

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.

**REPLY IN FURTHER SUPPORT OF REQUEST FOR BIFURCATION OF
RESPONDENT UNITED STATES OF AMERICA**

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UNITED STATES DEPARTMENT OF STATE

Washington, D.C. 20520

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In accordance with the Tribunal's Procedural Order No. 1 and Article 21(4) of the UNCITRAL Arbitration Rules, the United States respectfully submits this Reply in Further Support of its Request for Bifurcation.

The United States' request belies Glamis's characterization – whatever its rhetorical appeal – of the United States as “somewhat inconsistently” arguing that Glamis's claims are both too early and too late. Under NAFTA Chapter Eleven, a claimant may only challenge measures that have been adopted or maintained by a Party. Glamis identifies several government actions – some of which were taken by the federal government and some of which were taken by the state of California – that it contends are measures that violate NAFTA Chapter Eleven. 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.

With the exception of a lone and now-rescinded action, all of the federal actions of which Glamis complains were taken more than three years prior to Glamis's filing of its Notice of Arbitration. Under the express terms of the NAFTA, these claims are time-barred. In addition, Glamis is not – and never has been – in a position to have the California measures of which it complains apply to it. Its claim challenging those California measures, therefore, is not ripe.

It is within this Tribunal's discretion to decide these two objections preliminarily.¹ For the reasons set forth below, doing so would be the most efficient way to proceed with this arbitration. A preliminary phase devoted to the United States' time-bar and ripeness objections would dispense with the need for complex factual and legal analysis that would be required to arbitrate Glamis's claims on the merits. Moreover, if the United States were to prevail on its objections, Glamis's *only* remaining claim would be a challenge to the now-rescinded record of decision of former Secretary of the Interior Babbitt denying the plan of operations for Glamis's Imperial Project. A merits phase devoted to determining whether that sole action constituted a breach of NAFTA Chapter Eleven – if Glamis would pursue it at all – would require far fewer resources than an arbitration of all of Glamis's claims on the merits.

¹ See, e.g., *Electricity Co. of Sofia & Bulgaria (Belg. v. Bulg.)*, 1939 P.C.I.J. (ser. A/B) No. 77, 64, 81-83 (Apr. 4) (treating in a preliminary phase separate from the merits objections that certain portions of the claim were time-barred and other portions of the claim were not ripe).

ARGUMENT

I. GLAMIS'S TIME-BARRED COMPLAINTS SHOULD BE ADDRESSED IN A PRELIMINARY PHASE

It is a “fundamental principle of international judicial settlement” that a tribunal “not uphold its jurisdiction unless the intention to confer it has been proved beyond reasonable doubt.”² Article 1117(2)’s limitations period is at the core of the NAFTA Parties’ consent to arbitration.³ It establishes unequivocally the temporal limitations to that consent. The NAFTA Parties’ view is clear that “[a]n investor *may not make a claim* if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge of a loss or damage.”⁴

Glamis’s allusion to “the normal litigation context” provides no basis to disturb the NAFTA Parties’ clear choice to avoid having to defend stale claims.⁵ Moreover, “in respect of a claim arising from an international treaty the limitation rules of domestic law are not directly relevant and . . . international standards would have to be applied.”⁶

International tribunals routinely determine the applicability of temporal restrictions to

² *Certain Norwegian Loans (Fr. v. Nor.)*, 1957 I.C.J. 9, 58 (July 6) (separate opinion of Judge Lauterpacht).

³ *See, e.g.*, NAFTA art. 1122(1) (the NAFTA Parties’ consent to arbitrate is limited to claims submitted “in accordance with the procedures set out in this Agreement.”).

⁴ Department of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation*, in CANADA GAZETTE 68, 153 (Jan. 1, 1994) (emphasis added); *see also* NORTH AMERICAN FREE TRADE AGREEMENT, IMPLEMENTATION ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-159, Vol. 1, 103d Cong., 1st Sess., at 146 (1993) (“All claims must be brought within three years.”).

⁵ Response of Claimant Glamis Gold Ltd. To Request for Bifurcation of Respondent United States of America (“Objection to Bifurcation”) at 4 (Apr. 21, 2005).

