

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

GLAMIS GOLD LTD.,)
)
)
 Claimant/Investor,)
)
 and)
)
 UNITED STATES OF AMERICA,)
)
 Respondent/Party.)

**REJOINDER OF CLAIMANT GLAMIS GOLD LTD.
TO REPLY IN FURTHER SUPPORT OF REQUEST FOR BIFURCATION
OF RESPONDENT UNITED STATES OF AMERICA**

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The United States has failed to demonstrate – for it cannot – that preliminary review of the factual record would be any more expeditious than proceeding directly to the merits. To the contrary, its arguments underscore the conclusion that bifurcation would require duplicate development and detailed analysis of the full factual record. The United States concedes that this significant effort cannot possibly dispose of the case. Bifurcation of these proceedings would only result in unwarranted delay. Accordingly, the Tribunal should promptly deny the United States’ motion.

Argument

Glamis has brought two claims under NAFTA Chapter 11, one asserting a violation of Article 1105 and the other a violation of Article 1110. These claims arise from a common set of facts that will need to be addressed in any proceeding – merits or otherwise – in which the Tribunal seeks to assess Claimant’s investment in the mineral rights at the Glamis Imperial

Project, the failure of the United States through action and inaction to provide fair and equitable treatment as required by international law, and the failure of the United States to compensate Claimant for the expropriation of its investment. No efficiency is gained in evaluating the factual basis of Glamis' claim twice even if the Tribunal were inclined to treat either preliminary challenge as jurisdictional.

The facts, as alleged in Claimant's Notice of Arbitration, may be summarized as follows:

- Under United States law, Claimant has a recognized property interest in the mineral rights at the Imperial Project. *See* Notice of Arbitration, ¶¶ 4, 11, 17; *see also* Glamis Response, at 3 n.2.
- Claimant had a reasonable expectation that open-pit mining employing limited and economically feasible backfilling methods would be approved, particularly in light of numerous other major open-pit metallic mines operating in similarly-situated areas of the California Desert Conservation Area; this expectation was further bolstered by the federal government's nearly two-decade-long consideration and eventual protection of lands – *near but not including the Imperial Project site* – for Native American cultural and other resource values. *See* Notice of Arbitration, ¶¶ 5-8.
- The Department of the Interior and the State of California (acting through Imperial County) *jointly* considered Claimant's Plan of Operation to initiate mining (after previously having approved multiple exploration plans that demonstrated the existence of recoverable gold deposits). *See id.* ¶¶ 8-9.
- Following detailed environmental reviews through at least 1997, both the Department of the Interior and the State of California recommended approval of Claimant's Plan of Operation, subject only to additional economically-feasible mitigation measures. *See id.* ¶ 9.
- At some point thereafter, however, political elements within the Department of the Interior turned against the project and unlawfully denied the Plan of Operation through a series of actions that culminated in the January 17, 2001 Record of Decision by former Secretary Babbitt, which the Department of the Interior itself subsequently determined to be illegal and rescinded in late 2001. *See id.* ¶¶ 13-16.
- After rescission of the Interior Secretary's denial and completion of a *Mineral Report*, released in September 2002, confirming that Claimant had "valid existing rights" in its federal mining claims, the State of California acted by statute and regulation (adopted between December 2002 and April 2003) with the specific intent to stop the Imperial Project. Specifically, the

statute and regulation require complete backfilling of all open pit metallic mines and extensive site recontouring, and were mandatory, non-discretionary requirements that applied retroactively to pending plans of operation seeking to develop valid existing rights. *See id.* ¶¶ 16-22.

- Immediately upon the passage of these measures, Claimant’s mineral rights became worthless because, as acknowledged by the then-Governor of California, these unprecedented requirements were specifically intended to make mining of the significant and valuable gold deposits at the Imperial Project “cost prohibitive.” *See id.* ¶¶ 18, 21, 23, and Ex. A.
- To date, neither the Department of the Interior nor the State of California have taken further action on Claimant’s Plan of Operation, nor have they compensated Claimant for its loss of the value of its mineral rights. *See id.* ¶¶ 22, 24.

This Tribunal will need to explore this history no matter what it ultimately concludes with respect to the legal significance of some of the individual events encompassed therein. Respondent not only fails to articulate how its preliminary challenges could be briefed and decided without evaluating this history, but also fails to identify any convincing reason for doing so.

