

PROCEDURAL ORDER No. 8

January 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 this 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. These procedures included the eventual possibility of *in camera* review of the documents should the Parties be unable to resolve outstanding document production disputes.¹ 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. Both Parties had difficulty in meeting this aggressive timetable.

¹ Given the numerous complications raised with an *in camera* review, this possible final step in the procedures was suspended temporarily by the Tribunal in its December 16, 2006 letter to the Parties, until such time as the Tribunal could meet as a whole (with replacement arbitrator, Kenneth D. Hubbard) to discuss this issue in greater depth.

- a. With respect to documents withheld by the Claimant on grounds of the attorney-client and work product privileges, an amended privilege log was to be provided to the Respondent by December 1, 2005. Respondent was to respond with any challenges to such assertions of privilege by December 13, 2005. Finally, the Tribunal was to be informed by January 3, 2006, if the Parties were unable to resolve any issues of production with respect to this set of documents² – this date was later extended to January 16, 2006.³ Claimant produced some documents and an amended privilege log to Respondent on December 12, 2005. It does not appear that the Respondent has, of yet, made any further objections to Claimant’s continued withholding of documents. Respondent has not raised any specific disputed documents with the Tribunal.⁴
- b. With respect to documents withheld by Respondent on grounds of the attorney-client, work product and deliberative process privileges, the expected timetable requested by the Tribunal for various procedures and the actual dates of completion are as follows:
 - i. On a document-by-document basis, Claimant was to list its specific objections to Respondent’s claims of privilege or seek further explanation of such by December 1, 2005.⁵ It timely met this deadline.⁶
 - ii. In response, Respondent was requested to provide a more detailed explanation of the basis for the assertion of privilege and, if applicable, an objection as to the materiality of the requested document by December 13, 2005⁷ – this was later extended at Respondent’s request to January 5, 2006.⁸ Respondent provided further explanation for its assertions of privilege, as well as supplemental privilege logs and supporting affidavits for documents produced by the Imperial County Planning/Building Department, the Advisory Council on Historic Preservation, and the United States Department of the Interior (“DOI”) on January 10, 2006,⁹ a

² See November 17 Decision at para. 28(a)-(c).

³ See Tribunal’s December 7, 2005 letter to the Parties.

⁴ See Claimant’s January 19, 2006 letter to the Tribunal.

⁵ See November 17 Decision at para. 25(a), 33(a), and 38(a).

⁶ See Claimant’s December 1, 2005 letter to Respondent *and* Claimant’s January 12, 2006 letter to Respondent, attaching Tab A: “Documents Requiring Further Description” (With respect to 40 documents withheld by the State of California for which Respondent provided amended privilege logs on November 30, 2005, Claimant requested further explanation and listed its objections on January 12, 2006).

⁷ See November 17 Decision at para. 25(b), 33(b) and 38(b).

⁸ See Tribunal’s December 7, 2005 letter to the Parties *and* Respondent’s December 5, 2005 letter to the Tribunal (The Respondent believed it needed until January 10, 2005 to fully respond to Claimant’s objections. The Tribunal, however, in an attempt to maintain the current schedule, provided an extension only until January 5, 2005).

⁹ See Respondent’s January 10, 2006 letter to Claimant, attaching tabs A-I and K.

supplemental production and amended log listing additional documents withheld by the DOI on January 23, 2006,¹⁰ and, on January 26, 2006, a final production and supplemental log of withheld documents from the State of California.¹¹

- iii. Should the explanation underlying the assertion on a particular document provided by Respondent not satisfy Claimant, Claimant was to respond by December 22, 2005 with a detailed explanation as to why it believed each assertion of privilege was incorrect or failed based on the standards provided by the Tribunal or why it believed its need for the document was so great and the document otherwise unavailable that its need outweighed Respondent's interest implicit in the privilege.¹² With respect to documents withheld by the DOI, on January 16, 2006, Claimant provided generally applicable explanations as to why it believed Respondent's assertions of privilege with respect to the three broad categories of documents Claimant sought were generally invalid or outweighed by Claimant's own great need.¹³ Claimant has not had the opportunity yet to respond to California's amended log submitted by Respondent on January 26, 2006.
- iv. Finally, on January 16, 2006, Claimant was to specify to the Tribunal those withheld documents that, despite its objections and discussions with Respondent, it was still unable to compel from Respondent and still sought.¹⁴ As mentioned above, on January 16, 2006, Claimant explained that it still demanded three broad categories of documents and described its reasons for challenging the continual withholding of these documents, though it did not list the exact documents included within these categories.

