

**AN ARBITRATION UNDER CHAPTER 11 OF THE NAFTA
AND THE UNCITRAL ARBITRATION RULES, 1976**

between

MESA POWER GROUP, LLC

Claimant

and

GOVERNMENT OF CANADA

Respondent

PROCEDURAL ORDER NO. 2

ARBITRAL TRIBUNAL:

Professor Gabrielle Kaufmann-Kohler (Presiding Arbitrator)

The Honourable Charles N. Brower

Toby Landau, QC

Secretary of the Tribunal

Rahul Donde

I. PROCEDURAL BACKGROUND

1. On 3 December 2012, in accordance with the calendar for the arbitration set forth in Annex B to Procedural Order No. 1, the Respondent submitted its Objection to Jurisdiction as well as its Application for Bifurcation. On 24 December 2012, the Claimant submitted its Answer to the Request for Bifurcation.

II. THE PARTIES' POSITIONS

2. The Parties' positions, insofar as relevant to the issue of bifurcation, are set forth below.
 - a) The Respondent's Position
3. The Respondent submits that it has not consented to arbitrate this dispute as the Claimant did not respect the conditions precedent for submitting a claim to arbitration under Chapter 11 of the NAFTA. The Respondent objects to the jurisdiction of the Tribunal on this ground and submits that bifurcation of this jurisdictional objection is appropriate, as it will increase the efficiency of these proceedings. In support of its submission, the Respondent relies on Article 21(4) of the UNCITRAL Rules, which, according to the Respondent, establish the presumption that a tribunal should address jurisdictional issues as a preliminary question. The Respondent also quotes Redfern and Hunter to the effect that 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".
4. According to the Respondent, deciding questions of jurisdiction as a preliminary matter separate from the merits is a common practice in international arbitration. In *Glamis Gold v. USA*,¹ the Tribunal determined that a request that an objection be considered as a preliminary matter should be granted unless bifurcation is unlikely to bring about increased efficiency in the proceedings. The Tribunal further explained that bifurcation would bring about increased efficiency where: (1) the objection is substantial rather than frivolous; (2) resolving the objection as a preliminary matter will result in a material reduction of proceedings at the next phase; and (3) the facts and issues to be addressed in the jurisdictional phase are so distinct from the facts and issues of the merits phase that having a single proceeding would not result in savings of cost and time. The Respondent submits that all these factors are satisfied in the present case.

¹ *Glamis Gold, Ltd v. The United States of America* (UNCITRAL) Procedural Order No.2 (Revised), 31 May 2005 ("Glamis").

5. First, according to the Respondent, its objection to the jurisdiction of the Tribunal is substantial and not frivolous. The Claimant's failure to respect the requirement in Article 1120(1) of the NAFTA that it wait six months after the events giving rise to its claim before starting the arbitration cannot be ignored. The Respondent relies *inter alia* on *Murphy Exploration and Production Company International v. Ecuador*² and *Burlington v. Ecuador*³ to submit that the failure to abide by a waiting period results in a lack of consent and thus a lack of jurisdiction.
6. Second, the Respondent submits that a decision by the Tribunal in its favour will result in a dismissal of the entire claim or, at least, in a material reduction of the measures that must be considered in the merits phase. This will in turn result in significant savings of costs. Such savings are especially important as Canada is implementing a deficit reduction program which imposes serious constraints on its operations. In these circumstances, according to the Respondent, the potential for cost reductions in expenditures of public funds should be given considerable weight.
7. Third, the Respondent submits that this jurisdictional issue is distinct from the merits of the case. It emphasizes that there is little dispute over any of the facts relevant to the jurisdictional defense, i.e. over the dates when certain measures were taken and when the purported Notice of Arbitration was filed. The sole question is the interpretation of Article 1120(1) of NAFTA. No efficiencies will therefore be gained by hearing this particular jurisdictional objection alongside the merits.
8. Finally, the Respondent mentions other "potential jurisdictional objections" concerning the nationality of the Claimant, its alleged ownership of investments in Canada and the attribution of responsibility for acts of the Ontario Power Authority to Canada. If these objections were later raised, their bifurcation would not be efficient. Unlike with respect to the defense related to the waiting period, Canada accepts that these potential objections need not be heard on a preliminary basis and that they be joined to the merits.
9. For all of these reasons, the Respondent requests the Tribunal to "bifurcate the proceedings and hear the Respondent'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."