A. Bifurcation Is A Fruitless Exercise Where The United States Admits Pre-December 2000 Facts Remain Relevant And Must Be Considered Regardless Of The Success Of Its Preliminary Challenge On Timeliness

Respondent essentially admits that preliminary consideration of its timeliness defense would have no effect on the ultimate merits proceeding, which it also concedes would occur in any event. Specifically, Respondent now admits that “then-Secretary Babbitt’s January 17, 2001 Record of Decision denying Glamis’ Plan of Operations . . . is a ‘measure’ within the definition of NAFTA Article 201.”¹ Respondent also admits that “Glamis, of course, may refer to facts

¹ Respondent’s Reply, at 6 n.11.

that pre-date December 9, 2000, as background for its claims”² These two admissions and the indisputable fact that Claimant’s Notice of Arbitration was filed less than three years after Secretary Babbitt’s Record of Decision denying the Glamis Imperial Project³ confirm that Respondent’s timeliness challenge cannot be dispositive of Claimant’s case.

These admissions completely undermine any conceivable efficiency rationale for preliminary consideration of Respondent’s timeliness challenge. All of the events encompassed in the factual summary above will be before the Tribunal in a merits proceeding to determine Respondent’s breach of the obligations guaranteed to investors under NAFTA Articles 1105 and 1110. Respondent has not – and cannot – demonstrate any efficiency in preliminarily considering a few discrete events now, out of context, in order to obtain some undefined preliminary ruling. Indeed, any such ruling would be advisory in that Respondent continues to waffle with respect to the factual predicate for the assertion of a timeliness defense: that the identified events, such as a single letter from the Advisory Council on Historic Preservation, are in fact “measures” from which some independent damage flows.⁴ If the letter is not a “measure,”

² Respondent’s Reply, at 4.

³ For purposes of the bifurcation issue, Claimant assumes, but does not concede, that timeliness is established by reference to the date of the Notice of Arbitration.

⁴ Glamis has alleged two violations that result from a series of events. In the expropriation context, it is clear that “where the alleged expropriation is carried out through series of measures . . . , the cause of action is deemed to have arisen on the date when the interference, attributable to the State, ripens into an irreversible deprivation of those rights rather than on the date when those measures began.” *Riahi v. Iran*, Award No. 600-485-1, ¶ 345 (Iran-U.S. Claims Tribunal 2003). That Glamis sought to initiate litigation with respect to some of these events does not change the result. Furthermore, Respondent seeks to mislead the Tribunal with respect to those earlier actions. While it references repeatedly the 2000 litigation (*see, e.g.*, Respondent’s Reply, at 7 n.15; Respondent’s Request to Bifurcate, at 2 n.3), it fails to inform the Tribunal that the court ultimately accepted Respondent’s argument that the Leshy Opinion was not “final agency action” and dismissed the case as premature. With respect to the 2001 litigation to which
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then, according to Respondent's own theory, no claim arose and obviously there is no timeliness defense to even be considered preliminarily. If it is a "measure," but no independent damage arose from it, then (under the theory Respondent asserts in its ripeness challenge) there would be no cognizable claim under Article 1117. If it is a "measure," and independent damage is traceable to that measure, there would be an independent claim for those discrete damages that would be time-barred.⁵

These principles are neither complex nor difficult to apply, especially after discovery and in the merits phase when the Tribunal can best evaluate the meaning and legal significance of the array of governmental actions that damaged Claimant's investment and identifies the point when that damage was sufficiently concrete and permanent to result in breaches of Articles 1105 and 1110. While Respondent has certainly burdened the Tribunal (and Claimant) with a pile of decisions in cases in which time-related defenses were raised, not a single one holds or supports requiring preliminary consideration of a hypothetical timeliness challenge that would *not* be dispositive of either of Claimant's claims nor eliminate facts to be considered in the merits proceeding.⁶

(...continued)

Respondent now cites (Respondent's Reply, at 6 and n.14), it is simply false to say that Glamis "unsuccessfully" challenged Secretary Babbitt's Record of Decision. That suit was withdrawn, without prejudice, *only after* the Record of Decision was rescinded. The rescission might well have cured the damage done to Glamis had the Department of the Interior and the State of California acted promptly thereafter to approve Glamis' unobjectionable Plan of Operation. They did not and consequently we are before this Tribunal today.

⁵ Claimant has not made any such claim. As set forth in its Notice of Arbitration and as explained in its Response, Claimant's two claims are based upon a series of events that culminate in the breaches of Articles 1105 and 1110.

