

**WHERE SACRED SITES ARE DEEMED MORE PRECIOUS THAN GOLD,  
IS THE MINERAL CLAIMANT DUE COMPENSATION?:  
THE ODYSSEY OF GLAMIS GOLD LTD. AND THE NAFTA INVESTMENT PROTECTIONS**

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*(with introductory remarks by Charles A. Jeannes, Executive Vice President, Goldcorp Inc.)*

I. Introduction: The Rising Threats to Mining and Extractive Industries.

- While world demand and prices for metallic and energy minerals are reaching all-time highs, the international minerals industries face increasing challenges obtaining the necessary stable and predictable legal environment to protect long term investments necessary for mineral extraction. These challenges arise from trends towards expanding governmental powers controlling and retroactively changing economic aspects of mineral development as well as pressures for environmental and cultural resource preservation, often raised long after mineral exploration and investment occurs.
- The exploitation of mineral resources is a costly and complicated venture in any part of the world. Investments are made in exploration, first with the hope of a significant discovery, but ultimately with the expectation that extraction will be permitted. Investors should be entitled to expect that the investment climate and the reasonable expectations on which such investments are made be stable and free from arbitrary and significant changes that defeat the prospect of success *after* the investment has been made.
- Overall, while the exploration of natural resources is a costly and risky business venture, some of the risks can be tempered by structuring investments in such a way that they are covered by one or more investment treaties. Investment treaties can provide valuable protections against a variety of prohibited actions, including expropriation, as well as actions falling short of expropriation but constituting unfair and inequitable treatment, such as of arbitrary actions demonstrating a lack of due process and the frustration of an investor's legitimate and reasonable expectations.
- Foreign investors in planning their significant investments, particularly in the natural resource extraction industries which require a long lead on the return, should structure the transaction to maximize the available bilateral investment treaty or other protection. They should also be clear with the host country about their expectations and the assurances necessary to induce the investment. They must be practical in anticipating a level of xenophobic hostility which may well be fostered to build support for general opposition to a particular project.

- The pending *Glamis Gold Ltd. v. United States* arbitration filed under Chapter 11 of the North American Free Trade Agreement (“NAFTA”)<sup>1</sup> demonstrates that even in the most developed countries with well established legal systems, foreign investors may nonetheless need to assert that the host country ignored well-established law to undermine and destroy the investor’s prospect of profitably extracting proven mineral reserves. The Glamis case remains pending and a decision is expected soon. See generally <http://www.state.gov/s/l/c10986.htm>.<sup>2</sup> The case provides a case study on use of available investment treaty protections to obtain compensation where a foreign investor’s claims and investment are diminished or destroyed contrary to law and the investor’s reasonable investment backed expectations.

## II. General Considerations Relevant to Investment Protections Under NAFTA and Other Investment Treaties.

- A. Under traditional international law, foreign citizens had no specific rights or claims against a host country. Rather, it was the responsibility of individual countries to protect their citizens from arbitrary and unlawful action by foreign host governments – sometimes through gun-boat diplomacy, sometimes by bringing international claims, but unfortunately oftentimes doing nothing because other country-to-country interests were deemed more important than a single investor’s concerns. This approach gradually gave way to an international regime – fostered by the Convention on the International Settlement of Investment Disputes between States and Nationals of Other States – whereby states, through both bilateral and multilateral investment regimes, have provided foreign investors specific protections and, most importantly, specific rights to enforce those protections through international arbitration.
- B. In an effort to encourage and attract foreign direct investment, many nations have signed on to bilateral or multilateral investment treaties such as NAFTA and the Energy Charter Treaty. Such treaties provide key innovations that make them a popular investment promotion device.
1. First, they provide investors with a clear set of investment protection standards that have the status of international law.
  2. Second, they offer investors direct access to a binding, neutral form of investment dispute resolution to enforce their treaty rights.
  3. Third, many of these investment treaties have removed the traditional international law requirement that the foreign investor exhaust its local remedies before an international claim for compensation exists.

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<sup>1</sup> North American Free Trade Agreement, Chapter 11, U.S.-Can.-Mex., Dec. 17, 1992.

<sup>2</sup> The authors of this paper are counsel in the pending arbitration for Glamis Gold Ltd.

