly both measures were adopted in a fully transparent manner.

Glamis's complaints that the measures were arbitrary are equally baseless. In the ELSI case on which Glamis relies, the Court was interpreting an FCN--excuse me--Friendship, Commerce and Navigation Treaty with an explicit provision barring arbitrary conduct that did not contain the qualifying language that's found in Article 1105 or the FTC's interpretation.

The Treaty text in that case was different, and this difference is significant. But in any event, as we noted earlier, the ICJ in the ELSI case defined arbitrary conduct as conduct that is not contrary to

12:44:17 law, but is contrary to the rule of law. And none of the challenged conduct of the present case was contrary to the rule of law.

As I just noted, the SMGB's regulation and Senate Bill 22 were adopted in accordance with legal procedures, and those procedures are among the most transparent worldwide. California afforded all

interested parties, including Glamis, an opportunity to have their views about the measures heard.

We also showed at last month's hearing that each of the measures bears a rational relationship to the problems that it was designed to address. We have also shown that no Government should be held to a standard of perfection and that it is simply not enough for Glamis to complain that the measures did not fully accomplish what they were enacted to do.

Similarly, Glamis has no grounds for complaint that the Government chose to address problems associated with hardrock mining and did not address other problems that may raise similar issues at the same time; that regulations governing different types of projects in addition to mines were not

promulgated cannot render the measures that issue here arbitrary; that nonmetallic mines were not regulated because they were perceived to present different and less immediate problems cannot render the measures arbitrary.

Were this not the case, Governments would grind to a halt and no regulations would ever be adopted. 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.

We showed that the SMGB's regulation addressed the problems posed by open-pit metallic mining and is not arbitrary. Glamis argued that the regulation is arbitrary because it applies to metallic and not to nonmetallic mines, but we, along with Dr Parrish addressed at length in both our written and oral submissions why the Board determined to have the regulation applied to metallic and not nonmetallic

12:46:18 mines, and this decision was eminently reasonable.

Yesterday, Glamis asserted, and I quote, "There is no evidence in the administrative record that shows that the Board actually performed the comparative analysis of the metallic mines and nonmetallic mines," and that there was, "no record to support what it called Dr. Parrish's post hoc rationalization as to why the regulation governed metallic and not nonmetallic mines." But that is simply wrong.

The administrative record for the rule-making absolutely included consideration of whether the regulation should be applied to nonmetallic as well as metallic mines. There were numerous submissions made to the Board addressing the scope of the backfilling regulation and whether it should include and encompass aggregate mines.

During the rule-making process, the significant distinctions between metallic and

nonmetallic mines were highlighted by among other parties the Construction Materials Association of California or CMAC, and I put this on the slide.

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12:47:17 In its December 2002 letter to Dr. Parrish, the CMAC observed that, "As you know, aggregate operations primarily extract and process rock, sand, and gravel products for use in road building and construction. Aggregate operations often, as a secondary activity, recover metallic minerals in their processing operations. By the nature of the deposit, these aggregate operations do not accumulate large quantities of overburden and do not use the heap-leach method to recover metallic minerals."

In a separate December 2002 letter to Dr. Parrish from John Taylor as counsel to Techart Inc., Dr. Taylor stated, and I quote, that "unlike metallic minerals which typically represent only a small fraction of the excavated material, aggregate typically comprises the bulk of material removed from an aggregate mine. Once the aggregate is mined, processed, and sold, backfilling an aggregate mining site to grade is typically not feasible because of the need for substantial importation of fill material."

Similarly, at the April 2003 public hearing on the backfilling regulation, Secretary of Resources

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Mary Nichols stated and, I quote, "We understand the 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."

Further addressing the unique nature of open-pit metallic mining, Secretary Nichols stated, "Not only does it create in the nature of the mining operations the huge cavities, but also it creates large piles of waste that are in very close proximity to those so, in effect, it has a double impact on the environment."

The Chairman of the SMGB Allen Jones similarly observed at the March 2003 public hearing on the proposed rule making that aggregate and metallic mines present very different circumstances, given that excavated material is normally removed from aggregate mine sites while only a very small proportion of excavated material at metallic mine sites is recovered.

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Moreover, as we briefly noted at the August hearing, the Board in the Final Statement of Reasons for the rule-making expressly addressed the potential for aggregate mines to be included within the broad definition of metallic mine under their regulation.

And the Board rejected a commentator's proposal to increase the revenue threshold for qualifying metallic mines from 10 percent to 50 percent. The Board observed that any aggregate mines that might be included within the broad definition of metallic mine under the regulation would be accorded relief by the exception provided in the regulation to the--which doesn't require backfilling when materials are not available on the surface to mine.

Accordingly, the administrative record for the SMGB rule-making includes numerous submissions addressing whether the scope of the backfilling regulation should include aggregate mines. In addition, the Board's inclusion of only metallic mines within the scope of the rule-making was consistent with the SMGB regulatory practice, given that, as Dr. Parrish testified, the Board normally addresses

12:50:27 only those issues that are brought before it, and in this matter the Secretary of Resources had petitioned the Board to consider the particular subject of open-pit metallic mines.

In no way can this decision render the SMGB regulation arbitrary.

Nor has Glamis shown that Senate Bill 22 is arbitrary. At last month's hearing, we demonstrated that the bill was adopted in accordance with applicable law and therefore cannot be said to be contrary to the rule of law. We also showed that the

bill bore a rational relationship to its stated objectives. The clear objective of the legislation as stated in the legislation itself is to, "prevent the imminent destruction of important Native American sacred sites."

The bill accomplishes this end by requiring reclamation measures for open-pit metallic mines.

Yesterday, Glamis argued that the legislation was not rationally related to its goals because cultural resources would be destroyed by mining, and backfilling would not prevent that destruction. But

12:51:26 Glamis simply ignored the evidence in the record which we discussed at length in our pleadings and during last month's hearing, that the existence of archeological features at the Imperial Project site was just one among many reasons why the Quechan Tribe recorded the area to be sacred. Members of the Tribe repeatedly stressed the site's significance as a teaching area in their tradition and emphasized the particular role that its sense of solitude and expansive views played in contributing to its uniqueness.

Although the California Legislature could not prevent the destruction of the archeological evidence which confirmed the area's use for ceremonial purposes, it could and did impose a complete backfilling and regrading requirements to ensure that the proposed 300- to 400-foot stockpiles did not

destroy the area's view sheds or impede the Tribe from using the area to transmit their cultural heritage to future generations.

Clearly, these measures rationally relate to the legislative objective. Without the reclamation

12:52:25 measures in place, operators of open-pit mines like Glamis's proposed Imperial Project could leave massive open pits and large waste piles, as Glamis proposed to do. The documentary record in this proceeding is replete with evidence demonstrating the unique role that landscape and particularly view sheds to certain geologic formations like mountains that have significance in creation stories that are particularly important to Native American spirituality and religious practice.

The fact that Senate Bill 22's reclamation requirements will not prevent destruction of the archeological evidence of an area's historical use for religious purposes does not mean that it was not rationally related to preventing the destruction of sacred sites.

Finally, with Senate Bill 22, the California Legislature balanced the interests of various constituencies and proposed a solution that did not fully satisfy either of them or any of them. The Quechan Tribe did not believe that any measure short of project denial would adequately mitigate the harm

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posed by the Imperial Project. The California Mining Association, on the other hand, argued that the complete backfilling and recontouring requirements imposed would make many projects uneconomical. The Legislature did not accept either of these contentions. As the Methanex Tribunal explained, and I quote, "Decrees and regulations may be the product of compromises and the balancing of competing interests by a variety of political actors."