3. In addition to the correspondence regarding the withholding of documents claimed as privileged, additional communications were sent by the Tribunal and the Parties regarding the possibility of an *in camera* review to resolve outstanding document production disputes:

- a. On December 9, 2005, Respondent sent a letter to the Tribunal objecting to *in camera* review and, in particular, such a review conducted by the Tribunal.

¹⁰ See Respondent's January 23, 2006 letter to Claimant, attaching an amended Tab A.

¹¹ See Respondent's January 26, 2006 letter to Claimant, attaching a State of California Supplemental Expanded Privilege Log.

¹² See November 17 Decision at para. 25(c), 33(c), and 38(c).

¹³ See Claimant's January 16, 2006 letter to Respondent, attaching Tabs 1-25 of supporting documentation.

¹⁴ See November 17 Decision at para. 25(d), 33(d) and 38(d) and Tribunal's December 7, 2006 letter to the Parties (extending the deadline for this final procedure from January 3 to January 16, 2006).

- b. On December 16, 2005, the Tribunal informed the Parties that it would suspend discussion of the resolution of final objections until it could meet as a whole with replacement arbitrator Kenneth D. Hubbard.
 - c. On December 28, 2005, Claimant filed a lengthy letter and attachments to the Tribunal in support of an *in camera* review by the Tribunal.
4. Finally, on January 18, 2006, as the dispute over privileged documents continued and quickly approached the date of Claimant's submission of its memorial, the Parties exchanged correspondence regarding the issue of when 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.

II. The Views of the Parties

5. With respect to possibility of an *in camera* review by the Tribunal of documents remaining in dispute between the Parties, Respondent objects strongly to such a possibility.¹⁵ Respondent asserts that such a review is used only in exceptional circumstances in international arbitration and can only be conducted with unanimous consent of the Parties because of the potentiality of prejudicing the Tribunal. U.S. courts, Respondent explains, also limit their use of *in camera* review to situations where the challenging party makes an adequate evidentiary showing of why the privilege may not be asserted. Additionally, Respondent argues that such a review would fail not only to provide Claimant with any incentive for reducing the number of documents it seeks, but also fail to resolve legal issues of privilege. Respondent thus requests that the Tribunal first determine whether its assertions of privilege are sufficient over each requested document. For Respondent, it is only after the Tribunal reviews these assertions and Claimant's responses to them and only if the Tribunal is still unable to rule on the validity of the privilege assertions, that it should consider *in camera* review. Alternatively, Respondent requests a hearing on the matter.
6. Claimant argues *in camera* review is used in international arbitration and that lack of consent by the parties may require modification in the manner in which the review is carried out, but not refusal to conduct such a review.¹⁶ Claimant asserts that prejudicing the Tribunal should not be a concern and that such review may be necessary as two of Respondent's claimed privileges, work product and deliberative process, are qualified and thus the content of the withheld documents will be critical for the Tribunal in determining if Claimant's need for the documents outweighs Respondent's interest in protection. Second, Claimant argues that the practice of *in camera* review is well established in federal courts

¹⁵ See Respondent's December 9, 2005 letter to the Tribunal.

¹⁶ See Claimant's December 28, 2005 letter to the Tribunal.

and that no evidentiary showing is required of a challenger until the withholding party proves, by *in camera* review if necessary, that its documents are indeed privileged. Third, Claimant asserts that such a review will be necessary if the Parties cannot reach an agreement, and that the number of documents at issue would not be overwhelming.

7. With respect to the potential effects of this lengthy document production process on the arbitral schedule, Claimant states its paramount concern is that the presently scheduled December hearing date be maintained.¹⁷ It explains its preference that neither of the dates scheduled for submitting Claimant's memorial nor Respondent's counter-memorial be amended, but that further briefing and argument of the production issues be postponed until after these submissions. It then proposes that any materials obtained after these filings be included in the Parties' reply and rejoinder.
8. Respondent opposes Claimant's proposal to postpone resolution of these document production issues.¹⁸ Respondent argues that failure to resolve these issues prior to the submission of the Parties' memorials would undermine its opportunity to fully and fairly present its case. Respondent asserts that the rebuttal nature of the reply and rejoinder should be preserved as Respondent has little time to respond to Claimant's reply and this would be made more difficult if new information was revealed at that time. In addition, Respondent argues that the burden of production has fallen disproportionately on it and thus Claimant's desire to preserve the hearing schedule would be prejudicial to Respondent.

