Chapter 5

BIFURCATION

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I INTRODUCTION

In the world of investor-state dispute settlement (ISDS), the issue of bifurcation has been a topic of increasing discussion and divergence among tribunals. Before the ICSID amendments in 2022, most tribunals followed the three-stage test established in *Glamis Gold*;[2] however, the level of adherence required was not always clear, leading to differing approaches among tribunals.

The year 2020, in particular, saw a significant increase in the number of decisions made on the issue of bifurcation. By reviewing those decisions, we will examine the various approaches taken by tribunals, including those who have opted for a case-by-case approach and those who have judiciously applied the *Glamis Gold* test.

II BIFURCATION UNDER THE NEW 2022 ICSID ARBITRATION RULES[3]

In the past, Article 41 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) and Rule 41 of the 2006 Arbitration Rules of the International Centre for Settlement of Investment Disputes (the 2006 ICSID Arbitration Rules) expressly provided for bifurcation; however, the 2006 ICSID Arbitration Rules went through some changes, and these updates led to the 2022 ICSID Arbitration Rules (the 2022 ICSID Arbitration Rules).

As of 1 July 2022, the updated 2022 ICSID Arbitration Rules have been implemented, bringing two new procedures on bifurcation that were not present in the 2006 ICSID Arbitration Rules. Rule 42 pertains to a general request for bifurcation, while Rule 44 is specifically for requests concerning preliminary objections. The new rules aim to provide clarity on the topic of bifurcation, which was previously open to interpretation. As a result, practitioners and arbitrators now have a more defined understanding of the process.

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2 *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005 (*Glamis Gold*), Paragraph 12. The *Glamis Gold* test comprises the following criteria, which the tribunal applies to decide whether to bifurcate the proceedings: (1) the jurisdictional objection is substantial and not frivolous; (2) granting bifurcation would result in a substantial reduction of the next phase in the proceedings; and (3) the jurisdictional objection is so intertwined with the merits of the case, rendering bifurcation impractical.

3 To obtain a thorough understanding of bifurcation rules, the legal framework and their development, please see the author's chapter on bifurcation in the seventh edition of this book. Rebeca E Mosquera, 'Bifurcation' in Barton Legum (ed.), *The Investment Treaty Arbitration Review*, 7th edn., Law Business Research Ltd, 2022.

Examining the ICSID rules regarding bifurcation in the 2006 ICSID Arbitration Rules and the amended version of 2022 provides a better understanding of their differences. While Rule 41 of the 2006 ICSID Arbitration Rules does not explicitly name bifurcation, it allows for a party to object that the dispute or any ancillary claim is not within the tribunal's competence. The tribunal may also, on its own initiative, consider at any stage of the proceeding whether a dispute is within its competence. Once an objection is made, the tribunal may (1) deal with the objection as a preliminary question, with or without consideration of the merits; (2) overrule the objection; or (3) join the objection to the merits of the case.

Legal precedents have been the foundation for the 2022 ICSID Arbitration Rules on bifurcation. One noteworthy modification is the efforts to streamline and regulate the process of presenting, arguing and resolving bifurcation requests.[4]

Rule 42 of the 2022 ICSID Arbitration Rules goes further than Rule 41 of the 2006 ICSID Arbitration Rules by expressly enabling a party to submit a request for bifurcation, allowing for a question to be addressed in a separate phase of the proceeding. Rule 42 proceeds to set out the procedures that a party must follow when requesting bifurcation. It sets out what the tribunal shall consider relevant in determining whether to bifurcate the proceedings.

Before 2022, one of the key cases guiding decisions on bifurcation was *Glamis Gold* and its three-stage test. Almost two decades after the ruling of *Glamis Gold*, the Rule 42(4) of the 2022 ICSID Arbitration Rules codified the three-part test that has consistently been used and interpreted by tribunals to date:

> *(4) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:*
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> *(a) bifurcation would materially reduce the time and cost of the proceeding;*
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> *(b) determination of the questions to be bifurcated would dispose of all or a substantial portion of the dispute; and*
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> *(c) the questions to be addressed in separate phases of the proceeding are so intertwined as to make bifurcation impractical.*

Rule 44 of the 2022 ICSID Arbitration Rules implements a welcome set of strict timelines to speed up the bifurcation process, ensuring minimal impact on the overall arbitration

4 For further information, see Mosquera.

schedule. It also establishes a 180-day deadline for tribunals to decide on bifurcated preliminary objections after the last party submission.[5] This will help ensure that the process is efficient and timely.[6]

The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (the UNCITRAL Rules) permit the practice of bifurcation. Specifically, Article 21(4) of the 1976 version of the UNCITRAL Rules states that the arbitral tribunal must determine a plea concerning its jurisdiction as a preliminary question.