By passing Senate Bill 22, the California Legislature attempted to reconcile competing interests by addressing the threat to Native American sites in the CDCA while recognizing mining companies' rights to mine there.

Thus, Senate Bill 22 was rationally related to its stated purpose of preventing the imminent destruction of Native American sacred sites.

And finally, I will comment on Glamis's argument that both of the California measures frustrated its reasonable expectations.

The United States has explained in both its written and oral submissions why Claimant's contention

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that the alleged frustration of its expectations cannot give rise to a breach of the customary international law minimum standard of treatment. It's

well recognized that mere breach of contract does not violate the customary international law minimum standard of treatment; and thus, frustration of a lesser form of expectation could not do so. Glamis has failed to offer any response to this observation. Instead, Glamis continues to cite stray language from various arbitral decisions, such as the Tecmed versus Mexico case, as it did yesterday.

The Tecmed Tribunal was interpreting the fair and equitable treatment provision in that Treaty as an autonomous standard that was not expressly tied to the customary international law minimum standard of treatment. That Tribunal, in interpreting that standard, concluded that states may not, and I quote, "affect the basic expectations that were taken into account by the foreign investor," and they must, "act in a consistent manner free from ambiguity and totally transparently in its relations with the foreign investor so that it may know beforehand any and all

12:55:27 regulations and rules that will govern its investments."

In ICSID Annulment Committee in the MTD versus Chile case recently addressed the language used by the Tecmed Tribunal in interpreting the fair and equitable treatment standard. That Annulment Committee noted that the Tecmed language was subjected to strenuous criticisms from Respondent's experts in that case, Mr. Jan Paulsson and Sir Arthur Watts, two

preeminent international lawyers. And the Ad Hoc Committee continued, and I apologize, I thought I had a slide for this, but I don't. It said, "The Committee can appreciate some aspects of these criticisms. For example, the Tecmed Tribunal's apparent reliance on the foreign investor's expectations as the source of the host State's obligations, such as the obligation to compensate for expropriation, is questionable. The obligations of the host State towards foreign investors derived from the terms of the applicable investment Treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate

12:56:30 from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers and if the difference were material, might do so manifestly."

And that is from paragraph 67 of the Ad Hoc Committee's decision in the MTD versus Chile case.

Thus, that Tribunal confirmed that even when interpreting a broader autonomous fair and equitable treatment provision, a claim had to be based on the treaty and could not be based merely on the subjective expectations of an investor.

And similarly, in the Saluka case, which was also relied on by the Claimant yesterday, the Tribunal also in that case was applying an autonomous fair and equitable treatment standard as I referred to earlier.

But that Tribunal nevertheless recognized that it would be unreasonable for an investor to, "expect that the circumstances prevailing at the time the investment is made remained totally unchanged," and it held that when determining whether, "frustration of the foreign visitor's expectations was justified and reasonable, the host State's; legitimate rights

12:57:36 subsequently to regulate domestic matters in the public interest must be taken into consideration as well."

Now, Glamis has relied on a number of investor-State awards in interpreting the fair and equitable treatment provision in the United States-Argentina BIT to buttress its contention that the obligation contained in Article 1105 include a prohibition against the frustration of an investigator's legitimate expectations.

Quite apart from our legal arguments as to why those cases could not be followed on this point, a look at the facts of those cases reveals that none of the Federal or State measures about which Glamis complains are at all comparable to the Argentine measures found to be unfair and inequitable in these recent arbitral awards.

As the United States noted at last month's hearing, although a mere breach of contract does not violate the international law minimum standard of treatment, the United States has long recognized that

repudiation of a State contract for noncommercial

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12:58:34 reasons may give rise to a violation of the minimum standard of treatment. And as I will explain, the Argentine cases could reasonably be characterized as involving repudiations of State contracts. The same cannot be said for the measures at issue here. The fair and equitable treatment claims asserted in the CMS, Enron, Azurix, and Siemens cases, for example, all related to Argentina's decision to abandon express contractual commitments it had made to induce foreign investment during its extensive public services privatization program in the 1990s.

More specifically, the CMS and the Enron Tribunals found that Argentina had breached the fair equitable treatment obligation when it completely abandoned the regulatory framework that it had agreed to in the Gas Law of 1992. That law guaranteed foreign companies investing in its gas transportation network that they could charge tariffs that would be calculated in dollars and converted into pesos at the time of billing and that the tariff rates would be adjusted according to the U.S. Producer Price Index on a biannual basis.

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12:59:41 In Azurix and in the Siemens cases, the

Tribunals found that Argentina breached its fair and equitable treatment obligation when it and its subordinate entities refused to honor and forced renegotiation of rate adjustment provisions contained in their respective Concession Contracts.

And the same was true in the Tecmed case that I just discussed, and quite apart from the fact that the Tecmed case was interpreting this autonomous standard and did so in a way that has been widely criticized. The facts of that case are clearly distinguishable from those here.

In that case, Mexico was found to have refused to renew a landfill's operating permit and the Tribunal found that in doing so, Mexico had breached a quasi-contract between the investor and various governmental entities. The investor's expectations in that case did not derive generally from its understanding of the Mexican law and how the law would be applied, but rather from specific assurances that were made by all levels of the Mexican Government that were later revoked.

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13:00:40 In stark contrast to these situations where the Government entered into firm commitments with investors through concession agreements which later sometimes even codified into law or when they entered into contractual or quasi-contractual relationships with the investor, the United States never entered into any agreement with Glamis, much less enacted a

law guaranteeing that Glamis would be able to mine the Imperial Project in the manner in which it proposed.

Glamis has not and cannot point to any law guaranteeing approval of its Imperial Project Plan of Operations or its Reclamation Plan in the manner in which it proposed.

Nor did either the Federal or California Governments give Glamis any specific assurances that it would be able to mine without completely backfilling. Neither the recent awards against Argentina nor any of the other investor-State cases discussed lend any support to Glamis's Article 1105 claim.

To find liability here would contravene the NAFTA's express provisions which grant Glamis's

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13:01:42 investment treatment in accordance with the customary international law minimum standard of treatment, and not some amorphous right to collect damages for any action which it deems unfair. A finding of liability would also go far beyond what any of these other tribunals have found, even when those tribunals were interpreting an autonomous fair and equitable treatment standard.

Both of the California measures were rational responses to real problems. Neither of the measures was applied retroactively. Both the regulation and the legislation apply only to those new mines that have not yet received approval of the Reclamation

Plan. It was rational for California to not impose liability on mines that have completed operations or that had received a specific assurance in the form of an approved Reclamation Plan that they could go forward and mine in the manner in which they proposed.

Furthermore, the United States explained in its Rejoinder retroactivity either in law or regulation is generally disfavored under domestic law, and Congress and State legislatures often exempt or

13:02:41 grandfather preexisting operations even when those operations pose health, safety, and nuisance concerns.

Glamis didn't have an approved Reclamation Plan or even an approved Plan of Operations. Yet Glamis suggests that the application of the reclamation requirements to its project somehow upset--is somehow suspect because it has already made an investment--because it had already made its investment, but that's incorrect. Glamis's mining claims were always subject to State regulation, and that regulation was not frozen in time once Glamis acquired its mining claims. The fact that a Claimant has made investments in unpatented mining claims does not grant it the right to have a particular Reclamation Plan approved. Nor does it freeze the regulatory regime in place at that time. It is only after receiving assurance from the State in the form of an approved Reclamation Plan, for example, that a Claimant might have any such reasonable expectation,

but Glamis had no approved Reclamation Plan at that time, nor did it have an approved Plan of Operations as we've stated. It had, in fact, abandoned its

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pursuit of approval of its Plan of Operations at that time.

