

PROCEDURAL ORDER No. 9

October 31, 2006

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
Kenneth D. Hubbard, Arbitrator

I. Procedural Background

1. On October 3, 2005, a hearing was conducted before the Tribunal in Washington, D.C., at which the Parties presented their views on the withholding of documents on the grounds of privilege. At that time, each Party explained its objections to the withholding of categories of documents claimed to be privileged by the other party, and provided legal and factual support for its own documents withheld from production.
2. On November 17, 2005, the Tribunal issued its Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege ("November 17 Decision"). The November 17 Decision explained the privilege laws and theories that the Tribunal determined were applicable to this arbitration. In addition, it outlined procedures by which the Parties were to explain their assertions of privilege and challenge those of the other party. Included with these procedures was a timetable specifying the dates upon which each of the procedures was to be completed. This timetable was intentionally drawn up with short time periods so as to preserve the possibility of the Tribunal holding a hearing in this matter before the end of 2006.
3. Both Parties had difficulty in meeting this aggressive timetable and, in response to Respondent's request,¹ the Tribunal granted an extension to both parties until January 16, 2006, to finally specify the withheld documents that they still demanded from the other party.² As issues over documents withheld on privilege

¹ See Respondent's December 5, 2005 letter to the Tribunal.

² See Tribunal's December 7, 2005 letter to the Parties. This correspondence also requested that the Parties forward all remaining documents in dispute to the Tribunal on January 18, 2006 for *in camera* review. This request was suspended pending further discussion with Claimant's replacement arbitrator in the Tribunal's December 16, 2006 letter to the Parties.

grounds continued to arise, however, it became apparent that this extension was insufficient.

4. On January 18, 2006, as the dispute over privileged documents continued and the date of Claimant's submission of its memorial quickly approached, the Parties exchanged correspondence regarding the issue of how to resolve the document production disputes and whether the arbitral schedule, as a whole, needed to be amended in light of the length of the production process.
5. In response to these concerns, the Tribunal issued Procedural Order No. 8 on January 31, 2006. In this order, the Tribunal recognized the very considerable effort expended by both Parties to adequately and completely comply with the numerous procedural requirements outlined in the November 17 Decision in a timely manner. The Tribunal proposed what it hoped to be the final step in the resolution of all privilege objections: the Tribunal's examination of the validity of claims of privilege on a document-by-document basis, as informed by the privilege logs submitted by the withholding party and the challenges raised by the requesting party.³ To facilitate this review, the Tribunal requested from each Party further explanation of its challenges on a document-by-document basis by mid-February, 2006, and any outstanding arguments on production issues by March 1, 2006.⁴ In recognition of the extensive nature of the document production process and the Tribunal's desire to have evidence available to the Parties prior to their memorial submissions, the Tribunal found the arbitral schedule unsustainable.⁵ The Tribunal thus also took the opportunity in Procedural Order No. 8 to present an amended arbitral schedule.⁶
6. On April 21, 2006, the Tribunal issued its Decision on Requests for Production of Documents and Challenges to Assertions of Privilege. This Decision and Respondent's subsequent production of ten disputed documents ended the pre-hearing production phase of this arbitration.
7. With production of documents completed, the Parties timely submitted their Memorial and Counter-Memorial as required by Procedural Order No. 8, with only a minimal extension granted by the Tribunal in its letter to the Parties on April 25, 2006. Certain events described in Claimant's letter of October 20, 2006, however, are cited by Claimant as the reason for its request for a four or five week extension to file its Reply. In making this request, Claimant recognizes that such an extension will necessitate an equal extension for Respondent's filing of its Rejoinder and could require the delay of the final arbitral hearing.

³ See Procedural Order No. 8, para. 10.

⁴ See *id.*

⁵ See *id.*, at para. 12.

