

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

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

**RESPONSE OF CLAIMANT GLAMIS GOLD LTD.  
TO REQUEST FOR BIFURCATION  
OF RESPONDENT UNITED STATES OF AMERICA**

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Nineteen months after Claimant Glamis Gold Ltd. (“Glamis” or “Claimant”) first presented its two NAFTA Chapter Eleven claims to the United States, Respondent for the first time suggests that alleged defects in Glamis’ claims merit preliminary consideration. While Respondent baldly asserts it seeks resolution of only discrete “legal” issues, its “preliminary challenges” actually present the Tribunal with a fact intensive inquiry of the relevance of key events that Respondent would like to lop off Claimant’s case, some on the grounds that Glamis is objecting too late and some on the grounds that Glamis is objecting too soon. In the end, neither challenge would dispose of either of Glamis’ claims – which are both premised on the same operative set of facts – and preliminary consideration would simply invite either: (a) a full review of the events leading up to Glamis’ loss of its valuable mineral rights in the Imperial Mine project (a review that would occur at the merits stage in any event); or (b) some undefined

and truncated review that would compel the Tribunal to guess on the basis of an incomplete record the relevance of the events (consideration of which Respondent seeks to preclude).

Neither approach makes practical or legal sense at this preliminary stage.

## **I. SUMMARY OF THE CASE**

In light of Respondent's Request for Bifurcation ("Bifurcation Request"), it is useful to restate and summarize the claims that Glamis actually has brought before the Tribunal.

Claimant's Notice of Arbitration lays out two claims: (1) an Article 1105 claim based on Respondent's unfair, illegal and inequitable treatment – at both the federal and state level – of Claimant's effort to commence gold mining operations at the Imperial Mine site; and (2) an Article 1110 expropriation claim based on a series of actions that together constitute an indirect expropriation of Glamis' vested property rights to mine the valuable gold deposits at the proposed Imperial Mine site.

With respect to Article 1105, Glamis alleges – which is all that is required at this stage – that a course of conduct involving a series of federal and state government actions *and* omissions violate the minimum standard of treatment accorded to investors in accordance with international law, including fair and equitable treatment. At some point in the late 1990s, not precisely known to Glamis, the political leadership of the U.S. Department of Interior decided to interject itself into the consideration of Glamis' proposed Plan of Operation that relied on conventionally accepted mining practices at the Imperial Mine. The definitive adverse action was taken January 17, 2001, as the sun was setting on the Clinton Administration and then-Secretary Babbitt issued a Record of Decision denying Glamis' Plan of Operation. While the new administration correctly overturned that illegal and arbitrary denial many months later, damage had already been done. In any event, Respondent has failed to act since that time to approve the Plan of Operation, or even to identify any further issues that Glamis should (or could) address.

Likewise, the State of California has unfairly and inequitably withheld approval throughout the same period, continuing to this day.

The Notice of Arbitration further alleges – as required by Article 1117 – that this unfair, illegal and inequitable treatment by federal and state regulatory authorities has injured Glamis in at least two respects. By virtue of its valid federal mining claims (confirmed by the Bureau of Land Management to be valid in a formal *Mineral Report* on September 27, 2002),<sup>1</sup> Glamis held recognized vested property interests and the right to mine its economically viable gold deposit.<sup>2</sup> Both the unfair, illegal and inequitable denial of Glamis’ Plan of Operation in January 2001 – well within the three years prior to Glamis’ Notice of Arbitration – and the subsequent and continuing withholding of approvals have denied Glamis the opportunity to commence mining operations, recoup its \$15 million investment in developing the mine or otherwise to reap the nearly \$50 million appraised fair market value of the confirmed gold ore deposit subject to its mining claims.

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<sup>1</sup> See Notice of Arbitration, at 9.

