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

BETWEEN:

MESA POWER GROUP, LLC

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA

Request for Bifurcation

3 December 2012

Department of Foreign Affairs
and International Trade
Trade Law Bureau
Lester B. Pearson Building
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Ottawa, Ontario
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CANADA

1. In accordance with Article 21(4) of the *UNCITRAL Arbitration Rules, 1976*, (the "UNCITRAL Rules") Canada requests that the Tribunal bifurcate these proceedings and hear its objection to the Tribunal's jurisdiction as a preliminary question. The Claimant has failed to meet the conditions precedent for submission of a claim to arbitration pursuant to Chapter 11 of NAFTA. As such, Canada has not consented to the arbitration of this claim and objects to the jurisdiction of the Tribunal on these grounds. Bifurcation of this jurisdictional objection is appropriate, as it will increase the efficiency of these proceedings.

I. A JURISDICTIONAL OBJECTION SHOULD BE CONSIDERED AS A PRELIMINARY MATTER IF DOING SO WILL INCREASE THE EFFICIENCY OF THE PROCEEDINGS

2. Article 21(4) of the UNCITRAL Rules provides, in relevant part, that "[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question."[1] Commentators have explained that doing so can result in the parties "avoiding the expense of presenting the case on the merits."[2] According to Redfern and Hunter, bifurcation of an objection to jurisdiction "enables the parties to know where they stand at an early stage; and it will save them spending time and money on arbitral proceedings that prove to be invalid."[3]

3. In practice, international arbitral tribunals frequently decide questions of jurisdiction as a preliminary matter separate from the merits.[4] For example, the NAFTA Chapter 11 tribunal in

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[1] UNCITRAL Arbitration Rules, 1976, Article 21(4). Available at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf.

[2] **RL-001**, Gary B. Born, *International Commercial Arbitration* (New York: WoltersKluwer, 2009), p. 994.

[3] **RL-012**, Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration,* 4th ed. (London: Thomson, Sweet & Maxwell, 2004), pp. 257-258.

[4] See for *e.g.*, **RL-003**, *Canfor Corp. v. United States of America* (UNCITRAL) Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings, 23 January 2004, ¶ 55 (NAFTA Chapter Eleven tribunal deciding to treat the respondent's jurisdictional objection as a preliminary question); **RL-007**, *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL) Procedural Order No. 2, 22 May 2003, ¶ 1 (NAFTA Chapter Eleven tribunal deciding to address preliminary issues separate from proceeding on the merits); **RL-014**, *United Parcel Service of America v. Government of Canada* (UNCITRAL) Decision of the Tribunal on the Filing of a Statement of Defence, 17 October 2001, ¶ 16: ("[Jurisdictional issues] are . . . frequently, as the UNCITRAL rules indicate they should be, dealt with as a preliminary matter."); **RL-010**, *Loewen Group, Inc. v. United States of America* (ICSID Case No. ARB(AF)/98/3), Decision on Competence and Jurisdiction, 5 January 2001 (NAFTA Chapter Eleven tribunal addressing the respondent's objections to competence and jurisdiction as a question separate from the merits); **RL-006**, *Ethyl v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 24 June 1998 (NAFTA Chapter Eleven tribunal directing parties to brief and argue preliminary issues separate from proceeding on the merits); **RL-013**, *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, 106 I.L.R. 531, Decision on Jurisdiction, 14 April 1988, ¶ 63 (in bifurcating, the tribunal confirmed "there is no

Glamis Gold found that an objection to jurisdiction should be considered as a preliminary matter unless, taking the claim as it is alleged by the Claimant, bifurcation is unlikely to bring about increased efficiency in the proceedings.[5] The Tribunal further explained that bifurcation brings about increased efficiency where: (1) the jurisdictional challenge to the tribunal's authority is substantive and not frivolous; (2) the challenge, if successful, would materially reduce the proceedings at the next phase; and (3) the jurisdictional issues are not so intertwined with the merits that an early determination on the matter is likely to save time.[6]

II. BIFURCATION OF CANADA'S JURISDICTIONAL OBJECTION IS THE MOST EFFICIENT METHOD OF PROCEEDING

4. A consideration of the factors outlined in *Glamis* demonstrates that bifurcation of Canada's jurisdictional objection will increase the efficiency of this arbitration.

5. First, Canada's jurisdictional objection is substantial and not frivolous. As is explained further in Canada's Objection to Jurisdiction, which has been submitted alongside this Request for Bifurcation, the Claimant did not submit this claim to arbitration in accordance with the procedures and requirements of Chapter 11. In particular, the Claimant did not respect the requirement in Article 1120(1) that it wait six months after the events giving rise to its claim before submitting that claim to arbitration. As several investment treaty arbitral tribunals considering similar objections have found, the failure to abide by such a waiting period means that there is no consent to arbitration and thus, no jurisdiction for a tribunal to hear the claim.[7]

6. Second, if Canada's objection to jurisdiction is successful, it will result in the dismissal of the entire claim, or at the least, will materially reduce the number of measures that must be considered in the merits phase. In either case, significant savings will be achieved with respect to

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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").

[5] **RL-008**, *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL) Procedural Order No. 2 (Revised), 31 May 2005, ¶ 12 ("*Glamis*").

[6] *Ibid*, ¶ 13(c).

