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26 September 2005

Ucheora Onwuamaegbu
Secretary to the Tribunal
International Centre for the Settlement of Investment Disputes
1818 H Street, N.W.
Washington, D.C. 20433
U.S.A.

Dear Members of the Tribunal:

RE: Grand River Enterprises *et al* v. United States of America
NAFTA / UNCITRAL Proceedings

The Claimants are in receipt of the Respondent's Reply in support of its Request for Bifurcation, and hereby seek leave from the Tribunal for its acceptance of this short letter of rejoinder.

Reduced to its most basic formulation, the Respondent consistently and repeatedly argues that a preliminary hearing is required whenever there exists a lack of consent to the submission of a claim to arbitration under the NAFTA. Such consent can, and will, apparently be withheld by a NAFTA Party whenever a Respondent unilaterally determines that some or all aspects of the claim have no merit. If the Respondent's premise were valid, there would be precious little in any claim that could not be construed as jurisdictional and thus by addressed by way of a preliminary hearing.

The Claimants submit that this inevitable conclusion is why the majority of NAFTA tribunals - including, most recently, the Tribunal in Glamis Gold v. USA[1] - have refused to grant the Respondent what has become its 'standard' request for jurisdictional bifurcation of any NAFTA Chapter 11 arbitration. Just as in the *Glamis* case, the Respondent's argument about what constitutes a jurisdictional question in need of a preliminary hearing are as inaccurate as its argument that holding a preliminary hearing (at which evidence on a wide range of issues would need to be produced) would somehow be more efficient than merely proceeding - as appropriate - to a proper merits hearing.

Finally, the Claimants would only note that if efficiency was truly the objective of the Respondent in making its request for bifurcation, and if a hearing of the Respondent's preliminary objections was really as simple and straight-forward as it has claimed, the Respondent would have welcomed the opportunity to hold a preliminary hearing held on an expedited basis as suggested by the Claimant. Instead, the Respondent seeks multiple rounds of excessive (and likely repetitive pleadings).

In effect, what the Respondent is really seeking is two evidentiary hearings, running a span of two or more years, when one hearing would obviously suffice. In this case, the Claimant and Respondent have each submitted detailed briefs on their claims and defences. What is required at this point – for

[1] http://www.naftaclaims.com/Disputes/USA/Glamis/Glamis-Tribunal-Order-Two.pdf

the Tribunal to truly move forward expeditiously on this claim – is an elaboration of those briefs through the use of an appropriate evidentiary process, followed by one more exchange of memorials of fact and law. There is no valid reason to delay the process further.

All of which is respectfully submitted.

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Todd Weiler
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