Some tribunals have implied that there is a presumption in favour of bifurcation in the 1976 UNCITRAL Rules. For example, in *Mesa Power v. Canada*, the tribunal concluded that the use of the words 'should rule' in Article 21(4) of the 1976 UNCITRAL Rules indicates that when a party objects to jurisdiction, the presumption is to address the objection as a preliminary question.[7] Similarly, in *Pey Casado v. Chile (II)*, the tribunal agreed that Article 21(4) of the 1976 UNCITRAL Rules establishes a presumption favouring bifurcation.[8] Nevertheless, not all tribunals have been convinced that bifurcation applies automatically[9], which is the current practice.

In 2010, the UNCITRAL Rules were updated to remove the presumption contained in the 1976 version. Article 21(4) from 1976 was replaced with Article 23(3) in the 2010 version, which allows the arbitral tribunal to decide on a plea that challenges the tribunal's jurisdiction, either as a preliminary question or as part of the final decision. The same rule survived the 2013 and the 2021 amendments to the UNCITRAL Rules.

Regarding requests for bifurcation, tribunals are likely to weigh the benefits of saving costs and ensuring procedural efficiency. A study conducted in 2019 discovered that

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5 ibid. In our review of case law, in which bifurcation was granted to address preliminary question (and jurisdictional objections), it became apparent that tribunals were taking substantially more than 180 days (or 5.9 months) to render a decision or award on preliminary and jurisdictional objections. For example, in *The Renco Group, Inc v. Republic of Peru (I)*, ICSID Case No. UNCT/13/1, the tribunal granted bifurcation of the proceedings to address preliminary objections under Article 10.20(4) of the US–Peru Trade Promotion Agreement (USPTA) and objections to the waiver submitted by Renco. On 2 September 2015, the tribunal held a hearing on Peru's objections regarding the waiver provision issue. Afterwards, the tribunal requested further brief submissions in connection with the hearing. The parties' last submissions in connection with Peru's objections were between 23 and 27 October 2015 and on 24 November 2015. A partial award on the waiver issue was rendered on 15 July 2016, and a final award on 9 November 2016. It took the tribunal close to nine months after the last submission of the parties to render a partial award on Peru's waiver objection, and close to one year to render a final award. In another case, *Bacilio Amorrortu v. Republic of Peru (I)*, PCA Case No. 2020-11, the tribunal decided on 21 January 2021 to bifurcate the proceedings to address preliminary objections under Article 10.20(4) of the USPTPA and jurisdictional objections under Article 23(3) of the applicable Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). On 9 August 2021, the tribunal held a one-day hearing on preliminary objections, and the parties submitted post-hearing briefs on 10 September 2021. The partial award on jurisdiction was rendered on 5 August 2022, which is almost a year after the parties submitted their post-hearing briefs.

6 International Centre for Settlement of Investment Disputes (ICSID), 'Backgrounder on Proposals for Amendment of the ICSID Rules', p. 3.

7 *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Procedural Order No. 2, 18 January 2013, Paragraph 16.

8 *President Allende Foundation, Victor Pey Casado and Coral Pey Grebe v. Republic of Chile*, PCA Case No. 2017-30, Procedural Order No. 2, 29 November 2017, Paragraph 63.

9 See, e.g., *Glamis Gold*, Paragraphs 9–11; *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation, 3 August 2020 (*Red Eagle*), Paragraph 40.

bifurcated cases tended to take a year longer than non-bifurcated cases.[10] Additionally, if jurisdictional objections were unsuccessful, these cases typically lasted around five years and two months.[11] Another study from 2019 found that, on average, legal costs for the claimant increased by approximately US$2.3 million in bifurcated proceedings, noting, however, that the increased cost stemmed primarily from 'the case length generally – not bifurcation in particular'.[12] Nonetheless, this lends to the idea that bifurcation may not be the most cost and time efficient procedure.

To that end, the 2022 ICSID Arbitration Rules strive to establish highly efficient timelines that would hopefully lead to expeditious determinations on bifurcation, thereby enhancing the economic efficiency of the process. For example, with regard to preliminary objections, Rule 44(1)(a) of the 2022 ICSID Arbitration Rules sets a time limit of 45 days within which the request for bifurcation on preliminary objections must be filed following the filing of the memorial on the merits. Further, Rule 44(3)(c) of the 2022 ICSID Arbitration Rules requires that '[i]f the Tribunal decides to address the preliminary objection in a separate phase of the proceeding, it shall . . . render its decision or Award on the preliminary objection within 180 days after the last submission'.

