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.

REQUEST FOR BIFURCATION OF RESPONDENT UNITED STATES OF AMERICA

Mark A. Clodfelter
Assistant Legal Adviser for International Claims and Investment Disputes
Andrea J. Menaker
Chief, NAFTA Arbitration Division, Office of International Claims and Investment Disputes
David A. Pawlak
Mark S. McNeill
Jennifer I. Toole
Attorney-Advisers, Office of International Claims and Investment Disputes
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 requests that the Tribunal address as a preliminary question separate from the merits of the dispute the United States' objections that Glamis's claims challenging certain United States federal measures under NAFTA Article 1105(1) are time-barred and that Glamis's claim challenging California state measures under NAFTA Article 1110 is not ripe.

ARGUMENT

The governing arbitration rules support bifurcation. Article 21(4) of the UNCITRAL Arbitration Rules provides that "[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question." Moreover, it is standard practice in international arbitrations to separate proceedings on jurisdiction from the

merits of the dispute.[1] As one leading commentator explains, "[i]n general, the more prudent course is to conduct a preliminary proceeding on the question of jurisdiction. That permits the parties to fully address the issue and, if jurisdiction is lacking, avoids the expense of presenting the case on the merits."[2]

A separate proceeding on jurisdiction is particularly appropriate where, as here, the objections present questions of law distinct from the merits. Glamis claims that certain federal actions, which took place in October 1999, December 1999 and November 2000, violated NAFTA Article 1105(1).[3] To the extent these actions constitute measures, the United States objects to the jurisdiction of this Tribunal over these claims based on

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[1] *See, e.g.,* Robert B. von Mehren, *Enforcement of Foreign Arbitral Awards in the United States,* 579 PLI/LIT. 147, 163-64 (Feb. 1998) (noting preference in international arbitration to hear and decide jurisdictional issues before the merits).

[2] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 57 (1994); *see also, e.g., Canfor Corp. v. United States of America*, *Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings* ¶ 55 (Jan. 23, 2004) (NAFTA Chapter Eleven tribunal deciding to treat the respondent's jurisdictional objection as a preliminary question); *GAMI Investments, Inc. v. United Mexican States, Procedural Order No. 2* ¶ 1 (May 22, 2003) (NAFTA Chapter Eleven tribunal deciding to address preliminary issues separate from proceeding on the merits); *United Parcel Service Inc. v. Government of Canada, Decision of the Tribunal on the Filing of a Statement of Defence* ¶ 16 (Oct. 17, 2001) ("[Jurisdictional issues] are . . . frequently, as the UNCITRAL rules indicate they should be, dealt with as a preliminary matter."); *Loewen Group, Inc. v. United States of America*, *Decision on Jurisdiction* (Jan. 5, 2001) (NAFTA Chapter Eleven Tribunal addressing the respondent's objections to competence and jurisdiction as a question separate from the merits); *Ethyl v. Government of Canada,* 38 I.L.M. 708, 715-17 (1999) (Award on Jurisdiction of June 24, 1998) (NAFTA Chapter Eleven tribunal directing parties to brief and argue preliminary issues separate from proceeding on the merits); *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt,* 3 ICSID REPORTS 131, 143 (Decision on Jurisdiction of Apr. 14, 1988) (in bifurcating, the tribunal confirmed "there is no presumption of jurisdiction – particularly where a sovereign State is involved – and the Tribunal must examine [a sovereign's] objections to the jurisdiction of the Centre with meticulous care, bearing in mind that jurisdiction in the present case exists only insofar as consent thereto has been given by the Parties."); SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 99 (5th ed. 1995) (noting "basic rule of international law and a principle of international relations that a State is not obliged [to] give an account of itself on issues of merits before an international tribunal which lacks jurisdiction or whose jurisdiction has not yet been established.").

[3] Glamis Notice of Arbitration ("NOA") ¶¶ 14, 25. More than three years before filing its Notice of Arbitration, Glamis complained in filings before a U.S. district court that it had already been harmed by one of these measures. *See* Plaintiff's Opposition to Defendant's Motion to Dismiss, dated July 11, 2000, at 11, *Glamis Imperial Corp. v. Bruce Babbitt*, (D. Nev. filed April 14, 2000) (No. CV-N-00-0196-DWH-VPC); *see also id.* at 10 ("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*, (D. So. Cal. Oct. 31, 2000) (No. 00CV1934W(POR)) (same).

the straightforward application of the three-year limitations period in NAFTA Article 1117(2). Applying Article 1117(2)'s limitations provision will be an exercise much more limited in scope than considering the merits of all of Glamis's Article 1105(1) claims. Further, application of the limitations provision will potentially eliminate the costs and burden incurred by the parties and the Tribunal that are associated with presenting a full case on the merits for claims that clearly are not within the Tribunal's jurisdiction.

