

PROCEDURAL ORDER No. 13

March 21, 2008

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 January 31, 2006, the Tribunal issued *Procedural Order No. 8*, in which it outlined the procedures for the conclusion of the pre-hearing production phase of this arbitration. In addition, in recognition of the extensive nature of the document production process and the need for time for the Parties to evaluate the documents produced as a part of their memorial submissions, the Tribunal also took the opportunity in *Procedural Order No. 8* to present an amended arbitral schedule.
2. On April 21, 2006, the Tribunal issued its Decision on Requests for Production of Documents and Challenges to Assertions of Privilege. This Decision deemed many documents privileged by the attorney-client and/or work product privileges, requested ten documents withheld by the State of California to be produced, and deferred judgment on various categories of documents withheld pursuant to the deliberative process privilege “until such time as it becomes apparent to the Tribunal that the circumstances of this case indicate a need for the documents sufficient to justify an order for their production.”¹ This Decision and Respondent’s subsequent production of the ten specified documents concluded the pre-hearing production phase of this arbitration.
3. 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 of April 25, 2006.

¹ Decision on Requests for Production of Documents and Challenges to Assertions of Privilege, ¶ 62 (April 21, 2006).

4. On October 31, 2006, the Tribunal issued *Procedural Order No. 9* in which it extended the deadlines for the submission of both the Reply and Rejoinder due to circumstances that the Tribunal believed would impair Claimant's ability to effectively prepare its case.²
5. In *Procedural Order No. 10*, issued by the Tribunal on February 22, 2007, the Tribunal confirmed adjustments to the arbitral schedule, to which the Parties had agreed previously in informal discussions with the Assistant to the Tribunal. Specifically, the Tribunal requested the Parties to submit witness lists on June 14, 2007, specified June 28, 2007, for the Pre-Hearing Procedural Hearing, and established that the final arbitral hearing would be held on August 13-17, 2007 and, as necessary, September 17-21, 2007.
6. On June 28, 2007, the Parties and the Tribunal met at the World Bank in Washington, D.C. for the Pre-Hearing Procedural Hearing. The Tribunal and the Parties discussed the schedule of the hearing, time allocation between the Parties, witness examination, public access, and other logistical issues pertaining to the final arbitral hearing.
7. On July 9, 2007, the Tribunal issued *Procedural Order No. 11*, in which it confirmed many of the agreements reached between it and the Parties at the Pre-Hearing Procedural Hearing with respect to the timing of the two weeks of hearing and the schedule for the Parties' presentation, as well as provided a final schedule for the Hearing on the Merits. Much correspondence between the Parties and the Tribunal followed this Order as various details of the hearing presentation and witness examination were finalized.
8. The first session of the Hearing on the Merits took place in Washington, D.C., at the offices of the World Bank on August 12 to 17, 2007. At this hearing, each party presented its case-in-chief. At the close of the hearing, the Tribunal asked the Parties if they would agree to the possibility of the Tribunal sending a limited number of questions to be addressed and woven into the Parties' rebuttal and closing remarks at the second session of the Hearing; both Parties agreed.
9. In addition, at the close of the first session of the Hearing, the Tribunal requested that, with respect to documents withheld on grounds of privilege regarding which the Tribunal had previously deferred judgment, if Claimant still sought any such documents, it should clearly explain at the September hearing as to what issue the documents would be material.
10. Following this first week of the Hearing, the Tribunal issued *Procedural Order No. 12* on August 28, 2007. In this Order, the Tribunal affirmed that it would issue a limited number of questions to the Parties. The Tribunal also confirmed the schedule for the second session of the Hearing on the Merits to be held on September 17 through 19, 2007. In addition, the Tribunal reiterated its request that Claimant provide at the September hearing any additional information as to the materiality of any documents withheld on privilege about which the Tribunal had deferred judgment and which Claimant still sought.

² The date for the submission of Respondent's Rejoinder was additionally extended to March 15, 2007, per Respondent's request for reasons both of scheduling difficulty and equity in preparation time.