Rule 44 ultimately provides relief to parties who have had to wait for prolonged periods for a decision on preliminary objections; however, Rule 42 does not impose any such requirement on tribunals, instead assigning the responsibility of requesting bifurcation to the concerned party 'as soon as possible'.

While the ISDS system has often been under scrutiny by critics because of the protracted duration of ICSID proceedings that ultimately lead to extensive costs,[13] the 2022 ICSID Arbitration Rules are welcomed in an effort to alleviate those concerns, making ISDS more economically efficient and accessible while preserving the governing rule of fairness and procedural efficiency.

III APPLICATION OF THE GLAMIS GOLD TEST

Before the ICSID amendments in 2022, most tribunals followed the three-stage test established in *Glamis Gold*; however, there needed to be more clarity about the level of adherence required, evidenced by the increasing divergence of the application of the three-stage test among tribunals.

The year 2020 witnessed a significant increase in the number of decisions regarding bifurcation. This section will delve into the management of bifurcation by tribunals in 2020. A selection of these decisions indicates that various tribunals employed differing approaches to the *Glamis Gold* test: while some have been judicious in their application to determine case division, others have opted for a more customised approach and regarded the *Glamis Gold* test as merely one factor among several, favouring a case-by-case approach.

10 Lucy Greenwood, 'Revisiting Bifurcation and Efficiency in International Arbitration Proceedings', *Journal of International Arbitration*, Vol. 36, Issue 4, 2019, p. 424.

11 ibid.

12 Susan D Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration*, Oxford University Press, 2019, p. 276.

13 Alvarez Zarate et al., 'Duration of Investor-State Dispute Settlement Proceedings', *Journal of World Investment & Trade*, Vol. 21, 2020, pp. 300–335.

i Strict application of the Glamis Gold test

In *Renco v. Peru & Activos Mineros* (*Renco*) the tribunal acknowledged that the applicable test to determine the fairness and efficiency of an application for the bifurcation of the proceedings was the three-stage analysis, restating the test that the respondent's set out referring to *Glamis Gold*. In other words, the objections supporting bifurcation should be '(i) prima facie serious and substantial; (ii) not intertwined with the merits; and (iii) capable, if successful, of disposing of the claims or an essential part of the claims'.[14]

In satisfying the first element of the *Glamis Gold* test, the *Renco* tribunal found that all three of Peru's objections were 'serious and substantial'[15] and would dispose of 'all, or at least the majority of'[16] Renco's claims, thereby satisfying the second element of the test, as upholding the objection would ultimately result in a substantial reduction of the proceedings; however, the tribunal ultimately found that Peru's objections were too 'intertwined with the merits' thereby failing the third limb of the *Glamis Gold* test.[17] Accordingly, the tribunal held that bifurcation was 'not warranted' because 'significant inefficiency [was] likely to result if the Respondent's objections [were] not ultimately upheld'.[18]

Similarly, in *Tennant Energy v. Canada* (*Tennant Energy*) in February 2020 the tribunal initially rejected Canada's request to bifurcate the proceedings on the grounds that it was premature owing to the lack of 'specificity to the claims'.[19] In reaching this conclusion, the tribunal cited *Glamis Gold*, setting out the three relevant considerations identified by the test.[20] In September 2020, following the submission of its Memorial on Jurisdiction, Canada renewed its request to bifurcate the proceedings by submitting two jurisdictional objections *ratione temporis* with regards to two applicable North American Free Trade Agreement (NAFTA) Articles: Article 1116(1), arguing that the claimant had not met the requirements under Article 1116(1) as it was not a protected 'investor of a Party' when the alleged breach occurred (the first objection); and Article 1116(2), arguing that the claim was not filed before the three-year limitation period expired stipulated by the Article (the second objection).[21]

Ultimately, in November 2020, the tribunal restated its application of the *Glamis Gold* test and agreed to bifurcate the proceedings for Canada's first and second objections,[22] finding that neither objection was 'frivolous'.[23] If successful, the objections could potentially dispose of the totality and, if not, essential parts of Tennant Energy's claim, thereby granting bifurcation in respect of the first objection after being satisfied that the tribunal could determine this objection without delving into the merits of the claim.

Bifurcation for the second objection regarding NAFTA's limitation period under Article 1116(2) was ultimately granted in March 2021 on the same grounds, following the

14 *The Renco Group, Inc & Doe Run Resources, Corp v. The Republic of Peru & Activos Mineros SAC*, PCA Case No. 2019-47, Procedural Order No. 3 (Decision on Bifurcation), Paragraph 4.1.

