

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT AND THE
UNCITRAL ARBITRATION RULES, 1976**

-between-

**TENNANT ENERGY, LLC
(the “Claimant”)**

-and-

**GOVERNMENT OF CANADA
(the “Respondent”, and together with the Claimant, the “Parties”)**

PROCEDURAL ORDER NO. 8

The Arbitral Tribunal

Mr. Cavinder Bull SC (Presiding Arbitrator)

Mr. R. Doak Bishop

Sir Daniel Bethlehem QC

Registry

Permanent Court of Arbitration

Tribunal Secretary

Ms. Christel Y. Tham

12 November 2020

I. RELEVANT PROCEDURAL HISTORY

1. By Notice of Arbitration dated 1 June 2017, the Claimant commenced this arbitration against the Respondent pursuant to Articles 1116 and 1120 of Chapter 11 of the North American Free Trade Agreement (“**NAFTA**”), and the Arbitration Rules of the United Nations Commission on International Trade Law, 1976 (“**UNCITRAL Rules**”).
2. On 24 June 2019, the Tribunal issued Procedural Order No. 1 (“**PO 1**”) establishing the procedural calendar for an initial phase up to the Tribunal’s decision on bifurcation and preliminary motions, and two alternative timetables for a subsequent phase applicable (i) should the proceedings not be bifurcated; and (ii) should the proceedings be bifurcated.
3. On 2 July 2019, the Respondent filed its Statement of Defence.
4. On 23 September 2019, the Respondent submitted its Request for Bifurcation, requesting that the Tribunal address in a preliminary procedure the Respondent’s NAFTA Article 1116(2) time-bar jurisdictional objection.
5. On 23 October 2019, the Claimant submitted its Response to the Request for Bifurcation.
6. From 14 to 15 January 2020, a hearing on the issues of bifurcation and preliminary motions took place in Washington, D.C.
7. On 27 February 2020, the Tribunal issued Procedural Order No. 4 (“**PO 4**”), in which it dismissed the Respondent’s request for bifurcation on the ground that it was premature. The Tribunal held, in relevant part:

87. In the exercise of its discretion to bifurcate, the Tribunal is guided by three relevant considerations. These considerations are (i) whether the jurisdictional objection is frivolous; (ii) whether the objection, if successful, would materially reduce the time and costs of the proceeding; and (iii) whether the objection concerns issues intertwined with the merits of the arbitration.

88. Having considered the Parties’ submissions on this issue, the Tribunal has decided to dismiss the Respondent’s request for bifurcation on the ground that it is premature.

89. The Tribunal has been directed to paragraph 91 of the Claimant’s Notice of Arbitration dated 1 June 2017 (“**NOA**”).¹⁰² Paragraph 91 of the NOA refers to “four categories of wrongful actions” purportedly committed by the Respondent, namely (i) the unfair manipulation of the award of access to the electricity transmission grid; (ii) the unfair manipulation of the dissemination of the FIT Program information; (iii) the unfair manipulation of the awarding of the FIT Program Contracts; and (iv) the improper destruction of necessary and material evidence by senior officials in the Government of Ontario. However, the NOA simply does not contain sufficient particulars of each category of wrongdoing which would allow the Tribunal to take a view, one way or another, on whether the Tribunal can determine the Respondent’s jurisdictional objection without entering into the merits.

90. The Respondent has requested that the Tribunal bifurcate the proceedings to consider the Respondent’s jurisdictional objection that the Claimant allegedly failed to meet the conditions precedent for submitting a claim to arbitration pursuant to Article 1116(2) of the NAFTA. According to the Respondent, the NOA was filed more than three years after the Claimant first acquired, or should have acquired, knowledge of the alleged breach and knowledge that it incurred loss or damage as a result of that breach and as such, the claim is time-barred.

