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*.	)

AMICUS CURIAE APPLICATION

OF FRIENDS OF THE EARTH CANADA and FRIENDS OF THE EARTH UNITED STATES

Friends of the Earth Canada
260 St. Patrick Street, Suite 300
Ottawa, Ontario
Canada, K1N 5K5
Tel: (613) 241-0085
Web site: www.foecanada.org

Friends of the Earth United States
1717 Massachusetts Avenue, NW, 600
Washington, DC, United States
20036-2002
Tel: (877) 843-8687
Web site: www.foe.org

Counsel for Friends of the Earth Canada and Friends of the Earth United States:

Craig Forcese, Assistant Professor
Faculty of Law, University of Ottawa
57 Louis Pasteur
Ottawa, Ontario
Canada K1N 6N5
Tel: (613) 562-5800 ext. 2524
Fax: (613) 562-5124
E-mail: cforcese@uottawa.ca

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I. INTRODUCTION

1. Friends of the Earth Canada ("FOE Canada") and Friends of the Earth U.S. ("FOE US") (collectively "Applicants") apply for the status of *amicus curiae* on critical legal issues of public concern before this Tribunal in the arbitration between Glamis Gold Ltd. ("Claimant") and the United States of America. Applicants make this Application pursuant to the Statement on Non-disputing Party Participation adopted by the NAFTA Free Trade Commission on October 7, 2003.

II. DESCRIPTION OF THE APPLICANTS

2. FOE Canada is a federally registered charity (number 11893 3001 RR0001) and a not-for-profit corporation incorporated pursuant to the laws of Canada. It is governed by an independent Board of Directors. The mandate of FOE Canada is to work at international, national and provincial levels to promote environmental sustainability. FOE Canada's current campaigns include *Pollution Regulation Enforcement, Freshwater Management* and *Global Environmental Justice*. Information on FOE Canada's program areas and major projects is available at www.foecanada.org. FOE Canada has no relationship to either of the parties to the dispute and retains full control over the content of its work and projects, regardless of funding source. Funding for this *Amicus Curiae* Submission is being provided exclusively by Friends of the Earth Canada membership donations.

3. FOE US is a registered 501(c)3 not-for-profit corporation devoted to defending the environment and championing a just and healthy world. FOE US has approximately 30,000 members. FOE US brings considerable experience to this Tribunal regarding the effects of international trade agreements on environmental, social and economic policy. The organization addresses a wide range of domestic and international policy concerns, including those related to mining and extractive industries, public lands and vulnerable ecosystems, energy and transportation, and human health and the environment. FOE US staff also have a high degree of expertise in investor/state arbitration mechanisms and their relationship to environmental regulatory policy,

particularly the mechanisms established under NAFTA Chapter 11. Information on the organization's program areas and major projects is available at www.foe.org. FOE US staff currently serve on the United States Trade Representative's and U.S. Department of Commerce's Industry Trade Advisory Committee on Chemicals, Pharmaceuticals, Health Science Products and Services. FOE US receives no funding from the United States government.

4. FOE Canada and FOE US are independent organizations. Both are members of Friends of the Earth International, a network of independent, non-profit organizations in 73 countries around the world that are devoted to environmental sustainability. Friends of the Earth International played no role in the development of this Application.

5. Applicants have received strictly *pro bono* legal support from the University of Ottawa Faculty of Law International Trade Law Clinic.

III. THE INTEREST OF APPLICANTS IN THE PRESENT ARBITRATION

6. Applicants are concerned about the effect of nationality on corporate access to trade agreement remedies, both generally and in this specific instance. The nexus between international trade, environmental protection and environmental justice has been an issue of great concern to the Applicants, particularly in the context of multilateral trade agreements. As part of their work in this area, the Applicants have followed the actions of the Claimant's subsidiary Glamis Imperial since the 1990s.

7. Both the United States and Canada have a number of legislative and policy initiatives directed at preserving the environments of vulnerable populations. Applicants fear that these initiatives would be undermined by a finding that under Chapter 11, an essentially domestic corporate entity may organize its corporate structure, and hence its nationality, in such a way as to gain access to Chapter 11 remedial relief. Such a finding would allow *de facto* domestic companies access to an international venue to challenge the applicability of domestic environmental and other

laws to their operations. Applicants are concerned that this would promote the weakening of existing legislative and policy frameworks and would discourage governments from adopting new regulatory provisions.