11. On September 6, 2007, the Tribunal issued several questions to the Parties to be addressed in their closing and rebuttal arguments at the second session of the Hearing.
12. The second session of the Hearing on the Merits was held at the World Bank in Washington D.C. on September 17 to 19, 2007. At this session, the Parties presented their closing and rebuttal arguments. As part of its closing argument, Claimant renewed its request for the production of six documents held by the State of California under the deliberative process privilege.

II. The Views of the Parties

13. At the second session of the Hearing, Claimant renewed its request for the production of a series of six documents from the period of April 4 to 7, 2003 (California Log Nos. 162, 192, 193, 194, 197 and 208), withheld on the grounds of the deliberative process privilege and California Government Code §6254(1).³ Claimant asserts that these are communications between high-level executive branch agencies and the Governor's office. Claimant alleges that each of these communications deal with deliberations about what the Government was planning with respect to Senate Bill ("SB 22") and the backfilling regulations. Claimant presented its theory that these six documents would provide additional information as to why the legislation and regulation focused on the Imperial Project. Specifically, Claimant believed the documents could show that SB 22 and the SMGB regulations were "inextricably intertwined" and both were guided by the same motivation of making the Imperial Project cost prohibitive.⁴
14. Previously, Claimant argued that the deliberative process privilege does not protect these six documents addressing the Governor's "public outreach strategies" in "determining a course of action related to the pending backfilling requirements" because the Governor was not deliberating SB 22 as it was drafted at his direction.⁵ In addition, Claimant raised the argument that the deliberative process privilege should not protect these documents as the integrity of the deliberative process is at issue and Respondent had failed to provide sufficient descriptions of the specific harm that would result from disclosure.⁶ Finally, Claimant contended that, if the privilege does apply, it is outweighed by Claimant's need for evidence of "California's specific intent to block the Imperial Project by whatever means necessary."⁷
15. At the hearing, Respondent argued that it was clear from the face of the documents what their stated purposes are.⁸ Respondent contends that the fact that the California measures focused on the Imperial Project is not at issue: "We have never contested the fact that the Glamis Imperial Project provided the impetus or the reason why that brought to the fore the problem which the Legislature and the SMGB Board sought to address. There is no

³ Ross, Tr. 1792:22-1794:16.

⁴ Gourley, Tr. 2140:10-18.

⁵ Claimant's February 15, 2006 Letter to the Tribunal, Tab A, p. 10.

⁶ See Decision on Requests for Production of Documents and Challenges to Assertions of Privilege, ¶ 10 (April 21, 2006).

⁷ See Claimant's February 15, 2006 letter to the Tribunal, Tab A at pages 9-10.

⁸ Menaker, Tr. 2138:5-7.

need for more evidence on that point. ... It is quite different from what [Claimant] has been arguing, that they are somehow solely targeted by this or that or that it was discriminatory.”⁹

16. As Senate Bill 22 was signed on April 7, 2003, Respondent argues that it is not surprising that there were executive agency deliberations with the Governor’s Office regarding the Bill in the hours leading up to its signing.¹⁰ Respondent adds that, as the SMGB was scheduled to vote on the backfilling regulations just a few days later, it is also not surprising that the documents might also address the substance of these regulations.¹¹ Respondent additionally contends that Claimant has failed to provide any basis for the Tribunal to rule that the State of California’s need to protect its deliberative process is outweighed by Claimant’s need.¹²
17. In addition, in previous communications and submissions, Respondent contended that both California Government Code §6254(l) and the deliberative process privilege protect internal briefing documents and communications with the Governor’s office. These privileges are not outweighed, Respondent argued, because Claimant has no need for the documents: the purpose and intent of SB 22 can be gleaned from publicly available legislative history, which California has already produced, and from the Governor’s final proclamation.¹³

III. Decision

18. The Tribunal addressed these six documents (California Log Nos. 162, 192, 193, 194, 197 and 208) as Section A, Group 6 of its April 21, 2006 Decision on Requests for Production of Documents and Challenges to Assertions of Privilege.¹⁴ At that time, it held that:

With respect to the latter six documents relating to public outreach strategies, the Tribunal recognizes the qualified nature of the deliberative process privilege and that the interests in protection can be outweighed by a sufficient statement of need from the challenger. The Tribunal views Claimant’s argument that a challenge to the integrity of the decision-making process vitiates any assertions of the deliberative process privilege as an extreme variation of the generally applicable analysis of whether need outweighs interest in protection. The question of Claimant’s need, however, cannot be decided at this early point in the arbitration. The Tribunal therefore cannot compel production of these documents at this time, a holding that is demanded by the fact that the Tribunal does not override privilege unnecessarily and will not order production without restriction. If, at the point at which the Tribunal begins to make determinations on the merits of the claims,

⁹ Menaker, Tr. 2138:9-16.

