

PROCEDURAL ORDER No. 11

July 9, 2007

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 and Respondent's subsequent production of 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.
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.¹

¹ 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.

5. In light of these extensions, on December 15, 2006, the Tribunal sent the Parties a letter confirming adjustments to the arbitral schedule to which the Parties had agreed previously in informal discussions with the Assistant to the Tribunal. This letter confirmed that the final arbitral hearing would be held in Washington, D.C. on August 13 to 17, 2007 and, as necessary, September 17 to 21, 2007. In confirming these dates, the Tribunal stated its appreciation for the concerns expressed by Respondent regarding the division of argument between the two weeks. The Tribunal assured the Parties that it would determine the division in a manner that ensured fairness for both Parties, both in general at present and again, in specificity, at the Pre-Hearing Procedural Hearing. The inclination of the Tribunal was to structure the hearing on an issue-by-issue basis, with the exact number, order and time limit of each issue to be determined at the Pre-Hearing Procedural Hearing.
6. In *Procedural Order No. 10*, issued by the Tribunal on February 22, 2007, the Tribunal confirmed the adjustments to the arbitral schedule. 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.
7. 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.

II. The Views of the Parties

8. With respect to the length of the hearing, the Parties worked diligently to limit the hearing time as much as possible. Respondent presented a plan for a six-day hearing—using one weekend day—in an attempt to limit, or eliminate, the second week of hearings. Claimant expressed concerns about reducing the time for the scheduled hearing too greatly, but worked to find a reasonable compromise with this suggestion.²
9. With respect to witnesses, the Tribunal expressed its desire to hear testimony mostly from witnesses who could speak to factual issues, as opposed to legal standards, and to limit testimony of these witnesses primarily to cross examination,

² The Parties and Tribunal also discussed how to divide the hearing between two weeks, whether based on issues or factual predicates. The final conclusion that the hearing, excluding closing arguments, could be substantially completed in one extended week, however, made this discussion moot.

with any direct testimony to be presented in written statements. The Parties agreed to the limitation to factual witnesses, though Claimant wished to reserve its right to call Professor Sax for cross examination on his reply expert report to Mr. Olson's report or, alternatively, present Mr. Olson to respond to Professor Sax's report. The Parties additionally agreed to present direct testimony in writing, but requested that they be permitted to present a certain amount of direct examination to summarize each witness' testimony and highlight issues of particular importance.

10. Two other issues arose with respect to specific witnesses. Respondent requested leave to present additional limited direct testimony of Mr. Conrad B. Houser, of Norwest Corporation, regarding newly available information updating facts previously addressed in his expert report, namely recent developments of the Golden Queen Mining Company's Soledad Mine. Claimant did not object to this request, as long as Mr. Houser's testimony was provided in writing sufficiently prior to the hearing.
11. Claimant requested Respondent to present Mr. Robert W. Anderson of the Department of the Interior ("DOI"), as Claimant did not have access to him. Claimant wished to have the opportunity to question Mr. Anderson regarding the federal processing of the Imperial Project about which, Claimant argued, Respondent had not provided anyone to speak. Claimant asserted that Mr. Anderson was uniquely qualified to speak to the issue as he had worked with the BLM in California during the review of the Imperial Project and was still currently working with DOI in Washington D.C., and he had also served on the Section 3809 Regulations drafting committee. Respondent objected to the request both in terms of authority and because of the timing of the request. First, Respondent argued that a party cannot compel the testimony of the other party's employees nor can it compel another party to present a witness, citing UNCITRAL Arbitration Rules, Article 25(2). Second, Respondent asserted that the hearing was not the proper time to provide new testimony, which should have been requested during the production phase.
12. The Tribunal additionally requested the Parties' comments regarding whether witnesses and experts should be permitted to attend the hearing prior to their testimony and/or stay afterwards. The Tribunal stated its understanding that, generally, such witnesses were not allowed to attend the hearing prior to their testimony, but could remain after. During the hearing, Respondent expressed concern over a possible imbalance if witnesses were allowed to remain after the testimony but not attend the hearing prior, as Claimant would be presenting its witnesses substantially prior to when Respondent would present its witnesses. Respondent responded by email subsequent to the hearing, however, that it did not

consider necessary such a post testimony restriction for witnesses. Claimant did not express an opinion on the subject.