4. Together, these innovations operate to restrain host state governments in how they treat foreign investors and investments.<sup>3</sup>

C. Finding the Right Investment Treaty.

- Accordingly, when deciding whether, and how, to invest in a particular country, companies should be mindful of whether any investment treaties would serve to protect their investment in that particular country. Beyond NAFTA, there are some 2500 investment treaties currently in place, and not surprisingly, an increasing percent of foreign investment is protected by one or more investment treaties. However, this does not mean that all foreign investment is necessarily protected by an investment treaty – let alone a meaningful one. For instance, the United States has bilateral investment treaties in effect with only about 40 countries.
- Although increasingly resisted by many states, companies currently remain free to structure the investment vehicle in such a way as to take advantage of specific investment treaties; *i.e.*, by establishing an entity to hold the investment in a country that currently has a bilateral or other investment treaty offering the desired protection.

D. Common Treaty Protections.

Despite the fact that there are thousands of separate investment treaties, the substantive protections guaranteed by the signatory states are generally common to most investment treaties, reflecting as they do customary international law. These protections include:

- Protection from Expropriation without compensation;
- National Treatment;
- Most Favored Nation Treatment; and
- Minimum Standard of Treatment including fair and equitable treatment and full protection and security.

1. Expropriation.

- a. In general terms, expropriation is the governmental taking of property for which compensation is required. Historically, a taking of mineral

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<sup>3</sup> Eric Gottwald, *Leveling the Playing Field: Is it Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?*, 22 AM. U. INT'L L. REV. 237, 244-45 (2006).

property was often accomplished by the host State's blatant seizure of the investor's assets.

- b. Modern expropriation claims, however, tend to result from a more indirect approach – often involving a series of actions over time. While expropriation by a State for a public purpose, on a non-discriminatory basis and in accordance with due process of law, is widely accepted as lawful under international law, the compensation requirement makes it conditional.
- c. Although the assessment of an indirect expropriation claim is largely fact-specific, if an investor suffers a deprivation of the use or enjoyment of its investment as a result of conduct of the State, an expropriation claim may be viable,<sup>4</sup> depending on three criteria that are generally analyzed: (1) the degree of interference with the property right; (2) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (3) the character of the government action.<sup>5</sup>

## 2. National Treatment.

- a. In its simplest form, the national treatment obligation is the host country's commitment that the host country will treat the foreign investor as least as good as it treats its own citizens. This protection may not be much comfort when investing in countries where the rule of law is insufficiently established and the host government treats its own citizens arbitrarily.
- b. While, as noted above, host states may well be encouraged to take adverse actions against foreign investors in order to advance domestic interests, increasingly they try to hide or mask the most blatant of these discriminatory actions.

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<sup>4</sup> Campbell McLachlan et al., *INTERNATIONAL INVESTMENT ARBITRATION* 311 (Oxford University Press 2007).

<sup>5</sup> *OECD Working Papers on International Investment*, Paper 2004/4, "Indirect Expropriation" and the "Right to Regulate" in *International Investment Law*, at 10 (OECD Publishing, Sept. 2004); see also 2004 U.S. Model BIT, Annex B 1.1. (Providing that in determining "whether an action or series of actions by a Party . . . constitutes an indirect expropriation," the following factors are to be considered: "(i) the economic impact of the government action . . . (ii) the extent to which the government action interferes with reasonable investment-backed expectations; and (iii) the character of the government action."). These are also the same factors analyzed traditionally under U.S. takings law. See *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

3. Most Favored Nation Treatment.

- a. Most bilateral and other investment treaties also protect foreign investors by providing that they will receive treatment and protection equal to or better than investors from other states. Essentially, this means a foreign investor may rely on protections that have been made available to other investors – even in subsequent treaties.
- b. Interesting issues can arise under these clauses particularly concerning whether they extend to both procedural as well as subsequent rules and whether they apply to pre-existing obligations under other treaties or only to new treaties.

