

**ARBITRATION UNDER
CHAPTER ELEVEN OF THE NAFTA
AND THE UNCITRAL ARBITRATION RULES**

BETWEEN

VITO G. GALLO

Claimant

AND

GOVERNMENT OF CANADA

Respondent

PROCEDURAL ORDER NO. 1 [Amended]

March 10, 2009

ARBITRAL TRIBUNAL

**Professor Juan Fernández-Armesto (President)
Professor Jean-Gabriel Castel, O.C. ,Q.C.
J. Christopher Thomas, Q.C.**

1. **Whereas** this first order sets out the procedural rules which shall govern this arbitration.
2. **Whereas** these rules have been discussed between the disputing parties and the Arbitral Tribunal at the first procedural hearing on March 7, 2008. In addition, the rules take into account the joint letter of the disputing parties to the Arbitral Tribunal Can3/Gal 2, of February 15, 2008 with attached draft Procedural Order No. 1 and draft Confidentiality Order, and the subsequent submissions from the parties under Gal 6 and 7 and Can 5 and 6.

A) THE TRIBUNAL AND THE PARTIES

a) Constitution of the Arbitral Tribunal
(Article 1123 of the NAFTA)

3. The disputing parties agree and confirm that the Arbitral Tribunal has been duly constituted in accordance with Article 1123 of the NAFTA.
4. The disputing parties confirm that they waive any possible objection to the constitution of the Arbitral Tribunal and to the appointment of the Arbitrators on the grounds of conflict of interest and/or lack of independence or impartiality in respect of matters known to them at the date of signature of this Procedural Order.
5. Contact details of each Member of the Arbitral Tribunal are as follows:

Prof. Juan Fernández-Armesto
Armesto & Asociados Abogados
General Pardiñas, 102
28006 Madrid, Spain
Email: jfa@jfarmesto.com

Prof. Jean-Gabriel Castel, O.C. ,Q.C.
833387 4th Line Mono
RR5 Orangeville, Ontario
Canada, L9W 2Z2
Email: jgcastel@sympatico.ca

John Christopher Thomas, Q.C.
Suite 226-2211 West 4th Avenue
Vancouver, British Columbia
Canada, V6K 4S2
Email: jcthomas@thomas.ca

b) Representation of the Disputing Parties
(Article 4 of the UNCITRAL Arbitration Rules).

6. The Claimant is represented by:

Charles M. Gastle
Bennett Gastle
Professional Corporation

36 Toronto St., Suite 250
Toronto, Ontario M5C 2C5
Tel: (416) 361-3319
Fax: (416) 361-1530
Email: cgastle@bennettgastle.com

Murdoch Martyn
Barrister & Solicitor
Suite 94, 33 Hazelton Avenue
Toronto, Ontario
M5R 2E3
Tel: (416) 433-2890
Fax: (416) 964-2328
Email: murdochmartyn@hotmail.com

7. The Respondent is represented by:

Meg Kinnear
Senior General Counsel and Director General
Trade Law Bureau (JLT)
Department of Foreign Affairs and
International Trade Canada
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario KIA 0G2
Tel: (613) 943-2803
Fax: (613) 944-0027
Email: meg.kinnear@international.gc.ca

- c) **Administrative Services**
(Articles 38, 39 and 41 of the UNCITRAL Arbitration Rules).

8. The Permanent Court of Arbitration (“PCA”) shall administer the arbitral proceedings and will provide registry services and administrative support. The cost of the PCA’s services will be calculated in accordance with the PCA’s Schedule of Fees & Costs and shall be included in the costs of the arbitration.
9. In addition, the Arbitral Tribunal may retain an Administrative Assistant to the Presiding Arbitrator, whose fees and expenses shall be included in the costs of the arbitration. The Arbitral Tribunal has designated Mrs. Deva Villanúa as Administrative Assistant. Contact details are as follows:

Deva Villanúa
Armesto & Asociados Abogados
General Pardiñas, 102
28006 Madrid, Spain
Email: dvg@jfarmesto.com

B) PLACE OF ARBITRATION AND LOCATION OF HEARINGS

(Article 1130 of NAFTA; Article 16 of the UNCITRAL Arbitration Rules)

10. The place of arbitration is Vancouver, British Columbia, Canada.
11. Meetings and hearings may be held at other locations if so decided by the Arbitral Tribunal, after consultations with the disputing parties.
12. The Arbitral Tribunal may deliberate at any convenient location, without consultation with the parties.