15 ibid., Paragraph 4.2.

16 ibid.

17 ibid., Paragraph 4.3.

18 id.

19 *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54 (*Tennant Energy*), Procedural Order No. 4 (Interim Measures), 27 February 2020, Paragraph 91.

20 ibid, Paragraph 87.

21 *Tennant Energy*, Government of Canada Renewed Request for Bifurcation, 21 September 2020, Paragraph 3.

22 *Tennant Energy*, Procedural Order No. 8, 12 November 2020, Paragraph 38.

23 ibid., Paragraph 40.

tribunal's review of the claimant's reply on jurisdiction, which satisfied the tribunal that it could determine the second objection without delving into the merits of the Claimant's claim.[24] In its final award issued in October 2022, the tribunal found in favour of Canada's first objection under Article 1116(1), disposing of the case in its entirety, which ultimately negated the need to address the second objection under Article 1116(2).[25]

Citing Article 15(1) of the 1976 UNCITRAL Rules, which stipulates that the 'arbitral tribunal may conduct the arbitration in such a manner it considers appropriate', the tribunal in *Patel Engineering v. Mozambique* acknowledged the parties' agreement that the tribunal had discretion to bifurcate jurisdictional questions.[26] The tribunal further acknowledged the case law cited by the parties, being *Glamis Gold*, *Eco Oro v. Colombia*[27] and *Philip Morris v. Australia* (*Philip Morris*),[28] finding that tribunals generally turn to the three-factor test to decide on whether to grant bifurcation.[29] In applying the test, the tribunal declined to bifurcate the proceedings as the respondent's first objection (on the existence of a protected investment) was intertwined with the merits and, therefore, would need to review and analyse a significant amount of evidence to come to a conclusion.[30]

The tribunal in *Carlyle Group v. Morocco* decided that four out of the five jurisdictional objections submitted by Morocco were applicable for bifurcation, identifying four criteria to be satisfied, being the three-factor test and embedding the question of whether bifurcation would promote procedural efficiency into the test itself.[31]

From an examination of these selected decisions from 2020, it is clear that some tribunals have generally accepted and strictly applied the three-stage test evolved from *Glamis Gold*, as a basis, or even a starting point, to guide their decisions on whether to accept or reject requests for bifurcation.

ii Tribunals diverging from a strict application of the Glamis Gold test

Tribunals move away from 'one-size-fits-all' approach to bifurcation

In *Gran Colombia Gold v. Colombia* (*Gran Colombia*) the tribunal noted that while Article 829 of the Free Trade Agreement between Canada and the Republic of Colombia, Article 41(2) of the ICSID Convention and the 2006 ICSID Arbitration Rules 41(1), (3) and (4) do not outline an applicable legal standard on bifurcation and therefore leaving the decision on bifurcation at the tribunal's discretion, it further acknowledged that in exercising this discretion, other tribunals have applied certain factors in their analysis, referring to the *Glamis Gold* test.[32]

24 *Tennant Energy*, Procedural Order No. 9 (Renewed Request on Bifurcation), 10 March 2021, Paragraphs 31–32.

25 *Tennant Energy*, Final Award, 25 October 2022, Paragraphs 445–446.

26 *Patel Engineering Limited v. The Republic of Mozambique*, PCA Case No. 2020-21, Procedural Order No. 3 (Decision on the Motion for Bifurcation), 14 December 2020, Paragraph 60.

27 *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41.

28 *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12 (*Philip Morris*).

29 ibid., Paragraph 61.

30 ibid, Paragraph 65.

31 *The Carlyle Group L.P., Carlyle Investment Management LLC, Carlyle Commodity Management LLC and others v. Kingdom of Morocco*, ICSID Case No. ARB/18/29, Procedural Order No. 4 (Decision on Bifurcation), 20 January 2020, Paragraph 66.

32 *Aris Mining Corporation (formerly known as GCM Mining Corp and Gran Colombia Gold Corp) v. Republic of Colombia*, ICSID Case No. ARB/18/23, Procedural Order No. 3 (Decision on the Respondent's Request for Bifurcation), 17 January 2020 (*Gran Colombia*), Paragraphs 24–25.

