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GLAMIS GOLD: A CASE STUDY OF INVESTING IN DESTRUCTION

This briefing paper will describe the case of Glamis Gold, a Canadian gold mining corporation that recently initiated a claim against the United States using the investment agreement in Chapter 11 of the North American Free Trade Agreement (NAFTA). In December 2003, Glamis filed a NAFTA claim for US\$50 million claim against the United States over actions taken by the state of California intended to protect the environment and indigenous communities from the impacts of open-pit mining.

The Glamis case study dramatically demonstrates the way in which international investment agreements can undercut efforts to protect the public interest in the mining sector, throwing a much need spotlight on these issues in the context of investment provisions in a number of bilateral trade and investment agreements.

The Extractives Sector, Mining and Investment Agreements

Serious concerns about the impacts of multinational investment in the extractive industries – including mining – have increased significantly in recent years. In many developing countries, growing foreign investment continues to be concentrated in natural resource sectors such as oil, gas and mining. Yet rising investment in the extractive industries has had an immense negative impact on livelihoods in local communities around the world and has also led to significant damage to the environment in many countries.

According to the United Nations, the proportion of people living on less than \$1 per day in mineral and energy exporting countries grew from 61 percent in 1981 to 82 percent in 1999. Economic dependence on volatile global commodity markets threatens economic security, while studies point to slower economic growth rates for such countries.

Extractive oil, gas and mining sectors are capital intensive, create few direct jobs and, because they are reliant on imported technologies have few linkages with the rest of their host economies. The mining industry in particular spews almost half of all toxic emissions in some countries, in the process ruining local agriculture and causing a substantial boost in respiratory disorders and raising cancer rates among workers and people in nearby communities.

In the mining sector, comprehensive and enforceable regulations at the national and international level are necessary in order to control the negative social and environmental impacts of these industries and to guarantee equitable distribution of benefits to impacted areas. Yet international investment agreements – such as those under consideration in the Free Trade Area of the Americas (FTAA) and in a number of bilateral trade and investment agreements – would severely limit the ability of developing countries

to pursue pro-poor national investment strategies, to support the public interest, and to protect indigenous rights. The Glamis case study clearly demonstrates the potential for harm.

The Story of Glamis in California

Glamis Gold Ltd. is a gold mining corporation with its official headquarters in Vancouver, British Columbia in Canada. The company currently has mining operations in the United States (California and Nevada), Guatemala, and Honduras, with plans underway to begin mining at a site in Mexico in 2005. Its operation in Honduras has been the target of recent large community protests over the destruction of forests and contamination of the community's water supply. Glamis describes itself as "a premier intermediate gold producer with low-cost production."

Glamis' planned gold mining operations in the Imperial Valley of California resulted in a controversy that has continued unabated for nearly a decade. In 1987, Glamis first began acquiring interests in mining claims on federal public lands in the Imperial Valley of California managed by the U.S. Department of the Interior. Under the 1872 Mining Law in the US, U.S. citizens are allowed to acquire claims for mining on federal lands for free simply by putting up posts to mark the claim, with a notice of location on one of the posts, and then by registering the staked claim with the Department of the Interior. The holder of the claim can then mine the minerals located on that land for its own profit, without paying any royalties to the federal or other governments.

In order to comply with the requirement in the 1872 Mining Law that only "U.S. citizens" can mine on federal lands, Glamis established subsidiaries in the United States to act as "citizens" for the purposes of acquiring the mining claims. The mining claims acquired by Glamis in the Imperial Valley came to be known as the Glamis Imperial Project and eventually reached 187 mining claims and 277 millsites on a total of almost 1,500 acres (almost 650 hectares). In the early 1990's, Glamis proposed that the Imperial Project would be a massive, open-pit, cyanide heap-leach gold mine, a mining process

that has been banned by an increasing number of countries and the state of Montana. The Imperial Project ore is of such low grade that the project would require that approximately 422 *tons* of rock be mined, process or stored for *each ounce* of gold produced.

The mining operation would destroy a largely pristine area adjacent to a designated desert wilderness area, including 88 acres of woodland, critical habitat for wildlife in that part of the desert. The operation would also consume up to 389 million gallons of water annually from the desert groundwater aquifer.

In addition, the mining sites are located in the heart of an area near tribal lands that has now been withdrawn from future mining claims to protect Native American religious and cultural values, including sacred and ancestral sites, and the proposed mine area itself is sacred to the Quechan Indian Nation. The Quechan actively practice their religion in the area of the proposed mine, and ancient trails of major religious importance to the Quechan intersect on and near the proposed site. The mine area also is one of the richest archeological resource areas in the state of California and includes 55 known historic properties eligible for federal recognition.

In 2001, following an exhaustive six-year review process, including extensive public comment, the Department of the Interior under President Clinton denied a permit to Glamis to operate the Imperial Project mine. The denial was the first time the federal government had ever denied a major mining project on lands covered by the 1872 Mining Law. The Interior Department based its denial on the pollutant impacts of the mining operation and the cumulative adverse impact on Quechan religious sites, as well as on environmental justice grounds.