91. Before the Tribunal can make an assessment of whether to bifurcate the proceedings, the Tribunal will need to know what evidence it will likely have to consider in determining the Respondent's jurisdictional objection and whether the Tribunal will be substantially engaging in the facts of the dispute when considering that evidence. However, until the Tribunal is informed of the specific breach in question which the Respondent now contends is time-barred, the Tribunal does not know what evidence will likely be adduced or the evidence it will likely have to consider in assessing when the Claimant acquired, or should have acquired, knowledge of that breach. Consequently, the Tribunal is unable to decide at this stage whether an inquiry into the Respondent's jurisdictional objection will be best conducted with the merits phase when the Tribunal will have the benefit of the entire record or whether the jurisdictional objection should be heard as a preliminary issue. The Tribunal needs to see the Claimant's claims in more detail before it can decide whether the proceedings can be bifurcated. The Tribunal cannot decide whether to bifurcate the proceedings or not if there is no specificity to the claims. For these reasons, the Respondent's request for bifurcation is premature.¹

8. The Tribunal further determined that the proceedings would continue in accordance with the procedural timetable set out in PO 1 for the non-bifurcated scenario, with certain modifications adopted in order to allow the Respondent to pursue the bifurcation of the proceedings after having had sight of the Claimant's Memorial.² In the event that the Respondent decided to renew its request for bifurcation, the Tribunal held that:

(d) After receiving the [Parties'] submissions, the Tribunal will decide **on the papers without a hearing** on whether the proceedings should be bifurcated. In this regard, the Tribunal notes that it has had the benefit of extensive arguments by Parties on the issue of bifurcation and the oral arguments made at the Hearing in particular have been of assistance to the Tribunal. In the interests of expediency and to save time and costs for all Parties, the Tribunal is confident that it can address a second bifurcation request without a further hearing.

(e) The Tribunal will issue the relevant procedural directions after it has come to a decision on the Respondent's second bifurcation request, including any adjustments to the procedural timetable where necessary.³

9. On 26 June 2020, the Parties advised the Tribunal that they agreed to extend certain deadlines set out in PO 4. On 4 July 2020, the Tribunal confirmed the Parties' agreement to amend the procedural schedule.
10. On 7 August 2020, the Claimant submitted its Memorial on Jurisdiction, Merits and Quantum (the "**Memorial**"), along with the witness statement of Mr. John C. Pennie⁴ and the expert report on valuation by Richard Taylor and Larry Andrade of Deloitte.⁵
11. On 21 September 2020, the Respondent submitted its Memorial on Jurisdiction (the "**Memorial on Jurisdiction**") and, in a separate filing, its renewed request for bifurcation (the "**Renewed Request for Bifurcation**"), along with the witness statement of Mr. Lucas McCall.⁶
12. On 13 October 2020, the Claimant filed its response to the Respondent's request for bifurcation ("**Response to Renewed Bifurcation Request**").

¹ PO 4, ¶¶ 87-91, 183(b).

² PO 4, ¶¶ 92-93.

³ PO 4, ¶¶ 93(d) and (e).

⁴ First Witness Statement of John C. Pennie, dated 7 August 2020 (**CWS-1**).

⁵ Expert Report on Valuation by Deloitte LLP, dated 7 August 2020 (**CER-1**).

⁶ First Witness Statement of Luca McCall, dated 21 September 2020 (**RWS-1**).

13. On 28 October 2020, the Respondent sought leave (i) to submit into the record as a new legal authority the *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Procedural Order No. 3, Decision on Bifurcation, dated 20 October 2020 (the “*Westmoreland Decision*”); and (ii) for both disputing Parties to file submissions on the relevance of the *Westmoreland Decision* to the Renewed Request for Bifurcation.
14. On 30 October 2020, at the Tribunal’s invitation, the Claimant provided its response, stating that it “opposes [the Respondent’s request] based on practicality, delay, and cost.” Further, should the Tribunal decide to admit the *Westmoreland Decision* into the record, the Claimant argued that a specific procedure should then follow, according to which both the disputing and non-disputing Parties would be given the opportunity to file submissions, and the disputing Parties would then be given the opportunity to respond to the non-disputing Parties’ submissions.
15. On 10 November 2020, the Tribunal informed the Parties that, prior to receipt of the Respondent’s request, it had already decided on the course to be followed in connection with the Respondent’s Renewed Request for Bifurcation. As such, it saw no need to depart from that decision for purposes of receiving further submissions from the Parties on the *Westmoreland Decision*. Taking account of the fact that the *Westmoreland Decision* is already in the public domain, the Tribunal nevertheless granted the Respondent permission to submit it into the record, without comment from the Parties.