8. Environmental justice issues do not arise in most private commercial arbitrations, which are concerned typically with only the rights of investors, rather than the impacts of arbitral decisions on minority groups. Environmental justice issues are, however, squarely at issue in the present Arbitration. The U.S. and California measures impugned by the Claimant have environmental and cultural preservation objectives.

9. In seeking *amicus* standing in the present Arbitration, Applicants seek to ensure that the resolution of a dispute that implicates the public interest is informed by public participation. If Claimant had pursued its local remedies in U.S. court, Applicants and other interested parties would have ready access to *amicus* standing. Claimant's decision to submit the dispute to Chapter 11 dispute resolution should not prevent the participation of interested parties, such as the Applicants, as *amici*.

IV. ISSUES OF FACT AND LAW RAISED BY APPLICANTS

10. In the attached submissions, Applicants submit:

a. Claimant – as a dual national of Canada and the United States – does not meet the dominant nationality test prescribed by customary international law and incorporated into NAFTA by Article 1131(1), and thus is not entitled to make a claim under Chapter 11 against the United States.

b. In the event the Tribunal decides that the Claimant is entitled to make a claim, the tenuous nature of Claimant's Canadian ties should prompt it to interpret Chapter 11 in a manner that gives Claimant no greater rights than it would have if it were to pursue local remedies.

c. In the event the Tribunal considers the application of the minimum treatment standard in

Article 1105, the Tribunal should not engage in a *de novo* review of the merits of the environmental and cultural preservation objectives pursued by the United States and California and instead should consider whether Claimant has been accorded fair and equitable treatment *given* these environmental and cultural preservation objectives.

V. REASONS FOR ACCEPTING THE SUBMISSIONS BY APPLICANTS

11. Pursuant to paragraph 2(h) of the procedures set out by the Free Trade Commission in its October 7, 2003 Statement on Non-disputing Party Participation, the Applicants refer to four factors to support this Application:

a. *Applicants' submission would assist the Tribunal in the determination of a legal or factual issue by bringing a new perspective*. The tenuous connection between an investor and a non-disputing Party (in this case, Canada) is squarely raised by this Arbitration, in circumstances where environmental and cultural preservation issues are at issue. The Applicants have long standing involvement in environmental justice concerns surrounding international trade agreements. The Applicants also have considerable experience in drafting public interest *amici* in the context of international trade disputes[1] and in domestic disputes.[2]

b. *Applicants' submission would address matters within the scope of the dispute*. The determination of whether Claimant is entitled to relief by virtue of its incorporation (and nothing more) in Canada is a necessary condition that must be satisfied before Claimant is entitled to the relief requested pursuant to Articles 1105 and 1110. "Diversity of nationality" is a substantive requirement in both of these articles.

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[1] Friends of the Earth US, together with the Center for International Environmental Law (CIEL) and other non-governmental organizations submitted a joint *amicus* brief to the WTO dispute resolution panel in *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* (WT/DS/291, 292 and 293) (June 1, 2004).

[2] See *Hollick v. The City of Toronto*, [2001] 3 S.C.R. 158. See also *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 and *North Fraser Harbour Commission v. Environmental Appeal Board*, 2005 SCC 1.

c. *Applicants have significant interest in the arbitration*. As set out in part III above, Applicants have a significant interest and expertise in international trade and environmental justice issues. This Arbitration raises these matters.

d. *Public interest in the arbitration*. As set out in part III above, environmental justice issues are in play in the present Arbitration. The U.S. and California actions impugned by the Claimant have environmental and cultural preservation objectives and are classic public interest measures.

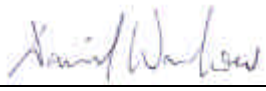
VI. CONCLUSION

12. For the foregoing reasons, Applicants request *amicus* standing, pursuant to the rules and procedures adopted by the NAFTA Free Trade Commission on October 7, 2003.

Respectfully submitted by Friends of the Earth Canada and Friends of the Earth United States, this 30th day of September, 2005, by counsel for Applicants:

Craig Forcese, Assistant Professor
Faculty of Law, University of Ottawa
57 Louis Pasteur Ottawa, Ontario Canada K1N 6N5
Tel: (613) 562-5800 ext. 2524 Fax: (613) 562-5124
E-mail: cforcese@uottawa.ca

And by:



Graham Saul
International Program Director
Friends of the Earth Canada
260 St. Patrick Street, Suite 300
Ottawa, Ontario Canada, K1N 5K5
Tel: (613) 241-0085

David Waskow
International Program Director
Friends of the Earth United States
1717 Massachusetts Avenue, NW, 600
Washington, DC, United States
20036-2002
Tel: (877) 843-8687