<sup>2</sup> Respondent apparently does not contest that Claimant’s mineral claims constitute a property right protected against uncompensated expropriation. The law on this point is clear. See *Freese v. United States*, 226 Ct. Cl. 252, 256 (1981) (“It is a matter beyond dispute that federal mining claims are ‘private property’ enjoying the protection of the fifth amendment.”); see also *North Am. Transp. & Trading Co. v. United States*, 53 Ct. Cl. 424, 429 (1918), *aff’d*, 253 U.S. 330 (1920) (“the mining claim of the plaintiff ... was its property, and if taken from it by the United States it is entitled to just compensation therefore...”). Thus, “[o]nce there has been a valid discovery and a proper location, an unpatented mining claim is real property in the highest sense,” *Skaw v. United States*, 13 Ct. Cl. 7, 60-61 (1987), and the “locator or owner of [the] unpatented mining claim, properly located, has a vested property interest therein. This has been universally recognized by the courts.” *Shell Oil Co. v. Andrus*, 591 F.2d 597, 603 (10th Cir. 1979), *aff’d*, 446 U.S. 651 (1980); see also *United States v. Locke*, 471 U.S. 84, 104 (1985); *Wilbur v. Krushnic*, 280 U.S. 306, 316 (1930).

Claimant's Article 1110 claim is premised on this same series of federal and state acts and omissions culminating in the State of California's effective elimination of open pit metallic mining, even on federal lands in the California Desert. The Notice of Arbitration alleges that as a result, Glamis' mining claims – conservatively appraised to be worth approximately \$50 million – are now worthless.

## II. ARGUMENT

Bifurcation of Respondent's objections in this proceeding is inappropriate. Neither preliminary challenge goes to the Tribunal's jurisdiction of the two claims that Claimant has actually brought. In any event, neither challenge can be decided in the abstract and instead requires the same comprehensive review of the federal and state mining approval process that will decide the merits of this dispute.

### A. **The United States Has Provided No Justification To Bifurcate Claimant's Article 1105 Claim And Address It Piecemeal**

Respondent's Request for Bifurcation does not seek to challenge Glamis' entire Article 1105 claim as a preliminary matter.<sup>3</sup> Rather, Respondent apparently would have the Tribunal carve the Article 1105 claim up into a series of mini-claims, with each action by the state or federal government standing alone as a separate and distinct claim. Respondent's approach makes no practical or legal sense and the Tribunal should reject it.

As a threshold matter, it is doubtful that Respondent's timeliness defense qualifies for preliminary treatment under Article 21(4) of the UNCITRAL Arbitration Rules. In the normal litigation context, whether a claim is timely asserted is not a jurisdictional issue, but rather an

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<sup>3</sup> The Statement of Defense of the United States of America also asserts that Glamis cannot prove a breach of an established international law standard of treatment, but it does not seek to divorce that defense from the merits.

affirmative defense for consideration as part of the merits of the dispute. Even if a timeliness defense could be considered jurisdictional in an arbitration proceeding, it would only relate to the scope of the consent to arbitrate. The very authority on which the Respondent relies for the unremarkable proposition that jurisdictional issues may be addressed initially also makes clear that it “may be difficult to separate examination of this issue [scope] from the merits . . . . This is not an easy matter.”<sup>4</sup>

Certainly, the allegations in this case underscore that conclusion and counsel against splitting Claimant’s Article 1105 claim into pieces, each to be addressed in isolation. Glamis is alleging a course of unfair, illegal and inequitable treatment by *both* federal and state government authorities that continues to this day. As both the Notice of Arbitration and the Statement of Defense make clear, the approval of mining operations on federal land is a complex process.<sup>5</sup> It involves a number of administrative actions at both the state and federal levels and includes input from numerous sources, some of which are more legally relevant than others. Significantly, the same series of events at the federal and state levels that are applicable to the Article 1105 claim are also applicable to the Article 1110 claim. In short, there simply would be no advantage – and Respondent has cited none – in attempting to address the legal or factual significance of specific federal or state government actions outside the context of the overall approval process. Claimant’s Article 1105 and Article 1110 claims are premised on the same set of facts that encompass the entirety of Respondent’s conduct, including both acts and omissions.