II. SUMMARY OF THE PARTIES’ POSITIONS

A. The Respondent’s Position

16. The Respondent requests that the Tribunal bifurcate the proceedings and consider its two *ratione temporis* jurisdictional objections as preliminary questions.⁷
17. The Respondent first advances that the Claimant has failed to establish that it was a protected “investor of a Party” when the alleged breaches occurred, and that therefore, it has not complied with the requirements of Article 1116(1) of the NAFTA.⁸ According to the Respondent, the exhibits accompanying the Claimant’s Memorial show that the Claimant did not acquire an equity interest in the alleged investment, Skyway 127 Wind Energy Inc. (“**Skyway 127**”), until 15 January 2015.⁹ This confirms, the Respondent asserts, that the Claimant was not a protected “investor of a Party” between 2008 and 2013 when the alleged breach occurred.¹⁰ In light of the former, the Respondent concludes that it has not consented to this arbitration, and therefore, the Tribunal lacks jurisdiction over the Claimant’s claims.
18. Second, the Respondent submits that the Claimant’s claims are time-barred under Article 1116(2) of the NAFTA.¹¹ Article 1116(2) requires that claims be filed within three years from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.¹² The Respondent submits, however, that the Claimant knew, or should have known, about the

⁷ Renewed Request for Bifurcation, ¶ 22.

⁸ Renewed Request for Bifurcation, ¶¶ 10-11. *See also* Memorial on Jurisdiction, Part V.

⁹ Renewed Request for Bifurcation, ¶ 11, *referring to* Shareholder’s Ledger Skyway 127, 15 January 2015 (C-115).

¹⁰ Renewed Request for Bifurcation, ¶ 11, *referring to* Memorial, ¶¶ 771-774; Memorial on Jurisdiction, ¶¶ 80-96.

¹¹ Renewed Request for Bifurcation, ¶¶ 15-16. *See also* Memorial on Jurisdiction, Part VI.

¹² Renewed Request for Bifurcation, ¶ 3.

alleged breaches more than three years before it submitted its claim to arbitration (*i.e.*, before 1 June 2014).¹³ This is because, the Respondent contends, most of the information on which the Claimant relies to substantiate its claims were available before the critical date of 1 June 2014, and the information that became available after that date was not, as the Claimant alleges, new.¹⁴

19. The Respondent considers that these two jurisdictional objections, considered either jointly or separately, warrant the bifurcation of the proceedings.¹⁵ In this regard, the Respondent recalls that Article 21(4) of the UNCITRAL Rules contains a presumption in favour of bifurcating jurisdictional questions “which is intended to increase the fairness and efficiency of arbitration proceedings.”¹⁶ The Respondent further recalls that in paragraph 87 of PO 4 the Tribunal relied on the three-pronged test for bifurcation as articulated in the *Glamis Gold* case, namely: (i) whether the jurisdictional objection is frivolous; (ii) whether the objection, if successful, would materially reduce the time and costs of the proceeding; and (iii) whether the objection concerns issues intertwined with the merits of the arbitration.¹⁷
20. The Respondent submits that all of the relevant criteria support bifurcation in the instant case.¹⁸ First, the Respondent asserts that its objections are not frivolous because they concern the Claimant’s compliance with conditions precedent to Canada’s consent to arbitration under Articles 1116(1) and 1116(2) of the NAFTA, and therefore “go[] to the very basis of the Tribunal’s authority to hear this claim.”¹⁹ The Respondent also contends that since as a general rule under international law treaties do not apply retroactively absent express provisions to the contrary, its objection under Article 1116(1) “raises a fundamental question concerning the non-retroactive application of the substantive obligations in NAFTA Chapter Eleven”.²⁰
21. Second, the Respondent maintains that either of its objections, if granted, would materially reduce the time and costs of proceedings because it would dispose of the totality of the Claimant’s claims and bring the arbitration to a close.²¹ Moreover, the Respondent notes, its objections may properly be considered by the Tribunal without the need for document production or expert reports.²²
22. Third, the Respondent submits that its objections do not concern issues intertwined with the merits of the arbitration.²³ The Respondent maintains that in order to assess its objection under Article 1116(1) of the NAFTA the Tribunal only needs to address two questions: “(i) when did the alleged breach occur; and (ii) when did the Claimant become an ‘investor of a Party’ with an investment in Skyway 127,” none of which require delving into the merits of