While the *Gran Colombia* tribunal accepted the three-factor test as 'highly relevant'[33] for their considerations on the mater, it went further to emphasise that jurisprudence 'does not suggest that there is a rigid or mandatory formula regarding the process of weighing [the *Glamis Gold*] considerations'.[34] As a result, the tribunal advised against a 'one-size-fits-all' structure in determining whether bifurcation is warranted,[35] noting that each tribunal should be 'free to consider all factors that it considers relevant' on a case-by-case basis.[36]

Similarly, in *Rand v. Serbia* (*Rand*), which was brought under the Canada–Serbia[37] and the Serbia–Cyprus bilateral investment treaties (BITs),[38] while the respondents rallied for the tribunal to consider the three factors in *Glamis Gold* in its analysis, the claimants objected to this test on the basis that the three factors were 'far from being universally accepted . . . as exhaustive considerations'.[39] In its examination, the tribunal held that while *Glamis Gold* 'usefully lists some of the main factors to be taken into account'[40] in assessing whether bifurcation is warranted, the factors identified in *Glamis Gold* are not a 'stand-alone' criteria, citing the case of *Philip Morris*, an arbitration governed by the 2010 UNCITRAL Arbitration Rules, which recast the *Glamis Gold* three-stage test such that bifurcation would be appropriate when the objection: (1) is prima facie serious and substantial; (2) can be examined without prejudging or entering the merits; and (3) if successful, would dispose of all or an essential part of the claims raised.[41] Even if all three factors were met, the tribunal still had the discretion to deny bifurcation of jurisdictional objections.[42] Ultimately, the tribunal gave precedence to the efficiency of the arbitration process and denied Serbia's request for bifurcation.[43]

The tribunal in *Sastre v. Mexico* (*Sastre*) took a similar view as that of the tribunals in *Gran Colombia* and *Rand*, finding that while the *Glamis Gold* criteria should be 'taken into consideration when deciding bifurcation',[44] the *Glamis Gold* test does not represent 'stand-alone' criteria[45] to be strictly followed; rather they serve as 'mere guidance' for the tribunal.[46] As a result, the tribunal must 'examine the legal and factual circumstances of each particular case' to facilitate the overarching goal of procedural efficiency.[47]

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33 ibid.

34 ibid., Paragraph 26.

35 ibid.

36 ibid.

37 Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, entered into force on 27 April 2015.

38 Agreement between Serbia and Montenegro and the Republic of Cyprus on Reciprocal Promotion and Protection of Investments, entered into force on 23 December 2005.

39 *Rand Investments Ltd, William Archibald Rand, Kathleen Elizabeth Rand, Allison Ruth Rand, Robert Harry Leander Rand and Sembi Investment Limited v. Republic of Serbia*, ICSID Case No. ARB/18/8 (*Rand*), Procedural Order No. 3 (Bifurcation), 24 June 2019, Paragraph 13.

40 ibid., Paragraph 16.

41 *Philip Morris*, Procedural Order No. 8, 14 April 2014, Paragraph 109.

42 *Rand*, Paragraph 16.

43 ibid., Paragraph 19.

44 *Carlos Sastre and others v. United Mexican States*, ICSID Case No. UNCT/20/2, Procedural Order No. 2 (Decision on Bifurcation), 13 August 2020, Paragraph 43.

45 ibid.

46 ibid., Paragraph 44.

47 ibid.

In *Nord Stream 2 v. European Union*, the UNCITRAL tribunal acknowledged that the *Glamis Gold* criteria was relevant to assess whether bifurcation 'would be fair and efficient'; however, similar to the ICSID tribunals' views in *Gran Colombia*, *Rand* and *Sastre*, the tribunal stated that the three-stage test does not 'constitute a rigid test' and is not the 'only criteria that may be considered by the Tribunal'.[48]

Additional considerations that tribunals take into account

In the case of *Westwater v. Turkey* (*Westwater*) an ICSID tribunal took the opportunity to correct Turkey's suggestion that there is a 'presumption in favour of bifurcation';[49] instead, the tribunal emphasised that the 'better view' would be to assess each case 'on its own facts and the relevant [BIT], in particular the dispute resolution clause',[50] applying a holistic view to the decision on whether to bifurcate the proceedings, as opposed to a strict reliance on the three-stage test.

In addition, while the *Westwater* tribunal acknowledged the parties' agreement to apply the three factors of the *Glamis Gold* test (being '(1) whether the objections are substantial or frivolous; (2) whether bifurcation would lead to a material reduction in the proceeding at the next stage; and (3) whether bifurcation is impractical in the sense that the issues are intertwined with the substantive phases of the proceeding'[51]), the tribunal's decision to reject Turkey's request for bifurcation (that the claimant did not make an 'investment . . . in the territory' under the Turkey–US BIT[52] or the ICSID Convention) ultimately turned on the finding that 'procedural efficiency would not be served'.[53] Were the tribunal to accept the bifurcation of the respondent's second objection (failure to respect the Negotiation Period required by the Turkey-US BIT), this would only add to the complexity of the case as 'the evidentiary basis for the Respondent's objection [was] intertwined with the factual issues'.[54]

