

DECISION ON OBJECTIONS TO DOCUMENT PRODUCTION  
July 20, 2005

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  
Donald L. Morgan, Arbitrator

## I. Procedural Background

1. On March 3, 2005, the Tribunal issued its Procedural Order No. 1 (“Order No. 1”) outlining a schedule of proceedings which, among other things, directed the Parties to serve their Request for Documents to each other on May 10, 2005, and any Objections to such Requests for Documents on May 24, 2005.
2. The Parties timely submitted their Requests for Documents to the Tribunal.
3. On May 18, 2005, the Parties jointly requested the Tribunal to extend to June 7, 2005, the deadline for submitting their Objection to Document Requests (“Objections”). The Tribunal granted this request in its May 23, 2005, letter to the Parties and its Procedural Order No. 2 issued on May 31, 2005.
4. Both Parties timely submitted to the Tribunal their respective Objections to the Request for Documents made by the other party.
5. On June 3, 2005, the Tribunal issued Procedural Order No. 3 permitting the parties to request rulings in conjunction with particular objections. Both parties expressed interest in receiving further guidance from the Tribunal and timely submitted requests on June 30, 2005 and replies to the requests on July 7, 2005.
6. Procedural Order No. 3 also set an August 19, 2005 date for a hearing in Washington D.C. to address any unresolved document production issues.

## II. Applicable Law

7. This arbitration is conducted under the UNCITRAL Arbitration Rules.

8. The UNCITRAL Rules in Article 24 provide:

1. Each party shall have the burden of proving the facts relied on to support his claim or defence.
2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.
3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

Article 24 is general in its terms, making clear the authority of the Tribunal to order the production of “documents, exhibits or other evidence” but providing only skeletal guidance as to the exercise of that authority. Under Article 15(1) of the Rules, “the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.”

9. The International Bar Associations Rules on the Taking of Evidence in International Commercial Arbitration (“IBA Rules on Evidence”) are not directly applicable to this proceeding.<sup>1</sup> As a part of the exercise of its authority under Article 15(1), however, the Tribunal may look to the IBA Rules on Evidence for guidance.
10. The Tribunal notes in particular the standards for production referenced in the IBA Rules on Evidence. Article 3(a)(ii) emphasizes that requests for documents should be of a “narrow and specific” nature and of documents that “are reasonably believed to exist.” Article 3(b) underscores the need for documents to be “relevant and material to the outcome of the case.” On the basis of this general guidance, the Tribunal has endeavored to ensure that any documents which it compels a Party to produce should be of a “narrow and specific” nature, “reasonably believed to exist”, and likely “material to the outcome of the case.”

### III. Scheduling

11. In Procedural Order No. 3, the Tribunal scheduled a hearing on August 19, 2005, to resolve any outstanding document production questions.
12. Respondent has indicated to the Tribunal that it is unavailable on August 19.
13. The Tribunal reschedules the hearing to address any outstanding document production issues for August 26, 2005.

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<sup>1</sup> See tape recording of the February beginning at minute 35, second 45 to minute 44.

14. Given the change in the hearing date, the Tribunal extends the date to raise specific objections involving the document production process or to renew requests for documents denied by this Decision until August 23, 2005.

#### IV. General Observations from the Tribunal Regarding Parties' Requests for Rulings

15. In the interest of avoiding the burdens of litigation and protecting the expectations of the parties in the arbitration process, the Tribunal has endeavored to make its decisions regarding the Parties' Objections in such a manner as to focus on the articulated materiality of a given document or category of documents. The Tribunal believes that as the document production efforts proceed the Parties will have evaluated the publicly available records and will be in a better position to articulate which additional documents will be necessary for the Parties to prepare their arguments.
16. The Tribunal notes that the Parties have been conferring on document requests and reaching exchange arrangements. The Tribunal welcomes the efforts of both parties to answer document requests.