¹³ Renewed Request for Bifurcation, ¶ 16. *See also* Memorial on Jurisdiction, Part VI.B.

¹⁴ *See* Memorial on Jurisdiction, Part VI.B.

¹⁵ Renewed Request for Bifurcation, ¶¶ 8-9.

¹⁶ Renewed Request for Bifurcation, ¶ 5, *referring to Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, UNCITRAL, Procedural Order No. 4 - Decision on the Respondent Application for Bifurcation, 19 April 2017, ¶ 78 (**RLA-056**); *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 11 (**RLA-054**).

¹⁷ Renewed Request for Bifurcation, ¶ 7, *referring to* PO 4, ¶ 87.

¹⁸ Renewed Request for Bifurcation, ¶¶ 12-14, 17-20.

¹⁹ Renewed Request for Bifurcation, ¶¶ 12, 17-18.

²⁰ Renewed Request for Bifurcation, ¶ 12.

²¹ Renewed Request for Bifurcation, ¶¶ 13, 19.

²² Renewed Request for Bifurcation, ¶¶ 13, 19.

²³ Renewed Request for Bifurcation, ¶¶ 14, 20.

the Claimant's claims.²⁴ Similarly, the Respondent asserts that the review of its objection under Article 1116(2) of the NAFTA would only involve identifying the measures that allegedly breached the NAFTA and the dates on which the Claimant first acquired, or should have first acquired, knowledge of the alleged breach and resulting loss or damage.²⁵

23. As for the two other jurisdictional objections raised in its Statement of Defence dated 2 July 2019, the Respondent states that these objections, although not frivolous, may be more closely intertwined with the merits of the dispute. Accordingly, the Renewed Request for Bifurcation only addresses the Respondent's objections to the jurisdiction *ratione temporis* of the Tribunal, and is without prejudice to other jurisdictional objections to be made in future pleadings, if such pleadings are necessary.²⁶

B. The Claimant's Position

24. The Claimant maintains that the Respondent's Renewed Request for Bifurcation "should be denied in its entirety, and costs should be assessed against it on a full indemnity basis".²⁷
25. The Claimant, like the Tribunal and the Respondent, refers to the three criteria under the *Glamis Gold* test for determining whether to bifurcate (*see* paragraphs 7 and 16 above).²⁸ In addition, the Claimant contends that other case-dependent considerations should be taken into account. In the present case, this includes the fact that, in the Claimant's view, evidence regarding its spoliation of evidence claim will likely arise in the document production phase.²⁹
26. The Claimant submits that not only has the Respondent failed to discharge its burden of proving that its Renewed Request for Bifurcation satisfies the *Glamis Gold* test,³⁰ but other case-dependent considerations also militate against bifurcation in this case.³¹ In fact, the Claimant alleges, when the "obvious defects" in the Respondent's objections are weighted against the harm, cost, and delay caused by bifurcation, it can be confirmed that bifurcation is not warranted.³²
27. First, the Claimant advances that the Respondent's objections are frivolous as these are "inconsistent with the facts pleaded in the arbitration."³³ The Claimant asserts that it has articulated specific claims that largely rest on information arising from the publication in 2015 of materials related to the Hearing in *Mesa Power v. Canada*, held in October 2014 (the "**Mesa Power Hearing**").³⁴ According to the Claimant, during the *Mesa Power* Hearing, government officials administering the Ontario Feed-In Tariff ("FIT") program made

²⁴ Renewed Request for Bifurcation, ¶ 14.

