The “difference without a distinction” strikes again in Glamis Gold: notes on the persisting confusion of preliminary objections to “admissibility” with objections to “jurisdiction” in investment disputes

Kluwer Arbitration Blog
October 20, 2009

Ariel Meyerstein (UC Berkeley School of Law)

Please refer to this post as: Ariel Meyerstein, ‘The “difference without a distinction” strikes again in Glamis Gold: notes on the persisting confusion of preliminary objections to “admissibility” with objections to “jurisdiction” in investment disputes’, Kluwer Arbitration Blog, October 20 2009, http://arbitrationblog.kluwerarbitration.com/2009/10/20/the-difference-without-a-distinction-strikes-again-in-glamis-gold-notes-on-the-persisting-confusion-of-preliminary-objections-to-admissibility-with-objections-to/

In one of the most recent NAFTA awards, Glamis Gold v. United States, the United States (“US”) raised objections to the tribunal’s “subject matter jurisdiction” against Glamis’ claims of expropriation under NAFTA Chapter 11. The US argued that the Canadian mining company’s claims based on recently passed California legislation were not “ripe” because the legislative measures had yet to be applied specifically to Glamis. In the US’ view, under NAFTA Article 1117(1) and customary international law, for a claim to be “ripe,” a claimant must assert that it has

actually "incurred loss or damage" from the alleged breach. This requirement, deemed by the US a prerequisite to subject matter jurisdiction, also reflected, in its view, the substantive requirement under customary international law (and the law on "takings" in the US and Canada) that to constitute an expropriation, a measure must "actually interfere" with a claimant's property right – not merely "threaten" such interference.

In addressing these issues, the Glamis Tribunal, following many international courts and arbitral tribunals before it, entered into what Jan Paulsson has described as a "twilight zone" where preliminary objections of "jurisdiction" and "admissibility" often appear indistinguishable.

As Paulsson passionately and persuasively cautions, practitioners should tread carefully on this conceptually confused terrain because a tribunal's decisions have consequences: whereas a decision by arbitral tribunals on jurisdiction is reviewable (by national courts or annulment committees), determinations of "admissibility," like merits determinations, are generally not reviewable. Thus, Paulsson concludes, "it is vital to understand the fundamental distinction between the two concepts. They are indeed as different as night and day. It may be difficult to distinguish the dividing line between the two. There is a twilight zone. But only a fool would argue that the existence of a twilight zone is proof that day and night do not exist."
This blog post dares to enter this thicket of confusion and in the process, find the path the Glamis Tribunal took to get itself out of it.

Jurisdiction, admissibility, or … merits?: two approaches to preliminary objections and a possible "third way"

The distinction between these two types of preliminary objections has been a subject of much head-scratching, primarily in the context of the inter-state disputes before the International Court of Justice, but more recently in the investor-state arbitration context. The confusion that has emerged in investment arbitration might be viewed by some – from the standpoint of the conceptual clarity and global harmonization of principles of international law – to be troubling.

As Ian Laird notes, the confusion is surely in part due to the way that parties and tribunals have described preliminary requirements; significantly, unlike in the ICJ's Rules, which in Article 79(1) entertain the possibility of preliminary objections as to a claim's "admissibility," none of the dispute resolution mechanisms utilized in

investor-state disputes have similar provisions. Thus, once particular requirements (e.g., the existence of an investment dispute under ICSID) are in the provisions of a treaty, it is perhaps simpler, Laird suggests, to term them broadly as "jurisdictional" objections "rather than to identify any particular requirement more specifically as a question of admissibility."

The tricky part is that there is often a very thin line separating questions of admissibility from determining the merits of a dispute. The challenge, as identified in Judge Higgins' Separate Opinion in the ICJ's Oil Platforms case, and repeated by the Salini v. Jordan Tribunal, is that adjudicators must strike a balance between guarding against the admission of baseless claims and effectively deciding the merits of a dispute without sufficient debate.

In Salini, Jordan argued that the claimant's pleadings "disclosed no arguable case that there has been any violation of the BIT." The Tribunal ultimately accepted jurisdiction over some claims and rejected others, but in doing so, did not bother to worry about whether Jordan's preliminary objections were in fact even jurisdictional in nature.

A different approach was taken in Methanex v. United States, which is usually spoken of not in relation to this rather abstract (and yet so important!) issue, but more for its treatment of the applications for participation submitted by non-disputing parties.