Tribunals have also had to determine whether bifurcation of proceedings is appropriate given the context of the proceedings at the time of the request. Without even proceeding to analyse the merits of the request for bifurcation under the *Glamis Gold* test or any equivalent assessment, tribunals have rejected requests on the basis that the requests were premature. This was the case in *Tennant Energy*, where the tribunal rejected the respondent's initial request for bifurcation as the tribunal did not have enough information to decide whether 'an inquiry into the Respondent's jurisdictional objection [would] be best conducted with the merits phase when the Tribunal [would] have the benefit of the entire record or . . . heard as a preliminary issue'.[55]

Similarly, in *Pildegovics v. Norway* the tribunal declined to determine whether proceedings should be bifurcated, as while the tribunal was 'sympathetic' to the claimant's preference not to 'face unduly protracted proceedings', it would be impossible at that stage

48 *Nord Stream 2 AG v. European Union*, PCA Case No. 2020-07, Procedural Order No. 4 (Decision on Request for Preliminary Phase on Jurisdiction), 31 December 2020, Paragraph 45.

49 *Westwater Resources, Inc. v. Republic of Turkey*, ICSID Case No. ARB/18/46, Procedural Order No. 2, 28 April 2020, Paragraph 16.

50 ibid.

51 ibid., Paragraph 15.

52 Treaty Between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments, entered into force 18 May 1990.

53 ibid., Paragraph 31.

54 ibid., Paragraph 40.

55 *Tennant Energy,* Paragraph 91.

of the proceedings for the 'Tribunal to make a sensible assessment of whether bifurcation would facilitate or hinder the effective and expeditio[u]s conduct of the proceedings'.[56] As an alternative, the tribunal offered to 'set a schedule which is as tight as dire process will allow' to ensure procedural efficiency.[57]

Tribunals' interpretation of 'seriousness' and 'frivolous'

Tribunals have also flexed their independence from the three-factor test of *Glamis Gold* in their interpretation of the 'seriousness' and 'frivolous' requirement.

The *Red Eagle Exploration v. Colombia* (*Red Eagle*) case represented one of the three ICSID arbitrations that emerged from Colombia's ban of mining activities in high altitude ecosystems. In its decision on bifurcation of August 2020, the tribunal acknowledged that under Article 829 of the Canada–Colombia Free Trade Agreement and Rule 41 of the 2006 ICSID Arbitration Rules, the tribunal has 'discretion to bifurcate . . . depending on the circumstances of each case', and further noted that Rule 41 'is silent on the circumstances, criteria or factors that the Tribunal may take into account' when deliberating its decision on bifurcation.[58]

In its analysis, the *Red Eagle* tribunal summarised that the parties agreed on the three-stage test to warrant bifurcation: 'a jurisdictional objection must be prima facie serious and substantial, capable of being examined without prejudging the merits and, if successful, capable of disposing of all or an essential part of the claims';[59] however, the parties disagreed on the degree of 'seriousness and substantive nature of an objection' that had to be satisfied in order to meet the first stage of the three-stage test.[60] While Colombia viewed that it was 'sufficient that the objection is not frivolous', Red Eagle Exploration held the view that it was not sufficient that an objection was not considered frivolous, arguing that a 'higher threshold must be applied than merely requiring that the objection is not frivolous or vexatious'.[61]

The tribunal cited the findings in *Gran Colombia*, where the tribunal held that the finding that a jurisdictional objection was 'frivolous on their face' was a starting point;[62] however, satisfaction of this low threshold does not mean that every jurisdictional objection 'presumptively warrants bifurcation'.[63] The *Gran Colombia* tribunal further noted that even if a jurisdictional objection is held to be 'non-frivolous', that does not automatically mean that it is not 'sufficiently serious and substantial to justify bifurcation'.[64]

This exemplifies the tribunal of *Red Eagle* stepping away from the strict application of the first stage of the *Glamis Gold* test, requiring a stricter interpretation of what is considered 'frivolous' under the test. The tribunal ultimately resorted to linguistically analysing the word 'serious', which, given its ordinary meaning, 'may be considered as the opposite of

56 *Peteris Pildegovics and SIA North Star v. Kingdom of Norway*, ICSID Case No. ARB/20/11, Decision on Bifurcation and Other Procedural Matters, 12 October 2020, Paragraph 8.

57 ibid., Paragraph 9.

58 *Red Eagle*, Paragraph 40.

59 ibid., Paragraph 41.

60 ibid.