²⁵ Renewed Request for Bifurcation, ¶ 20.

²⁶ Renewed Request for Bifurcation, ¶ 4.

²⁷ Response to Renewed Bifurcation Request, ¶ 388.

²⁸ Response to Renewed Bifurcation Request, ¶ 141, *referring to* PO 4, ¶ 87.

²⁹ Response to Renewed Bifurcation Request, ¶¶ 143-145, *referring to* Jeffrey Commission and Rahim Moloo, *Procedural Issues in International Investment Arbitration* at ¶¶ 5.30-5.31 (CLA-267).

³⁰ Response to Renewed Bifurcation Request, ¶¶ 376-378.

³¹ Response to Renewed Bifurcation Request, ¶¶ 148-150.

³² Response to Renewed Bifurcation Request, ¶ 381(b).

³³ Response to Renewed Bifurcation Request, ¶¶ 193-197, 381(a).

³⁴ Response to Renewed Bifurcation Request, ¶ 63.

admissions of internationally wrongful conduct which form “the fundamental basis” of the Claimant’s claim.³⁵

28. Specifically, the Claimant alleges that the post-hearing briefs and the transcript of the *Mesa Power* Hearing revealed for the first time that: (i) government officials held secret meetings to, *inter alia*, take steps to protect the business prospects of an applicant to the FIT program which had connections with the Ontario government;³⁶ (ii) ██████████ met with another company that applied to the FIT program, following which said company left a list with the government of six of its FIT projects that needed assistance;³⁷ and (iii) Canada was providing preferential treatment to a foreign investor that had signed an agreement with the Ontario Government titled the Green Energy Investment Agreement (the “GEIA”), which exceeded the terms of that agreement.³⁸ The Claimant underscores that it could have not accessed any of this information prior to 2015 because the Respondent purposely concealed and suppressed this wrongful conduct.³⁹
29. In the Claimant’s view, the Respondent’s objection under Article 1116(2) of the NAFTA is frivolous because it is predicated on the suggestion that the Claimant must have known of the above-mentioned facts before these were made public.⁴⁰ The Claimant asserts that the three-year period under Article 1116(2) of the NAFTA is initiated only when there is actual or constructive knowledge of both the breach and the loss or damage that has been incurred by the investor as a result.⁴¹ In this respect, the Claimant contends that the Respondent provides no evidence that these facts were known by the Claimant three years before the filing of the Notice of Arbitration (*i.e.*, before 1 June 2014).⁴²
30. The Claimant similarly contends that the Respondent’s objection under Article 1116(1) of the NAFTA is frivolous.⁴³ The Claimant submits that a claim does not arise until an investor is aware or could have been aware of the alleged breaches.⁴⁴ The Claimant alleges it did not have knowledge of the Respondent’s wrongful actions before 15 August 2015, the date of the publication of the *Mesa Power* post-hearing briefs.⁴⁵ At that time, the Claimant avers, Tennant Energy owned 45.6% of Skyway 127’s shares and “had been exerting actual control over the project for years”.⁴⁶ In any event, the Claimant submits that the NAFTA defines an “investor” as someone “who makes, is making, or has made an investment.”⁴⁷ Thus, the Claimant argues, even if the Tribunal finds that the alleged breach arose before 15 August 2015, Tennant Energy would still qualify as an investor because since June 2011 it has held

³⁵ Response to Renewed Bifurcation Request, ¶¶ 242-246.

³⁶ Response to Renewed Bifurcation Request, ¶¶ 246-248. The Claimant specifies that this fact was revealed through the publication of the post-hearing briefs in the *Mesa Power* arbitration on 15 August 2015.