4. Minimum Standard of Treatment.

- a. Recognizing that “national treatment” from an arbitrary government does not offer much protection, international law also provides for a minimum standard governing a host country’s actions no matter how well or how poorly it treats its own citizens. Over time, this minimum standard has encompassed many recognized strands two of which NAFTA Article 1105 called out specifically: (1) fair and equitable treatment and (2) full protection and security.
- b. In contrast to expropriation, fair and equitable treatment is a non-contingent standard; it is absolute and protects a given entity irrespective of the treatment which may be afforded to others. The fair and equitable treatment standard, despite its long recognition as part of customary international law – has proved to be one of the more controversial among the rights provided under investment treaties,<sup>6</sup> largely, perhaps, because many tribunals have found it to be the “outcome-decisive right, eclipsing even the more established protection against expropriation.”<sup>7</sup>
- c. The question, then, is what is required by “fair and equitable treatment”? The fair and equitable treatment standard protects certain fundamental rule of law concepts that are common to principal legal systems throughout the world. As stated by a noted U.S. international lawyer, Elihu Root, in 1910:

“There is a standard of justice, very simple, very fundamental, and of such general acceptance by all

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<sup>6</sup> INTERNATIONAL INVESTMENT ARBITRATION, at 200.

<sup>7</sup> *Id.* at 201.

civilized countries as to form a part of the international law of the world.”<sup>8</sup>

- d. These principles – so basic that they are required by all countries – include principles such as *good faith*, *due process*, *fairness* and *protection from arbitrariness*. These general principles have been given greater specification through judicial practice. The NAFTA tribunal in *Waste Management v. Mexico* considered prior tribunals’ discussions of the standard of fair and equitable treatment and concluded that a general standard was emerging. It stated:

“Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”<sup>9</sup>

In cases involving the review of administrative decisions, which are most likely to be at issue in the mining and oil industries, tribunals have been predominantly concerned with two principles: (1) due process or the protection from arbitrariness, and (2) legitimate expectations, precisely because it is easy to mask politically-motivated measures under the guise of legitimate regulation in a way that the burden of the new regulation or measure is felt largely by the foreign investor.

- III. The circumstances giving rise to the *Glamis Gold Ltd. v. United States NAFTA* claim.
- A. Overview: By administratively reversing settled federal law which required mitigation of cultural resources to the extent economically feasible, the U.S. Department of the Interior (“Interior”) in January 2001 denied approval of the

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<sup>8</sup> Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 AM. J. INT’L L. 517, 521-22 (1910).

<sup>9</sup> *Waste Management v. Mexico*, NAFTA/ICSID Case No. ARB(AF)/00/3, ¶ 98 (Award) (Apr. 30, 2004).

Glamis plan of operations even though it met all existing applicable requirements. Then, once that denial was reversed by the subsequent Interior administration, California enacted new measures in 2002 and 2003, first by "emergency" regulation and then by "urgency" legislation, to require complete and mandatory backfilling for the targeted purpose of making the extraction "cost prohibitive" and to preserve the Native American cultural resources associated with the site.

- B. The Legal Landscape: Laws and regulations applicable to mining operations on federal public lands in California provided Glamis Gold confidence that its mining operations would be approved.
1. The federal Mining Law of 1872, 30 U.S.C. §§ 22 *et seq.*, as amended, actively promoted the development of the mining resources of the United States. *See United States v. Shumway*, 199 F.3d 1093 (9th Cir. 1999).
  2. The Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701 *et seq.*, recognized the nation's need for multiple use of the public lands, including mineral development, subject only to reasonable regulation.
  3. BLM's 43 C.F.R. Subpart 3809 regulations and BLM's California Desert Conservation Area Plan, as adopted in 1980, in coordination with the National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq.*, recognized that Interior only had authority to minimize mining impacts which were reasonably avoidable, and that unavoidable cultural resource impacts would not be a basis for mine denial.
  4. The 2001 "3809" regulation revisions ultimately repudiated Secretary Babbitt's claimed "mine veto" authority, and revisions in 2000 recognized that mandatory complete backfilling of open pits was infeasible, based on a 1999 study of the National Academy of Sciences/National Research Council, *Hardrock Mining on Federal Lands*, prepared at the request of the U.S. Congress. *See 66 Fed. Reg.* 58,834 (Oct. 31, 2001); *see also 65 Fed. Reg.* 70,047, 70,051 (Nov. 21, 2000).
- C. California Laws and Regulations: The 1975 California Surface Mining and Reclamation Act, Cal. Pub. Res. Code §§ 2710 *et seq.*, sought to further California's long mining heritage: before the 2002-2003 measures at issue which blocked the Glamis Imperial Project, California's mine reclamation standards had never imposed complete backfilling requirements.
- D. The Physical Landscape: The recent and past history of mining in the California Desert provided Glamis with confidence that the Imperial Project would be approved.