[7] **RL-011**, *Murphy Exploration and Production Company International v. Republic of Ecuador* (ICSID Case No. ARB/08/4) Award on Jurisdiction, 15 December 2010, ¶ 149 and more generally ¶¶ 90-157; **RL-002**, *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5) Award on Jurisdiction, 2 June 2010, ¶¶ 315-318; See also **RL-005**, *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic* (ICSID Case No. ARB/01/3) Decision on Jurisdiction, 14 January 2004, ¶ 88.

the costs associated with the tribunal, the fact and expert witnesses and the briefing and argument of the case. Indeed, in a case where the disputing parties agree that, should it proceed beyond jurisdiction, the merits and damages phases should be heard together, millions of dollars in tribunal and expert fees could be saved if Canada's objection is successful. The Government of Canada is in the process of implementing a deficit reduction action program which imposes serious fiscal constraints on its operations. In these circumstances, the potential for cost reductions in expenditures of public funds should be given considerable weight.

7. Third, the jurisdictional issues here are not intertwined with the merits of the dispute. While Canada disputes that any of the measures challenged by the Claimant violated Canada's obligations under Chapter 11 of NAFTA, the only facts relevant to this objection concern the dates on which certain measures occurred and the date on which the Claimant's purported Notice of Arbitration was filed. There appears to be little, if any, dispute between the parties concerning the timing of the relevant events. The sole question that appears to be in dispute is a legal one concerning the interpretation of Article 1120 of NAFTA.

8. Accordingly, if Canada's objection is successful, hearing it as a preliminary matter will reduce or eliminate the costs and time necessary to resolve this dispute, and as a consequence, increase the efficiency of this arbitration. No efficiencies will be gained by hearing this particular jurisdictional objection alongside the merits as the facts related to it are distinct from those that will be relevant in determining whether the complained of measures are consistent with Canada's obligations under NAFTA.

III. BIFURCATION OF OTHER POTENTIAL JURISDICTIONAL OBJECTIONS WOULD NOT BE EFFICIENT AT THIS TIME

9. In its purported Notice of Arbitration, the Claimant alleges that it is a U.S. investor that owns and controls certain investments in Canada. The Claimant has provided no proof of its alleged nationality and no proof of its alleged ownership of investments in Canada. Canada has no reason, at this time, to doubt the veracity of the Claimant's allegations, and as such, no reason to request that this be dealt with as a preliminary matter. To the extent that the Claimant fails to adduce sufficient proof to support these allegations, Canada will raise jurisdictional objections as soon as possible.

10. The Claimant also appears to intend to proceed with a claim that certain actions of the Ontario Power Authority (the "OPA") are directly in breach of Canada's obligations under NAFTA Chapter 11. Canada does not dispute that in certain instances the OPA exercises governmental authority or acts directly upon the instructions of Ontario, such that its actions are attributable to Canada. However, as noted in Canada's Outline of Potential Issues, the OPA is an "independent, non-profit corporation"[8] which according to the *Electricity Act* has a separate legal personality,[9] is not an agent of the Crown,[10] and has a Board of Directors who, while appointed by the Minister of Energy, are independent[11] and obligated to act in the best interests of the OPA.[12] As such, certain actions of the OPA are not attributable to the Government of Canada. The Claimant's purported Notice of Arbitration is imprecise as to the specific actions of the OPA, if any, that intends to claim are inconsistent with Canada's NAFTA obligations. To the extent that the Claimant does make such claims, the facts that would be relevant to a determination of whether the acts of the OPA are attributable to Canada are closely intertwined with the facts relevant to the merits of this dispute.[13]

11. As it would not increase the efficiency of these proceedings, Canada does not request that a jurisdictional objection on either of these grounds, should one be necessary, be treated as a preliminary question.[14]

IV. CONCLUSION

12. Canada respectfully requests that the Tribunal bifurcate these proceedings and hear Canada's objection to the jurisdiction of this Tribunal based on the Claimant's failure to respect the conditions precedent for submitting a claim to arbitration as a preliminary matter.

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[8] Canada's Outline of Potential Issues dated July 31, 2012, ¶ 3.

[9] **RL-004**, *Electricity Act*, S.O. 1998, c. 15, Sch. A, s. 25.2(4).

[10] *Ibid*, s. 25.2(3).

[11] *Ibid*, s. 25.4(3).

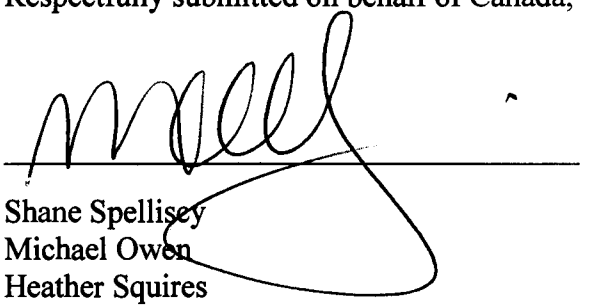
[12] *Ibid*, s. 25.5.

[13] It is for this reason that tribunals often consider questions of attribution to be more appropriately heard along with the merits, rather than as a preliminary question. See for example, **RL-009**, *Gustav F W Hamester GmbH & Co. KG v. Republic of Ghana* (ICSID Case No. ARB/07/24) Award, 18 June 2010, ¶¶ 143-145.

[14] In this regard, Canada notes that at the October 12 procedural meeting, it similarly represented that it would not seek to have jurisdictional objections, other than its objection based on lack of consent, heard as a preliminary matter (Procedural Hearing Tr: pp. 233-19 to 235-3).

December 3, 2012

Respectfully submitted on behalf of Canada,



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