So, under these circumstances it's neither unreasonable nor unfair that a Claimant would be subject to California's reclamation requirements.

So, in conclusion, despite the fact that this Tribunal cannot rule in equity, Glamis has argued throughout this hearing that the equities weigh in its favor, but they do not. Glamis could have had no reasonable expectation that California would not enact the measures that it did. Those measures did not apply retroactively as I mentioned, and this is not a case where the public is benefiting at the investor's expense. Glamis is only being asked to remedy the damage that its own profit-making activities are causing. The California measures did not ban mining of the Imperial Project. On their face, neither measure bans mining those claims. In fact, the only company that has had either measure applied to it is going forward and is mining its claims, and we have shown that it would be economic for Glamis to mine its claims in compliance with California's requirements.

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13:04:54 1 Not only would it be economic, but in a few
2 weeks since we all met at last month's hearing, as
3 Mr. Sharpe mentioned, gold prices have risen another
4 $60 per ounce. The Tribunal will recall that there is
5 an estimated 1.4 million ounces of gold at the
6 Imperial Project. This additional revenue amounts to
7 another approximately $85 million in just the past
8 month. This increase in just the past month has
9 largely offset if not completely offset the entire
10 cost of complying with the California reclamation
11 requirements that serve as the basis for Glamis's
12 claim.
13 Given these facts, the equities are certainly
14 not in Glamis's favor. In fact, if it were to prevail
15 in this arbitration, Glamis would be receiving a
16 windfall.
17 And with that as such, we respectfully
18 request that the Tribunal dismiss Glamis's claims in
19 their entirety.
20 Thank you.
21 PRESIDENT YOUNG: Thank you very much.
22 Can you give us just a moment, please.

13:05:51 1 (Tribunal conferring.)
2 PRESIDENT YOUNG: Thank you very much.
3 What the Tribunal would like to do with the
4 parties' understanding is ask that the parties
5 reconvene here at 2:15, if that's acceptable, and at

that point we do have some questions we would like to put to the parties. Our thinking is, in part, we can put these questions to you this afternoon. If, in fact, some of those require a bit more research through the record and so forth, you could certainly--we would take time and answer those tomorrow. But we thought that if we started the questions this afternoon, that that would aid the process and the accuracy of the answers.

Is that acceptable?

MR. GOURLEY: We had understood that Respondent was getting two or two-and-a-half hours tomorrow to respond to our rebuttal because we would have this afternoon to do--to prepare that rebuttal, so I'm not objecting to the questions so much, but it seems like the rationale for the timing is not.

PRESIDENT YOUNG: I don't think we anticipate

13:07:19 this would go more than an hour. I don't think we anticipate this would go more than an hour, Mr. Gourley. We do understand that, and we are certainly not--hoping not to intrude long into that preparation time, but we would imagine about an hour.

MS. MENAKER: That's fine with us.

May I just ask, we did want to spend just a minute or two responding to Claimant's very late request, renewing its request for those documents, and I don't know if you would like me to do that now or later.

PRESIDENT YOUNG: Tomorrow.

MS. MENAKER: Okay.

PRESIDENT YOUNG: Executive decision.

Thank you. We will see you at 2:15.

(Whereupon, at 1:06 p.m., the hearing was adjourned until 2:15 p.m., the same day.)

AFTERNOON SESSION

PRESIDENT YOUNG: If we are ready to start, as we had indicated, we will try to keep this to just about an hour.

At the conclusion of this, by the way, we would like to propose the following schedule for tomorrow, but would be interested in the parties' views.

We will have Claimant at the first 51 minutes in the morning from 9:00 until 10:00. We will break until 12:30, at which point the Respondent will have 12:30 to 1:30. At that point, we would only like to take a 15-minute break and then recommence the questions and answers at that point, asking that perhaps those parties for whom sustenance might be important would do that sometime in the morning before the 12:30 session starts, with the idea that we will

run largely until we have completed the questioning. We don't really anticipate that would go I don't imagine much beyond 5:30 or 6:00 at the latest, I would imagine, but that's the schedule that we would like to follow tomorrow we think otherwise breaking up

14:23:45 the day in complicated ways that will reduce our time rather significantly.

So, if that's acceptable to the parties, we would like to proceed that way.

MR. GOURLEY: That's acceptable to us.

MS. MENAKER: Yes.

PRESIDENT YOUNG: Thank you.

I know it forces you to eat over box lunches, but presumably you're spoiling their dinner tonight, so this works out fairly, I hope.

Thank you very much for your presentations for the last two days. We still have a few inquiries that the Tribunal would like to directly make to the parties. So, let me start first with Mr. Hubbard.

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR HUBBARD: My first question is for the Claimant.

Could you please elaborate on the status of Glamis's pending Federal Plan of Operations and why it apparently has never been withdrawn by Glamis or further processed by the BLM.

MR. GOURLEY: The Plan of Operations has

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14:24:49 1 remained pending since it was--the last modification
2 was back in the '97-98 time frame with some additional
3 mitigation offered in response to the cultural
4 concerns.
5 It has never been abandoned. There was a
6 letter at the time of the emergency--in November of
7 2002, the Board, the Geology Board and the State of
8 California announced--put on the agenda emergency
9 regulations to be considered at their December
10 meeting. It was at that time that the justification
11 for the emergency was the Glamis project and the
12 possibility that BLM would, in fact, approve it in
13 that month. To remove that consideration, Glamis did
14 request that BLM suspend the consideration. BLM
15 refused. They wanted to--they required for such an
16 action to occur a waiver of any damages against--that
17 could be asserted against them. Glamis did not agree
18 to that.
19 So, as far as we know, there was never any
20 suspension because they told us they weren't going to
21 suspend, unless we provided that waiver, and we did
22 not.

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14:26:28 1 And then, although the parties continued to
2 discuss whether compensation would be a
3 way--compensation to Glamis would be a way to resolve

the controversy over whether the mine could be pursued or not, that never proved to be the case, and it was that letter that they continued to cite to say that it is--we are pursuing other avenues.

When you read the entire letter, what you will see is that we say that there isn't any compensation, we don't think we could get approved now because the State has done what it's done, and we have a short period of time under NAFTA to submit our claim.

And it backs up. You have to give the 90 days for consultation which we said we hope we will still have those 90 days, will still use those to continue consultation; and, unfortunately, that didn't happen. So, that's--it stated there.

In fact, the letter conveyed our Notice of Intent to file a claim, which we had to do 90 days before we can actually file the claim under NAFTA. And the Notice of Intent as well as the claim

14:27:53 itself--probably four months later because it was December--maybe five months--always made the point that the additional delay was part of our claim, that the failure to approve continued to be part of our claim.

So, those are the actual facts.

ARBITRATOR HUBBARD: Thanks.

PRESIDENT YOUNG: Yes, but before I turn the microphone to Professor Caron, let me also add that we

are very pleased to get your answers to the questions now. If you believe an answer requires you to go back, look at the record, and reflect a bit more on the answer, we are happy to have the answer tomorrow as well that could be either woven into your time, the respective hours that you get tomorrow, or be used in the afternoon, as well. We are anxious to put the parties on the spot on the one hand; and, on the other hand, we are anxious to get your best answers and best thinking on these subjects, as well. Thank you.

David?

ARBITRATOR CARON: I just want to follow up on Mr. Hubbard's question. I think this is to both

parties.