In the First Partial Award in Methanex, as Jan Paulsson notes, the Tribunal was dealing with a misuse of terminology (again) in the U.S. pleadings, which asserted "challenges of admissibility," namely, that "taking all of the allegations of fact made to be true, including uncontested facts, … as a matter of law, there can be no claim, and the claim is ripe for dismissal at this stage for that reason." (Note the similarity to the pleadings in Glamis: "the mere adoption of an expropriatory measure … without more, does not give rise to a cognizable expropriation claim." US Counter-Memorial at p. 109; US Rejoinder at p. 3).

As Paulsson explains, however, while the US' objections in Methanex, "may be a very good definition of a motion to dismiss for failure to state a cause of action, or, to use the expression current in England, a strike-out application," it was not, as the Methanex Tribunal clarified, a jurisdictional challenge (according to the Tribunal, "indeed, if [it] had no jurisdiction, it could not be invited by the USA to

dismiss the individual claim for lack of legal merit").

To this, Paulsson adds that the preliminary objections were not objections to admissibility, either. He notes that:

the USA may have been seeking a knock-out blow on the merits before any hearing of facts, but however early such a defense may be pleaded and considered, it is a defence on the merits and not a matter of admissibility. The USA was not arguing that the case was unhearable, but that it was legally hopeless. That is precisely how one should understand the difference between a challenge of inadmissibility and a strike-out application.

And this is precisely what the Methanex Tribunal did in dealing with the US' "admissibility" challenges, noting that it did not have authority under the UNCITRAL Rules to deal with preliminary objections of "admissibility," and noting further Shabtai Rosenne's commentary on the ICJ, that a "rough rule-of-thumb" is that "it is probably that when the facts and arguments in support of the objection are substantially the same as the facts and arguments on which the merits of the case depend, or when to decide the objection would require decision on what, in the concrete case, are substantive aspects of the merits, the plea is not an objection but a defence to the merits." Methanex Award at ¶ 125.

As Laird describes the case law, investment arbitration tribunals have dealt with this murky soup of concepts in one of two ways: the Salini approach, "which follows the ICJ model (but can be criticized for conflating admissibility into jurisdiction)" and the Methanex approach, "which has recognized the distinction in application between the two concepts and rejected the general application of admissibility challenges[.]"

For his part (though not in direct response to Paulsson), Laird wonders whether the distinction must be so "stark." He points out that tribunals approaching the matter like the Salini Tribunal did, i.e., treating the terms in a looser and overlapping way, is not without precedent; he observes that the ICJ also had moments early-on in the crystallization of the concepts where the distinction was not so clear. Moreover, Laird considers the Salini approach to be more "practical." This "looser" approach, Laird notes, has been followed in several cases (noting CMS Gas, Enron, and LGE – all versus Argentina) about which he explains:

they do not reject the possibility of deciding a question of admissibility if there is a

way in which such a question can be addressed in the terms of the BIT or ICSID Convention … they have sought to take into account the need to "establish a balance" and that a cut-off point "beyond which claims would not be permissible" be recognized in that analysis. Because the ultimate aim with respect to questions of jurisdiction and admissibility is essentially the same, to avoid a merits phase if there is a preliminary issue which would make it unnecessary, then perhaps the distinction is one without a difference.

Then again, Laird notes, we must consider the counter-argument: the concepts do have a history of conceptual independence and, in the absence of a provision like the ICJ's Article 79(1) being inserted into the relevant treaties, thereby empowering tribunals to consider issues of admissibility, perhaps the best approach is to keep the concepts distinct.

There is, of course, what can be described as a "third way," taken by the Tribunal in *SGS v. Philippines*. In SGS, the Philippines argued that the ICSID Tribunal had no jurisdiction over SGS' claims because of an exclusive jurisdiction clause in the underlying contract. The Tribunal determined that the BIT's jurisdictional clause encompassed contract claims, and thus, while there was no question that it had jurisdiction, it nonetheless concluded the question of whether the treaty provision could override the choice of forum in the parties' contract was a question of admissibility, and that as such, there was an 'impediment' to the Tribunal's jurisdiction: SGS needed to submit its claim to the Philippine courts to have them determine the "scope or extent" of the Philippines' obligation to pay under the contract. In a display of pragmatism, the Tribunal took a novel approach and stayed the arbitration until this 'impediment' to admissibility was removed.