² *Murphy Exploration and Production Company International v. Republic of Ecuador* (ICSID Case No. ARB/08/4) Award on Jurisdiction, 15 December 2010.

³ *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5) Award on Jurisdiction, 2 June 2010.

b) The Claimant's Position

10. The Claimant submits that the Respondent's request for bifurcation is premised entirely on the basis that the Respondent has not consented to arbitrate this dispute. However, Canada's consent to arbitration is granted in Article 1122 of the NAFTA and compliance with the waiting period is not a prerequisite to the Tribunals' jurisdiction. Relying on several commentators, the Claimant submits that "waiting period" provisions similar to Article 1120(1) of the NAFTA are purely procedural and not a matter of jurisdiction. In support of its position, the Claimant cites *SGS v. Pakistan*⁴ where it was held that "[t]ribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction."
11. In the Claimant's view, bifurcation is a practical question to be determined by reference to principles of arbitral efficiency and economy. A series of measures impugned by the Claimant predate the Notice of Arbitration by at least six months. These cannot be assessed and determined without a full hearing. In fact, the Respondent has itself acknowledged that some of the impugned measures would, in any event, require a hearing. In this context, bifurcation would not promote or provide significant costs savings. It would be the exact opposite.
12. The Claimant further submits that to the extent Article 1120(1) of the NAFTA raises any question of law at all, it is certainly not one that can be determined in the abstract. A full examination of the entire factual matrix in which the claim arises would be required. The events of 3 June (changes to the FIT interconnection rules) and 4 July 2011 (announcing the FIT Power Purchase Agreements) are directly connected to earlier events granting special and more favorable treatment to the Claimant's competitors. These earlier events arose in January 2011, 10 months prior to the submission of the Notice of Arbitration. The Respondent's breach extends over the entire period starting with the first of the impugned actions and lasting for as long as governmental actions were not in conformity. Consequently, the determination whether the events of January through July 2011 constitute a breach of the NAFTA requires a full consideration of all the evidence, including witnesses and experts. Bifurcation would therefore require the Claimant to prove its case twice.

⁴ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003.

13. Finally, in response to the Respondent's reliance on the decisions in *Murphy* and *Burlington*, the Claimant submits that those cases are easily distinguishable. The text of the US-Ecuador BIT requires a waiting period from the date the investor notifies the respondent of the dispute. This is not applicable to Article 1120(1) of the NAFTA. Further, the US-Ecuador BIT uses the word "dispute" rather than the word "events" seen in Article 1120(1) of the NAFTA. This imposes a notice requirement that is completely different from Article 1120(1) of the NAFTA. The Claimant submits that the "notice" provisions in *Murphy* and *Burlington* are akin to Article 1119 of the NAFTA pursuant to which the Respondent has a right to be advised and informed of the dispute.
14. For all of these reasons, the Claimant requests the Tribunal to deny the Respondent's request for bifurcation.

III. ANALYSIS

15. At the outset, the Tribunal notes that the purpose of this Order is to decide whether to bifurcate the present proceedings between, on the one hand, the issue regarding the Claimant's alleged non-compliance with Article 1120(1) of the NAFTA and, on the other, all other objections that may arise and the merits. At this stage, it is not to decide whether or not the Claimant complied with the requirements of Article 1120(1) of the NAFTA. The Tribunal will decide this latter issue at the relevant time as provided in the calendar for this arbitration.
16. The Tribunal further notes that Article 21(4) of the UNCITRAL Rules provides that "[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary matter". It follows that when a Party raises an objection to jurisdiction, the presumption is in favor of addressing the objection as a preliminary question. Indeed, it is good practice to let the parties "know where they stand" – to use Redfern and Hunter's words – at an early stage and not to impose the burden of full fledged proceedings on a party that disputes being subject to arbitration. There are obviously circumstances when the presumption must be discarded, in particular when the preliminary objection is frivolous or dilatory or when the facts it involves are the same or closely linked to those pertinent to the merits.
17. In this respect, the decision in *Glamis* helpfully illustrates the factors to be borne in mind while determining an application for bifurcation. Applying these factors in this case, the Tribunal sees potential merit in the requested bifurcation. This conclusion, however, is reached with a reservation. While at the present stage, it appears to the Tribunal that the separate