C) APPLICABLE LAW AND ARBITRATION RULES

(Article 1120 and 1131 of the NAFTA; Article 1 and 33 of the UNCITRAL Arbitration Rules)

13. The governing law for this arbitration is the NAFTA and applicable rules of international law.
14. The applicable arbitration rules are the UNCITRAL Arbitration Rules, except to the extent that they are modified by Section B of NAFTA Chapter 11.

D) PROCEDURAL LANGUAGE AND TRANSLATION

(Articles 17 and 25(3) of the UNCITRAL Arbitration Rules)

15. The arbitration shall be conducted in English.
16. All documentary evidence in a language other than English shall be translated to English by the party submitting that evidence at its own cost. Witness testimony in a language other than English shall be translated consecutively to English, the cost of which shall be borne by the party calling that witness.

E) CONFIDENTIALITY

(Articles 25(4) and 32(5) of the UNCITRAL Arbitration Rules)

17. The Arbitral Tribunal's Confidentiality Order, issued on the same date as this Procedural Order, applies to these proceedings.

F) ISSUES AFFECTING THE ARBITRAL TRIBUNAL

a) Quorum and Replacement of Arbitrators

(Articles 13 and 14 of the UNCITRAL Arbitration Rules)

18. The presence of all three members of the Arbitral Tribunal shall normally constitute a quorum and shall be required to conduct proceedings unless the disputing parties agree otherwise. In the event of the death or incapacity of a member of the Arbitral Tribunal, the truncated tribunal may proceed to decide procedural matters.
19. In cases of urgency, the presiding arbitrator may decide procedural matters alone, upon reasonable consultation with the remaining members of the Arbitral Tribunal.

- b) **Decisions of the Arbitral Tribunal**
(Article 31 of the UNCITRAL Arbitration Rules)
20. Subject to paragraph 19, the Arbitral Tribunal shall make any award or other decision by a majority of its members.
21. All awards and decision shall be deemed to be made at the place of arbitration, regardless of place of signature.
- c) **Time Limits**
22. The Arbitral Tribunal shall, in consultation with the disputing parties, fix the time limits in respect of all documents to be filed. In case of urgency, the presiding arbitrator may fix a time limit or amend an existing limit.

G) **PROCEDURAL ISSUES**

- a) **Service of Documents and Copies of Instruments**
(Article 15 (3) of the UNCITRAL Arbitration Rules)
23. The Arbitral Tribunal and the disputing parties shall send all correspondence and submissions, including pleadings and memorials (with exhibits or attachments), by email simultaneously to opposing counsel, to the Members of the Arbitral Tribunal, to the PCA and to the Administrative Assistant, on the date the submission in question is due to the following email addresses:
- Charles M. Gastle
Bennett Gastle
cgastle@bennettgastle.com
 - Murdoch Martyn
murdochmartyn@hotmail.com
 - Meg Kinnear
meg.kinnear@international.gc.ca
 - Tracey Walmsley
tracey.walmsley@international.gc.ca
 - Juan Fernández-Armesto
jfa@jfarmesto.com
 - Deva Villanúa Gómez
dvg@jfarmesto.com
 - Jean-Gabriel Castel, O.C. ,Q.C.
jgcastel@sympatico.ca
 - John Christopher Thomas, Q.C.
jcthomas@thomas.ca

- Maurizio Brunetti
mbrunetti@pca-cpa.org

24. The disputing parties agree to send hard copies of documents that are 25 pages or longer by overnight delivery service to the address noted above to Charles Gastle for the Claimant (two copies), Meg Kinnear for the Respondent (two copies), to the PCA, each member of the Arbitral Tribunal and to the Administrative Assistant (one copy each). Each disputing party shall also provide digital copies of the submissions including witness statements, expert reports, documentary exhibits and legal authorities.

b) Apportionment of Costs and Advance Payments
(Articles 38 and 40 of the UNCITRAL Arbitration Rules)

25. Without prejudice to the final decision of the Arbitral Tribunal regarding costs, the Claimant and the Respondent agree to share equally advance payments for the Arbitral Tribunal. Upon the issuance of an award, the Arbitral Tribunal may apportion the costs of the arbitration between the disputing parties if it determines apportionment is reasonable under the circumstances of the award.

26. The disputing parties have made an initial advance payment of \$50,000.00 each to the Secretariat of the PCA.

27. The PCA will review the adequacy of the deposit from time to time and, at the request of the Arbitral Tribunal, may invite the disputing parties to make supplementary deposits in accordance with Article 41(2) of the UNCITRAL Arbitration Rules.