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<sup>4</sup> See Shabtai Rosenne, *The World Court – What It Is and How It Works*, at 101 (5th ed. 1995) (Respondent’s Appendix, Tab 11).

<sup>5</sup> See Notice of Arbitration, ¶¶ 11-17; Statement of Defense, ¶ 4.

Furthermore, Respondent is essentially asking the Tribunal to delay resolution of the merits in order to issue an advisory opinion premised on an assumption. To establish a timeliness defense, Respondent must first establish both: (a) that the allegedly untimely actions are “measures”; *and* (b) that each provides a separate and distinct basis for a claim. Yet the Respondent’s Request to Bifurcate fails even to assert the first predicate for a timeliness defense, namely that the October 1999 Advisory Council on Historic Preservation letter, the now-rescinded December 1999 legal opinion by former Interior Solicitor Leshy (issued in January 2000), or the November 2000 Final Environmental Impact Statement/Environmental Impact Report (“EIS/EIR”) constitute individual “measures.”<sup>6</sup> The Request thus invites the Tribunal to enter a definitional quagmire with the potential for adverse consequences merely to address an issue that likely is completely irrelevant.

The definition of what constitutes a “measure” has been extensively litigated in some NAFTA arbitrations. While the United States has acknowledged – as Glamis alleges here – that both actions and omissions can be measures,<sup>7</sup> in the *Loewen* arbitration it vigorously contested whether the definition of measure could extend to various actions including court decisions and settlements.<sup>8</sup> In the end, whether the Final EIS/EIR and the Leshy opinion are distinct measures

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<sup>6</sup> Respondent merely states: “To the extent that these actions constitute measures . . . .” Bifurcation Request, at 2.

<sup>7</sup> See Rejoinder on Competence and Liability of Respondent United States of America (*Mondev Int’l Ltd. v. United States*), ICSID Case ARB(AF)/99/2, at 5 (Oct. 1, 2001) (“As the written phase of this proceeding concludes, it is now undisputed that this Tribunal is competent to hear only claims for alleged breaches of Chapter Eleven based on *acts or omissions* of the United States . . . .”) (emphasis added).

<sup>8</sup> See, e.g., Memorial of the United States of American on Matters of Competence and Jurisdiction (*Loewen Group, Inc. v. United States*), ICSID Case No. ARB(AF)/98/3, at 27-39 (Feb. 15, 2000).



is irrelevant unless there is some damage resulting from those actions that is distinct from the damage flowing from the Secretarial Record of Decision and the subsequent failure of the federal and state government authorities to comply with the law and approve Glamis' Plan of Operation.<sup>9</sup> The Tribunal will be in the best position to address this issue as part of the merits determination when it has all of the evidence and can review all of the federal and state actions in their complete context.

Furthermore, Respondent's request, if granted, would set an illogical and unworkable precedent. Potential claimants would be forced to file *seriatim* NAFTA claims after each and every possibly adverse party action in order to protect against subsequent challenges that discrete events are barred from consideration, even where such events constitute mere steps in a broader course of dealing that violates the investment protection afforded by Article 1105. Far from promoting efficiency, such a result would unnecessarily burden the system with overlapping claims seeking redundant relief.

In short, bifurcation of Respondent's timeliness objection is inappropriate, inefficient, and unnecessary, and the Tribunal should proceed to the merits in keeping with the terms of UNCITRAL Article 21(4).

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<sup>9</sup> Yet, Respondent does not even address this second element necessary to establish a timeliness defense. The closest it comes is the misleading suggesting that Glamis recognized immediate injury from the now rescinded Leshy legal opinion. *See* Bifurcation Request, at 2 n.3. What Respondent fails to tell the Tribunal is that the United States successfully objected and obtained dismissal of the case on the grounds that the Leshy opinion was not final agency action subject to review under the Administrative Procedures Act. In any event, close review of Claimant's pleadings in that case show its "injury in fact" argument looked to the future and the certainty of a Secretarial denial based upon the Leshy opinion. *See, e.g.,* Bifurcation Request App., Tab 8 at 12 ("Here, too, it is easy 'to presume specific facts' under which Glamis *will* be injured.") (emphasis added).