#### IV. Decisions Regarding Claimant's Requests for Document Production

##### *Decision as to Claimant's Request for Production of Non-Public Documents Responsive to Category 3 Document Request*

17. Claimant believes it is "entitled to all responsive non-public documents regardless of the date"<sup>2</sup> which relate to communications between the Department of the Interior (DOI) and the Indian tribes, the creation and management of the Indian Pass Area of Critical Environmental Concern, the October 27, 1998 proposal to withdraw DOI lands encompassing the Imperial Project, and the October 27, 2000 withdrawal of DOI lands. The Claimant states that it intends to use such documents to show that it was "no coincidence" that boundaries of an "area of cultural resource concern were nearly co-extensive with the proposed Glamis Imperial Project area."
18. Respondent argues that the documents which are relevant in answering the Claimant's requests are part of the public administrative record, and the documents which the U.S. intends to produce were the publicly available documents on which the Claimant would have formed its investment expectations. In addition, the U.S. observes that many of the documents sought by Claimant will in all likelihood be a part of the public record.
19. The Tribunal believes that it is premature to require the U.S. to produce non-public documents before the Claimant has reviewed the public documents which Respondent will be making available. Therefore, the Tribunal denies Claimant's request without prejudice to it later renewing its request for non-public documents. If after review of the public documents made available by the U.S., the Claimant has

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<sup>2</sup> Claimant's Request for a Ruling, June 30, 2005, p. 5.

reason to believe that there are specific non-public documents that are likely to be material, then the Claimant will have the opportunity to request these documents for production.

*Decision as to Claimant's Request for Category 8 Documents*

20. Claimant requests documents from a specified list of Federal and State Government offices that would have been active in “deciding or guiding the fate of the Imperial Project.” Claimant acknowledges that the scope of this request potentially overlaps with its Categories 1 and 7 document requests, but states that the request “is simply designed to ensure that Respondent does not neglect these important and discrete offices in its search of records” under Categories 1 and 7 requests.
21. Respondent objects to this request as “unwarranted” and a “fishing expedition”<sup>3</sup> since the U.S. has never indicated any intention of limiting its production of relevant documents to particular government offices. Respondent states “there is no reason to assume that the United States will neglect to search any of the offices that Glamis has identified in its category 8 requests.”
22. The Tribunal, noting the overlap of Claimant’s Category 8 request with its Categories 1 and 7 requests (the latter being subject matter requests for which the Respondent has, with qualifications, indicated it will produce the requested documents) views the offices specified in the Category 8 as encompassed within the production effort underway for Categories 1 and 7. If after review of the documents made available by the U.S. under Categories 1 and 7, the Claimant has reason to believe that a particular source for documentation named in Category 8 was not a part of the Categories 1 and 7 production effort and is likely to contain material information, then the Claimant will have the opportunity to renew its request of a search of those particular offices.

*Decision as to Claimant's Requests for the Production of Post July 21, 2003 Documents*

23. Claimant objects to any temporal restriction being placed on documents produced by the United States and argues that post July 21, 2003 documents are relevant because Glamis’ proposed mining operation is still pending and the Governments’ “continued failure to act is an element of Glamis’ claim.”<sup>4</sup>
24. Respondent argues that documents created after July 21, 2003, are unlikely to have any bearing on the dispute before the Tribunal since they are not relevant to the claim of expropriation based on actions taken by the California government between December 12, 2003 and April, 10 2003. Moreover, such documents have not been identified with sufficient specificity. Finally, because most of these documents are likely protected by privilege, Respondent indicates that production would be especially burdensome since it would involve the creation of a privilege log.

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<sup>3</sup> Respondent’s July 7, 2005 letter to Tribunal, pp. 4-5.

<sup>4</sup> Claimant’s Request for a Ruling, June 30, 2005, p. 10.

25. The Tribunal concludes that it is at a minimum premature to ask for post-July 2003 documents until the public record has been reviewed. The Tribunal therefore denies the Claimant's request with leave to renew the request. The Tribunal is also not disposed at present to regard the documents requested as material. In any renewal of this request, the Claimant should articulate as fully as possible the likely materiality of the documents requested.