61 ibid.

62 ibid., citing *Gran Colombia*, Paragraph 27.

63 *Red Eagle*, Paragraph 41.

64 ibid., citing *Glencore Finance (Bermuda) Ltd v. Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2 (Decision on Bifurcation), 31 January 2018, Paragraphs 42 and 50–51.

frivolous'.[65] The tribunal, therefore, found that within the spectrum of 'frivolous' and 'serious' there may be instances where the 'degrees of seriousness . . . do not carry the weight to justify bifurcation',[66] ultimately stating that under Rule 41 of the 2006 ICSID Arbitration Rules, the arbitral tribunal has discretion in its decision, with the ultimate aim of 'strik[ing] a balance between [procedural efficiency and fairness]'.[67]

Similarly, the UNCITRAL tribunal in *Westmoreland Coal Company v. Canada* considered the meaning of 'substantial' in the three-stage test of *Philip Morris* that developed from its predecessor, *Glamis Gold*.[68] While the respondent argued that the tribunal should follow the meaning used in previous NAFTA arbitrations under the 1976 UNCITRAL Rules, requiring that an objection must not be 'frivolous or vexatious' for it to constitute as 'serious or substantial', the claimant applied for a 'higher threshold than non-frivolous' to be taken into account.[69] The tribunal found that each of the respondent's objections satisfied the first factor of the *Philip Morris* test (that the objection is prima facie serious and substantial), without concluding whether a higher threshold of 'serious or substantial' is met.[70]

From examining the developing case law on bifurcation, it is clear that while tribunals still apply the *Glamis Gold* test as a guide for their analysis, many tribunals have also diverged from the strict application of the rules either by building on top of the three-stage test and adding their own factors for consideration, adapting their interpretation of each stage of the test on a case-by-case basis or outright advising against a 'one-size-fits-all'[71] approach.

IV CASE LAW DEVELOPMENTS SINCE THE 2022 ICSID RULES

In examining case law to date, it remains to be seen how the tribunals will navigate the new 2022 ICSID Arbitration Rules, which came into effect on 1 July 2022; however, it is worth examining the decisions since (and slightly before) the Rules came into force, which sees tribunals moving away from a strict application of the *Glamis Gold* test.

i Tribunals place more importance on procedural fairness and efficiency

Albeit an UNCITRAL decision, the decision on bifurcation of *Windstream Energy v. Canada (II)* (*Windstream Energy*) from September 2022 identifies the three-stage test of *Philip Morris* as being relevant in its decision;[72] however, the tribunal notes that while each of the three factors are 'relevant to its decision', this analysis should be 'considered through the lens of whether or not bifurcation would enhance procedural efficiency and economy and overall fairness of the proceedings'.[73] This, therefore, leaves scope for the tribunal to move away from a strict application of the three-stage test in favour of the overarching goal of procedural efficiency and economy, which the 2022 ICSID Arbitration Rules welcome.

65 *Red Eagle*, Paragraph 42.
66 ibid.
67 ibid.
68 *Westmoreland Mining Holdings, LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Procedural Order No. 3 (Decision on Bifurcation), 20 October 2020.
69 ibid., Paragraph 47.
70 ibid.
71 *Gran Colombia*, Paragraph 26.
72 *Windstream Energy LLC v. The Government of Canada (II)*, PCA Case No. 2021-26, Procedural Order No. 2 (Decision on Bifurcation), 13 September 2022 (*Windstream Energy*), Paragraph 39.
73 ibid., Paragraph 40.

Furthermore, in looking at the efficiency of bifurcation in *Windstream Energy*, the tribunal noted that a 'major factor' in its decision to reject bifurcation of the respondent's interpretation objection[74] was that a 'non-bifurcated hearing of the jurisdictional and substantive issues jointly' would increase the proceedings by only four months if jurisdiction were disposed of and 'would save at least a year if not'.[75]

In the December 2022 decision on bifurcation for *Energia y Renovacion Holding v. Guatemala*, the parties acknowledged the applicable standard as the three-stage *Glamis Gold* test, which was further restated by the tribunal in its analysis.[76] The tribunal proceeded to add further clarity to the application of each stage.[77] Although the tribunal noted that the three conditions are cumulative, the tribunal took the opportunity to clarify that it is not essential that all the objections meet the three conditions of the three-stage test, as the request for bifurcation may be approved with respect to one or some of the factors being met.[78]

ii Tribunals adopt a bespoke test

In the decision on bifurcation of June 2022 for *Mainstream Renewable Power v. Germany* (*Mainstream Renewable Power*) the tribunal proposed its own five-part test, which built upon the three factors of *Glamis Gold*.[79] In exercising its discretion, the tribunal considered the following:

> *a. the nature of the jurisdictional objections;*
> *b. whether or not bifurcation would result in dismissal or a material reduction of the questions to be addressed in the proceedings;*
> *c. whether or not the preliminary issue is intertwined with the merits;*
> *d. whether or not bifurcation would promote procedural, time and cost efficiency; and*
> *e. general principles of fairness to both sides.*[80]

In his dissenting opinion, Mr Fernández Antuña considered that 'absent compelling reasons, no respondent State should be imposed to go through full-fledged proceedings and plead the merits of the case . . . where the jurisdictional mandate is contested'.[81] This aligns with the views of several member states during consultations for the 2022 ICSID amendments, commenting that 'bifurcation should be allowed more often, or automatically, when jurisdictional objections are raised'.[82] While this notion was rejected, the overarching theme from Mr Fernández Antuña's views and the considerations that were taken into account preceding the approved 2022 ICSID Arbitration Rules is that of procedural efficiency.

74 Canada's three preliminary objections related to the interpretation and impact of the earlier case of *Windstream v. Canada (I)*, alleging that the claimant misinterpreted the *Windstream (I)* award.

75 *Windstream Energy*, Paragraph 59.

76 *Energía y Renovación Holding, SA v. Republic of Guatemala*, ICSID Case No. ARB/21/56, Procedural Order No. 2 (Decision on Bifurcation), 2 December 2022, Paragraph 81.

77 ibid., Paragraph 82.

78 ibid., Paragraph 83.

79 *Mainstream Renewable Power Ltd and others v. Federal Republic of Germany*, ICSID Case No. ARB/21/26, Procedural Order No. 3 (Decision on Bifurcation), 7 June 2022 (*Mainstream Renewable Power*).

80 ibid., Paragraph 46.

81 *Mainstream Renewable Power*, Dissenting Opinion of Mr. Antolín Fernández Antuña, Paragraph 1.

82 Proposals for Amendment of the ICSID Rules – Working Paper 1, Vol. 3, 2 August 2018 (Working Paper 1), Paragraph 392.

In the same vein, the majority tribunal in *Mainstream Renewable Power* found that even if bifurcation had been granted, and the first or second objections had been successful,[83] the parties would have only 'saved the time and cost of proceeding with the arbitration' for an additional nine months;[84] however, if those objections failed, a second hearing and decision phase would have had to take place, likely leading to duplicative facts procedures.[85] Based on its five-part test, the tribunal by majority dismissed the respondent's request for bifurcation.

Despite being a decision from 2021 (and, therefore, before the scope of this section), in *Sumrain v. Kuwait*, the tribunal adopted its own bespoke test, similar to the tribunal in the case of *Mainstream Renewable Power*. In assessing the three-factor test (i.e., the test prescribed in *Philip Morris*), the tribunal cautioned that by rigidly applying those factors, there is a 'risk that a test, which is formulated to meet the exigencies of one case, becomes a box-ticking exercise in other cases when divorced from its original context'.[86]

V CONCLUSION

Although it remains to be seen how tribunals are going to interpret and apply the 2022 ICSID Arbitration Rules into their analysis of bifurcation requests, considering the range of discretion each tribunal has on the matter, an analysis of a selection of decisions from 2020 onwards indicates that guidance and structure will be welcomed by arbitrators and practitioners alike. From examining those decisions, it appears that tribunals are increasingly prioritising procedural fairness and efficiency over a strict application of the *Glamis Gold* test.

Despite the range of application of the *Glamis Gold* test – ranging from a judicious application of the three stages to a bespoke adaptation of the test – its importance cannot be understated, considering it has been the cornerstone of tribunals' decisions and has ultimately been codified in the 2022 ICSID Arbitration Rules. Time will tell whether the time limits introduced by the Rules will truly impact the effectiveness of bifurcation, honouring the overarching objective of fairness and procedural efficiency.

83 The Respondent raised three jurisdictional objections, the first being lack of consent to arbitrate pursuant to ECT Article 26 and the ICSID Convention Article 25(1), the second being the lack of subject-matter jurisdiction as the Claimant's activity allegedly did not constitute an investment, and the third being the argument that there was no personal jurisdiction with regards to the three German Claimants.

84 *Mainstream Renewable Power*, Paragraph 63.

85 ibid., Paragraph 64.

86 *Ayat Nizar Raja Sumrain and others v. State of Kuwait*, ICSID Case No. ARB/19/20, Procedural Order No. 2 (Decision on Bifurcation), 1 February 2010, Paragraph 10.