³⁷ Response to Renewed Bifurcation Request, ¶¶ 246, 250. The Claimant specifies that this fact was revealed through the publication of the post-hearing briefs in the *Mesa Power* arbitration on 15 August 2015.

³⁸ Response to Renewed Bifurcation Request, ¶¶ 246, 249. The Claimant specifies that this fact was revealed through the publication of the hearing transcript and post-hearing briefs in the *Mesa Power* arbitration on 30 April 2015 and 15 August 2015, respectively.

³⁹ Response to Renewed Bifurcation Request, ¶¶ 243-245.

⁴⁰ Response to Renewed Bifurcation Request, ¶¶ 258-260.

⁴¹ Response to Renewed Bifurcation Request, ¶¶ 14-16.

⁴² Response to Renewed Bifurcation Request, ¶¶ 318-320.

⁴³ Response to Renewed Bifurcation Request, ¶¶ 263-278.

⁴⁴ Response to Renewed Bifurcation Request, ¶ 154.

⁴⁵ Response to Renewed Bifurcation Request, ¶ 153.

⁴⁶ Response to Renewed Bifurcation Request, ¶ 176. *See also id.*, ¶¶ 264-265, referring to Memorial, ¶¶ 772-773, Witness Statement of John C. Pennie, ¶ 48 (CWS-1).

⁴⁷ Response to Renewed Bifurcation Request, ¶ 271.

a beneficial interest in Skyway 127 that constituted a protected investment in the form of intangible property.⁴⁸

31. With respect to the above arguments, the Claimant cautions that ignoring evidence at the core of its claims, as the Respondent is doing with respect to the admissions made during the *Mesa Power* Hearing, would violate due process guarantees provided for in Article 1115 of the NAFTA and Article 15 of the UNCITRAL Rules.⁴⁹ For this reason, the Claimant emphasizes that, absent evidence of bad faith, the Tribunal must consider the claims and facts as pled by the Claimant when considering the Respondent's bifurcation request.⁵⁰
32. With respect to the Respondent's claim that its jurisdictional objections are not frivolous because they pertain to the scope of its consent to arbitrate under the NAFTA, the Claimant disagrees. According to the Claimant, as a matter of law, there can be no question that the Respondent consented to this arbitration because Article 1122 of the NAFTA "represents an ongoing, fully valid offer to arbitrate, which the investor has accepted in bringing the present claim."⁵¹ The Claimant argues that the NAFTA contracting parties cannot unilaterally withdraw this consent to arbitrate.⁵² As such, the Claimant submits that any condition precedent established in the NAFTA, such as that under Article 1116(2), does not constitute a condition on the contracting parties' consent to arbitrate.⁵³ Rather, in the Claimant's view, these are procedural issues that are decided upon by arbitral tribunals.⁵⁴
33. Second, the Claimant argues that bifurcating the proceedings would be inefficient because the Tribunal would need to engage in a substantial consideration of the merits in order to determine the Respondent's jurisdictional objections.⁵⁵
34. In the Claimant's view, the Tribunal's determination of whether 15 August 2015 or earlier dates constitute the date of breach "will be determinative of the jurisdictional questions",⁵⁶ because it would dictate when the three-year time limitation started running, and when the Claimant would have had to qualify as an "investor" under the NAFTA.⁵⁷ According to the Claimant, such determination, in turn, "requires a full consideration of all the evidence, including witnesses and experts", as well as information obtained through document production.⁵⁸ This is because, the Claimant contends, the Tribunal would have to engage in a review of (i) when the Claimant first obtained information about Ontario's internationally wrongful actions; (ii) the decision to limit transmission access in Ontario; (iii) whether the measures at issue in the *Mesa Power* arbitration could have been known by other applicants to the FIT program; (iv) whether the testimony of Mr. John C. Pennie, the Claimant's representative, should be considered regarding the bare trusteeship of Skyway 127 shares held by Tennant Energy and the control exercised by Tennant Energy over Skyway 127; and

⁴⁸ Response to Renewed Bifurcation Request, ¶ 266, referring to Memorial, ¶¶ 779-780. See also Response to Renewed Bifurcation Request, ¶¶ 268-278.