In speculating on how the SGS Tribunal reached this novel outcome, Laird suggests the following possibility: the parties felt the issue was a preliminary one and sought resolution of it at that stage and not later. The Tribunal addressed these apparent preferences, moreover, by shoe-horning their analysis within the confines of the ICSID Convention: they based their authority to issue the stay order on Article 44 of the ICSID Convention, which empowers tribunals to decide issues or questions not addressed by the Rules or the Convention. In a sense, then, the SGS Tribunal just did what King Solomon would have done.

So, where does the Glamis decision fit into these approaches?

Applying an early-game "full court press" on Glamis, the US pursued its "ripeness" objection initially in a request to bifurcate the proceedings into "jurisdictional" and "merits" phases. The Tribunal rebuffed the "ripeness" attack in its Procedural Order No. 2, where it found that:

23. … an objection asserting that claimant has not suffered a loss in accordance with Article 1117(1) is not a plea as to jurisdiction for the purposes of Article 21(4). The requirement that the Claimant establish through evidence the existence of a loss is typically a part of the merits of a case and is not transformed into a jurisdictional limitation by its articulation in a provision of Chapter 11 of NAFTA.
…
25. … if it were to bifurcate its consideration of the issue identified, the Tribunal would be immediately confronted with the issue of whether California's laws and policies resulted in an expropriation under Chapter 11 of NAFTA. Since the facts presented to answer the Article 1117(1) issue are likely to be the same facts presented on the expropriation issue, the Tribunal finds the proposed bifurcation to be impractical in that the Article 1117(1) issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost. The question, therefore, of identifying 'the point when the damage was sufficiently concrete and permanent to result in breaches' is to be considered as a part of the merits.
Glamis Procedural Order No. 2 at ¶¶ 23, 25.

Curiously, though, in the Glamis Award, when dealing with the US' "jurisdictional" objections, the Tribunal appeared to back-pedal a bit, dancing delicately through this preliminary objection of "jurisdiction." It noted that:

[t]hrough the language of Article 1117(1), the State Parties conceived of a ripeness requirement in that a claimant needs to have incurred loss or damage in order to bring a claim for compensation under Article 1120. Claims only arise under NAFTA Article 1110 when actual confiscation follows, and thus mere threats of expropriation or nationalization are not sufficient to make such a claim ripe; for an Article 1110 claim to be ripe, the governmental act must have directly or indirectly taken a property interest resulting in actual present harm to an investor.
Glamis Award at ¶ 328.

This "factual predicate," the Tribunal found, is "required by NAFTA Article 1117(1)," and a "similar concept is found in international law and in the domestic

law of the US invoked by the Parties, and is agreed upon by both of the Parties[.]" *Glamis* Award at ¶ 329. It would appear from the pleadings and the Award that this was a novel argument under NAFTA arbitration, because the Parties could not cite any NAFTA precedent to substantiate their arguments.

In describing the international legal precedent (primarily from the Iran-US Claims Tribunal, a few other quite old ad hoc arbitral commissions and one ICSID case), the Tribunal explained that "[a]lthough none of these disputes addressed the NAFTA and none of the tribunals provided that its analysis rested on customary international law, the logic utilized by each of these tribunals to come to the same conclusions is instructive. Without a governmental act that moves beyond a mere threat of expropriation to an actual interference with a property interest, it is impossible to assess the economic impact of the interference[.]" *Glamis* Award at ¶ 331.

The Tribunal notes further that, "[p]resumably because of this common underlying logic, these international arbitral awards are in congruence with the US domestic takings law, which holds that court needs a 'final, definitive position' of the administrative agency to evaluate whether a governmental act has effected a taking," because without such final determination regarding how an agency will apply the regulations at issue to a particular land in question, the "economic impact and interference with reasonable investment-backed expectations" simply "cannot be evaluated." *Glamis* Award at ¶ 332 – quoting Williamson County, 473 U.S. 172, 191 (1985). Finally, and "[m]ost importantly, of course," the Tribunal stated, "the Respondent also relies on this premise and Claimant does not dispute it and even appears to agree with its validity." Glamis Award at ¶ 332.

The *Glamis* Tribunal ultimately concluded that, "[a]s Claimant has constructed its claim … to argue that the California measures caused such significant harm to its investment as to effect an expropriation on the date of their passage, its claim is adequately presented in a timely way for adjudication," and that the Tribunal "is able to assess whether in fact the Imperial Project was worthless on the date utilized by the Parties as that of a possible expropriation… *In this way, the inquiry into ripeness in this case leads directly to the threshold inquiry of any expropriation analysis: evaluation of the economic impacts of the complained of measures.*" *Glamis* Award at ¶ 342 (emphasis added).