Limitations periods such as that set forth in NAFTA Article 1117(2) must be observed. They prevent the airing of stale claims, for which evidence may no longer be available and witness recollections may be infirm. The NAFTA Parties in Article 1117(2) demonstrated their clear intent to preclude stale claims. Article 1117(2) also promotes finality by ensuring that claims of harm that were raised, or could have been raised, in another forum cannot be brought belatedly before a NAFTA Chapter Eleven Tribunal. The application of NAFTA Chapter Eleven's limitations period is precisely the kind of matter that should be considered as a preliminary question. Were any claim allowed to proceed without first considering its timeliness, the Parties' intent in agreeing to the three-year limitation period set forth in Chapter Eleven would not be given effect.

By deciding the issue of the timeliness of these Article 1105(1) claims preliminarily, the Tribunal has the opportunity to focus and substantially limit its work – and the parties' costs and burdens of presenting argument – with respect to Glamis's Article 1105(1) claims. A decision in the United States' favor will dispense with almost all of Glamis's Article 1105(1) claims regarding the federal measures of which Glamis complains. In fact, of Glamis's complaints against the federal measures under Article 1105(1), only the decision by former Secretary of the Interior Bruce Babbitt denying

Glamis's plan of operations would survive the application of Article 1117(2)'s time-bar. That decision was rescinded shortly after it was issued. Additionally, the Tribunal will have the opportunity to prevent the United States from having to litigate before this Tribunal Glamis's stale complaints regarding measures that the United States already devoted substantial resources to defending in U.S. District Court.

The United States also seeks preliminary treatment of its objection to Glamis's claim brought under NAFTA Article 1110 with respect to California state measures on the ground that it is not ripe. NAFTA Article 1117(1) provides in pertinent part that an investor may bring a claim on behalf of an enterprise that "has incurred loss or damage by reason of, or arising out of, [a] breach" of the NAFTA. As set forth in the United States' Statement of Defense, Glamis has acknowledged that BLM's approval of its proposed plan of operations is necessary for it to proceed with the Imperial Project. It is indisputable that Glamis had not obtained such approval as of the dates – December 12, 2002 to April 10, 2003 – when California adopted the series of measures that Glamis now asserts constituted a taking of its property rights.[4]

Thus, Glamis is not – and has never been – in a position in which the California measures at issue here could have been applied to it. Therefore, Glamis cannot have been affected by the California measures. Glamis, therefore, is not in a position to assert, as required by Article 1117(1), that it "*has incurred*" a loss as a result of the California measures. Future, uncertain and contingent events that may give rise to losses, that may not occur as anticipated, or may not occur at all are not cognizable under NAFTA Chapter Eleven.

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[4] *See* NOA ¶¶ 20-23.

Considering the applicability of Article 1117(1)'s ripeness requirement to Glamis's claims in a preliminary phase would be an exercise substantially more limited in scope than consideration of the merits of Glamis's expropriation claim. Additionally, this would focus the work of the parties and the Tribunal on the federal measures of which Glamis's complains, eliminating what is likely to be substantial evidence gathering and factual development of the case.[5]

If bifurcation is granted and the United States prevails on its preliminary objections, only a small portion of Glamis's claim would remain. Glamis's *only* remaining claim would be based on the Record of Decision denying Glamis's plan of operations, which was rescinded shortly after its issuance. Adjudication of this one claim would be significantly less costly and time-consuming than the adjudication of all of Glamis's claims on the merits. Bifurcation is, therefore, not only consistent with the governing arbitration rules, it is the most efficient and economical way to proceed in this matter.

[5] *See Amco Asia Corp. v. Indonesia,* 1 ICSID REPORTS 389, 390 (Decision on Jurisdiction of Sept. 25, 1983) (legal objections to jurisdiction raised by the respondent were dealt with as a preliminary matter, as compared to fact-intensive objections which were joined to the merits (*e.g.*, whether in fact the army did or did not seize the hotel)).

CONCLUSION

For the foregoing reasons, 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 expropriation claim.

Respectfully submitted,

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Mark A. Clodfelter
Assistant Legal Adviser for International Claims and Investment Disputes
Andrea J. Menaker
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