PROCEDURAL ORDER No. 12

August 28, 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. 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. 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 that time and again, in specificity, at the Pre-Hearing Procedural Hearing. The inclination of the Tribunal, at that time, 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.

2. 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.

3. 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 and provided a final schedule for the Hearing on the Merits. Specifically, *Procedural Order No. 11* reflected the adoption of an eight-day hearing schedule, which enabled the Hearing to proceed without the necessity

of splitting it based on legal issue, factual predicate, or otherwise. The first session of the Hearing on the Merits was scheduled for Sunday, August 12 through Friday, August 17, 2007, at the offices of the World Bank, in Washington, D.C. During this period, each Party was to have seventeen (17) hours in which to present its case-in-chief, as it wished, with Claimant presenting its case first and Respondent following. The second session of the Hearing was scheduled for Monday, September 17 through Tuesday, September 18, 2007, at which the Parties would each have four (4) hours in which to present rebuttal and closing remarks, with the option of reserving one of these hours for surre-rebuttal statements following the other party's summation comments.

4. *Procedural Order No. 11* additionally detailed other agreements regarding the form and structure of the Hearing on the Merits. First, in an effort to limit direct witness testimony, it was agreed that all testimony that was presented by either party that was "new"—in that it responded to new items in Respondent's Rejoinder or addressed events subsequent to the filing of the Rejoinder—were to be submitted prior to the Hearing in writing, and deadlines were established for these submissions. In addition, a deadline was set for the submission of each Party's estimate of cross examination times, as well as the proposed sequence of witnesses, which the Tribunal intended to use to establish a tentative schedule for witness testimony so as to limit the time each witness needed to spend waiting to testify. The Order also established procedures for witness attendance, document use and viewing by the public.

5. In accordance with *Procedural Order No. 11*, the Parties timely submitted their proposed witness sequences and estimated cross examination times on July 23, 2007. Following these submissions, on July 26, 2007, the Tribunal issued a tentative schedule for the first session of the arbitral hearing.

6. On July 27, 2007, Respondent raised concerns about this tentative schedule with the Tribunal and Claimant. Specifically, Respondent pointed out that the Tribunal had distributed the witnesses throughout the hearing week, leaving insufficient time for Respondent to present its case-in-chief, "which [was to be] composed primarily of oral argument," following Claimant's presentation of its case. Respondent therefore requested a revised schedule reflecting these understandings.

7. Claimant, in a letter to the Tribunal of July 30, 2007, responded to Respondent's July 27 letter, expressing its surprise at Respondent's desire "to present extensive oral argument by counsel as part of its evidentiary presentation." Claimant objected to Respondent's request but stated that, if the Tribunal were to permit the proposal, Claimant would "be forced to reserve additional time" for rebuttal argument that it doubted could be accomplished within the thirty-four (34) hours scheduled for argument within the first session of the Hearing on the Merits.

8. Respondent and Claimant submitted further responsive letters with respect to the tentative hearing schedule on July 30, 2007 and July 31, 2007, respectively.

9. In response to the concerns expressed by the Parties with respect to the tentative schedule for the first session of the Hearing on the Merits, the Tribunal issued an amended schedule on July 31, 2007. In this letter to the Parties, the Tribunal noted that the agreement between the Parties and the Tribunal reached at the Pre-Hearing Procedural Hearing—as memorialized in *Procedural Order No. 11*—was that each Party would have "seventeen (17) hours to present their arguments in the first week of the hearing, as they wish." The Tribunal explained that, in preparing the July 26, 2007 proposal, it "focused upon the scheduling of the witness presentation and inadvertently departed from [this] understanding...." The Tribunal additionally stated that its "understanding of the agreement of the parties and the Tribunal reached at the Pre-Hearing Procedural Meeting [was] in conformity in large measure with the view indicated by the Respondent."

10. The Tribunal explained that, in approaching the scheduling of the hearing both at the Pre-Hearing Procedural Meeting and at that point, it was guided by four considerations:

> (1) that the parties be treated equally and that one way that this equality is achieved is through an equal allocation of time to each side during the hearing;
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> (2) that the basic structure of the hearing should be that Claimant present its case, that Respondent present its defense, that Claimant present its rebuttal and Respondent present its rebuttal;
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> (3) that the manner in which each party is to present its case or defense is left to that party; and
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> (4) the division of the Hearing over two separate weeks should not work to the disadvantage of either party.

Given Claimant's concerns, however, the Tribunal offered to reconsider the hearing schedule if amendments were submitted by Claimant by 4 PM Eastern Time on August 2, 2007. In addition, the Tribunal permitted Claimant, by the same time and date, to propose a "more fundamental reorganization," but emphasized that any reorganization would be guided by the four considerations above and would likely necessitate a postponing of the hearing.