⁴⁹ Response to Renewed Bifurcation Request, ¶¶ 22-24.

⁵⁰ Response to Renewed Bifurcation Request, ¶¶ 18-21, 25. See also *id.*, ¶ 377.

⁵¹ Response to Renewed Bifurcation Request, ¶ 362.

⁵² Response to Renewed Bifurcation Request, ¶ 360.

⁵³ Response to Renewed Bifurcation Request, ¶¶ 363, 368-370.

⁵⁴ Response to Renewed Bifurcation Request, ¶¶ 363, 368-370.

⁵⁵ Response to Renewed Bifurcation Request, ¶¶ 322-340.

⁵⁶ Response to Renewed Bifurcation Request, ¶ 188.

⁵⁷ Response to Renewed Bifurcation Request, ¶ 336.

⁵⁸ Response to Renewed Bifurcation Request, ¶ 339.

(v) the impact of the composite act of spoliation and the alleged secret meetings on the damages suffered by the Claimant.⁵⁹

35. In this regard, the Claimant urges the Tribunal to consider the example of the *Mesa Power* arbitration in deciding whether to bifurcate. In *Mesa Power*, the Claimant notes, the tribunal initially ordered the bifurcation of proceedings in order to address as a preliminary question an objection regarding a temporal issue.⁶⁰ After receiving further written submissions, however, the *Mesa Power* tribunal decided to reverse its decision on bifurcation on the basis that it could not decide on the objection at issue without substantially engaging in the facts of the dispute.⁶¹
36. Third, the Claimant contends that its “case on the effects of spoliation of evidence is not an issue that Canada seeks to bifurcate.”⁶² Accordingly, even if the Respondent’s objections are successful in a first bifurcated phase, the arbitration would need to continue to the merits phase for the determination of this claim.⁶³ Moreover, the Claimant maintains that “given Canada’s ongoing campaign to refuse to produce documents, the extent of the relevance of this particular breach cannot be fully assessed until document production has been completed.”⁶⁴ In fact, the Claimant considers that its “entire claim concerning the harm caused to it arising from the spoliation of evidence relates to the information that will be produced from this document production phase.”⁶⁵ Thus, in the Claimant’s view “it makes no sense for jurisdiction to be bifurcated until that production happens.”⁶⁶

III. THE TRIBUNAL’S ANALYSIS

37. The Respondent has submitted two objections to the Tribunal’s jurisdiction *ratione temporis* for decision on a preliminary basis, namely: (i) the Claimant was not a protected “investor of a Party” when the alleged breach occurred, and therefore the Claimant has not met the requirements of Article 1116(1) of the NAFTA (“**First Objection**”); and (ii) the claim was not filed prior to the expiry of the 3-year limitation period articulated in Article 1116(2) of the NAFTA (“**Second Objection**”).⁶⁷
38. As stated in PO4, the Tribunal is guided by three relevant considerations in the exercise of its discretion to bifurcate. These considerations are (i) whether the jurisdictional objection is frivolous; (ii) whether the objection, if successful, would materially reduce the time and costs of the proceeding; and (iii) whether the objection concerns issues intertwined with the merits of the arbitration.⁶⁸
39. Having carefully considered the submissions of the Parties, the Tribunal concludes that these considerations favour a bifurcation of the proceedings, with the scope of the bifurcated jurisdictional hearing to be determined after the Claimant’s filing of its Counter-Memorial on Jurisdiction.

⁵⁹ Response to Renewed Bifurcation Request, ¶ 341.

⁶⁰ Response to Renewed Bifurcation Request, ¶ 343.

⁶¹ Response to Renewed Bifurcation Request, ¶¶ 344-345, referring to *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Procedural Order No. 3, ¶ 73.

⁶² Response to Renewed Bifurcation Request, ¶ 146.

