

PROCEDURAL ORDER No. 2 (Revised)  
May 31, 2005

Glamis Gold, Ltd., Claimant  
v.  
The United States of America, Respondent

An Arbitration Under Chapter 11 of the North American Free Trade Agreement (NAFTA), in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, and administered by the International Centre for Settlement of Investment Disputes (ICSID)

Michael K. Young, President  
David D. Caron, Arbitrator  
Donald L. Morgan, Arbitrator

I. Summary

1. Based on its reading and application of Article 21(4) of the UNCITRAL Arbitration Rules to Respondent's request for bifurcation of the proceedings, the Tribunal does not find sufficient grounds to justify the separation of the identified jurisdictional issues from the merits of the case. Respondent's request for bifurcation therefore is denied.

II. Procedural History and Contentions of the Parties

2. This Arbitration was commenced by Claimant in a Notice of Arbitration dated December 9, 2003.
3. On March 3, 2005, the Tribunal issued its Procedural Order No. 1 ("Order No. 1") outlining a schedule of proceedings which incorporated Respondent's stated intent to make preliminary objections to the jurisdiction of the tribunal and to request bifurcation of the proceedings.
4. Under Order No. 1, Respondent was directed to file any request for bifurcation of the proceedings based upon pleas as to the jurisdiction or preliminary objections along with its Statement of Defense on April 18, 2005. The Claimant was directed to file its response to a request for bifurcation by April 21, 2005. The Respondent was given the opportunity to reply by April 29, 2005. The Claimant was permitted to file a rejoinder by May 5, 2005.
5. Respondent's request for bifurcation of the proceedings and the subsequent filings identified in the preceding paragraph were all submitted in a timely fashion.

6. The Tribunal indicated in Order No. 1 that it would expeditiously issue a decision regarding bifurcation and inform the Parties as appropriate of changes to the schedule of proceedings.

### III. Applicable Law

7. The applicable procedural rules are the UNCITRAL Arbitration Rules.
8. Article 21(4) of the UNCITRAL Arbitration rules provides:

“In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.”

9. Article 21(4) establishes a presumption in favor of the tribunal preliminarily considering objections to jurisdiction. Simultaneously, however, Article 21(4) does not require that pleas as to jurisdiction must be ruled on as preliminary questions. The choice not to do so is left to the tribunal’s discretion.<sup>1</sup>
10. Parties direct the Tribunal’s attention to a significant number of arbitral awards and commentary on the subject of jurisdiction, bifurcation, and justiciability. The majority of these sources do not involve UNCITRAL Rule 21(4). Most importantly, these sources often do not involve rules with a presumption in favor of the preliminary consideration of pleas as to jurisdiction and are not directly relevant to the tribunal’s considerations.
11. In examining the drafting history of Article 21(4) of the UNCITRAL Rules, the Tribunal finds that the primary motive for the creation of a presumption in favor of the preliminary consideration of a jurisdictional objection was to ensure efficiency in the proceedings. Importantly, the Tribunal reads the presumption in favor of preliminarily considering an objection to jurisdiction as an instruction to the Tribunal and clearly not as an absolute right of the requesting party.
12. This Tribunal in examining the various sources finds that Article 21(4) contains a three fold test.
  - a. First, in considering a request for the preliminary consideration of an objection to jurisdiction, the tribunal should take the claim as it is alleged by Claimant.
  - b. Second, the “plea” must be one that goes to the “jurisdiction” of the tribunal over the claim. For example, the presumption in Article 21(4)

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<sup>1</sup> The exercise of this discretion is implicit in a number of decisions in proceedings governed by the UNCITRAL Arbitration Rules. See e.g. *Canfor Corporation v. United States of America*, Decision on the Place of Arbitration, Filing of a Statement of Defense and Bifurcation of the Proceedings, (January 23, 2004), ¶ 46 (Rule “allows an arbitral tribunal to rule on its jurisdiction as a preliminary question.”)

would not apply to a request to bifurcate the proceedings between a liability phase and a damages phase. Likewise, Article 21(4) would not apply to a request that the Tribunal first consider whether the actions complained of were the cause of the loss, even though such a determination might be efficient overall for the proceedings. The Tribunal does not mean to suggest that such a request can not be made to the Tribunal under, for example, Article 15(1), but rather seeks to emphasize that the presumption in favor of bifurcation contained in Article 21(4) extends only to pleas as to the jurisdiction of the tribunal.