## V. Decisions Regarding Respondent's Requests for Document Production

### *Decision as to Respondent's Request No. 21*

26. Respondent requests the Tribunal to issue an order requiring Glamis to produce documents wherever located concerning complete backfilling as "contemplated, proposed or adopted by governments in foreign countries . . . including Mexico, Guatemala, and Honduras."<sup>5</sup>
27. The Claimant argues that the issuance of any such order would be unduly burdensome since Claimant is unaware of any "complete backfilling requirements proposed or adopted by any jurisdiction other than the State of California's mandatory complete backfilling measures at issue here."<sup>6</sup> Claimant argues that an order that it produce documents from offices other than the documents for the Imperial project held in its Reno, Nevada office would be unduly burdensome.
28. Given Claimant's statement of a lack of knowledge of "complete backfilling" requirements outside of the U.S., the Tribunal in order to grant such a geographically wide ranging broad request requires a more substantial nexus to be articulated between the category of requested documents and the likely materiality of such documents to the outcome of the case.
29. The Tribunal denies the Respondent's request with the leave to renew this request if the Respondent's identifies more specifically likely material documents which should be in the possession of the Claimant.

### *Decision as to Respondent's Request No. 40*

30. Respondent requests that the Tribunal require Glamis to release documents concerning "the consideration, approval or review by Glamis' board of directors or committees of the board of directors of expenditures on any expansions of existing projects or any new gold mining projects, other than the Imperial Project."<sup>7</sup> Respondent argues this information is important to its effort to ascertain the economic criteria employed by Glamis leading to its evaluation of the investment potential of the Imperial Project.

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<sup>5</sup> Respondent's June 30, 2005 letter to Tribunal, p. 2.

<sup>6</sup> Claimant's Reply, July 7, 2005, p. 2

<sup>7</sup> Respondent's June 30, 2005 letter to Tribunal, p. 2.

31. Claimant expresses concern about the relevance of such information for the purposes of deciding this dispute since “Glamis considers each project on its own merits in light of the circumstances that exist at the time the opportunity arises,”<sup>8</sup> the risks of releasing such confidential information, and the burden of producing information responsive to Request No. 40.
32. The Tribunal notes first on the issue of confidentiality that it is reasonable that parties will seek to protect proprietary information from inadvertent disclosure. Here, however, it appears that the Parties have some willingness to negotiate confidentiality agreements that would protect against such disclosure.
33. Turning to the issue of materiality, the Tribunal has some appreciation for Respondent’s assertion that it will need to evaluate Claimant’s expectations regarding the investment potential of the Imperial Valley project. The Tribunal also can in theory recognize that the numerous factors which interact in complex ways to inform the investment expectations of the Claimant regarding a project may be identified through evaluation of how Claimant approaches similar projects.
34. However, in its examination of Respondent’s request, the Tribunal is not satisfied that the proposed discovery will in practice be transferable to the evaluation of the Imperial Project given the different circumstances of the projects. At this juncture in the proceedings, the Tribunal thus finds the request appears to be unduly burdensome on the Claimant, given the unclear value of production. After reviewing the documents made available to it by the Claimant, the Respondent will either be able to renew its broad request or narrowly tailor its request to compel production of documents that are likely material to the outcome of this case. In any renewal of this request, the Respondent should articulate as fully as possible the likely materiality of the documents requested, including the methodology by which a comparative analysis will be made.

## VI. Conclusion

35. In summation, the Tribunal:
  - a. reschedules its hearing on document production issues for August 26, 2005 and requests the parties to identify any issues which they intend to present at these hearings by August 23, 2005,
  - b. denies without prejudice Claimant’s request for non-public documents responsive to Category 3 requests, documents responsive to its Category 8 requests, and post July 21, 2003 document requests,
  - c. denies without prejudice Respondent’s requests for documents responsive to Category 21 and 40.

All requests may be renewed by the Parties after reviewing the documents made available or produced under the arrangements ongoing between the Parties. As stated

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<sup>8</sup> Claimant’s Reply, July 7, 2005, pp. 4-5.

above, the Tribunal emphasizes the value of the Parties clearly articulating to the Tribunal in any renewed request the materiality of the requested documents.

Signed July 20, 2005

David D. Caron  
Arbitrator

Michael K. Young  
President

Donald L. Morgan,  
Arbitrator

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