The question for us is to understand this process, the process that might have occurred at that time a little more.

One statement that I think was made by Respondent earlier was that, as the process, as if the process went forward, it would have been necessary to respond to certain comments on the earlier EIS to consider the impact of the State regulation, possibly undertake more action.

Do either counsel have knowledge as to the process that's involved? Is that a process that the Department of Interior undertakes simply on its own? Is it something that it works with the applicant closely to try and work out? To better understand the

notion of suspension or abandonment.

MR. GOURLEY: The process is an iterative one, but it is after you have gotten to the EIS/EIR stage; that is in the comments. That is exclusively BLM responding to those comments. And that was our point yesterday, that it's not us to sit there and prod and put the taser to the Government to move

14:30:42 forward. It is the Respondent here, the BLM, has the information that they need, and they may either go forward or not. If they have questions, obviously, then we need to respond to those, but there never were any more questions.

ARBITRATOR CARON: Could I ask the Respondent for their comments.

MS. MENAKER: I would like to give you a more precise answer tomorrow on the specific interrelationship of what role Claimant would play at that stage of the processing, but I would just note that it is simply not credible, in our view, to say that, at that point in time, all of the onus was on DOI to just continue processing and that they were just simply sitting back assuming this was happening. It clearly was not happening. And had they had any questions about that, all it would take would be a phone call or a letter to make that clear.

And they were not shy about corresponding with DOI in the several, several years while their plan was being processed, and they made numerous phone

22 calls, had numerous meetings, and then instantly all

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14:31:58 1 communication shut off.
2 So, we simply note once again--and we argued
3 this at length--but that it's simply not credible to
4 assume that DOI was acting in light of the letters it
5 received; in light of Glamis's attitude, which was
6 expressed during the testimony last month; and in
7 light of the fact that it ceased all communications
8 with DOI at that point, and never, then, did anything
9 to start up those communications. Even if it had
10 thought that DOI was responding to comments for a
11 couple of months, it never then even did as much as
12 ask what was going on.
13 PRESIDENT YOUNG: Could I follow up with one
14 phrase you used which I'm not sure I understand. The
15 "it" reference point in here. You said that the onus
16 was on DOI to--it's not clear that the onus was on DOI
17 to continue processing and they would just simply send
18 it back assuming this was happening; it clearly was
19 not happening. The "it" that you're referring to that
20 was not happening was the processing of the claim?
21 MS. MENAKER: That's clear. After getting
22 the letter saying "Our mining claims have been taken

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14:33:06 1 by the U.S. Government, they have been expropriated.

We are making a claim for that. We thank you for your efforts. We have now chosen to pursue new avenues. Thanks." At that point, no, what wasn't happening, the "it" was the process that wasn't happening.

PRESIDENT YOUNG: The DOI stopped processing?

MS. MENAKER: Yes.

PRESIDENT YOUNG: Let me follow up with one last question in this area, which is for Respondent.

I'm pretty sure I think I understand Claimant's answer to this question, but I'm interested in yours. If the Tribunal were to not--to not agree with the Respondent that that was an abandonment of the claim, that DOI--that there was nothing in the actions of Claimant that abandoned or withdrew their request for continuing processing and yet, as you say, DOI stopped, what should we make of that in terms of the taking claim? Not so much the fair and equitable treatment claim, but the taking claim.

MS. MENAKER: Their taking claim would still fail because, as we noted, the very fact that they did not affirmatively do anything or seek any relief,

14:34:25 that, in and of itself, weakens their expropriation claim, and we cited to the Generation Ukraine case as well as two other cases that made clear that a Claimant's failure to seek any administrative or judicial remedies for a supposed administrative error or a failure to act seriously weakens any claim they might bring under international law for an

expropriation claim.

PRESIDENT YOUNG: So, in your view, they would have then had an obligation to go under the APA and compel the Government to act, and the pursuing of a NAFTA claim is not adequate? Is that the Government's position?

MS. MENAKER: It's not our position that they had a requirement to take one specific action, but they had an obligation to take some action and that their failure to do so does, in light of all of the other facts, does seriously weaken their expropriation claim.

PRESIDENT YOUNG: And to take some action other than a NAFTA--pursuing a NAFTA claim; is that correct?

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14:35:39 MS. MENAKER: Yes. And even so much as to simply inform the agency that they expected it to continue processing, even that would have been some action. Whether or not that would have been sufficient, you know, I won't say definitively one way or the other right now, but it's clear that even the minimal actions they did not take, whereas in those cases we cited, the Claimant's failure to take action that was much more formal than that was deemed insufficient, but here they didn't even take the smallest step possible, which was simply to ask the agency to continue processing its claim.

ARBITRATOR CARON: I would like to turn to

the Article 1110 claim based on Federal action.

As far as the State action, we have an alleged date of taking. Claimant points to several particular acts as the basis for the claim under 1110, and so I would want to return to the Tribunal's question. Could you, with specificity, point a date of taking and the act that was the breach.

MR. GOURLEY: Yes, Professor Caron. The Federal taking occurred on January 17, 2001. That's

14:37:10 the date of the Record of Decision which failed to approve the Plan of Operation and denied it. That taking has never been cured.

But, as I stated at the hearing in August, and as I think the Respondent's argument to date confirms, they're responsible for all of the measures, and there is not really a need to split in an indirect expropriation measures tantamount to an expropriation. You always have a choice in there as to what point is the final point, but this starts with the Federal measure in January 17, 2001. What we have always said is that, by December of 2002, it's now done or you could take April of 2003.

In terms of valuation for simplicity, it didn't really matter whether you looked at April 2003 or December 2002 because the 10-year average for gold, which is the normal way, and even the spot price were in that $325-$326 an ounce range.

Now, if you were to say that the--quite

literally, if you were to take the earlier date, then a different valuation would occur, but we didn't try to do multiple ones for that entire period, but rather

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14:38:48 picked one that was sort of in the middle and a reasonable date among all the measures that affected the expropriation.

ARBITRATOR CARON: Thank you.

ARBITRATOR HUBBARD: That was going to be my next question to the Claimant, so that's been answered.

I do have a question for Respondent, and bear with me on this. I would like to have you explain one more time, at least for my benefit, why you contend that the Tribunal must find that both of the California measures must be expropriatory for there to be a taking. In 25 words or less.

MS. MENAKER: Okay. In the simplest formulation, it's because both measures required--or assuming that both measures were applied to Claimant as they allege, although we have shown that neither has been applied to Claimant, but assuming that they have been applied to Claimant, they both require the same exact reclamation requirements, so they both have the same effect on Claimant and its property interest.

So, if you find that one of the measures did

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not exact an expropriation of Claimant's property right, that is akin to saying that the requirement to fully backfill and recontour the land post-mining did not interfere with Claimant's property interest in a cognizable way, then another measure that has the exact same effect and requires the Claimant to do the exact same thing cannot be said to have taken any property right of Claimant.

ARBITRATOR HUBBARD: So, in other words, they're pretty much identical in what they require and, therefore, you have to consider both of them as either being expropriatory or not, together?

MS. MENAKER: Yes, yes, because they both require the same action to be taken by Claimant, and they both have the same exact economic effect on Claimant.

ARBITRATOR HUBBARD: Okay. Could Claimant also address that question.

MR. GOURLEY: Absolutely.

The question highlights a dispute between the two parties in that we find and have asserted and, I believe, have proven that the two measures are

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inextricably intertwined. They are one and the same in what their purpose and effect was going to be. Only if, and as Respondent's example this morning showed, if you had two independent measures which both proceeded along one could have affected another taking

than another one could have, but you determined that the result would have been the same, then yes, it is true, you would have to prove that both effected an expropriation.