⁶³ Response to Renewed Bifurcation Request, ¶ 349.

⁶⁴ Response to Renewed Bifurcation Request, ¶ 251.

⁶⁵ Response to Renewed Bifurcation Request, ¶ 348.

⁶⁶ Response to Renewed Bifurcation Request, ¶ 251.

⁶⁷ Renewed Request for Bifurcation, ¶ 8.

⁶⁸ *Glamis Gold v. United States*, ¶ 12(c) (**RLA-054**).

40. First, in the Tribunal's view, neither the Respondent's First Objection nor the Second Objection could be said to be frivolous. Without deciding the merits of the Respondent's two jurisdictional objections, it appears to the Tribunal that both Parties were able to cite authority for their respective positions, and the objections are not ones that could be dismissed out of hand.
41. Secondly, either of the Respondent's two objections, if successful, could potentially dispose of the totality, and if not, essential parts of the Claimant's claim. There is a fair chance that bifurcation will allow for less evidence and more focused legal arguments at the next stage of the proceedings.
42. Thirdly, the Tribunal considers that the Respondent's First Objection can be examined without delving into the merits of the Claimant's claim. The Respondent's First Objection is discrete and focuses on: (i) when the alleged breach occurred; and (ii) when did the Claimant become an "investor of a Party" with an investment in Skyway 127. This is separate from the question of whether there is merit to the Claimant's allegations of breach. This is also separate from the question of whether the Claimant knew or should have known about the alleged breach, and/or the loss or damage arising from the breach.
43. With regard to the Respondent's Second Objection however, it is not yet clear to the Tribunal whether it would be able to determine this objection without delving into the merits of the Claimant's claim. At the heart of this objection is the question of whether the Claimant knew or should have known about the alleged breaches, as well as the loss or damage arising out of those breaches, more than three years prior to the filing of its Notice of Arbitration. On one hand, this could well be a relatively straightforward issue for decision on a preliminary basis. The Respondent's case is simply that the Claimant's allegations should have been known to the Claimant based on information that was publicly available prior to 1 June 2014, including the numerous public documents used in the *Mesa Power* arbitration and the *Mesa Power* submissions. On the other hand, depending on the evidence which the Claimant intends to adduce, the Tribunal may be required to substantially engage in the facts of the dispute, and to establish certain facts and connections between these facts. This may also involve significant testimony from, and cross-examination of, witnesses. In that case, the inquiry would be best conducted together with the merits phase when the Tribunal has the benefit of the entire record.
44. In the premises, the Tribunal grants the Respondent's Renewed Request for Bifurcation, at least with respect to the First Objection. However, with respect to the Second Objection, the Tribunal finds that it would be able to better assess whether this objection should similarly be decided on a preliminary basis after it has had sight of the Claimant's Counter-Memorial on Jurisdiction. The Tribunal shall therefore determine the scope of the bifurcated jurisdictional hearing after the Claimant's Counter-Memorial on Jurisdiction is filed.
45. Having allowed the Respondent's bifurcation application, and having taken into account the fact that the time for the Claimant to prepare its Counter-Memorial on Jurisdiction overlaps with the Christmas and New Year periods, the Tribunal directs that the Claimant files its Counter-Memorial on Jurisdiction 60 days from the date of this procedural order. Thereafter, the Tribunal will issue the relevant procedural directions after it has come to a decision on the scope of the bifurcated jurisdictional hearing.

IV. THE TRIBUNAL'S DECISION

46. For the foregoing reasons, the Tribunal determines and orders as follows:
 - a. The Respondent's Renewed Request for Bifurcation is granted;

- b. The scope of the bifurcated jurisdictional hearing shall be determined after the Claimant's Counter-Memorial on Jurisdiction is filed; and
- c. The issue of the costs of the Respondent's Renewed Request for Bifurcation is reserved to a further order, decision or award.

Dated: 12 November 2020

Place of Arbitration: Washington, D.C.



Mr. Cavinder Bull SC
(Presiding Arbitrator)

On behalf of the Tribunal