III. Decision

9. The Tribunal recognizes that the production of documents phase of this arbitration has been relatively extensive and that this process has been burdensome for the Parties, especially in light of the tight arbitral schedule. The Tribunal appreciates the very considerable effort expended by both Parties to adequately and completely comply with the numerous procedural requirements in a timely manner.
10. In keeping with its November 17 Decision, the Tribunal views the next—and hopefully final—step in this production process as being its 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. In order to complete this determination, the Tribunal requests the following from the Parties:

¹⁷ See Claimant's January 18, 2006 letter to the Tribunal.

¹⁸ See Respondent's January 18, 2006 letter to the Tribunal.

- a. From Respondent, a description of any renewed challenges to Claimant's withheld documents—if any remain—with an explanation for such challenges provided on a document-by-document basis, preferably in a table or log format that is easily tied to the privilege log provided to it by Claimant. Should Respondent not seek any further documents from Claimant, please inform the Tribunal of such. The Tribunal requests such information by February 8, 2006.
 - b. From Claimant, a challenge to Respondent's assertions of privilege on a document-by-document basis. The Tribunal recognizes the arguments of invalidity and out-weighting that Claimant asserted with respect to three categories of documents generally in its January 16, 2006 letter. In order to enable the Tribunal to examine the validity of claims of privilege on a document-by-document basis, however, the Tribunal requests that Claimant relate each argument to each challenged document with an adequate degree of specificity. Therefore, the Tribunal requests a log or table easily tied to the privilege logs provided to it by Respondent listing each document that Claimant still seeks with an explanation of how the assertion of privilege is incorrect or invalid with respect to that document, or why Claimant's need is so great for that document that this need outweighs Respondent's interest in withholding the document. In addition, if it does not present a large additional burden for Claimant, the Tribunal would like a list of all documents arranged by the arguments against their privileged nature. The Tribunal requests such documents by February 15, 2006.¹⁹
 - c. From either party, any argument on the production issues that remain outstanding. Claimant, for instance, raised certain over-arching issues, like that of waiver,²⁰ which the Tribunal is willing to consider, but feels that it cannot adequately answer at this time. If either party wishes to present further argument, please do so as soon as possible and no later than March 1, 2006.
11. If this review of the privilege logs and corresponding challenges is insufficient to enable the Tribunal to adequately determine the validity of all assertions of privilege, the Tribunal will consult further with the Parties about the process to be taken to complete this determination, including the possibility of the confidential review of individual documents by an independent special master. If such a special master were to be appointed, the Tribunal foresees an allocation of the costs of such a procedure on the basis of the requesting party's success in its challenges to assertions of privilege.

¹⁹ If Claimant receives any further privilege logs from Respondent after this date, it may have an additional two weeks following the receipt of such logs to present its challenges.

²⁰ See Claimant's January 16, 2006 letter to Respondent at pages 8-9.

12. Due to the extensive nature of this document production process and the desire to have evidence available to the Parties prior to their memorial submissions, the Tribunal finds the current arbitral schedule unsustainable. Therefore, despite the desire not to delay the arbitral hearing, the Tribunal determines that the schedule must be extended to accommodate these additional production procedures. In adjusting the schedule, the Tribunal is cognizant of Respondent's arguments that the Parties must be treated equally with respect to the completion of submissions to the Tribunal. The Tribunal notes that Article 15(1) of the UNCITRAL Rules provides that "[s]ubject to these Rules . . . the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case." As to the requirement that each party be given a full opportunity to present its case, the Tribunal observes that a period of approximately four months to prepare a memorial, whether that be the memorial or counter-memorial, is customarily an adequate amount of time, absent unusual circumstances. A general delay in the proceedings, which as a consequence in theory provides more time to the Claimant for the preparation of its memorial, does not require under Article 15(1), absent unusual circumstances not present in this case, the granting of an equally long extended period of time to the Respondent for the preparation of its counter-memorial. Therefore, the Tribunal amends the arbitral schedule as follows:

February 8, 2006	Submission by Respondent of any Renewed Challenges to Claimant's Claims of Privilege
February 15, 2006	Submission of Claimant's Revised Challenges to Respondent's Claims of Privilege
March 1, 2006	Submission of any Additional Party Arguments on Outstanding Document Production Issues
May 1, 2006:	Submission of Claimant's Memorial
September 7, 2006:	Submission of Respondent's Counter-Memorial
October 13, 2006:	Submission of any Art. 1128 Submissions and Non-Disputing Party Submissions
November 7, 2006:	Submission of Claimant's Reply
January 16, 2007:	Submission of Respondent's Rejoinder
February 15, 2007:	Submission of Witness Lists
February 22, 2007:	Pre-Hearing Procedural Hearing
March 26-30, 2007	Arbitral Hearing

April 2-6, 2007: Possible Continuation of Arbitral Hearing

Michael K. Young

President of the Tribunal on behalf of the Tribunal

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