# Striking NAFTA Gold: Investors Can't Circumvent Environmental Rules

By Jordan C. Kahn and Gideon Kracov

On June 9, a longstanding and controversial North American Free Trade Agreement arbitration was resolved in favor of the United States. The State Department announced that arbitrators unanimously ruled against Canadian company Glamis Gold Ltd. (now owned by GoldCorp), rejecting its claims under NAFTA's takings and due process provisions. The award will be publicly released after the parties make modifications to redact confidential information.

But the outcome — and the unusual order that the loser pay two-thirds of the arbitration costs — provides a strong message that foreign investors cannot use NAFTA arbitration as a means to circumvent domestic environmental protections.

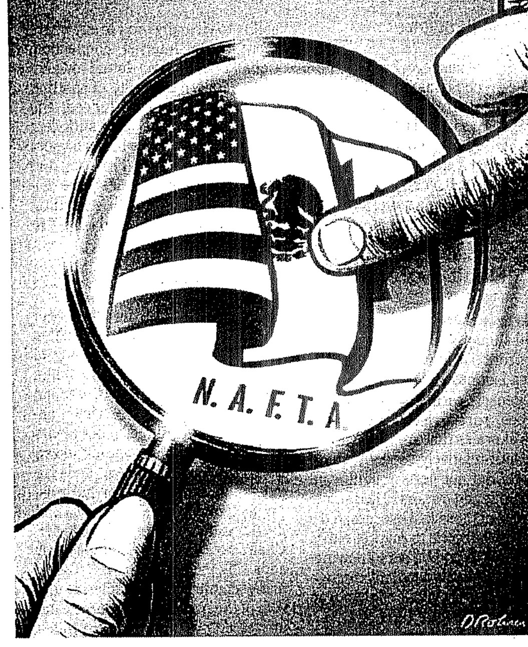
The Glamis case centers on Indian Pass in Imperial County. This federal property within the California Desert Conservation Area is located across the Colorado River from the Quechen Tribe's reservation. In 1987, Glamis used its Nevada subsidiary to acquire rights to mine Indian Pass under 1872 legislation allowing U.S. citizens to mine federal lands without payment of royalties. In 1994, Glamis proposed a project to remove 150 million tons of ore and 300 million tons of waste rock from three open pits using a cyanide heap leach process. Two of the three pits were to be "backfilled" to their original contours while the third would remain scarred.

The project was subjected to rigorous environmental impact review under both the National Environmental Policy Act and the California Environmental Quality Act. This included onsite meetings with Quechan representatives to assess the cultural impacts of the project site that is sacred for the tribe. In 2001, Interior Secretary Bruce Babbit denied a permit for the project, citing an inability to fully mitigate adverse impacts. After meetings between Glamis and the new Bush administration, however, Interior Secretary Gale Norton rescinded the denial in November 2001. California Sen. Barbara Boxer publicly criticized this action for lacking transparency.

With the federal permit ready to issue, California's Mining and Geology Board adopted regulations in 2002. Months later, California amended its Surface Mining and Reclamation Act. These actions applied statewide (including on federal lands) and would require Glamis to backfill completely all three pits at the mine project. Gov. Gray Davis announced that the "measure sends a message that California's sacred sites are more precious than gold." Although Glamis was still able to proceed, it claimed that the California reclamation requirements rendered the project economically infeasible.

In response, Glamis filed a NAFTA Chapter 11 arbitration claim against the United States in 2003 seeking $50 million. Chapter 11 allows investors from one NAFTA country to arbitrate alleged violations of NAFTA protected rights directly against another NAFTA country that hosts the investment using rules from either the U.N. Commission on International Trade Law or the International Centre for Settlement of Investment Disputes. NAFTA Article 1105 provides investors with the right to "fair and equitable treatment." This somewhat amorphous right is analogous to the Due Process Clause of the 14th Amendment to the U.S. Constitution (although the remedy differs because arbitrators can only award damages and cannot invalidate government action). NAFTA Article 1110 protects against expropriation and is virtually identical to the Takings Clause in the Fifth Amendment.

*Glamis* is not the first NAFTA Chapter 11 arbitration involving a challenge to environmental laws. For example, NAFTA Articles 1105 and 1110 were found to have been violated by Mexico in the 2000 *Metalclad* arbitration award. The California investor there was awarded more than $16 million for its failed effort to construct a landfill in the state of San Luis Potosi. At the time, *Metalclad* sparked fears that Chapter 11's investor protections would override domestic environmental laws and give disproportionate influence to investors. This is because environmental interests cannot bring Chapter 11 arbitration claims and must instead rely on the weaker environmental enforcement provisions of NAFTA's Environmental Side Agreement. In 2005, however, the *Methanex* Chapter 11 arbitration award eased environmentalists' concerns. *Methanex* rejected the Canadian investor's challenge to California's ban of the gasoline additive MTBE. The arbitrators found that California's ban applied to all MTBE suppliers and thus did not discriminate against foreign investors.




Glamis claimed that California's actions deprived it of the value of its investment in violation of NAFTA Articles 1105 and 1110. It relied on its Canadian nationality to pursue the NAFTA claim even though it had used its U.S. subsidiary to benefit from domestic mining laws. The United States argued that the California reclamation requirements were supported by the legitimate public policy goals of both protecting the environment and Native American cultural resources. Arbitration hearings took place in late 2007 in Washington, D.C. before a tribunal of arbitrators consisting of Boalt Hall professor David Caron (selected by the United States), private practitioner Kenneth Hubbard (selected by Glamis) and University of Utah President Michael Young (selected by both parties).

The *Glamis* tribunal dismissed Glamis' claim and ordered it to pay two-thirds of the arbitration costs. As in *Methanex*, the arbitrators unanimously found that California's actions did not violate NAFTA's standard of treatment or constitute an expropriation of the investment at issue. Despite the lack of binding precedent in the arbitration context, these awards deter foreign investors from using trade agreements to bypass domestic judicial remedies and weaken environmental laws that advance valid state interests. *Glamis* builds on *Methanex* to illustrate increased international acceptance of robust environmental standards.

The *Glamis* tribunal should be commended for the outcome, as well as for the process it employed. Documents were made available and the hearings were open to the public. Amicus briefs were accepted on behalf of the Sierra Club, the National Mining Association and the Quechan Tribe. By involving these interested parties, Glamis demonstrates improved transparency and fairness in NAFTA Chapter 11 arbitration proceedings.

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