⁶ None of these cases addressed claims such as the ones here that are based upon a series of actions and continuing inaction. To the extent they are relevant at all, they appear to
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B. Preliminary Consideration Of Respondent’s Ripeness Challenge Would Likewise Accomplish Nothing But Delay In Reaching An Inevitable Merits Proceeding

Again, Respondent concedes, as it must, that Claimant’s Article 1110 claim would survive a preliminary “ripeness” challenge. Accordingly, bifurcation cannot be justified on the grounds that it would be dispositive. Rather, Respondent apparently contends that the Tribunal, in its discretion, should consider a preliminary “ripeness” challenge to a portion of Claimant’s Article 1110 claim on grounds that it would narrow the issues the Tribunal would need consider in a merits proceeding. That contention is simply wrong.

Claimant will resist the strong temptation to address in detail the merits of Respondent’s so-called “ripeness” challenge. However, in evaluating “the substantiality of the objection,” as Respondent acknowledges the Tribunal must do,⁷ it is impossible to escape the conclusion that this “ripeness” challenge does not withstand even cursory scrutiny, much less require an exhaustive preliminary proceeding. As detailed in Claimant’s Notice of Arbitration – and not denied in Respondent’s Statement of Defense – the California regulation and statute were

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support Claimant’s position, not Respondent’s. Thus, in *Aryeh v. Iran*, Award No. 581-842/843/844-1 (Iran-U.S. Claims Tribunal 1997), for example, the Tribunal had joined the jurisdictional issues to the merits (*see* ¶ 2). Most of the cases appear to address not the affirmative defense of whether a claim has been asserted within the applicable limitations period, but the jurisdictional issue – not present here – of whether the dispute arose before the effective date of the applicable treaty (thus seeking retroactive protection from the treaty). *See, e.g., Lucchetti v. Peru*, Case No. ARB/03/4 (Award), ¶ 59 (Feb. 7, 2005).

⁷ Respondent’s Reply, at 11 n.26 (*citing* Matti Pellonpää & David Caron, *The UNCITRAL Arbitration Rules as Interpreted and Applied* 383 (1994) (“The decision making effort as a result must evaluate the substantiality of the objection and consider the cost in time and money to the parties of such a preliminary ruling . . .”).

specifically intended to *and have* killed the Imperial Project and were significant steps in a series of events that resulted in the complete expropriation of Claimant's investment:

- On September 30, 2002, Governor Davis stated: "I have directed my Secretary of Resources to pursue all possible legal and administrative remedies that will assist in stopping the development of that mine." Notice of Arbitration, ¶ 18.
- On October 1, 2002, Governor Davis directed his Secretary of Resources accordingly and stated he "strongly oppose[d] the Glamis gold mine" *Id.*
- On December 12, 2002, the California Mining Board cited Glamis' pending Plan of Operation as the "emergency condition" justifying unprecedented and extraordinary backfilling and site recontouring requirements on an emergency basis. *Id.* ¶ 20.
- On April 7, 2003, Governor Davis signed new legislation statutorily compelling substantially similar backfilling and site recontouring requirements, and acknowledged that the statute "*specifically addresses* the controversial Glamis Gold Mine . . . [and] would make operating the Glamis Gold Mine *cost prohibitive*." *Id.* ¶ 20 and Ex. A (emphasis added).

In light of these undisputed facts, Respondent's repeated, but factually incorrect, assertion that "Glamis is not now, and never was, in a position to have the California measures applied to it," is at best misleading.⁸ In any event, nothing would be gained by the Tribunal wrestling preliminarily with what Respondent means by its suggestion that these measures have not been "applied" to the very target (the Imperial Project) for which they were intended. First, Respondent's protestation notwithstanding,⁹ both the Article 1105 and the Article 1110 claims

⁸ *See id.* at 12. In any event, as set forth in the Notice of Arbitration (¶¶ 18-23) and explained in Claimant's Response (at 11-16), California made the application of these measures mandatory and non-discretionary to all metallic hard-rock open pits mines not approved prior to December 12, 2002. It is undisputed that Claimant's Plan of Operation has not been approved.

⁹ Respondent's Reply, at 5 n.10. ("Glamis, for the first time, complains that the federal government has improperly failed to approve its plan of operations.").

are predicated on the *actions and the continuing inaction* of both the Department of the Interior and the State of California:

13. Despite Glamis Imperial’s compliance with all applicable requirements for the commencement of mining at the Imperial Project, the Department of Interior and the State of California have, through a series of measures detailed below, *failed to approve and erected barriers* that have effectively destroyed all economic value of Glamis Imperial’s established mineral rights.