**B. Respondent’s Partial Challenge to Claimant’s Article 1110 Expropriation Claim Is Neither A Jurisdictional Challenge Nor Well Suited For Preliminary Treatment Separate From The Merits**

Somewhat inconsistently with its first assertion that Glamis has waited too long to bring its claim, Respondent also asserts that Glamis has not waited long enough. Although it has been over ten years since Glamis filed its Plan of Operation seeking to invoke its lawful right to extract gold from the Imperial mining claims, and more than two years since the State of California enacted legislation specifically designed and intended to “stop[] the Glamis Gold Mine proposal in Imperial County,”<sup>10</sup> Respondent nonetheless asserts that at least some aspects of Claimant’s Article 1110 expropriation claim are not ripe for consideration.

No further delay in reaching the merits of Glamis’ claims is warranted. First, Respondent’s purported “ripeness” challenge is not jurisdictional nor is it dispositive of the Article 1110 claim. Second, Respondent’s challenge is premised on the erroneous assumption that somehow these state actions can be segregated and addressed separately from the federal actions, all of which together constitute the measures resulting in the complete expropriation of Claimant’s investment in the United States. Finally, the challenge fails in any event because Claimant’s Article 1110 claim is demonstrably ripe for review.

**1. Respondent’s “Ripeness” Challenge Is Not Jurisdictional**

As a threshold matter, Respondent has not cited any authority to suggest that customary international law has even adopted the United States administrative law concept of “ripeness.”<sup>11</sup>

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<sup>10</sup> Notice of Arbitration, Ex. A.

<sup>11</sup> “Ripeness” is not a jurisdictional issue but rather a judicially created prudential “justiciability doctrine designed ‘to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until an administrative

(continued...)

In fact, as the International Court of Justice has stated: “While the existence of a dispute does presuppose a claim arising out of the behavior of or a decision by one of the parties, it in *no way* requires that any contested decision must already have been carried into effect.”<sup>12</sup> Here, the fact that two years have passed since the confiscatory California statute and regulations were enacted and that neither the federal nor state government authorities have done anything further with Glamis’ pending Plan of Operation demonstrates that Claimant has suffered actual damage.<sup>13</sup>

Indeed, another NAFTA Tribunal has confronted and rejected Respondent’s attempt to seek preliminary consideration of a similar set of challenges. In *Methanex Corp. v. United States*, for example, Respondent raised seven preliminary objections, two of which – as here – asserted that Claimant could not demonstrate damage from the alleged measures. One, referred to by the Tribunal as Challenge I (No proximate cause), challenged Methanex’s claim on the grounds that it had not alleged that the breach was a proximate cause of the damages sought. The other, referred to by the Tribunal as Challenge IV (No loss), asserted – as Respondent here does – that Methanex’s claim was not “ripe” because neither the California Bill nor the

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(...continued)

decision has been formalized and its effects felt in a concrete way . . . .” *Nat’l Park Hospitality Ass’n v. Dep’t of the Interior*, 538 U.S. 803, 807 (2003) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967)). On its face, it has no application in the international arbitration context where “jurisdiction” depends exclusively on the consent of the parties.

<sup>12</sup> *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, 1988 I.C.J. 12, ¶ 42 (emphasis added).

<sup>13</sup> As demonstrated by its first preliminary challenge, were Glamis to wait one more year, it would face Respondent’s challenge that the claim was barred by the three year limitation period in Article 1117(2).