⁶ *SCC Case*, No. 49/2002 (Final Award 2003), 2004:1 STOCKHOLM ARB. REP. 141, 165 (2004).

their jurisdiction preliminarily, before addressing the merits of a dispute.⁷ Similarly, the applicable UNCITRAL Arbitration Rules support this Tribunal's addressing preliminary issues in a phase separate from the merits.⁸

While Glamis, of course, may refer to facts that predate December 9, 2000, as background for its claims, events that predate that time may not form the basis for a finding that the United States breached a provision of the NAFTA.⁹ The only actions of

⁷ See *Lucchetti v. Peru*, Case No. ARB/03/4 (Award) ¶¶ 50, 59 & dispositif (Feb. 7, 2005) (addressing objection of temporal infirmity as a jurisdictional matter in a preliminary phase separate from the merits); *Tradex Hellas S.A. v. Republic of Albania*, Case No. ARB/94/2 (Decision on Jurisdiction) at 178-80, 14:1 ICSID Rev.-F.I.L.J. 161, 178-80 (Dec. 24, 1996) (same); *Phosphates in Morocco (Ital. v. Fr.)*, 1938 P.C.I.J. 10, 24, 29 (June 14) (Preliminary Objections) (stating "it is necessary always to bear in mind the will of the State which only accepted . . . jurisdiction within specified limits," and dismissing in a preliminary phase for lack of jurisdiction claims that did not arise within the specified time period); see also Convention for the Protection of Human Rights and Fundamental Freedoms, as amended, art. 35 (Nov. 4, 1950) ("The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and *within a period of six months* from the date on which the final decision was taken.") (emphasis added); *Koval v. Ukraine*, App. No. 65550/01, Eur. Ct. H.R. at 17 (Mar. 30, 2004), available at <http://www.echr.coe.int/Eng/Judgments.htm> (holding that applicant's complaints not raised until more than six months after the cessation of the alleged problem were "introduced out of time and must be rejected"); *A.L.M. v. Italy*, App. No. 35284/97, Eur. Ct. H.R. ¶ 19 & dispositif (Jul. 28, 1999), available at <http://www.echr.coe.int/Eng/Judgments.htm> (holding that the Court was "unable to take cognisance of the merits of the case" because the Government's application "was made out of time"); *Riahi v. Iran*, Award No. 600-485-1 ¶ 68 (Iran-U.S. Claims Tribunal 2003) (finding certain claims barred by the "jurisdictional cut-off date established by [the one year limitation period] of the Claims Settlement Declaration"); *Aryeh v. Iran*, Award No. 581-842/843/844-1 ¶¶ 59-63 (Iran-U.S. Claims Tribunal, 1997) (first determining that a portion of the claims was precluded as too late before discussing the merits of any claims); *Harrington & Assocs. Inc. v. Iran*, Award No. 321-10712-3 ¶ 24 (Iran-U.S. Claims Tribunal 1987) (rejecting claimant's belated attempt to substitute parties due to one-year limitation period of Article III(4)).

⁸ See UNCITRAL Arbitration Rules, art. 21(4); see also Request for Bifurcation of Respondent United States of America, n.2 (collecting authorities); *United Parcel Service of America Inc. v. Government of Canada* (Award on Jurisdiction) ¶¶ 30-31 (Nov. 22, 2002) ("International judicial practice has long recognized that challenges to jurisdiction may be able to be determined in advance of the hearing of the merits of the claim. So article 21(4) of the UNCITRAL Arbitration Rules provides: 'In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question' This power both supports the efficient and effective administration of the arbitral process and reflects the fact that parties, notably State parties, to arbitration processes are subject to jurisdiction only to the extent that they have consented.").

⁹ Cf. *Mondev Int'l Ltd. v. United States of America*, Case No. ARB(AF)/99/2 (Award) ¶ 70 (Oct. 11, 2002) ("events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach."); see also *Northern Cameroons (Cameroon v. U.K.)*, 1963 I.C.J. 15, 129 (Dec. 2) (separate opinion of Judge Fitzmaurice) ("In so far as the Applicant State . . . is making [the earlier matters] the basis of independent complaints, the claim must, to that extent, be considered inadmissible.").

which Glamis may timely complain are those that occurred within the three years immediately preceding Glamis's filing of its Notice of Arbitration on December 9, 2003. Of the federal actions of which Glamis complains, only the now-rescinded January 17, 2001 denial by then-Secretary Babbitt is within the limitations period prescribed by Article 1117(2).¹⁰ Glamis's complaints about any other federal actions cannot serve as the basis for finding a violation of NAFTA Chapter Eleven. A straightforward application of Article 1117(2) in a preliminary phase, thus, will focus the work of the parties and the Tribunal on that sole federal measure.