- c. Third, if an objection is raised to the jurisdiction of the tribunal and a request is made by either party that the objection be considered as a preliminary matter, the tribunal should do so. The tribunal may decline to do so when doing so is unlikely to bring about increased efficiency in the proceedings. Considerations relevant to this analysis include, *inter alia*, (1) whether the objection is substantial inasmuch as the preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding; (2) whether the objection to jurisdiction if granted results in a material reduction of the proceedings at the next phase (in other words, the tribunal should consider whether the costs and time required of a preliminary proceedings, even if the objecting party is successful, will be justified in terms of the reduction in costs at the subsequent phase of proceedings); and (3) whether bifurcation is impractical in that the jurisdictional issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost<sup>2</sup>

#### IV. The Contentions of the Parties

13. In its Request for Bifurcation, the Respondent advances two preliminary objections to the jurisdiction of the Tribunal: (1) that Claimant's claims under NAFTA Article 1105(1) based upon three federal actions taking place in October 1999, December 1999, and November 2000 are time-barred under the limitation period set forth in NAFTA Article 1117(2); and (2) that Claimant's claims under NAFTA Article 1110 are not ripe because the Claimant cannot assert that it "has incurred" a loss as a result of California state measures as required by NAFTA Article 1117(1).

14. The Claimant argues that it has properly pleaded its claims with respect to NAFTA Article 1105 and Article 1110. Claimant argues that bifurcation would

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<sup>2</sup> See e.g., *Methanex Corporation and United States of America*, Partial Award on Jurisdiction (NAFTA Chapter Eleven, 7 Aug. 2002), at 37 ¶ 110, 160 (footnote omitted), reprinted in 14 *World Trade & Arbitration Materials* 109, 146, 186, 188-89 (No. 6, 2002); *Methanex Corp. and United States of America*, Letter from the Tribunal President to the Parties' counsel (NAFTA Chapter Eleven, 2 Jun. 2003), at 1-3, available at <http://naftalaw.org>; and *Bank Markazi Iran and The Federal Reserve Bank of New York*, Award No. 595-823-3 (16 Nov. 1999), Dissenting Opinion of Mohsen Aghahosseini (13 Jun. 2000), at 26.

result in unwarranted delay since its claims arise from a common set of facts that will eventually need to be addressed at a merits phase. In Claimant's view, the Tribunal will have to perform "the same comprehensive review of the federal and state mining approval process that will decide the merits of this dispute."<sup>3</sup>

15. Respondent disagrees arguing that Claimant in its Article 1105 claim is impermissibly attempting to "bundle" actions taken at different time by separate governmental entities into a single measure as a basis for its claim.

#### V. Decision of the Tribunal

16. The Tribunal is not persuaded that the proceedings should be bifurcated at this time. To do so would not ultimately avoid expense for the Parties, contribute to Tribunal efficiency, or be practical.

*Respondent's Objection that Various Aspects of Claimant's Article 1105 Claim are Time Barred.*

17. Respondent objects to Claimant's Article 1105 claim on the ground that three federal actions from October 1999, December 1999, and November 2000, but not all federal actions, mentioned by Claimant are time barred from being considered as "offending measures."
18. The Tribunal finds that an objection based on a limitation period for the raising of a claim is a plea as to jurisdiction for the purposes of Article 21(4).
19. The Parties dispute whether the several federal actions mentioned in Claimant's Article 1105 claim are each independent bases for an Article 1105 claim or whether they can be "bundled" for the purpose of an Article 1105 claim. In Respondent's view, "[w]hile Glamis, of course, may refer to facts that predate December 9, 2000, as background for its claims, events that predate that time may not form the basis for a finding that the U.S. breached a provision of the NAFTA."<sup>4</sup> It is unclear from the pleadings of Claimant whether the three federal actions to which Respondent directs its objection are asserted as NAFTA claims in and of themselves or as supporting evidence of a later NAFTA claim.
20. The Tribunal need not decide which of the references to government actions in Claimant's Notice of Arbitration are asserted as the direct basis of a NAFTA claim and which are asserted as supporting factual evidence of a NAFTA claim. Without prejudice to that question, it is clear that Claimant relies on the January