Notice of Arbitration, ¶ 13 (emphasis added); *see also id.* ¶ 16 (“The Department of Interior . . . has taken steps to reverse some of these illegal actions, *but to date has still not approved* Glamis Imperial’s plan of operation.”) (emphasis added).¹⁰ Thus, the entire history of the acquisition and development of Glamis’ investment to the present day refusal to approve mining operations is at issue in this proceeding. Undoubtedly, the California statute and regulation play a significant role in the continued inaction on Glamis’ Plan of Operation, but exactly the role and the background of these actions is most appropriately considered after discovery during the merits proceeding.

Second, Respondent’s apparent assumption that Glamis’ expropriation claim is dependent on approval (or denial) of its plan of operation is incorrect. As Claimant’s Notice of Arbitration makes clear, the investment at issue here comprises Claimant’s property rights in the distinct federal mining claims and related mill sites – regardless of whether it ever actually

¹⁰ *See also* Notice of Arbitration, ¶ 22 (“Glamis Imperial’s plan of operation only remained ‘pending’ on that date *because of the illegal actions of the Department of Interior in failing to approve the plan in accordance with applicable law and regulation over the preceding several years.*”) (emphasis added). Claimant has provided Respondent more than sufficient notice that continued inaction by the Department of the Interior and the State of California is among the measures that have resulted in the breach of both Article 1105 and 1110.

mined there.¹¹ Such mining claims are valued in the market place by what a willing buyer would pay a willing seller for those rights, considering, among other things, the net present value of the extracted gold minus the cost of extraction. Because the California statute and regulation impose mandatory, non-discretionary requirements for unprecedented complete backfilling and site recontouring, which in Governor Davis's own words make extraction of gold from the Imperial Project mine "cost prohibitive," the property – the mining claims and mill sites – is now worthless.¹²

In short, even if Glamis had never filed a plan of operation to commence mining, and had the Department of the Interior and the State of California never *jointly*¹³ considered that plan for nearly 10 years, the enactment of these California measures effected a taking of Glamis' investment, and the failure to compensate Glamis is a present breach of Article 1110. Glamis'

¹¹ Notice of Arbitration, ¶ 4 ("The Imperial Project consists of 100 percent interests in approximately 187 mining claims and 277 mill sites located on nearly 1,650 acres of federal public lands managed by the U.S. Department of the Interior. . . . Such mineral claims are recognized under United States law as freely transferable property rights."); *see also* Claimant's Response, at 3 n.2.

¹² Notice of Arbitration, ¶ 23.

¹³ Without citation, Respondent baldly asserts that "Glamis's attempt to bundle these actions taken by separate governmental entities into a single measure finds no support in international law or the NAFTA." Respondent's Reply, at 1. This is wrong. Article 1110 applies to actions that "indirectly" expropriate an investment and to measures that are "tantamount" to expropriation. At a minimum, Article 1110 incorporates the customary international law concept of "creeping expropriation" resulting from a series of measures. *See* 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 712, cmt. g (1987) ("creeping expropriations" are "actions of the government that have the effect of 'taking' the property in whole or in large part, outright or in stages"). Nothing in international law or NAFTA – and Respondent has cited nothing – requires that each measure (whether action or inaction) needs to be taken by the same governmental body. As Respondent has acknowledged in other cases, under NAFTA, the Party (here the United States of America) is responsible for the acts of sub-tier governmental entities, not just its own. *See Metalclad v. The United Mexican States*, Submission of the United States, Case No. ARB(AF)/97/1, ¶¶ 3-8 (Nov. 9, 1999).

actions in pursuing development simply make its case for compensation stronger. They demonstrate that under the statutory and regulatory scheme applicable to gold mines on federal land in the California desert, Glamis had a reasonable, investment-backed expectation of recovering its investment, at least until the series of targeted measures, culminating in the California statute and regulation and the continuing failure to act, have completely expropriated that investment.

In short, preliminary consideration of Respondent’s argument that the California statute and regulation have not been “applied” to Glamis’ investment does not eliminate any of the issues raised by Claimant’s expropriation claim. The Tribunal will still need to review the “status and evolution over time of various complicated regulatory schemes”¹⁴ at both the federal and state level in order to evaluate Glamis’ property interest and value of its investment. It will still need to consider the valuation of Claimant’s mining and mill site rights both before and after the expropriation, and it will still need to examine the basis of these California actions and their impact on the value of Claimant’s investment.

Again, Respondent cites to numerous decisions in an effort to suggest that either “ripeness” is a recognized concept of international law¹⁵ or that preliminary treatment is appropriate, but none of these cases addressed a challenge similar to the one Respondent makes

¹⁴ Respondent’s Reply, at 12.