Glamis incorrectly suggests that a determination of the timeliness of its claims requires that the United States establish that those actions are in fact "measures" under NAFTA Article 201. Such an inquiry with respect to at least some of the actions about which Glamis complains likely would be required in any merits phase. However, the task for a preliminary phase is far simpler. Whichever events or actions Glamis challenges, be they measures under NAFTA Article 201 or something other than measures, they are indisputably outside this Tribunal's jurisdiction unless they fall within Article 1117(2)'s limitations period. A preliminary phase resulting in a decision favorable to the United States would obviate the need for litigation regarding the meaning of the term

¹⁰ Perhaps recognizing the validity of the United States' objection, Glamis appears to be trying belatedly to expand the universe of federal measures that serve as a basis for its claims. In its Objection to Bifurcation, Glamis, for the first time, complains that the federal government has improperly failed to approve its plan of operations. *See* Objection to Bifurcation at 5. Any purported delay, however, is attributable to Glamis itself. *See* Statement of Defense ¶ 40 (Apr. 8, 2005); *see also* GLAMIS GOLD, LTD., QUARTERLY REPORT (Mar. 2000) at 11 ("[I]n conjunction with commencing legal proceedings, . . . the Company requested that the Bureau of Land Management ("BLM") temporarily suspend activities relating to the Company's permit . . ."). In addition, Glamis's assertion that BLM's alleged delay in processing its plan of operations is a NAFTA breach contradicts the allegations made in Glamis's Notice of Arbitration that its investment had been expropriated by the California actions adopted between December 12, 2002, and April 10, 2003. *See* Notice of Arbitration ¶¶ 18, 23 (Dec. 9, 2003). In any event, to the extent that Glamis seeks a finding of liability on this basis, the United States hereby objects to the jurisdiction of this Tribunal over that claim on the ground that it was improperly noticed, and seeks preliminary treatment of the matter. *See* NAFTA art. 1119.

“measure.”¹¹ Thus, the Tribunal can avoid any so-called “definitional quagmire” by disposing of Glamis’s untimely complaints as a preliminary matter, without having to hear the parties on the issues of whether each complained-of government action is a measure that proximately caused Glamis’s purported loss.¹² By doing so, the Tribunal will reduce substantially its work and the burdens on the parties.

Finally, Glamis’s concern over “*seriatim*” filings provides no basis for this Tribunal to defer applying Article 1117(2)’s time-bar to Glamis’s claims. And, Glamis sheds no light on how treating the United States’ time-bar defense in a preliminary phase supposedly would lead to an “illogical and unworkable precedent” under which “claimants would be forced to file *seriatim* NAFTA claims.”¹³ A decision by this Tribunal to apply Article 1117(2)’s limitations period preliminarily will not affect the timing of the filing of claims under NAFTA Chapter Eleven.

In Glamis’s case, any need for such “*seriatim*” filing of claims relating to its Imperial Project is entirely of its own making. Glamis previously (and unsuccessfully) asserted in United States district court that it had been injured by some of the very actions that Glamis raises as NAFTA violations before this Tribunal.¹⁴ On the dates when Glamis filed its claims in U.S. district court, there was no time-bar obstacle preventing

¹¹ The United States does not dispute that the sole timely complained-of federal action – then-Secretary Babbitt’s January 17, 2001 Record of Decision denying Glamis’s plan of operations – is a “measure” within the definition of NAFTA Article 201.

¹² Objection to Bifurcation at 6.

¹³ *See id.* at 7.

¹⁴ In a suit filed against the DOI and BLM in March 2001 for declaratory and injunctive relief, Glamis challenged, *inter alia*, the January 17, 2001 Record of Decision signed by Secretary Babbitt denying Glamis’s proposed Imperial Project. *See* Plaintiff’s Complaint for Declaratory and Injunctive Relief, *Glamis Imperial Corp. v. U.S. Dep’t of the Interior*, No. 01-530 at 1-2 (RMU) (D.D.C. filed March 12, 2001).