13. Finally with respect to witnesses, the Tribunal asked for the Parties' views on whether witnesses should be sworn in prior to their testimony. Ms. Obadia read the swearing in statements as provided for witnesses and experts, per the ICSID Arbitration Rules 35(2) and 35(3), respectively. Neither party objected to these statements.
14. The Tribunal questioned the Parties as to how they intended to provide documents that would be used in the hearing. Respondent explained that it would provide those documents that it intended to use and could produce trial binders. Claimant expressed its intent to call up documents electronically. Both Parties agreed that they would only reference documents that had already been produced.
15. Finally, with respect to public access to the hearing, ICSID explained that a separate room had been reserved into which a television broadcast would be made through the Bank's video channel. Neither Party objected to public access in this form. Both Parties did, however, recognize that public viewing would not be possible during the discussion of specific confidential information, including the presentation of company financial information and details as to the exact locations of cultural sites and artifacts. With respect to confidential cultural information, the Parties also discussed the request of the Quechan Indian Nation to view this otherwise restricted testimony and, again, neither Party objected to the request, as long as it was logistically feasible.

III. Decision

16. With respect to the schedule of the hearing, the Tribunal greatly appreciates the efforts of the Parties to think creatively and work together to keep the hearing length to a minimum. After discussion with the Parties, the Tribunal adopted an eight-day hearing schedule. There will be six days starting on Sunday, August 12, 2007 and continuing through Friday, August 17, 2007. In addition, the first two days of the scheduled September hearing dates—Monday, September 17, 2007, and Tuesday, September 18, 2007—were maintained for closing remarks, as well as any rebuttal arguments, and final questions from the Tribunal.
17. Each hearing day will begin at 9:00 a.m. EDT and continue until 6:00 p.m., with a morning break from 10:30 a.m. to 11:00 a.m., lunch from 1:00 p.m. to 2:15 p.m., and a healthy break from 3:30 p.m. to 4:00 p.m. The days of closing arguments—September 17 and 18, 2007—may only require the morning hours of

each of the days, however, depending on the number and scope of the Tribunal's questions.

18. Within these scheduled days, it is expected that the Parties will present opening arguments on Sunday, August 12, 2007 and, time allowing, one or two witnesses will be called by the Claimant. Including this time used for opening remarks, the Parties will each have seventeen (17) hours to present their arguments in the first week of the hearing, as they wish. This total includes any time used for the cross examination of witnesses, as well as questions from the Tribunal to counsel. The Tribunal reserved five (5) hours, including all of the afternoon of Friday, August 17, 2007, for its questions to witnesses and procedural issues. During this first week, Claimant will present first, followed by Respondent. In the first two days of the second week of hearings, each Party will have an additional four hours to present its closing remarks, with Claimant again preceding Respondent in presentation, though each party may reserve up to one hour of its time for rebuttal statements following the other party's summation comments, should it so choose.
19. In an effort to limit the extent of direct witness testimony at the hearing, the Tribunal requests that all witness testimony presented by either party that is "new," in that it responds to new items in Respondent's Rejoinder or addresses events that have occurred subsequently to the filing of the Rejoinder, be provided to the Tribunal and other Party in writing, no later than Monday, July 16, 2007, and be provided only by witnesses already identified in the Parties' respective witness lists. In addition, any rebuttal testimony that the Parties intend to present at the hearing in reply to the written statements submitted on July 16, 2007, is also to be submitted to the Tribunal and the other Party in writing. These rebuttal statements are requested no later than August 7, 2007.
20. In addition to the witnesses' written statements, the Tribunal also requests no later than July 23, 2007, an estimate of the time each Party plans to use for the cross examination of each witness and the sequence of witnesses that it intends to call. The Tribunal intends to use this information to prepare a tentative schedule for witness testimony, thus hopefully reducing the time each witness needs to spend waiting to testify. The Tribunal confirms its desire that all witnesses speak to factual issues, but will permit limited legal testimony as the Parties wish.
21. With respect to Respondent's request that its witness, Mr. Conrad B. Houser, offer new testimony at the hearing, the Tribunal, noting that this testimony addresses new circumstances that have developed since the submission of Respondent's Rejoinder and that Claimant has not objected to such new testimony provided there is a written statement prior to the hearing, grants Respondent's request. With respect to Claimant's request that Mr. Robert W. Anderson be made available by