¹⁵ *See id.* at 9 n.20. Four of these cases are not “ripeness” cases at all, but again address the jurisdictional issue of whether the claim arose within the period covered by the applicable treaty. In the fifth case (the *Lockerbie* decision), the International Court of Justice did not dismiss the case (it simply denied the provisional measures sought), and only one of the seventeen judges participating argued that a failure to comply with the 6-month “cooling off” period was a procedural bar to the court’s jurisdiction; a proposition that has been specifically rejected in the NAFTA context. *See Ethyl Corp. v. Canada*, Award on Jurisdiction, NAFTA/UNCITRAL Case, ¶ 84 and n.33 (June 24, 1998) (App. II, Tab 2).

here and Respondent cannot distinguish the one case that squarely does – *Methanex*.¹⁶ As explained in Claimant’s Response (at 9-10), in *Methanex*, Respondent made an identical “ripeness” challenge to the one it is making here; that Claimant could not show “loss” (despite alleging damage) because the complained-of measures had not yet effected a ban on the chemical in question. Not only did the *Methanex* Tribunal conclude that the challenge was not jurisdictional,¹⁷ but it also noted that “even if [the United States’ ripeness challenge] qualified as a jurisdictional challenge (which in our view, it does not), its legal merits are so intertwined with the factual issues arising from Methanex’s case that we would have been minded, as a matter of discretion, to join that challenge to the merits under Article 21(4) of the UNCITRAL Arbitration Rules.”¹⁸ Similarly here, the purpose and effect of these California measures and their contribution to the total destruction of Claimant’s investment is inextricably intertwined with the resolution of the nature and value of the mineral rights at issue, the nature and effect of the joint consideration of Glamis’ Imperial Project by the Department of the Interior and State of

¹⁶ See Respondent’s Reply, at 10 n.22. The cases cited address a variety of issues, including whether particular claimants have demonstrated their status as nationals for standing purposes (*Nottebohm Case*), whether a dispute in fact existed (*Nuclear Tests I and II*), whether the claimants possessed “any legal right or interest appertaining to them in the subject matter of the . . . claims” (*South-West Africa*), and technical issues specific to the agreement at issue (*Tanzania Electric Supply Company Ltd.*). None of these cases, however, involves a ripeness challenge. The United States purports to identify only one case that does – *SGS Societe Generale de Surveillance S.A. v. Philippines* – and it mischaracterizes the holding. What Respondent appears to characterize as a “ripeness” challenge was a question of whether the parties were bound by a pre-existing contractual forum selection clause, not, as here, whether Claimant’s allegation of damage is facially sufficient to state a cause of action. In any event, the tribunal did not decide the issue because it found the BIT did not apply to mere contract disputes (*see* ¶ 96).

¹⁷ *Methanex Corp. v. United States of America*, Preliminary Award on Jurisdiction and Admissibility, NAFTA/UNCITRAL Case, ¶ 86 (Aug. 7, 2002) (App. II, Tab 5).

¹⁸ *Id.*

California, the loss Glamis suffered as a result of the actions taken to block the commencement of mining and the continuing refusal to approve operations, and the quantum of damages associated with the loss from that indirect expropriation of Glamis' investment.

In sum, there is nothing "hypothetical" about this expropriation. The gold is real; the statute and regulation are real, the mandatory and non-discretionary impact of the California measures on the extraction of the gold after 2002 is real; and the complete loss of Glamis' investment is real. Under the position advanced by the United States, if California enacted *any* discriminatory and capricious legislative action designed to block the Glamis Imperial Project (*even an action solely motivated by the fact that Glamis was a Canadian corporation*), Glamis would be unable to bring a NAFTA claim over such an action so long as the Department of the Interior withheld a final administrative action on the proposed Project. In other words, Respondent contends that it can avoid liability under NAFTA simply by refusing to act. This perverse result is irreconcilable with the protections that NAFTA's investment provisions are intended to afford.

Conclusion

In addition to misapprehending the nature of Glamis' claim, mischaracterizing the factual record as summarized in Glamis' Notice of Arbitration, and misapplying the relevant legal tests for "temporal infirmities" and ripeness, the United States has failed to demonstrate any administrative efficiency that bifurcation might lend the proceeding. On the contrary, bifurcation will require the same complex and lengthy factual analysis that will be required to address the merits of the case. As such, Glamis requests that the Tribunal deny the United States' motion.

Respectfully submitted,

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