presentation of the Respondent's objection concerning Article 1120(1) of the NAFTA and other possible jurisdictional issues and the merits could lead to a more efficient proceeding, the Tribunal does not exclude the possibility that, once the issue is explored further with the benefit of the Parties' further briefing, it may transpire that a determination cannot be made without substantially engaging with the merits of the dispute, such that the objection ought then to be re-joined to the merits. The Tribunal considers it necessary expressly to reserve this possibility.

18. Reverting to the factors enumerated in *Glamis*, the Tribunal notes first, that the Respondent's objection does not appear frivolous. The Notice of Arbitration is dated 4 October 2011. At least two of the impugned measures (dated 3 June and 4 July 2011 respectively) fall within the six month notice period stipulated in Article 1120(1) of the NAFTA. The Claimant itself does not dispute this observation, submitting instead that these measures are directly connected to earlier measures falling outside the six month period. As the Respondent points out, some tribunals have found that the failure to abide by a waiting period requirement results in a denial of jurisdiction. The Claimant cites other decisions to the effect that waiting periods are mere procedural requirements, not affecting jurisdiction. Whatever the correct position, it cannot be denied that the Respondent's objection concerning Article 1120(1) of the NAFTA, if found to be valid, could have an effect on the Tribunal's jurisdiction.
19. Second, if it were to succeed, the objection in issue is likely to at least narrow the scope of issues to be briefed at the merits stage. Bifurcating the proceedings may thus result in a reduction in the time and costs of any future phase of the proceedings. In such event, the Respondent would not be put to the burden of defending the entire case on the merits.
20. Third, at this juncture, the Tribunal believes that the facts involved in determining the objection in issue are distinct from those likely to be involved in determining the merits of the claims. Similarly, the application of Article 1120(1) of the NAFTA gives rise to legal questions that are likely to be separate and distinct from those arising on the merits. These questions may well be answered without entering into the full array of facts pertinent to the merits. At present, it thus appears to the Tribunal that the issues to be analysed under Article 1120(1) of the NAFTA are unlikely to overlap with the issues to be reviewed at the merits phase. Consequently, separating the presentation of the objection in question and the rest of the proceedings should, in principle, lead to a more efficient proceeding.

21. In conclusion, on the basis of the record as it stands, the Tribunal sees merit in the Respondent's request for bifurcation. However, it cannot rule out that, after having reviewed the Claimant's Answer on Jurisdiction (on compliance with Article 1120(1) NAFTA) due on 18 February 2013 and the Reply and Rejoinder on the same issue, if any, it may find it preferable to re-join the objection in issue to the merits. As noted, this eventuality is expressly reserved.


IV. ORDER

22. For the reasons set out above, the Tribunal:

- a) Grants the Respondent's request to bifurcate the present proceedings between (i) the jurisdictional objection based on the alleged failure of the Claimant to comply with Article 1120(1) of the NAFTA, and (ii) the merits of the case and any and all other jurisdictional objections that may arise, subject to the Tribunal exercising its power, which it hereby reserves, to re-join the said objection to the merits of the case following receipt of the Answer and, if any, the Reply and Rejoinder to the said objection, with or without holding a separate hearing on the said objection;
- b) Directs the Parties to follow the scenario of the procedural calendar set forth in Annex B to Procedural Order No. 1 that assumes bifurcation; and
- c) Reserves costs for subsequent determination.

Date: 18 January 2013

For the Arbitral Tribunal



Prof. Gabrielle Kaufmann-Kohler