California Executive Order had actually effected a ban on the use of MBTE.<sup>14</sup> As explained by the Tribunal in rejecting Respondent's request to address these (and other) challenges:

Second, as a jurisdictional challenge, it fails on the wording of Article 1116(1) because it is indisputable that Methanex has made "a claim . . . that [Methanex] has incurred loss and damage"; and in our view, the plain meaning of this provision does not require, as a jurisdictional matter the claimant to prove loss or damage. Third, even if it 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 minded, as a matter of discretion, to join that challenge to the merits under Article 21(4) of the UNCITRAL Arbitration Rules.<sup>15</sup>

Here, there is no question that Claimant's Notice of Arbitration has alleged the loss of its \$15 million investment in developing the Imperial Project Mine as well as the loss of the full value of its mineral property right, previously appraised conservatively at \$50 million (and significantly more at today's \$430 per ounce gold price).<sup>16</sup> Accordingly, Glamis has met the jurisdictional requirement for assertion of a claim under Article 1110, and as the *Methanex* Tribunal held, Article 1116(1) (identical for these purposes to Article 1117(1) at issue here) does not require proof of causation or damages at this stage. To the extent that there is any substance to Respondent's "ripeness" challenge, it is best suited for resolution by the Tribunal after the parties have had the opportunity to adduce and present complete evidence such that the Tribunal

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<sup>14</sup> Memorial on Jurisdiction and Admissibility of Respondent United States of America (*Methanex Corp. v. United States of America* ("Methanex")), NAFTA/UNCITRAL Case, at 57-62 (Nov. 13, 2000).

<sup>15</sup> *Methanex*, Preliminary Award on Jurisdiction and Admissibility, ¶ 86 (deferring Challenge I to the merits) and ¶ 90 (deferring Challenge IV to the merits) (Aug. 7, 2002).

<sup>16</sup> See Notice of Arbitration, at 7 and 11.

may evaluate the dispute on a complete record rather than having to undertake a piecemeal review of isolated portions of the claim.<sup>17</sup>

## **2. The Impact Of The California Statute And Regulation Is Inextricably Intertwined With The Merits**

In any event, Respondent's ripeness challenge is at its core simply an argument that Claimant cannot prove damage resulting from the California statute and regulation. In raising this challenge, Respondent ignores the integrated nature of the federal and state approval process and it further ignores the clear evidence that both the statute and the regulation were adopted with the specific goal of stopping the approval of the Glamis Imperial Mine project, a goal – as Claimant alleges – that these measures already have achieved.

The fact is that the Interior Department's Bureau of Land Management (the federal agency involved) and the Imperial County Planning and Building Department ("ICPBD") frequently have worked in tandem to evaluate proposed mines on federal lands in Imperial County, California. In fact, these entities, along with Claimant's enterprise, executed a Memorandum of Understanding in March 1995 that essentially established that the BLM and

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<sup>17</sup> The *Methanex* Tribunal noted the practical difficulties in addressing separately challenges to the relevance of particular events or measures: "The Tribunal faces an obvious practical problem in addressing the USA's various [preliminary] challenges. The parties' respective cases raise a large number of disputed issues of fact and law. Apart from any jurisdictional challenges, such issues would be decided by the Tribunal after full hearing on the merits and a complete investigation of the relevant factual evidence and the legal principles to be applied to such evidence . . . . The Disputing Parties have not adduced any factual evidence on disputed issues (nor have they been entitled to do so); and the Tribunal cannot pre-judge any eventual decisions on the merits, still less pre-determine any issue of disputed fact." *Methanex*, Preliminary Award on Jurisdiction and Admissibility, ¶ 110.