But we would say that, even if you don't accept--even if the Tribunal were not to accept that these are really one and the same, they're all part of the same concerted action to reach out, use the California legal process to destroy the value of this mine, to stop mining at the Imperial Project site, then you would look to the two independently, and you would still come to the conclusion that both are expropriatory.

ARBITRATOR CARON: I just want to follow up on Mr. Hubbard's question again.

So, bearing in mind what Claimant just said, my question goes partly to how this works in a more

14:42:58 detailed way in terms of your two defenses that you raise. So, one defense is what you term the "background principle" defense or "scope of property" defense.

So, bearing in mind what Claimant just said, am I correct that if the background principle is such that there is not a property right under either basis, then that is a sufficient defense? Is that the argument? And could you then extend that to the "ripeness" defense in an analogous way? How would you extend it?

MS. MENAKER: The initial part of your question, let me just say yes, that that is our view for the "background principles" defense because, if the thing that you are prohibited from doing was not part of your property right to begin with, if you find that is the case pursuant to one measure, then there is no expropriation. If the second measure does the same thing--I need to think a moment about ripeness.

ARBITRATOR CARON: Well, in part, I found the ripeness question a little more difficult to apply it to it, and that's I asked that part in particular of

14:44:29 the--

(Sound interference.)

ARBITRATOR CARON: Your statement on ripeness is that the regulation is not actually applied, is how I understand the "ripeness" defense, but both of these would have gone through the same Plan of Operation process, both regulations.

So, both would have been sort of applied at the same time. That's what I'm somewhat confused about.

MS. MENAKER: The issue here is that neither was applied to Glamis, and I don't think that--there really is no argument that neither has been applied because Glamis--I mean, it clearly hasn't been applied to its Reclamation Plan, and it didn't have an approved Plan of Operations.

So, neither has been applied; and in that

respect, neither is ripe. Their claim with respect to both measures fails because neither is ripe. You could imagine a situation where you had two measures, one of which was applied, one of which wasn't. In this case you would have a "ripeness" defense with

14:45:39 respect to one and not the other, but that's just not the case here because at no time was one applied and--was either applied, and they were adopted within a four-month period of one another, but there is nothing that happened within that four-month period that would suggest that one of them was applied and the other wasn't applied.

ARBITRATOR CARON: Would Claimant wish to comment?

MR. GOURLEY: With respect to the background principles, the background principles goes to the statutes that already exist, not to S.B. 22 and the regulations which come in. With respect to those statutes that they claim are the background principles that permit these subsequent acts without effecting the taking, we agree that those are separate and distinct, have distinct purposes, and you should evaluate them separately.

With respect to the ripeness, there is just a factual error in what the Respondent just said. The Plan of Operation includes the Reclamation Plan. You submit your Reclamation Plan with your Plan of

Operation. They're both sitting there.

The fundamental flaw in the whole ripeness argument is those are still there in front of the Imperial County and in front of the Department of Interior. They could act on those at any time. They could deny them and say they don't apply. They're not valid because you don't have complete backfilling in here.

So, it's only a matter of them doing what they could do. It's not anything that we've blocked them from doing.

MS. MENAKER: Let me just respond very briefly to that, that here, even though the plan of operations includes the Reclamation Plan, there is actually an error in what Glamis has said in that it is not the case that the Federal or State Government could have acted on those at any time and applied the measures to them, because you will recall that when the first of the measures was enacted, which was December 12, 2002, three days, I believe, prior to that, that's when Glamis sent the letter to DOI, asking it to suspend processing of its Plan of

Operations. Today, just earlier, Glamis suggested that that suspension never went into effect because of a subsequent letter, but that's not true. They sent a

letter saying, "Please suspend processing the Plan of Operations."

Three days later, SMGB enacts its emergency regulations. At that point in time, it's clear those regulations aren't being applied to Glamis's Plan of Operations. In fact, at that point they have a suspension. Their plan isn't being processed at Glamis's request.

Three months pass, the rest of December, all of January, all of February, all of March. March 31st, Glamis sends a letter to DOI saying--excuse me. Earlier, in December, DOI sends a letter to Glamis saying, "Fine, we are suspending processing, but we want you to confirm that you're basically going to hold us harmless from any delay that results from our suspension, but Glamis takes a full three months to respond.

So, at this point in time, DOI has this request to suspend, doesn't hear anything, is not

14:49:12 working. And then, on March 31st, they receive a letter back from Glamis that does not say, "No, please process," it only says, "I'm sorry, we are not able to reconfirm your request." I should say this precisely, but essentially it says, "We are not able to reconfirm your request that we hold you harmless for any delay that results from our suspension request," and doesn't say anything more than that.

A few days after that is when S.B. 22 is

enacted. During that time period, clearly, there is no application of either measure to Glamis.

And then you will recall during this time period that Glamis clearly has no intention that the Federal Government is going along processing its Plan of Operations because its own officers and CEO testified that it didn't intend for the Government to be processing at that point in time. It said, "No, it would have been reckless for us to proceed. We thought it would have been futile for us to proceed. In our view, the California measures made it uneconomic. It would have been reckless." It would have been in their Reply. They say, "It would have

14:50:28 been futile for us to continue to participate in the Federal processing of our Plan of Operations."

So, clearly, they had withdrawn from that process. They knew DOI wasn't processing. They thought it would be reckless for DOI, for them to continue processing, and so there was no possibility that either of those California measures would be applied to its Reclamation Plan or its Plan of Operations by either the Federal or the State Government.

PRESIDENT YOUNG: Ms. Menaker, you mentioned earlier today cases, if I'm recalling, S.D. Myers case was one of the cases where you talked about there were two successive acts either/or both of which can be considered an expropriation and what the effect of

those was. Am I reminding you of what you talked about? Was it Mr. Benes? I think it was you.

Can you remind me of those two cases. Am I ringing any bells yet? It was a question of a temporary taking. There was an act of a hotel that was expropriated and then later condemned in one case and compensation paid.

14:51:55 MS. MENAKER: No, I'm sorry, that was simply a hypothetical I was offering because I was trying to illustrate the fact that, typically speaking, if you have two measures that do the same exact thing, have the exact same impact on a Claimant, it's going to be a highly unusual situation where one could be deemed expropriatory and another couldn't, and I offered an example of, you know, imagine if Government forces took over a hotel, and that was the example, but that wasn't--

PRESIDENT YOUNG: It's not an actual case?

MS. MENAKER: No.

PRESIDENT YOUNG: As I recall, you ended that hypothetical with the Government actually paying for the expropriation.

MS. MENAKER: Yes. The hypothetical was, imagine if the Government came in and unlawfully took over a hotel and then four months later it actually went through lawful condemnation procedures and offered adequate, effective, and prompt compensation.

One could imagine a scenario there where a

court or tribunal found that the later act was

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14:53:00 entirely consistent with international law because it was expropriatory, but compensation was paid, therefore no liability. But the earlier act was unlawful--it was an unlawful expropriation--and you could have what's called a "temporary taking."

PRESIDENT YOUNG: So, it would be additional compensation for that delta of time?

MS. MENAKER: That period of time, but I was contrasting that with the case here where, when you have two acts, especially when you're talking about regulatory acts and neither of those acts have been applied to Claimant, Claimant could not have, even though the acts weren't passed on the same date, Claimant could not have sustained any damage from application of one of those acts because, during the four-month lapse between the SMGB regulations and S.B. 22, Claimant didn't incur any damages because of the SMGB regulation.