Respondent for testimony at the hearing, the Tribunal observes that the production phase of this proceeding was completed substantially prior to this point, and that, absent exceptional circumstances, it is not appropriate for new testimony to be offered at the hearing. No exceptional circumstances have been offered in support of this request. The Tribunal denies Claimant's request that Respondent make Mr. Anderson available for testimony at the hearing.

22. As regarding the attendance of witnesses at the hearing, the Tribunal decides that witnesses and experts will be permitted in the hearing room throughout the arbitration, except during discussions of confidential information to which the witnesses or experts have not been made privy. The Tribunal requests, however, that the Parties restrict communication with experts and witnesses to breaks and try to limit the overall number of people in the hearing room.
23. All witnesses will be sworn in per Rules 35(2) and 35(3) of the ICSID Arbitration Rules.
24. With respect to the provision of documents for reference in the hearing, the Tribunal accepts the differing approaches as suggested by the Parties, but requests that all documents used—whether physical or electronic—be provided to the Tribunal in a physical form that is clearly marked: (1) as to what the document is and (2) as to where it is to found in the pleadings.
25. The public is invited to view the proceedings in Room H1-200 in Building H on 600 H Street, N.W. Visitors should check in at the Building H visitor's entrance and receive a pass for entry to that room. Members of the Quechan Indian Nation that wish to view the proceedings are requested to do so in Room MC-C1-110 in the World Bank Main Complex. They should be prepared to present identification at that time to confirm their Tribal affiliations. The Parties and the Tribunal will make every effort to provide advance notice to viewers as to when confidential information will be presented and thus the broadcast will be temporarily turned off. To facilitate communications about when the broadcast will not be available, the Tribunal requests viewing members of the public to provide email addresses at which they can be reached throughout the hearing to Ms. Eloïse Obadia (eobadia@worldbank.org) and Mr. Malkiat Singh (malkiatsingh@worldbank.org) of ICSID, for notification purposes.
26. Finally, the Parties are requested to notify Ms. Eloïse Obadia and Mr. Malkiat Singh of ICSID, of their technological needs for the hearing. Specifically, the Parties shall advise Ms. Obadia if they intend to provide their own computers for viewing the live transcription, or whether ICSID should rent them, specifying the quantity. The Parties are also asked to mention the number of hook-ups each of

them would like for viewing the transcript. If the Parties are bringing their own computers, these should be installed with the necessary software program in coordination with David Kasdan during the set-up day. Parties shall provide email addresses for receiving electronic transcripts. Finally, Parties shall specify, what visual aids they need, including whether they intend to use a computer projector and where they would like the hook-up for this application to be located.

27. The Tribunal, therefore, confirms the following arbitral schedule:

- | | |
|-------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| July 16, 2007 | Submission of direct witness statements provided to rebut new information in Respondent's rejoinder or provide new facts that have developed since the filing of the Rejoinder |
| July 23, 2007 | Submission of estimates of time necessary for witness cross examinations and the expected sequence of witnesses |
| August 7, 2007 | Submission of written statements of any rebuttal witnesses

Advisement to the Tribunal of the estimated time required for opening arguments |
| August 12–17, 2007 | Arbitral Hearing |
| and | |
| September 17 – 18, 2007 | |



Michael K. Young

President of the Tribunal on behalf of the Tribunal

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