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<sup>3</sup> Claimant's Response at p. 4.

<sup>4</sup> Claimant's Response at p. 4.

17, 2001, Department of Interior Record of Decision and subsequent state and federal acts as a basis for its Chapter 11 claims.<sup>5</sup>

21. The Tribunal notes that even if it were to find the three mentioned federal actions to be time barred, such a finding does not eliminate the Article 1105 claim inasmuch as other federal actions are alleged by Claimant to be a basis for its claim. The potential exclusion of certain events at the merits stage to serve as independent bases of the claim will not in the circumstances of this proceeding exclude the claim in its entirety. Inasmuch as there is no jurisdictional objection to the NAFTA Article 1105 claim as based on the Record of Decision and subsequent acts, the Tribunal does not find the request for preliminary consideration of the objection to the Article 1005 to be justified in that even if the Tribunal were to grant respondent's objection, the cost and time of that proceeding would not be justified in terms of the reduction in costs at the subsequent phase of these proceedings.

*Respondent's Objection that Claimant's Article 1110 Claim is not Ripe because Claimant has not Incurred a Loss.*

22. Respondent objects to Claimant's Article 1110 as not ripe because Claimant cannot assert that it "has incurred" a loss as a result of California state measures as required by NAFTA Article 1117(1).
23. The Tribunal finds that an objection asserting that claimant has not suffered a loss in accordance with Article 1117(1) is not a plea as to jurisdiction for the purposes of Article 21(4). The requirement that the Claimant establish through evidence the existence of a loss is typically a part of the merits of a case and is not transformed into a jurisdictional limitation by its articulation in a provision of Chapter 11 of NAFTA.
24. Respondent alternatively presents its request for bifurcation under the Tribunal general authority over the proceedings under Article 15(1) of the UNCITRAL Rules.<sup>6</sup>
25. Considering Respondent's request for bifurcation and preliminary consideration of the 1117(1) under Article 15(1), the Tribunal does not find the request justified and therefore denies Respondent's request. In particular, the Tribunal finds that if it were to bifurcate its consideration of the issue identified, the Tribunal would be immediately confronted with the issue of whether California's laws and policies resulted in an expropriation under Chapter 11 of NAFTA. Since the facts presented to answer the Article 1117(1) issue are likely to be the same facts presented on the expropriation issue, the Tribunal finds the proposed bifurcation

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<sup>5</sup> Claimant's Response at p. 2 (referring to the January 17, 2001 Record of Decision as "the definitive adverse action.").

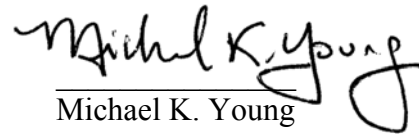
<sup>6</sup> Respondent's Reply at p. 10.

to be impractical in that the Article 1117(1) issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost. The question, therefore, of identifying “the point when the damage was sufficiently concrete and permanent to result in breaches” is to be considered as a part of the merits.<sup>7</sup>

VI. Schedule of Proceedings and the May 18, 2005 Joint Request of the Parties.

26. The Parties in a letter dated May 18, 2005 jointly requested the Tribunal to extend to June 7, 2005 the deadline for submitting objections to the document requests exchanged on May 10, 2005. This request is granted.

27. The schedule otherwise set forth in Order No. 1 of March 3, 2005 is confirmed.

  
Michael K. Young

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<sup>7</sup> Claimant's Rejoinder at p. 5.