Glamis from seeking compensation under NAFTA Chapter Eleven for the harm Glamis alleges here to have suffered from those same government actions. Had Glamis determined that it legitimately could have complained under the NAFTA of harm incurred as a result of, for example, the October 1999 Advisory Council on Historic Preservation letter, Glamis was required by Article 1117(2) to submit a claim for such harm to arbitration within three years of the letter, or no later than October 2002. By that date, Glamis already was aware of all the additional federal actions of which it now complains, and even had filed suit in U.S. district court claiming to have suffered harm from those actions.¹⁵ The injury Glamis purports to have suffered as a result of those measures has not changed between the date of its filings before the district court and its submission of this claim to arbitration. Glamis thus could have timely asserted its complaints about all of the purportedly offending federal actions it lists in its Notice of Arbitration in a single NAFTA Chapter Eleven arbitration.

For the foregoing reasons, the Tribunal should rule on the United States' objection that certain of Glamis's claims are out of time as a preliminary question.

II. GLAMIS'S PREMATURE CLAIMS SHOULD BE ADDRESSED IN A PRELIMINARY PHASE

Contrary to Glamis's contention, the United States' objection to Glamis's claims based on the California measures is jurisdictional and should be addressed in a preliminary phase. The United States bases its objection that these claims are not ripe on

¹⁵ See *id.*; Plaintiff's Opposition to Defendant's Motion to Dismiss, dated July 11, 2000, at 10, *Glamis Imperial Corp. v. Bruce Babbitt*, No. CV-N-00-0196-DWH-VPC (D. Nev. filed April 14, 2000) (Glamis "has been injured by the delays occasioned by waiting for the [December 27, 1999] Solicitor's Opinion."); Plaintiff's Opposition to Defendant's Motion to Dismiss, dated Oct. 23, 2000, at 2, *Glamis Imperial Corp. v. Bruce Babbitt*, No. 00CV1934W(POR) (D. So. Cal. Oct. 31, 2000) ("Glamis has already suffered harm from protracted delays . . .").

the NAFTA Parties' consent to arbitration as reflected in Article 1117(1). Therefore, the United States' objection directly implicates the Tribunal's jurisdiction.

Glamis's mere assertion that it has sustained a loss is insufficient to confer jurisdiction. Rather, a claimant must allege credible facts that, if proven, are capable of constituting a breach of an obligation in Section A of Chapter Eleven.¹⁶ Article 1117(1) does not embrace hypothetical claims, such as Glamis's, that a loss *may be* incurred if circumstances ripen into an actual breach of a treaty obligation.¹⁷ The United States' objection that Glamis fails to satisfy this requirement, therefore, is jurisdictional.

Glamis's reliance on the opinion in *Applicability of the Obligation to Arbitrate Under Section 21 of the UN Headquarters Agreement* to demonstrate otherwise is misplaced. The principal issue in that case – which was an advisory opinion – was whether a dispute existed between the United Nations and the United States concerning the interpretation of a treaty.¹⁸ In order to submit a claim to arbitration under Article 1117(1), however, a claimant must plead not that a dispute over the interpretation of the treaty exists, but that it *has incurred* loss or damage by reason of or arising out of a

¹⁶ See *United Parcel Service of America Inc. v. Government of Canada* (Award on Jurisdiction) ¶ 34 (“That formulation rightly makes plain that a claimant party’s mere assertion that a dispute is within the Tribunal’s jurisdiction is not conclusive.”); *id.* ¶ 37 (“Accordingly, the Tribunal’s task is to discover the meaning and particularly the scope of the provisions which UPS invokes as conferring jurisdiction. Do the facts alleged by UPS fall within those provisions: are the facts capable, once proved, of constituting breaches of the obligations they state?”).

¹⁷ Compare NAFTA art. 1117(1) (An investor, on behalf of an enterprise, may submit a claim to arbitration where the enterprise “has incurred loss or damage”) with NAFTA art. 2004 (making State-to-State dispute resolution available “with respect to the *avoidance* or settlement of all disputes between the Parties regarding *the interpretation* or application of this Agreement or wherever a Party considers that an actual *or proposed measure* of another Party is *or would be* inconsistent with the obligations of this Agreement . . .”) (emphasis added).