ICPBD would jointly prepare an EIS and an EIR at Claimant's expense.<sup>18</sup> As noted in the Notice of Arbitration, the federal and state agencies published for notice and comment two draft EIS/EIRs supporting approval of the Plan of Operations as the "Preferred Alternative" and subsequently (in November 2000) a Final EIS/EIR in which BLM identified "No Action" as the Preferred Alternative.<sup>19</sup> The ICPBD did not concur with BLM's selection, but did note that Claimant's proposed action was the "Environmentally Superior Alternative."<sup>20</sup> In short, the actions of the State of California are part and parcel of the federal evaluation of Claimant's Plan of Operation. It makes no sense to suggest that California's subsequent efforts to shut that approval process down (*i.e.*, the statute and regulation) can be isolated from the federal actions initially denying the Plan of Operation and/or from the subsequent legal limbo in which both the federal and state lead agencies have left Claimant's Plan of Operation thereafter.

This conclusion holds particular force here, as the California statute and regulation undisputedly sought this very result. Again, as noted in the Notice of Arbitration, the sole basis for the emergency December 12, 2002 regulation (later made permanent) was California Governor Davis' direction "to pursue all possible legal and administrative remedies that will assist in stopping the development" of Claimant's Imperial Mine.<sup>21</sup> Likewise, Governor Davis candidly acknowledged upon signing the separate statute on April 7, 2003 that its purpose was to "stop[] the Glamis Gold Mine proposal in Imperial County," because "[t]he reclamation and

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<sup>18</sup> An EIS is the federal document which assesses compliance with the national Environmental Policy Act of 1969 (and related requirements), and an EIR is the document that assesses compliance with the California Environmental Quality Act (and related requirements).

<sup>19</sup> See Notice of Arbitration, at 6-8.

<sup>20</sup> *Imperial Project Final EIS/EIR*, at 2-70 (Sept. 2000).

<sup>21</sup> See Notice of Arbitration, at 9.

backfilling requirements of this legislation would make operation of the Glamis Gold Mine cost prohibitive.”<sup>22</sup>

During the merits phase, Respondent may seek to diminish the value of Claimant’s Article 1110 claim by suggesting that there are various other regulatory hurdles that, wholly apart from these transparently discriminatory measures, would have precluded commencement of mining operations at the Imperial Mine. On the other hand, Glamis will show that its Plan of Operation with the proposed mitigation measures was fully compliant with applicable federal and state law prior to the enactment of these California measures (and should have been approved well before these intervening events). It will rely, *inter alia*, on the federal and state approvals in numerous other major open pit gold mines in the California Desert Conservation Area without anything approaching complete backfilling requirements – including some within several miles of the proposed Imperial Mine:

- *American Girl Mine* – located in Imperial County about 9 miles south of the Imperial Project;
- *Mesquite Mine* – located in Imperial County about 10 miles northwest of the Imperial Project with open pits and disturbance about three times larger than the Imperial Project;
- *Picacho Mine* – operated in Imperial County by a Glamis affiliate about 8 miles east of the Imperial Project;
- *Briggs Mine* – located in nearby Inyo County and approved in 1995 and 1996 notwithstanding Native American “sacred” site allegations;
- *Rand Mine* – operated by a Glamis affiliate in nearby Kern County.

The operation and expansion of these nearby mines in the 1980s and 1990s in the California Desert, and the repeated actions of BLM and the state in approving them, provided

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<sup>22</sup> *Id.* at 9-10 and Ex. A

Glamis with a sound, reasonable expectation that the Imperial Project would be approved – until the politically driven measures designed expressly to kill the Imperial Mine were imposed.

### **3. Claimant’s Article 1110 Claim Is Ripe for Review**

Finally, even if there were some practical way to isolate certain state actions from the overall state and federal review of Claimant’s Plan of Operation for the Imperial Mine, and even if the Tribunal were inclined to apply the U.S. “ripeness” doctrine, the California statute and regulation and their application to the Glamis Imperial Project are clearly ripe for consideration. Neither the statute nor the regulation allow any discretion with respect to the complete backfilling and onerous site regrading requirements. Whether California has applied it through a permit process or not, these unprecedented and mandatory requirements effectively block approval of Glamis’ Plan of Operation.