In November 2001, however, the new Bush administration Secretary of the Interior, Gale Norton, reversed the permit denial. The decision to reopen the permit involved no consultation with tribal groups, no public input, and took only a few months, even though the initial permit denial took six years and hundreds of hours of consultation.

In April 2003, partly in response to the Imperial Project, the State of California took action to limit the impact of open-pit mining. The state actions primarily focused on requiring that the holes created by open-pit mining operations be “backfilled” and that the landscape in the area be recontoured once mining operations have been completed.

After extensive review, the California State Mining and Geology Board approved permanent regulations that will require backfilling of all future open pit mines in the state. The California State Legislature also passed legislation, SB 22, which specifically requires the backfilling of open pit mines on or near sacred sites or areas of special concern.

Enactment of the legislation and regulations fulfill the legislative mandate of the state law that governs mining in the state of California, the Surface Mining and Reclamation Act of 1975 (SMARA). SMARA dictates that public health and safety concerns must be provided for and that reclaimed land must have “subsequent beneficial use.” The law and regulations apply broadly to all new open-pit mines in the state, not specifically to the Imperial Project alone.

Glamis Challenges California’s Actions Using NAFTA’s Investment Rules

After California acted to protect the interests of its citizens and environment, Glamis brought a new tool to its battle over the Imperial Project – the investment rules in Chapter 11 of NAFTA.

On December 10, 2003, Glamis submitted an arbitration claim for \$50 million under the investment rules in Chapter 11 of the North American Free Trade Agreement (NAFTA).

In its Notice of Intent, the company asserts that the actions of the state of California and the Federal government have “destroyed” the value of its mining investments in California and therefore should be compensated under the terms of NAFTA Chapter 11.

NAFTA Chapter 11 provides foreign investors broad substantive rights and the ability to bring arbitral claims directly against a government before international tribunals. Under Chapter 11, foreign investors can seek financial compensation for the impacts on their business interests of federal, local, or state actions, including laws and regulations intended to protect the public interest and the environment.

Glamis’ Notice of Intent demonstrates the threat posed to public interest protections by the rules in NAFTA Chapter 11 and other investment agreements. Glamis argues that the actions of California violated two central rules in Chapter 11: the prohibition on expropriation and the requirement to provide “fair and equitable” treatment to foreign investors.

The rules against *expropriation* in Chapter 11 include the overly broad and unclear concepts of “indirect expropriation” and actions “tantamount to expropriation.”

While expropriation rules were originally intended in international law to guard against outright seizures of property, the standard in Chapter 11 goes far beyond that principle. Using these rules, multinational investors can argue that a government law or regulation has even indirectly diminished the value of the company’s investment. The expropriation standard can thus exert a chilling effect on government’s decisions to regulate in the public interest.

In the case of Glamis, the company has asserted that the backfilling requirements instituted by California have made its mining operation too costly and therefore uneconomic. Glamis asserts that the resulting impacts on its investment should be compensated by the U.S. government, even though the company surely knew of the risks it was taking in pursuing the Imperial Project – including the possibility of government regulation. Moreover, whether the company gains or loses from the mine depends in significant part on the volatile price of gold at any one time. Glamis also argues that California and federal actions did not comply with the requirement that governments provide “*fair and equitable*”

treatment” to foreign investors. “Fair and equitable treatment” is a completely open-ended standard that has never been fully defined in international law or elsewhere. The standard seems to provide foreign investors a nearly limitless opportunity to challenge government actions they do not like. As has often been the case in past investment claims, Glamis fails to clarify the manner in which California or Federal actions were unfair or inequitable.

Not only do the substantive investment rules pose significant challenges to government policymaking, the Glamis case also raises significant questions about the potential for investment agreements to undermine domestic policymaking and democratic governance. According to the Inside US Trade newsletter, Glamis CEO Kevin McArthur said that the company resorted to a Chapter 11 claim because the company would have a better chance of receiving compensation than would be the case under U.S. law.

It is also worth noting that the arbitration claim, with its \$50 million compensation demand, was submitted as the Department of the Interior was separately considering Glamis’ attempt to get the U.S. government to buy out Glamis’ mining claims in the Imperial Valley. Serious questions have been raised about whether Glamis is attempting to use the Chapter 11 as leverage in its buy-out effort.

Conclusion

The Glamis case is a dramatic example of the way in which the rules in investment agreements could be used to undermine policies needed to protect people and the environment. While developed countries such as the US may at times face claims like the one initiated by Glamis, developing countries will be much more politically vulnerable when faced with similar challenges by foreign investors. In the mining sector in particular, where negative impacts in developing countries have been significant, investment agreements could hamper efforts to pursue badly needed regulation of the sector.

The implications of investment agreements for environmental protections have been raised prominently in recent years. Now, however, Glamis assertions also highlight the potential impacts of investment agreements for indigenous communities. By indicating its intent to challenge a California law intended to protect sacred indigenous sites, Glamis has put front and center the issue of whether investment agreement rules can undermine indigenous rights, potentially even including rights guaranteed in international agreements.

For more information on investment agreements and the extractives sector, see Oxfam America’s report “Investing in Destruction,” found on the web at:
www.oxfamamerica.org/publications/art5574.html.

Friends of the Earth – U.S. and Oxfam America wish to thank the Mineral Policy Center for their assistance.