PRESIDENT YOUNG: So, this would be relevant in the event that we found the first act expropriatory and the second--

MS. MENAKER: Precisely. And the opposite

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14:54:00 situation you don't kind of need to go through this.

PRESIDENT YOUNG: Thank you.

I want to ask Respondent--and you may want to take this as a homework assignment, but let me ask--it's a two-part question: The first is, I think I understand the distinction between in 1105 the application of customary international law as opposed to the application of an autonomous standard of some sort.

Am I correct in assuming that the Government's position is that all the U.S.--the BITs into which the U.S. Government has entered and the NAFTA are reflective of customary international law and not the autonomous standard? Are there any BITs in which the U.S. has entered in which you would say the applicable standard under fair and equitable treatment is, in fact, under autonomous standard and not customary international law, or are all the BITs and NAFTA coterminous in that regard?

MS. MENAKER: There is none of which I'm aware, and I hesitate only because I don't know that the Government has ever taken a position on the

14:55:12 interpretation of every single BIT. And so, sitting here today, I don't feel like I can do that.

I do agree with the statement that was quoted, which is a statement that we made in our submission to the Pope & Talbot Tribunal, that we have consistently considered that the fair and equitable treatment standard to be a reference to the minimum

standard of treatment under customary international law. But, just being in a position I'm now, I don't want to say anything further without checking further.

PRESIDENT YOUNG: I absolutely understand that, although I'm about to put you on the spot even more because what I would actually appreciate is, therefore, a listing of those decisions interpreting 1105 in which the U.S. Government believes the Tribunal got the standard wrong. I realize you also distinguish some of those on the facts, but assume for a moment that I'm less interested in the facts than in the law. I would be interested in a listing of those Tribunal decisions in which you think the 1105 Tribunal is applying the autonomous standard with which the Government disagrees. That again can just

14:56:25 be for purposes of this arbitration. I will let you sort out what happens in your next arbitration later on.

MS. MENAKER: We could give that to you, and I could offer you one example now that I know offhand.

If you look at the Pope & Talbot Tribunal's decision, the decision was rendered prior to the time that the FTC issued its July 31st, 2001, interpretation; and there, that Tribunal interprets Article 1105 as providing protection that goes beyond the minimum standard under customary international law, and it says it interprets it to mean that fair and equitable treatment essentially is an equitable

standard, an autonomous standard. And despite the NAFTA parties having made submissions in that case telling the Tribunal that this was not their view, subsequent to that, the parties issued the FTC's interpretation.

And if you look at--I believe it's their damages Award, although I would have to check, but a subsequent award where the Tribunal somewhat reluctantly accepts the fact that it is bound by that

14:57:39 interpretation and, therefore, must interpret the standard in that manner, but indicates that it disagrees with that.

Now, I would note that there are many other tribunals that have said that they would have reached the interpretation that was given by the FTC. They would have reached that same interpretation; that is, that 1105, the fair and equitable treatment standard is, in fact, a reference to the customary international law minimum standard of treatment, even had the FTC not issued its the interpretation. But given the plain language of the Article, given the Article's title as well as given the historical evolution of that provision, it would have reached that conclusion, and among those are the Methanex Tribunal, for instance, and also the UPS Tribunal, I believe.

PRESIDENT YOUNG: Thank you. Yes, I assume the Pope case, but I'm interested in any others you

think that might exceed that standard.

ARBITRATOR CARON: I had some questions in a similar vein, so let me just follow along those.

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14:58:39 Going directly to first to Respondent and then Claimant: So, specifically would you say, in this autonomous customary distinction, could you place the U.S.-Argentine BIT for us and the awards based on that BIT.

Let me first ask: Is the U.S.-Argentine BIT, in the U.S. Government's view, a customary international standard or an autonomous meaning, since those cases are cited to us?

And secondly, the awards that are then coming--that are being cited to us, do they disagree with that U.S. view, which I understand is not--they are not bound by an FTC note, but the question is more identifying for us in that select case those awards that are based on custom.

As far as the President's comment/question to Respondent concerning this universe of awards, I guess the question I would have to the Claimant is: Given the FTC Note of Interpretation, and for the moment assuming you're not challenging that we are bound by that note, which maybe it's a whole separate thing, we therefore have a distinction between autonomous

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15:00:10 1 meaning and meaning referring to the customary
2 international minimum standard. Respondent's response
3 to your presentation, in part, is many of the awards
4 are really dealing with the autonomous meaning, not
5 with the customary meaning; and, therefore, they're
6 not actually applicable here. Secondly--and the
7 phrase they used was "for the most part," so that
8 means there are some out there that are based, in my
9 view, on custom.
10 Second, I would take Respondent as having
11 said that, even when it's based on custom, it's not
12 clear that they have established persuasively that it
13 is actually custom. So, if you had any comments on
14 that, whether State practice is somehow looked to to
15 buttress the Tribunal's statement that that is a rule
16 of custom. That would be helpful among the cases you
17 have cited.
18 Can I continue with the 1105 for a moment?
19 I had actually--so, many of our questions
20 have gone to the standards. We have a number of facts
21 before us, and I guess I had two questions concerning
22 application of the law to the facts for a moment. In

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15:01:43 1 part, Respondent, in their description of the
2 Claimant's claim concerning California's acts under
3 1105, the phrase "assurances, state contracts,
4 quasi-contracts" were used.
5 Now, I know that looking at your

materials--and I would say also, in doing that, they emphasized what the assurance or the contract is to, so they seem to emphasize an assurance as to a particular reclamation requirement rather than an assurance that at some point it might go forward or something like that.

So, I know you have some reference to the existing legislative structure, the regulatory regime you're looking at. And I guess I'm looking, in part, to your response to the statement that what is it an assurance to; and, secondly, what particular assurances--are there any other particular assurances that you're looking at?

MR. GOURLEY: That will be part of our reply tomorrow morning.

ARBITRATOR CARON: Okay. And then if I could have a second one--I can't find it right now, but you

15:03:31 had a certain slide that indicated in the title "unlawful delay," and the question I have is, for example, in the preamble that has been shown to us several times to the 3809 regulations, it was stated under some grounds--

(Sound interference.)

ARBITRATOR CARON: It was stated that outside the endangered species--

(Sound interference.)

PRESIDENT YOUNG: If we could all check our cell phones, Blackberries, your ankle bracelets...

(Pause.)

ARBITRATOR CARON: As I remember the preamble, it stated that at some point you might expect delay, but certain statutes would not stop the Project; they would only delay the Project.

And so I guess what I'm wondering is why would a delay--why--on what basis do you characterize a delay as unlawful?

MR. GOURLEY: When you go back to the Leshendok Expert Report, you will see that he has cataloged the normal course and the types of

15:05:09 processing times that are expected for the--for a mining project in the California Desert--he was looking only at the California Desert projects for that--and you see this is extraordinary. Even just going up to the time of the record of denial in January 2001--this was already double what the next longest was--our point has been that, when you look at the timing sequence, yes, the review of cultural resources required a certain amount of time, but that was actually done in mid '98, and then there would be an ACHP process, a consultation process to evaluate in mitigation. Even that was done by even the extraordinary process that they undertook that was unique for this project had concluded by September of '99.

So, even if you were to build in extra time for delay, our point has been that, in '99, whether

it's early when the first draft of the Leshy Opinion was already out and already our position internally was set, all of the other work was done except for that work which Solicitor Leshy himself directed not to continue, which was the Mineral Report.

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So, that's where we focus on the unlawful delay. 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.