Indeed, this case is quite analogous to *Whitney Benefits, Inc. v. United States*, where the U.S. Claims Court and the Federal Circuit Court of Appeals found that a taking had occurred when Congress enacted measures prohibiting specific surface coal mining in western “alluvial valley floors,” and that the issue was ripe for adjudication without further post-enactment administrative proceedings.<sup>23</sup> The Claims Court specifically rejected the United States’

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<sup>23</sup> See *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), *aff’d*, 926 F.2d 1169 (Fed. Cir. 1991). In affirming, the Federal Circuit stated in part, as follows: “The government’s facile application of the label ‘regulatory’ and its citation of cases dealing with congressional regulation of the uses of land and other property subject to many uses are inapt here. First, . . . the only property here involved is the right to surface mine a particular deposit of coal. The only possible use of that right is to surface mine that coal. When Congress prohibited the mining of that coal, it did not merely regulate, it took, all the property involved in this case. Second, if . . . [the statute] could somehow be deemed ‘regulatory’ in this case, it would avail the government nothing, for a regulatory statute that ‘goes too far’ will be recognized as a taking.” *Whitney Benefits*, 926 F.2d at 1172 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).



argument – similar to its ripeness challenge here – that the property “could not have been taken until their application for a mine permit actually was denied as a result of . . . [the statute’s] prohibitions” because such further administrative process would be clearly “futile.”<sup>24</sup> The court’s holding, rendered after a complete evidentiary trial, is particularly appropriate here:

*A fortiori*, when a statute is enacted, at least in part, specifically to prevent the only economically viable use of a property, an official determination that the statute applies to the property in question is not necessary to find that a taking has resulted . . . . It makes little sense for Congress to pass SMCRA with the intention that it applied to plaintiffs’ property and for defendant to require plaintiffs to obtain an official determination that SMCRA applied to their property before taking could occur. Congressional intent as to the Whitney coal was abundantly clear when it passed SMCRA. Plaintiffs’ property was taken as of its enactment.<sup>25</sup>

Similarly nothing in customary international law would require that Glamis perform the “futile” act of obtaining a further administrative decision on its Plan of Operation in order to perfect and bring its Article 1110 expropriation claim. Indeed, in *Ethyl Corp v. Canada*, the Tribunal acknowledged that international law did not require performance of “futile” acts and applied that concept in refusing to dismiss a NAFTA dispute on the grounds that the Claimant had filed before the expiration of the six-month “cooling off period” in Article 1118.<sup>26</sup>

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<sup>24</sup> *Whitney Benefits*, 18 Cl. Ct. at 407.

<sup>25</sup> *Id.*

<sup>26</sup> *Ethyl Corp. v. Canada*, Award on Jurisdiction, NAFTA/UNCITRAL Case, ¶ 84 and n.33 (June 24, 1998) (citing *Finnish Ships Arbitration (Finland v. UK)*, Award of May 9, 1934, reprinted in 3 R.I.A.A. 1479 (1934) (Finland’s failure to appeal to the Court of Appeal did not mean that it had not exhausted local remedies. Such an appeal would have been “obviously futile” because the Court of Appeal could not have reversed the Boards’ finding of fact); and *Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)*, P.C.I.J. Rep., Ser A/B, No. 76, at 18 (1939) (“There can be no need to resort to the municipal court if the result must be a repetition of a decision already given.”)).

In short, there is nothing left for Glamis to do. The California statute and regulation preclude, as intended, commencement of economically viable gold mining operations at the Imperial Mine and thereby destroy all value of Claimant's vested property rights. To suggest that its expropriation claim is not "ripe" is to relegate to Respondent the ability to forever withhold Claimant's compensation for this loss simply by withholding further action on Glamis' Plan of Operation – as it has done for over two years.

### **III. CONCLUSION**

For all of the foregoing reasons, bifurcation of these proceedings would make no legal or practical sense. Accordingly, the Tribunal should reject Respondent's request and direct the parties to proceed to the full merits according to the schedule set forth in this Tribunal's Procedure Order No. 1.

Respectfully submitted,

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