¹⁸ See *Applicability of the Obligation to Arbitrate Under Section 21 of the UN Headquarters Agreement*, 1988 I.C.J. 12, 27, ¶ 34 (Apr. 26).

breach. The arbitration clause at issue in the *Headquarters Agreement* case contained no such requirement.¹⁹

International tribunals, in fact, routinely apply the principle of “ripeness” and similar requirements to dismiss international claims on jurisdictional grounds.

Accordingly, the International Court of Justice and various international tribunals and claims commissions have declined to find jurisdiction where a claim is not ripe.²⁰

In any event, whether the United States’ ripeness objection is determined to be a question of jurisdiction or admissibility, it is precisely the sort of issue that should be addressed preliminarily under the UNCITRAL Arbitration Rules.²¹ Glamis’s assumption

¹⁹ Glamis’s reliance on the First Partial Award in *Methanex Corp. v. United States of America* is also misplaced. See Objection to Bifurcation at 9. The issue of whether the United States’ ripeness objection was jurisdictional or otherwise was not briefed by the parties in that case. Because the *Methanex* Tribunal determined that the objection was one of admissibility, and because it joined certain questions of its jurisdiction over the entirety of the claims to the merits of that dispute, it did not address the United States’ remaining objections preliminarily. See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 457 (6th ed.) (Oxford 2003) (“In normal cases the question of admissibility can only be approached when jurisdiction has been assumed . . .”). If the Tribunal in this case determines that the United States’ ripeness objection is *not* jurisdictional, its jurisdiction over that portion of Glamis’s claims may be presumed. It may then, within its discretion, address the ripeness objection preliminarily.

²⁰ See, e.g., *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.)*, 1992 I.C.J. 3, 23 (Apr. 14) (separate opinion of Judge Ni) (joining in the majority’s determination not to grant provisional measures, explaining that the Court must “first decide on this temporal question” of whether the application was filed too soon, and stating, “It is premature for the Applicant to seek a legal remedy now from this Court. This is the threshold question which must first be solved before any other question can be decided upon.”); *Electricity Co. of Sofia & Bulgaria (Belg. v. Bulg.)*, 1939 P.C.I.J. (ser. A/B) No. 77, 64, 83 (Apr. 4) (“[I]t rested with the Belgian Government to prove that, before the filing of the Application, a dispute had arisen between the Governments respecting the Bulgarian law of February 3rd, 1936. The Court holds that the Belgian Government has not established the existence of such a dispute and accordingly declares that the Belgian Application cannot be entertained in so far as concerns the part of the claim relating to this law.”); *Malek v. Iran*, Award No. 534-193-3 ¶ 57 (Iran-U.S. Claims Tribunal 1992) (“Since the Claimant does not rely on any other legal basis to prove the expropriation of the Farmland by the Respondent during the relevant period, the Tribunal dismisses also this Claim for lack of jurisdiction.”); *International Technical Prods. Corp. v. Iran*, (Award No. 196-302-3), 9 Iran-U.S. Cl. Trib. Rep. 206, § II(C)(4)(c) (1985) (“[T]he conclusive deprivation would have occurred after 19 January 1981. Hence the Tribunal lacks jurisdiction.”); *Mariposa Claim (U.S. v. Pan.)*, Dep’t of State Arb. Series No. 6, American & Panamanian General Claims Arbitration 573, 577 (1933) (“The Commission holds that the damage from which the Mariposa claim arose was not sustained prior to October 3, 1931, and that the claim is not within its jurisdiction.”).

²¹ The issue of whether Glamis’s expropriation claim is ripe, addressed in part II.B.3 of Glamis’s Objection to Bifurcation, is relevant to an assessment of the merits of the United States’ objection, and not to the

that only objections labeled “jurisdictional” can be addressed preliminarily is faulty. International tribunals regularly grant preliminary treatment to issues that may not be strictly jurisdictional, such as objections based on the admissibility of the claim or the standing of the claimant.²² “No purpose . . . would be served by undertaking an examination of the merits in the case for the purpose of reaching a decision which . . . ineluctably must be made.”²³ The UNCITRAL Arbitration Rules accordingly grant tribunals broad discretion to conduct the arbitration in a manner it considers appropriate, within the guiding principles of fairness and efficiency.²⁴

Furthermore, the principles underlying the presumption in UNCITRAL Arbitration Rule Article 21(4) that jurisdictional objections be dealt with preliminarily

question of whether bifurcation is permissible and appropriate in this case. For this reason, and although the United States disagrees with the arguments made by Glamis in this regard and finds the cases it cites to be distinguishable, the United States will defer until the appropriate time responding to these arguments.