ARBITRATOR CARON: Could I stick to that for a second. You said two different things there. One was a reference to the average, whether it's two years or double or however you want to look at that.

The other is not so much the average but purposefully put on delay, and those are two different sets of evidence, and one might be evidence of the other in some way, but I just--so, again, if you could clear it up between those two.

MR. GOURLEY: The primary evidence of the violation is the purposeful intentional delay. The proof--the part of the proof of that is not just the actual statements and what did Leshy do to stop the normal processing, but also the comparative evidence of when you look at it versus other mines, how did they--how long did they get processed. It demonstrates conclusively that this was a very

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15:08:05 1 unusual, abnormal length of time just to get to the
2 denial in January of 2001.
3 ARBITRATOR HUBBARD: This is a question for
4 Claimant and Respondent, and I think that you
5 addressed it, in part, in some of the previous
6 hearings and in some of the writings, but I think it's
7 a crucial question that all of us have, and that is:
8 How do the cases define the property right that's
9 inherent in an unpatented mining claim, and what are
10 the respective roles of Federal and State law in this
11 regard?
12 MR. McCRUM: The case law in the United
13 States is quite clear, that the unpatented mining
14 claim is real property in the highest sense of the
15 term protected by the U.S. Constitution, and the State
16 and Federal Governments each have a role of regulating
17 those activities; but, particularly in the case of the
18 State area, there is a distinction drawn between State
19 power simply to prohibit mining. There is a
20 limitation recognized on that State authority. It's
21 touched upon in the Granite Rock case, which actually
22 just upheld a State regulatory role. It's also

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15:09:49 1 reflected in cases such as the South Dakota Mining
2 Association versus Lawrence County in the Eighth
3 Circuit in 1998, which recognized that States and

municipalities would not have a right to prohibit surface mining on Federal lands.

In the case of the Federal Government, the Federal Government itself has long recognized under FLPMA a right to reasonably regulate mining and minimize impacts but not prevent any and all impacts from mining, and that's reflected in the materials we have put forth reflecting Interior's long-standing interpretation of FLPMA with the Leshy Opinion being the primary departure from that.

MS. MENAKER: And we agree that the State and Federal Governments each have a role in regulating mining, but the mining claim is a--it's a property right, but it's a possessory interest. The Government maintains title to the land, and those mining claims are always subject to regulation, both Federal and State regulation.

As we agree with the Claimant, while they're subject to regulation, that does not mean that States

15:11:16 may prohibit mining on Federal lands that are open to mining, but they can regulate mining. And Glamis referred to the Lawrence County case, where the Eighth Circuit found that the State could not ban open-pit mining on Federal lands, and we don't disagree with that; but again, that's different from a State regulating mining as was done in the Montana case, where Montana banned cyanide heap-leach mining, a certain type of mining. It didn't ban mining

altogether. It just now so happens that the only way to get that gold out of the ground when it's low-grade gold is by cyanide heap-leach mining, and so currently there is no economically or technologically feasible way to mine that gold. But, nevertheless, that's not a ban on mining. That is a State regulation, and that is permissible.

And here, as we noted this morning, Glamis's mining claims are subject to California State property law, and we have noted that some preexisting limitations are both SMARA and the Sacred Sites Act as well as the applications of those preexisting principles in the California measures, and Glamis is

15:12:36 not arguing that those California measures are preempted.

So, in other words, it is not making the argument that California is restricted in regulating mining in the manner--on Federal lands in a manner in which it has done.

PRESIDENT YOUNG: Ms. Menaker, can I follow up on that, and I will come back to Claimant with sort of a parallel question.

Obviously, much of the heart of this case revolves around what is contained in this bundle of rights, whether it's possessory interest or an outright ownership interest. It's clearly not an ownership interest, but possessory is still nevertheless a property and what is the bundle of

things contained in that.

Is it the Respondent's position that the Montana law is consistent with Federal law and is not a taking? In other words, if I had a claim--if I had a nonpatented claim in Montana to do open-pit gold mining, prior to the passage of this law, is it the Respondent's position that I'm just out of luck, that

15:13:55 that's not a taking?

MS. MENAKER: I just want to check one brief fact.

PRESIDENT YOUNG: While they're checking, would you like to respond to that, Claimant?

MR. McCRUM: The Montana Supreme Court decision in the Seven Up Pete case actually involved a State lease interest, which was an interest on State lands involving a State lease. So, it's a decision that's peculiar to the State property interest in Montana that was at issue in that case. And, in that case, the Supreme Court of Montana said that, under their State leasing regime, that was not a taking, in their view.

I would say there is some question about whether that particular ruling of the State of Montana is fully consistent with the Lucas decision of the Supreme Court; but, in any event, it is a ruling by Montana involving State lands and State lease.

There is an indication in the preamble in the 3809 Rules and the Rule revisions of 2000 that there

is a reference to the regulation in Montana as

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indicating that Montana--the Montana regime could be a State regulatory regime that may have applicability on Federal land as the Respondent pointed out earlier today. A preamble statement is not necessarily a definitive statement of the Government, and nothing by the Interior Department in that statement addressed the question of whether that would be a taking.

So, the Federal Government expressed no position in the preamble statement about whether that would be a taking, in their view, if applied to Federal land.

PRESIDENT YOUNG: But what is your position and the basis for it?

MR. McCRUM: Our position would be that, number one, as I said, if you look at that actual decision, it is a statement--

PRESIDENT YOUNG: I'm not asking you to validate the decision. We will let Montana jurisprudence work itself out. What I'm interested in is, if there had been an unpatented mining claim on Federal land in Montana prior to the passage of that law and that law passed, would that be a taking, in

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your view? And what is your support for that, if

that's your view?

MR. McCRUM: I think under the Lucas regime, if that particular State restriction was applied to Federal land, that it likely would be a taking because Lucas places emphasis on what--first of all, it rejects the idea that you have to have a permit to have a property right. If you have a property right and you're prevented from reasonable use of your property, then that is a taking under Lucas.

Now, we don't have the complete factual record of the Montana situation here that we would have in this case, where we have evidence of targeted action in California and all the other factors that are present here.

PRESIDENT YOUNG: Respondent?

MS. MENAKER: Well, we disagree with many of the things that Glamis has just stated.

First of all, with respect to the statement in BLM's 3809 preamble, that is a statement made by the Government. There is no reason to say that is not a definitive statement made by the Government. What

15:17:23 we have said before is that it's not part of the regulatory language, so that's quite different. But we said it could be used, of course, to interpret the regulatory language. It's considered to be preambular language.

But the Federal Government did take a position that the application of the Montana ban to

mining claims on Federal lands would not constitute a taking in that preambular language because it says that, in its view--well, first it states that 3809 regulations make clear that States may impose more stringent economic regulations on mining claims than the Federal Government. And then it goes on to say that, in is view, the Montana ban is not preempted by Federal law because it says it's consistent with the Granite Rock case.

So, in that case there, the Federal Government is expressing its view that the application of that Montana ban to claims that are located on Federal lands would not constitute a taking.

Now, that being said, I understand that the Montana voter initiative, when it was passed, made the

15:18:35 ban applicable to future mines, and it was subject--made subject to valid existing rights, just like the California reclamation measures here, which only applied to future mines and not to those mining Claimants who had already received an approved Reclamation Plan.

PRESIDENT YOUNG: What I'm trying to get at--and I would love even more guidance on this tomorrow--is that there is a theoretical agreement between the parties, as I see it, which is that this is a Federal property right, and there is a limit on what can be done to intrude on those rights. You disagree where that limit is, and I would love more

guidance as to what you respectively think what that limit is.