1. Congress' multiple-use objectives for the California Desert were achieved through an extensive BLM land-use planning process in the 1980s and 1990s.
  - a. BLM's land-use classifications recognized the importance of mining in the California Desert.
  - b. Cultural-resource surveys and Native American consultations played an integral role in BLM's development of the California Desert land-use classifications.
  - c. BLM took care in establishing "Areas of Critical Environmental Concern" throughout the California Desert, specifically to protect cultural resources and scenic values.
  - d. BLM's decades-long planning effort culminated in the passage of the California Desert Protection Act of 1994, 108 Stat. 4471 (Oct. 31, 1994), which set aside millions of acres within the California Desert for preservation and confirmed that other lands were open for multiple uses, including mining.
  - e. The Glamis Imperial Project area remained open to mineral entry and development after completion of the congressionally directed California Desert planning efforts and passage of the 1994 Act.
2. During the 1980s and 1990s, metallic open pit mines were relatively common and operated without controversy in the California Desert and region, including in proximity to Native American cultural sites.
  - a. Representative open-pit projects in the California Desert include the Mesquite Mine (over three times larger than the proposed Imperial Project), the American Girl Mine, the Glamis Picacho Mine, and the Glamis Rand Mine (in addition to several others).
  - b. In addition, the Quechan Tribe received government funding to explore for "bulk mineable" gold deposits in the early 1990s in fairly close proximity to the Glamis Imperial location.
  - c. Many other major metallic open-pit mines operate in the same "Basin and Range Geologic Province" in Nevada, Arizona and Utah.
3. Other development activities within the California Desert traversed Native American cultural areas:
  - a. The Mesquite Solid Waste Landfill (approved in 1996 and 2002, with construction commencing in 2007): one of the largest landfills in the United States, designed for disposal of millions of tons of trash from Los Angeles to be transported by rail to the California Desert.

- b. The Baja Natural Gas Pipelines (approved in 2002 with an expansion approved in 2007): travels 80 miles across the California Desert and crosses many Native American trail features along the way.
- c. The Quechan Tribe Casinos (approved and constructed in 1996 and 2007).

IV. Glamis Gold's Reasonable Expectations.

- A. Glamis Gold identified a valuable gold deposit at the Imperial Project site.
  1. Between 1987 and 1996, with BLM approvals, Glamis explored the Imperial Project site and developed its valuable mining claims and mill sites, drilling about 400 mineral exploration holes and confirming valuable gold reserves.
  2. 1991 and 1995, cultural-resource surveys performed in connection with Glamis' drilling and exploration activity, with Quechan Tribe participation, did not reveal vast cultural features that would distinguish the Imperial Project site from the surrounding area.
- B. In December 1994, Glamis submitted its plan of operations with the reasonable expectation of approval.
  1. Glamis first verified that the Imperial Project site remained outside any designated Area of Critical Environmental Concern ("ACEC") or land withdrawn by the California Desert legislation passed in 1994.
  2. Glamis' plan of operations was a reasonable proposal for sound mine development, which provided reasonable mitigation that was comparable to the mitigation provided at other mines in the California Desert.

V. BLM's and Imperial County's initial review indicated that the Imperial Project was on track for approval, confirming Glamis reasonable investment-backed expectations.

- A. On January 10, 1995, a high-level BLM memorandum favorably reviewed the proposed Imperial Project and referred to the company as a "good steward" of natural resources.
- B. The 1996 Draft Environmental Impact Statement ("EIS") selected Glamis' plan of operations as the preferred alternative.
- C. After further analysis, the 1997 Draft EIS also selected Glamis' plan of operations as the preferred alternative "that best fulfills the agency's statutory mission and responsibilities . . . giving consideration to economic, environmental, technical and other factors."