²² See, e.g., *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Case No. ARB/02/6 (Decision on Jurisdiction) ¶ 94 (Jan. 29, 2004) (characterizing objections to the ripeness of certain contract claims as a matter of admissibility and addressing those objections in a preliminarily phase); *Tanzania Electric Supply Company Ltd. v. Independent Power Tanzania Ltd.*, Case No. ARB/98/8 (Decision on Preliminary Issues) ¶¶ 10-11 (addressing certain legal issues and certain issues relating to the interpretation of the agreement at issue, such as how the final reference tariff should be calculated and whether a party was entitled to terminate the agreement, in a preliminary phase); see also, e.g., *Nuclear Tests I (N.Z. v. Fr.)*, 1974 I.C.J. 457, 463 (Judgment) (Dec. 20) (examining as a preliminary question whether a dispute existed); *Nuclear Tests II (Austl. v. Fr.)*, 1974 I.C.J. 253, 260 (Judgment) (Dec. 20) (same); *South-West Africa (Eth. v. S. Afr.; Lib. v. S. Afr.)*, 1966 I.C.J. 6, 18, 51 (Second Phase) (July 18) (finding that because the claimants lacked “any legal right or interest appertaining to them in the subject-matter of the present claims,” they lacked standing to pursue a claim on the merits); *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4, 26 (Second Phase) (Apr. 6) (dismissing the claim without reaching the merits because the claimant failed to show the validity of its national’s naturalization).

²³ *Northern Cameroons (Cameroon v. U.K.)*, 1963 I.C.J. 15, 38 (Judgment) (Dec. 2).

²⁴ See UNCITRAL Arbitration Rules art. 15(1) (granting the tribunal discretion “to conduct the arbitration in such manner as it considers appropriate”); *id.* art. 32(1) (envisioning the issuance of interim, interlocutory and partial awards); see also Prof. Pieter Sanders, *Commentary on the UNCITRAL Arbitration Rules*, II YEARBOOK OF COMMERCIAL ARBITRATION 172, 210 (1977) (“As a partial award may be regarded, for example, the preliminary decision by the arbitrators rejecting an objection to their jurisdiction. . . . A partial award may also be indicated when one part of the claim, involving a considerable amount of money, can already be decided, whilst other points at issue need more time. Whether an award must be qualified as interim or interlocutory is of no importance for the application of the Rules. Arbitrators are entitled to make any kind of award they deem appropriate for the proper conduct of the arbitration.”) (emphasis added).

apply equally to non-jurisdictional questions. Article 21(4) was drafted to encourage the efficient resolution of claims.²⁵ “[E]arly resolutions of significant preliminary issues may yield substantial savings to the parties by either deciding the case or narrowing the scope of the dispute.”²⁶ Here, a preliminary decision favorable to the United States on its ripeness defense would yield substantial savings.

Despite Glamis’s attempt to characterize all of the federal and state actions at issue in this proceeding as inextricably intertwined, it is clear that the basis for Glamis’s expropriation claim is the California measures.²⁷ Addressing the United States’ objection to that claim preliminarily will eliminate the need to adjudicate several complex factual and legal issues. For example, a decision favorable to the United States in a preliminary phase will obviate the need, in connection with the police power defense, for a detailed review of the administrative record for at least three California State Mining and Geology

²⁵ STEWART A. BAKER & MARK D. DAVIS, *THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 106 (1992) (“In many cases, the potentially dispositive issue of the tribunal’s jurisdiction should be decided before the parties have been put to the trouble and expense of making out a full case on the merits. The *travaux* show that the drafters recognized the substantial savings to the parties if the arbitrators recognize jurisdictional bars early in the proceedings.”).

²⁶ MATTI PELLONPÄÄ & DAVID CARON, *THE UNCITRAL ARBITRATION RULES AS INTERPRETED AND APPLIED* 381 (1994); *id.* at 383 (“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 . . .”).

