***Glamis Gold v United States* (NAFTA Chapter 11)**

AREAS OF POLICY AFFECTED: resource management (gold mining), indigenous rights (culture), culture (Native American heritage), environmental protection (land conservation, mining remediation)

CASE SUMMARY: Glamis Gold, a Canadian mining company, sued the United States under NAFTA. Glamis owned mining rights and planned an open-pit gold and silver mine on federal land in southeast California. The plan involved treating the mined ore with an on-site cyanide leaching process. The mine was to be located near Native American lands that were designated to have cultural and spiritual importance.

The California government introduced regulatory restrictions that applied to the project due to its potential cultural and environmental impact. The measures included requirements for mandatory backfilling and restoration of the land to a usable condition. Glamis argued that the requirements rendered the project unviable. Federal officials subsequently denied Glamis' proposals for the mine.

The tribunal rejected Glamis' argument that the government measures expropriated its assets, concluding that they did not render Glamis' mining rights substantially without value. The tribunal also decided that the measures were not "a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons", and so rejected Glamis' argument that they violated the NAFTA standard of fair and equitable treatment.

COMMENT: The claim demonstrated the tension between the protection of investor rights and expectations, on the one hand, and government efforts to protect the rights and interests of other actors or pursue policy aims, such as environmental protection, on the other hand.

Notably, the tribunal's approach to the concept of fair and equitable treatment was more restrictive than that of other tribunals. In *Glamis*, the tribunal required the investor to satisfy a relatively high threshold before demonstrating a violation of the NAFTA standard. It also required the investor to provide affirmative evidence of state practice and *opinio juris* in order to establish an evolution of standard beyond its established content in customary international law. This approach, which tracks the position of the NAFTA governments in Chapter 11 litigation, was not adopted by earlier tribunals or by the subsequent tribunal in *Chemtura v Canada*. This shows how investors and states may be subject to different degrees of legal protection or liability depending on the tribunal's interpretive approach.

Source: www.iiapp.org (June 2011), based on information in publicly-available awards and materials in known investment arbitrations (for texts of awards, see www.italaw.com). This report was produced by a research team coordinated by professor Gus Van Harten (gvanharten@osgoode.yorku.ca) of Osgoode Hall Law School of York University in Toronto, Canada.