- VI. Interior initially denied the Imperial Project on January 17, 2001, only after constructing a newly claimed mine veto “authority” under FLPMA to block mines that fully complied with all environmental and regulatory conditions without payment of just compensation.
- A. Under former Interior Secretary Bruce Babbitt, political appointees at Interior seized control of the Imperial Project beginning in 1998.
1. On October 19, 1999, the Advisory Council on Historic Preservation (“ACHP”) issued a non-binding recommendation to Interior Secretary Babbitt opposing the proposed mine based on cultural resource concerns.
  2. On December 27, 1999, Solicitor John Lesly issued an opinion asserting a new mine veto authority that would allow Interior to deny a project based, for example, on cultural resource concerns only.
  3. Based on Solicitor Lesly’s legal opinion, BLM reversed itself in November 2000 and recommended in the Final EIS the “no action” alternative for the Glamis Imperial Project to Secretary Babbitt.
  4. On the eve of leaving office, Secretary Babbitt issued a January 17, 2001 Record of Decision denying the Imperial Project, based in part on a previously undesignated Native American “spiritual pathway” traversing more than 130 miles, and a determination that the proposed mine would “impair the ability to travel . . . physically and spiritually” across a “Trail of Dreams.”
- B. The Norton Interior Administration rescinded the unlawful acts of her predecessor but failed to approve the project in a timely fashion.
1. In October 2001, Interior rejected former Solicitor Lesly’s expansion of Interior’s authority under the 1872 Mining Act in part due to concerns regarding widespread adverse economic impacts and “as a matter of basic fairness.” See 66 *Fed. Reg.* 58,834 (Oct. 30, 2001).
  2. On November 23, 2001, Interior Secretary Gale Norton rescinded Secretary Babbitt’s denial of the Imperial Project.
  3. By September 27, 2002, BLM’s *Mineral Report* confirmed Glamis’ long-held belief that its mining claims were valid and in compliance with U.S. laws, but the federal government failed to issue a new Record of Decision before the State of California took new targeted action against Glamis’ investment.
- C. California’s unprecedented and targeted measures imposed complete backfilling requirements on the Glamis Imperial Project.
1. On September 5, 2002, California Senator Sher wrote to California Governor Davis urging him to support “measures . . . needed to stop the Glamis Imperial

mining project in Imperial County proposed by Glamis Gold Ltd., a Canadian based company.”

2. On September 9, 2002, Senator John Burton, President pro Tempore of the California Senate, wrote to California Governor Gray Davis advising that “last year the U.S. Department of the Interior reversed a previous decision to deny a permit for a Canadian company to dig a huge open pit gold mine at Indian Pass in Imperial County.”
3. Governor Davis heeded this advice, and on September 30, 2002, directed his “Secretary of Resources to pursue all possible legal and administrative remedies that will assist in stopping the development of the Glamis gold mine.”
4. California Senate Bill 22, signed into law by Governor Davis on April 7, 2003, was drafted to specifically target the Imperial Project. As stated in a California Senate Committee Report, dated January 14, 2003: “These changes to [the] statute are urgently needed to stop the Glamis Imperial mining project in Imperial County proposed by Glamis Gold Ltd., a Canadian-based company. . . .”
5. The pending Glamis Imperial Project was also the sole stated basis for California’s adoption of “emergency” mandatory backfilling regulations between December 2002 and April 2003.
6. California’s mandatory backfilling requirements for new metallic mines (exempting all existing open pit mines and all new non-metallic open pit mines) were not supported by any technical, theoretical or empirical studies and were completely unprecedented for metallic mines. The Glamis Imperial project was the only affected mine proposal pending at the time of these State actions.
7. Imperial County, the lead California agency responsible for regulating the Imperial Project, strongly opposed the mandatory complete backfilling requirements in comments to the State, dated March 17, 2003, in part because there was “no scientific analysis” in support of the regulation.
8. As California Governor Gray Davis declared on April 7, 2003: “By requiring complete restoration of metallic mining sites, the bill essentially stops the Glamis Gold Mine proposed in Imperial County. . . . This measure sends a message that California sacred sites are more precious than gold. The proposed Glamis Gold Mine would irreparably harm . . . the Quechan’s spiritual trail, the ‘Trail of Dreams.’ The reclamation and backfilling requirements of this legislation would make operating the Glamis Gold Mine cost prohibitive.” No other mines were mentioned.
9. The *New York Times* acknowledged these basic facts on August 12, 2007, when it wrote: “Glamis Gold, the Canadian mining company that sought to

build the California mine, learned the hard way several years ago. After investing \$15 million, the company watched Mr. Jackson [President of the Quechan Tribe] tie up the project with regulators. It was finally killed when Gray Davis, then the governor of California, issued an emergency order." The *Times* added: "Mr. Jackson isn't always against new development. The Quechans are considering building a second casino on the California side of the border, and he has faced protests from his own tribal elders who argue that the \$200 million project is on sacred ground."