²⁷ *See* Notice of Arbitration ¶ 18 (“the State of California which in 2002 initiated a series of measures that individually and together have resulted in the expropriation of the Investor’s investment in the Imperial Project.”). To the extent that Glamis claims that *federal* measures exacted an expropriation of its investment, that claim can be easily addressed at a merits phase. The only federal action specified in Glamis’s Notice of Arbitration that is not time-barred is then-Secretary Babbitt’s rescinded record of decision denying Glamis’s plan of operations. Glamis has conceded that the federal actions at issue have not expropriated its investment. *See* Plaintiff’s Notice of Dismissal, dated Dec. 5, 2001, at 1, *Glamis Imperial Corp. v. U.S. Dep’t of the Interior*, No. 01-530 (RMU) (D.D.C. filed March 21, 2001) (stating that the “vast majority of [its] claims were rendered moot by the Rescission of Record of Decision for the Imperial Project Gold Mine Proposal issued by Secretary of the Interior Gale A. Norton on November 23, 2001.”). Glamis cannot now credibly claim that the denial of its plan of operations by former Secretary Babbitt constitutes an expropriation of its investment. Nevertheless, a merits phase devoted to whether this one act constituted an expropriation would require far fewer resources than would one addressing Glamis’s claim that the California legislation and regulations expropriated its investment.

Board regulations as well as the history of the challenged legislative actions.²⁸ With respect to the reasonable-investment-backed-expectations defense, a favorable decision will eliminate the need to determine the status and evolution over time of various complicated regulatory schemes, including those governing not only mining generally, but also those governing, *inter alia*, the protection of environmental resources, Tribal sacred sites, historical places and water resources.²⁹ Additionally, the Tribunal's decision in a preliminary phase may dispense with the issue of the value of Glamis's Imperial Project, which inevitably will require the costly involvement of expert witnesses.³⁰

By contrast, a preliminary phase would be far less fact intensive. For example, there are significant factual issues relevant to the Tribunal's determination of the ripeness issue that Glamis has not disputed. Glamis, for instance, has acknowledged that the Bureau of Land Management's ("BLM") approval is required, but has not been obtained, to allow Glamis to proceed with its Imperial Project. Similarly, nowhere does Glamis dispute – because it cannot – that without the BLM approval, Glamis is not now, and never was, in a position to have the California measures apply to it.³¹

Thus, Glamis's presumption that a preliminary phase would entail a detailed review of all facts relevant to the merits of Glamis's claims is incorrect.³² So too is Glamis's suggestion that the Tribunal would be forced to "guess" in a preliminary phase

²⁸ See Statement of Defense ¶ 51.

²⁹ See *id.* ¶¶ 52-55.

³⁰ See *id.* ¶ 51.

³¹ Glamis's claims of futility also are appropriately addressed in a preliminary phase. Claims of futility frequently are considered in connection with preliminary objections in a phase separate from the merits. See, e.g., *Finnish Ship Arbitration (Finn. v. Gr. Brit.)*, III R.I.A.A. 1479, 1497-1550 (1934) (treating in a preliminary phase whether local remedies had been exhausted, including whether remedies were effective); see also, e.g., *Interhandel Case (Switz. v. U.S.)*, 1959 I.C.J. 6, 26-29 (Mar. 21) (same).

³² See Objection to Bifurcation at 1-2.

on the basis of an incomplete record.³³ As demonstrated above, the factual review required for the proposed preliminary phase would be significantly more limited than that required for a merits phase, yet would be comprehensive with respect to the facts at issue in that preliminary phase.³⁴

Accordingly, the Tribunal should address as a preliminary question the United States' objection to Glamis's expropriation claim based on the California measures on the ground that its claim is not ripe.

³³ *See id.*

³⁴ *See, e.g., Lucchetti v. Peru*, Case No. ARB/03/04 (Award) ¶¶ 50, 59 & dispositif (Feb. 7, 2005) (finding in a preliminary phase separate from the merits that jurisdiction was lacking following factual determination that the dispute in question was temporally infirm).

CONCLUSION

For the foregoing reasons, and those set forth in the United States' Request for Bifurcation, the United States respectfully requests that the Tribunal decide as a preliminary matter the United States' objections to certain of Glamis's Article 1105(1) claims and the entirety of its Article 1110 claim.

Respectfully submitted,

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