⁶ See *id.*

II. The Views of the Parties

8. Three events are cited as causing Claimant to request an adjustment to the case management schedule.⁷ First, Claimant learned upon the receipt of Respondent's Counter-Memorial that Respondent partially grounded its defense on an interpretation of U.S. First and Fifth Amendment law. Claimant was able to secure an appropriate expert on this issue, but this individual's assistance will be delayed as he is currently unavailable due to prior commitments. Second, Claimant's cultural resource expert is unexpectedly detained by other duties. Claimant contends that this particular expert is critical to Claimant's ability to address many of the arguments in Respondent's Counter-Memorial and the non-disputing party submissions of the Quechan Tribe. Third, Claimant is currently involved in a corporate merger that requires the involvement of senior officials who are also witnesses in this arbitration. Claimant explains that they are therefore less available to the arbitration at this time.
9. Because of these events, Claimant seeks a four-week extension for the filing of its Reply from November 7, 2006 to December 8, 2006.⁸ Claimant acknowledges that Respondent could be granted an equal extension, delaying the deadline for the filing of its Rejoinder from January 16, 2007 to February 27, 2007. Claimant believes that this schedule could still provide sufficient time prior to the currently scheduled arbitral hearing, but is prepared to move the hearing date if the Tribunal and Respondent believe more time would be necessary.
10. Respondent contends that the specific events described by Claimant, neither individually nor collectively, justify the extension.⁹ Respondent objects to Claimant's request for a one-month extension, arguing that such a delay leaves insufficient time for numerous pre-hearing procedural requirements and thus would necessitate postponing the hearing. Further, Respondent argues that it would be extremely difficult for it to revise its briefing schedule, at this juncture, without creating conflicts with its other pending cases. Respondent, therefore, requests the denial of Claimant's extension request, but argues alternatively that, if the Tribunal grants the extension, the hearing must be postponed.

⁷ See Claimant's October 20, 2006 Letter to the Tribunal.

⁸ Claimant explains that its new constitutional law expert would strongly prefer an extension until December 15, 2006, but Claimant did not request this so as to attempt to preserve the current arbitral hearing date. If, however, the Tribunal determines that the hearing must be delayed, Claimant requests a Reply deadline of the latter date so as to accommodate its expert.

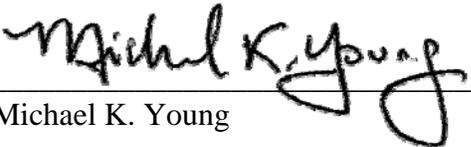
⁹ See Respondent's October 23, 2006 Letter to the Tribunal.

III. Decision

11. The Tribunal recognizes the diligent efforts of both Parties to comply with the numerous and difficult requirements of the pre-hearing submission schedule. At the request of the Parties, the Tribunal has attempted to maintain a very tight timeline so as to facilitate a final arbitral hearing at the earliest date possible. This, however, has continually challenged the Parties and left no room for unexpected circumstances.
12. The Tribunal is aware of its dual responsibility to keep the arbitration schedule moving effectively forward and to ensure that both parties have the opportunity to develop and present reasoned and supported arguments. The Tribunal believes that the circumstances described by Claimant impair its ability to effectively prepare its case and thus an extension is required, though this necessitates adjustment to the hearing dates. In granting an extension to the Claimant, an equal extension of time has been granted to the Respondent. Therefore, the Tribunal amends the arbitral schedule as follows:

December 15, 2006:	Submission of Claimant's Reply
February 27, 2007:	Submission of Respondent's Rejoinder
March 22, 2007:	Submission of Witness Lists
March 29, 2007:	Pre-Hearing Procedural Hearing
May, 2007	Arbitral Hearing

13. The Secretary to the Tribunal will work with the Parties to ascertain as soon as possible their availability for the final arbitral hearing in the month of May or possibly the first week in June.



Michael K. Young

President of the Tribunal on behalf of the Tribunal

David D. Caron, Tribunal Member
Kenneth D. Hubbard, Tribunal Member