- D. In accordance with the determination of California's Governor, Glamis Gold determined that the Imperial Project's entire economic value was destroyed by 2003, a determination that was confirmed by an appraisal conducted by Behre Dolbear, Inc.

## VII. The Glamis Gold Arguments and Issues under NAFTA.

- A. It is uncontested that Glamis' property interest in the mining claims, and associated expenditures, qualify as an "investment" under NAFTA Chapter 11.
- B. It is uncontested that under NAFTA and international law generally, the United States is responsible for the actions taken by federal agencies and agencies of the State of California.
- C. Article 1110 of NAFTA provides: "No party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such investment."
- D. Article 1105 of NAFTA provides: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."
- E. Expropriation Claim: Whether the United States has breached its obligations under Article 1110 by taking measures tantamount to expropriation of claimant's investment without payment of compensation is at issue in the pending arbitration.
  - 1. NAFTA is broadly drafted to afford protection from direct and indirect expropriations as well as measures "tantamount to expropriation."
  - 2. U.S. takings law informs customary international law and NAFTA Chapter 11 jurisprudence and therefore is important in evaluating NAFTA expropriation claims. *See Restatement (Third) of Foreign Relations* § 712, n.6. Leading U.S. cases on regulatory takings are persuasive precedent. *E.g., Lucas v. South Carolina Coastal Comm'n*, 505 US. 1003, 1029 (1992); *Whitney Benefits Inc. v. United States*, 18 Cl. Ct. 394, *aff'd* 926 F.2d 1169 (Fed. Cir. 1991).

3. Glamis contends that both the Federal and the California's actions with respect to the Imperial Project are measures tantamount to expropriation, because:
  - a. At the Federal level, both Secretary Babbitt's initial denial after delaying completion of the plan of operations review while arbitrarily changing the rules under which the plan would be assessed was an expropriation. While the United States argues that measure was temporary because the denial was subsequently lifted, it cannot deny that the interference was permanent because no approval was ever provided.
  - b. The California measures' also permanently interfered with Glamis' property right and the measures effected a full devaluation of the mineral interest. *See Metalclad Corp. v. The United Mexican States*, ICSID Case No. ARB (AF)/97/1, ¶ 103 (Award) (Aug. 30, 2000) (An expropriation under NAFTA includes "covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.")
- F. Fair and Equitable Treatment Claim: Glamis also asserts that the Federal Government and the State of California failed to comply with the minimum standard of treatment and provide fair and equitable treatment:
  1. Fair and equitable treatment, as developed under customary international law, and recognized under numerous investment treaties imposes an obligation that host countries act in good faith to accord due process in the way regulations and policies are formulated and applied to protect the legitimate expectations of an investor who has relied to its significant detriment on the established regulatory framework and the established process for modifying that framework.
  2. Discriminatory and arbitrary actions targeted against a specific project on the eve of approval have commonly been found to violate the fair and equitable treatment strand of the minimum standard. Glamis contends that the Federal government did this when it distorted the 3809 process to justify the January 2001 denial. It contends the State of California did this when it imposed reclamation and recontouring requirements that served no rationale purpose and focused essentially on stopping a single mine – the Glamis Imperial project.
- G. Under NAFTA, Glamis Gold claims compensation for the lost value of the Imperial Project gold reserves and related damages.

## VIII. Conclusion

- The upcoming ruling in the *Glamis Gold Ltd. v. United States* claim under NAFTA may provide significant guidance to the mineral extraction industry on the level of protection available when investing in countries with bilateral or other investment treaties with the foreign investor's home country.
- Companies must be aware of these protections when structuring the investment vehicle and deciding whether to pursue a particular mineral extraction project. Given the long lead before the foreign investor is likely to obtain any return on the significant investment necessary to develop a mineral extraction project, foreign investors should be very clear with the host country about their expectations and the assurances necessary to induce the investment.