¹⁰ Menaker, Tr. 2139:5-10.

¹¹ Menaker, Tr. 2139:11-15.

¹² Menaker, Tr. 2139:16-22.

¹³ See Respondent’s March 1, 2006 letter to the Tribunal at pages 10-11.

¹⁴ See Decision on Requests for Production of Documents and Challenges to Assertions of Privilege, ¶¶ 27-30 (April 21, 2006).

however, it becomes apparent that a particular decision is essential to such determinations and other documents, witnesses or evidence lead the Tribunal to believe that the documents currently requested may assist the Tribunal in such a decision, the Tribunal will revisit the requests for production of these particular documents.¹⁵

19. With respect to California's argument that California Government Code §6254(l) protected its documents, the Tribunal held in its April 21, 2006 Decision that this privilege did not apply to the documents withheld by the State of California:

After analysis of California Government Code §6254(l) and relevant case law, the Tribunal finds that §6254(l) does not protect the particular documents in question. In a similar situation in which a California agency was not a party to the litigation, but was very involved in the facts of the dispute, a California Court of Appeals held that the information was critical to a party to the litigation and thus §6254(l) did not protect the agency's records.¹⁶ The Tribunal finds that the rights of Claimant (in effect a litigant here) are affected by the documents requested and, in addition, the State of California has been similarly involved intimately in the events that culminated in this dispute. Therefore, the Tribunal finds that the absolute protection of California Government Code §6254(l) does not protect the documents at issues.¹⁷

20. Per its previous Decision, the Tribunal must determine whether Claimant has stated sufficient materiality of the documents, in light of the Tribunal's current deliberations and determinations, to warrant application of the balancing test required by the deliberative process privilege. Based on Claimant's arguments and issues currently before the Tribunal in deliberations, the Tribunal has determined that these documents do appear to be material and there is a need for the Tribunal to review them. Although the Tribunal recognizes the assertions for and interests in the deliberative process privilege, it finds the need to review these documents to be sufficiently great to override these interests. Therefore, the Tribunal requests Respondent to produce these six documents to the Tribunal and Claimant, at its earliest opportunity.
21. The Tribunal accepts the same conditions under which California agreed to produce documents in May of 2006. Namely, the documents will be covered by a confidentiality agreement and used only for the purposes of this arbitration. California's production will be without prejudice to its ability to assert a claim of privilege or exemption from disclosure with respect to any of these documents in any other legal proceeding.

¹⁵ Decision on Requests for Production of Documents and Challenges to Assertions of Privilege, ¶ 30 (April 21, 2006).

¹⁶ See *Marylander v. Superior Court*, 81 Cal.App.4th 1119, 1125 (2000).

¹⁷ Decision on Requests for Production of Documents and Challenges to Assertions of Privilege, ¶ 13 (April 21, 2006). This holding was included in the discussion of an earlier group within Section A (Decisions with respect to Documents Withheld by the State of California), but the Tribunal finds it applicable to all document groups within that section.

22. Within three weeks of the production of these documents, the Tribunal will accept brief analysis of the content of these documents and their relevance from the Parties. These comments must be strictly limited to the relevance of the newly produced documents and arguments already made.

IV. Conclusion

23. In summation, the Tribunal, as detailed above:

- a. requests Respondent, and the State of California, to produce California Log Nos. 162, 192, 193, 194, 197 and 208, as soon as possible; and
- b. invites the Parties to briefly comment on the content of these documents and their relevance within three weeks of the production of the six documents.

Signed March 21, 2008,



Michael K. Young

President of the Tribunal on behalf of the Tribunal

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