Clearly, I have got some sense from Claimant. I think I have a little less sense of what the Government thinks that limit is at the moment. So, if you can help me out with that tomorrow, I would appreciate that.

ARBITRATOR CARON: If I could just follow on the President's question there, just phrasing it

15:19:56 slightly differently. I'm trying to understand the range of agreement between the two parties here. So, my understanding is that the parties agree that it's a Federal right which includes a State role in that Federal right that's possessed, and that the question before us as far as the "background principle" defense is understanding whether the particular statutes involved are background principles, and I'm wondering if that's the limit--is that the limit of the question before the Tribunal?

The other possibility is that somehow you don't feel the State has--is exceeding its role entirely in limiting the property right in this case, but what I heard was that the assertion by Respondent that the parties are in agreement that this is the issue presented, and you have different views on that issue. That I understand, and so I want to know if the parties are in agreement on that question, on that point.

MR. GOURLEY: I don't think we are, but I will elaborate more tomorrow. But, for now, what I will say is that the U.S. Constitution--this isn't a

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15:21:40 preemption question--the U.S. Federal Constitution provides that all regulation of U.S. property is for the U.S.--the Federal--they have plenary power, so any State regulation that occurs is only by--unlike normal preemption, which is does the United States Federal Government go into an area and preempt States from regulating? Here, the Constitution has already made that decision. The United States property is for the United States to regulate.

Now, they can, as they have with the 3809 Regulation, permitted a level of State regulation in the activities that will be conducted on that Federal land, and we'll talk more about that tomorrow in answer to the President's question as to where we see that line.

MS. MENAKER: If I may just briefly respond on this: The Claimant is really trying to have it both ways. They have said yesterday quite clearly that they are not arguing that the measures are preempted. They can't now try to preserve an argument that somehow the State is precluded by the constitutional reasons from regulating this Federal

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15:23:06 1 property right. That is a preemption argument.
2 It is our view--and we apologize if this
3 hasn't been clear, but that this is a Federal right
4 and the States have the right to regulate, to impose
5 more stringent environmental regulations. What they
6 cannot do is impose a land-use regulation, essentially
7 withdraw the land from mining or prohibit mining.
8 Now, we have said repeatedly that the
9 California measures--neither of them do that. They're
10 not a ban on mining. They are an environmental
11 reclamation measure, and so that is permissible, and
12 that can limit the nature of the property right
13 insofar as those measures are objectively reasonable
14 applications of preexisting background principles,
15 which we have argued they are.
16 Now, Glamis cannot--the only way that the
17 State is somehow prohibited from regulating the
18 Federal mining claim in this manner is if they have
19 been preempted by Federal law from doing so, is if
20 this is not the type of regulation that they are
21 entitled to enact. And we have argued that these are
22 not preempted, and Glamis hasn't shown that they are,

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15:24:31 1 and then they came out yesterday and said, "Why are we
2 arguing preemption?" Why were we arguing it is
3 because they sent a memo to DOI, arguing that the
4 measures were preempted. But they have explicitly
5 disavowed that they are arguing that these measures

are preempted.

If once you accept that the measures are not preempted, that means that the State may lawfully regulate in this manner, and then the only question before this Tribunal, insofar as our background principles argument, is concerned is, one, whether these are indeed background principles, SMARA and the Sacred Sites Act; and whether the measures are reasonably--reasonable objective applications of those background principles.

I hope that makes it somewhat more clear.

PRESIDENT YOUNG: Actually, I thought I had understood it, but now I think I don't.

Let me see. We are out of time, and so I am going to pose this and a couple of other questions we could get to tomorrow.

Actually, what I think I now understand

15:25:41 Respondent is saying is a little bit different than what I thought you were saying before is there are actually two levels of definition of the Federal property right. One is that the Federal property right defined by the Federal Government permits the State to regulate up to the point of preemption, so that's one set of reasonable expectations that investor-backed reasonable expectations would relate to preemption, that the State can't do more than one would plausibly assume from looking at the regulatory regime.

Secondly, even within that area where it may not be preempted, there may be further things the State can't do if it unsettles the expectations based on these background principles.

Am I misunderstanding that?

MS. MENAKER: The second portion of that I don't quite understand because, when it comes to our "background principles" defense, we are not talking about the investor's reasonable investment-backed expectations.

PRESIDENT YOUNG: You are, but I may be.

15:26:57 But what I'm curious about is the background principles, whatever they do, they must somehow inform--as I understand your argument, they do inform the limits of what the State can do. If they depart the background principles, then they somehow deprive the party of the property right; is that correct?

Maybe you want to start over and tell me what background principles are all about, then.

MS. MENAKER: Sure.

Background principles are preexisting law that limits the nature or defines the nature of the property right. So, in this case, if the Claimant has a mining claim, that mining claim is subject to preexisting State property law, all preexisting California State property law, which in our case we contend includes SMARA and the Sacred Sites Act.

So, to the extent that those statutes limit

the rights that Claimants may enjoy in its mining claims; or, to the extent that they impose any restrictions on the manner in which they might otherwise utilize those claims, those limitations inhere in the actual property right that it acquired

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15:28:27 when it acquired its unpatented mining claims.

PRESIDENT YOUNG: In light of that, am I correct in understanding first that this is a Federal property right? Capacity to mine on State land is a Federal property right?

MS. MENAKER: Yes.

PRESIDENT YOUNG: I'm not hoping to lead you down a garden path here. I'm really trying to clarify in my mind, it is your position that it is a Federal property right. That property right, the Federal Government has allowed the States to restrict.

MS. MENAKER: Yes.

PRESIDENT YOUNG: Basis for those restrictions, are they two-fold or one-fold? That's essentially what I'm asking you. In other words, is the basis of that restriction what the Government permits the State to do, which is the preemption issue, as well as the background principles that the State itself promulgated, in whatever it promulgates, through common law or through judicial-based decisions in terms of the definition of State property, or are the background principles coterminous with preemption?

15:29:53 I realize we have been talking about preemption not being relevant, but it sounds to me like they're either two separate things or they are conflated; and, since they all start with Federal property rights, I'm trying to figure out where Respondent's position is.

You're perfectly welcome to do this tomorrow, again.

MS. MENAKER: I will do that just so maybe I could answer in a more coherent manner.

PRESIDENT YOUNG: I think we are out of time. I would like to leave a couple of last questions, if I may, that relate to the questions we put to the parties earlier.

I wasn't entirely clear whether on the Article 1110 expropriation claim--we have a set of general questions sort of, do you agree, and I wasn't clear on the Government--the Respondent's answer to 1(4), which is if the measures--the chapeau says, "Do the parties agree that the Tribunal should, in evaluating an Article 1110 claim, do a series of things, and if the measures effected an economic

15:31:09 impact assessed via a fact-specific inquiry, the reasonable investment-backed expectations held by the investor," and here is the kicker, "determining

whether the investor acquired the property in reliance on the nonexistence of the challenged regulations?"

So, if you would give me some thoughts on your views on that.

For Claimant, the Government articulated a fairly clear position on 1(5) in their--which says again, "If the measures effected an economic impact to evaluate the character of the questioned governmental acts, applied a balancing test," et cetera, if you would give us your views in light of what the Government told us about that, it would be helpful.

So, with that, we again thank you for your patience, and we will see you at 9:00 tomorrow morning.

(Whereupon, at 3:31 p.m., the hearing was adjourned until 9:00 a.m. the following day.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

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DAVID A. KASDAN