Indeed it does! The analysis arguably dovetails so smoothly precisely because the

objections deemed "jurisdictional" by the US were not jurisdictional at all (as the Tribunal initially had asserted more forcefully in its Procedural Order No. 2). The objections were really closer to objections to the *admissibility* of Glamis' expropriation claims, but in truth, they were perhaps most appropriately dealt with under the substantive expropriation analysis itself (which the Tribunal ultimately did by first refusing to bifurcate the proceedings and then eventually finding that Glamis' claim was 'perfected enough' as it had pleaded it).

Glamis' unique approach: a pragmatic synthesis (without synthesizing)

What is interesting is that, despite neither considering nor relying on any of the above approaches, the *Glamis* approach exhibited tendencies of each in trailblazing its own path to resolving the US' preliminary objections.

As in Methanex (*see* Paulsson's quote above), the US was essentially arguing what U.S. lawyers call a "motion to dismiss," two justifications for which can be a "lack of subject matter jurisdiction" or a "failure to state a clam upon which relief can be granted." But as the *Glamis* Tribunal noted in Procedural Order No. 2 (similar to *Methanex*), in investment treaty arbitration, the US' preliminary objections were not really a question of jurisdiction: the issue was not whether the Tribunal would have had jurisdiction over an alleged taking in which actual interference or loss was alleged (*i.e.*, a category of dispute between certain categories of parties, all delineated by treaty), but rather, whether the underlying dispute had reached a point where Glamis could have made such a claim.

In doing so, however (unlike *Methanex* but very much like *Salini*), the Glamis Tribunal is not fussy over the appropriate way to label ("admissibility" or "jurisdiction") the US' preliminary objections; it simply took the objections as they were plead ("jurisdictional") and, while being careful in assessing just how arguable a case Glamis needed to plead to establish a hearable claim, it did its best to resolve them (which also meant considering weighty issues of evidentiary burdens and their practical consequences, *i.e.*, the scope of document production required). Finally, somewhat like the SGS tribunal finding the authority to stay proceedings to allow the jurisdictional/admissibility 'impediment' to its jurisdiction to be cleared, the *Glamis* Tribunal, prompted by the US arguments, attempted to squeeze the preliminary objections at issue into the language of the provisions of the treaty it was dealing with (the requirements of Article 1117(1)). In doing so, however, it seemed to come very near to convincing itself that such questions

were really best addressed on the merits: "[i]*n this way, the inquiry into ripeness in this case leads directly to the threshold inquiry of any expropriation analysis: evaluation of the economic impacts of the complained of measures*[.]" Glamis Award at ¶ 342 (emphasis added).

Conclusion

Thus, the Glamis Tribunal unintentionally encapsulated the spirit of all previous approaches, which, it turns out, led to a pragmatic and exceedingly fair resolution (on the preliminary questions) for both parties, particularly given the procedural and factual complexity of Glamis' claim and the somewhat anticipatory nature of its allegations. It should be re-emphasized, as well, that the Tribunal's true guidance in the substantive determination of the "ripeness" issue was also hoisted upon it by the parties: US case law whose applicability, the Tribunal pointed out ("most importantly"), was not contested by Glamis. Glamis Award at ¶ 332. The Tribunal, then, by ultimately not obsessing over the distinction between jurisdiction and admissibility, seemed to strike an appropriate balance and, in doing so, gave both parties a little of what they wanted, while remaining partially albeit unintentionally faithful to a variety of investment dispute "precedents" that it had not expressly considered.

This result leaves much to be considered: which of the above is the best approach to preliminary objections? How much (if at all) should the parties' expectations affect the outcome on preliminary objections? What about practical considerations of case management? (Specifically, consider evidentiary burdens and document production issues, and also whether views change depending on whether the preliminary objections are dealt with in bifurcated proceedings). More theoretically, should the ICJ's jurisprudence influence decision-making in the investment context on preliminary objections, given (1) the differences between its Statute and investment treaties and arbitral rules, and (2) its status as a court of first and last resort that does not need to worry about reviewability of its decisions? (Paulsson forcefully says "no".) Is there some greater threat to the integrity and coherence of international law if we allow this to be a "difference without a distinction"?

I welcome the readers' comments and questions on this confounding topic, which rears its head in many, if not most, investment disputes.