11. Claimant timely submitted a response on August 2, 2007, in which it requested a reservation of three (3) of its seventeen (17) total argument hours for rebuttal argument following the presentation of Respondent's case in chief. On the same day, Respondent objected to this request stating that it contravened the Tribunal's determination that "the basic structure of the hearing should be that Claimant present its case, that Respondent present its defense, that Claimant present its rebuttal and Respondent present its Rebuttal." Respondent thus requested the Tribunal to issue an order either directing Claimant to present any oral argument

within its case-in-chief, or allowing both Parties to present their rebuttal statements on Friday, August 17, 2007, thus eliminating the second session of the Hearing. Claimant responded immediately that it was "adamantly opposed to eliminating" the second Hearing session and that it had "confidence in the Tribunal to make any minor adjustments to the August and September hearing schedules that [were] deemed appropriate."

12. Also on August 2, 2007, the Tribunal issued a second amended schedule for both sessions of the Hearing on the Merits. In this letter, the Tribunal expressed its appreciation for "the efforts the Parties [had] made to accommodate each other's different styles of case presentation and work towards a hearing schedule that provide[d] equal opportunity for each Party to present its case and defense, as it wishes." After weighing the Parties' statements with respect to the arbitral schedule, the Tribunal presented an amended schedule very similar to that provided on July 31, 2007, with one exception: "Claimant, having reduced the time it intend[ed] to examine witnesses by approximately three hours, [could] utilize that time within the presentation of its case-in-chief and preceding that of Respondent as it [saw] fit to make legal arguments and apply the facts presented to those arguments, and the Tribunal urge[d] it to do so." In addition to presenting an amended schedule in accordance with this change, the Tribunal included a schedule for the second session of the Hearing on the Merits to be held on September 17-18. In that schedule, the Tribunal foresaw Claimant's rebuttal and closing arguments occurring on Monday, September 17, and Respondent's rebuttal and closing arguments, as well as any Party surre-rebuttals and Tribunal questions, taking place on Tuesday, September 18.

13. 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. In light of this proposal and the desire of the Tribunal to ensure that both Parties had an adequate time to present oral arguments, the Tribunal questioned whether the Parties might be available for additional time on the morning of Wednesday, September 19, 2007. The Parties indicated their availability.

II. The Views of the Parties

14. In addition to expressing its ability to be present for further hearing on Wednesday, September 19, Claimant explained its concern that the four (4) hours allotted for rebuttal and closing arguments in the second session was not sufficient due to the different focuses of the Parties in their arguments, and requested six (6) hours for such argument.

15. Respondent objected to allotting further time at the September session for rebuttal and closing arguments in light of the length of the first session of the Hearing and the ability that each Party had to design and present its own case.

16. In addition, Respondent requested notice prior to the second session if Claimant planned to reserve one hour of its time for surre-rebuttal argument because, if Claimant did so, Respondent planned to do the same. Claimant responded that it suspected that it would reserve such time.

III. Decision

17. The Tribunal determines that it will issue to the Parties a limited number of questions, answers to which the Parties should weave into their rebuttal and closing arguments. The Tribunal will provide these questions as quickly as possible so as to enable the Parties adequate time to research the answers and structure their arguments for the second session of the Hearing. The Tribunal notes that the answers to these written questions should be incorporated into the Parties' closing remarks and, as such, will be counted against each Party's allotted time as detailed below. Any additional questions that the Tribunal may have during the presentations, however, will come out of the Tribunal's time.

18. The Tribunal foresees that it will ask additional questions of the Parties during and following their rebuttal, closing and surre-rebuttal arguments. In light of this fact, the stated desire of Respondent to present its arguments starting on Tuesday morning, and the intention of both Parties to present surre-rebuttal arguments, the Tribunal deems that reserving the morning of Wednesday, September 19, 2007, for surre-rebuttal argument will provide greater flexibility to the schedule. The Tribunal also requests the Parties to reserve time in the afternoon on Tuesday, September 18, in the event that the Tribunal wishes to confer during the lunch hour and question the Parties further following the break.

19 Finally, as expressed at the closing of the first session of the hearing, the Tribunal suggests that, with respect to documents withheld on privilege grounds to which the Tribunal had previously deferred judgment, if the Claimant still seeks any such documents, it should clearly explain at the September hearing as to what issue the documents would be material.

20. The Tribunal, therefore, confirms the following schedule for the second session of the Hearing on the Merits:

September 17, 2007	Claimant's rebuttal and closing arguments and responses to the Tribunal's written questions (3 ½ hours)
September 18, 2007	Respondent's rebuttal and closing arguments and responses to the Tribunal's written questions (3 ½ hours)
	Possible additional Tribunal questions in the afternoon

September 19, 2007	Claimant's surre-rebuttal (1 hour)
	Respondent's surre-rebuttal (1 hour)
	Additional Tribunal questions

Michael K. Young
President of the Tribunal on behalf of the Tribunal

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