28. Upon request, the PCA shall provide a detailed statement of account with respect to the deposit.

29. The unused balance held on deposit at the end of the arbitration shall be returned to the disputing parties as directed by the Arbitral Tribunal.

c) Organization of Hearings
(Article 25(3) of the UNCITRAL Arbitration Rules)

30. After consultation with parties, the Arbitral Tribunal shall issue, for each hearing, a Procedural Order convening the meeting, establishing its place, time, agenda and all other technical and ancillary aspects.

31. Hearings shall be held in camera and shall be transcribed.

32. The technical characteristics of the transcription will be determined by the Arbitral Tribunal in the Procedural Order organising the hearing, after consultation with the parties. This Procedural Order will also determine the publicity or confidentiality of transcripts.

33. The Arbitral Tribunal shall establish, as necessary, procedures and schedules for the correction of transcripts. If the disputing parties disagree as to the corrections of transcripts, the Arbitral Tribunal shall determine which corrections are to be adopted.

d) **Written and Oral Procedures – Pleadings: Number, Sequence, Time Limits**
(Articles 18-23 of the UNCITRAL Arbitration Rules)

34. The schedule of proceedings agreed by the parties shall be as follows:

Date	Action
January 14, 2008	Organizational conference call with the Arbitral Tribunal.
February 29, 2008	Disputing parties file written submissions on procedural issues.
March 7, 2008	Procedural Hearing in Toronto, Canada.
June 23, 2008	Gallo – Statement of Claim with key documents in the possession of the Claimant.
September 15, 2008	Canada – Statement of Defence with key documents in the possession of the Respondent.
October 15, 2008	Requests to Produce Documents.
December 1, 2008	Production of Documents & Objections to Production, if any.
January 12, 2009	Replies to Objections to Production, if any.
February 6, 2009	Order on Production of Documents, if necessary.
February 27, 2009	Production of Remaining Documents, if any.
March 3, 2009	Exchange of privilege logs
March 6, 2009	Observations as to the other's claims which it contests
March 17, 2009	Reply to such observations
March 20, 2009	Short Rebuttal
July 29, 2009	Gallo – Memorial with Witness Statement(s) and Expert Report(s).
November 30, 2009	Canada – Counter-Memorial with Witness Statement(s) and Expert Report(s).
December 16, 2009	Applications for Leave to File a Non-disputing party Submission.
December 30, 2009	Claimant and Respondent Submissions, if any, on Non-disputing party Submissions.
March 15, 2010	Gallo – Reply with Reply to Witness Statement(s) & Expert Reply Report(s).
June 10, 2010	Canada – Rejoinder with Reply to Witness Statement(s) & Expert Reply Report(s).
July 9, 2010	NAFTA Article 1128 Submissions.
TBD	Replies to Article 1128 Submissions by Claimant and/or Respondent, if needed.
TBD	Oral Hearing.

35. Key documents in the possession of the parties shall be produced together with the Statement of Claim and the Statement of Defence, respectively. Such production is without prejudice to either disputing party producing relevant and material documents not later than together with the Memorial or Counter-Memorial. Neither disputing party will object to production of a document solely on the basis that it was not annexed to the Statement of Claim or of Defence.

- e) **Amendments to Claims**
(Article 20 UNCITRAL Arbitration Rules)
36. Any amendments to claims shall be governed by the NAFTA and Article 20 of the UNCITRAL Arbitration Rules.
- f) **Non-Disputing Party Participation**
37. Applications for leave to file *amicus curiae* briefs must be presented by third parties no later than December 16, 2009, in accordance with the procedure set forth in recommendations of the North American Free Trade Commission on non-disputing party participation, issued on October 7, 2003. The Arbitral Tribunal will decide on any application, taking into consideration the recommendations of such Commission.
38. *Amici curiae* have no standing in the arbitration, will have no special access to documents filed in the pleading, different from any other member of the public, and their briefs must be limited to allegations, without introducing new evidence.
- g) **Article 1128 - NAFTA Party Participation**
39. Delivery of NAFTA Article 1128 submissions by the other NAFTA Parties, should be presented not later than July 9, 2010.
- h) **Conservation of the record**
40. After termination of this procedure, the Government of Canada and the Government of Ontario may each retain a complete copy of the record, including confidential information. All other confidential information relating to this procedure must be returned to the respective party or otherwise destroyed, following the conclusion of any set aside proceedings or after the time to request a set aside proceedings under Article 1136 NAFTA has expired.

H) **ISSUES REGARDING EVIDENCE**

- a) **Guidelines**
(Articles 24-25 of the UNCITRAL Arbitration Rules)
41. The disputing parties agree that provisions of the *International Bar Association's Rules on the Taking of Evidence* ("IBA Rules") shall be followed as guidelines on:
- the exchange of documents (Article 3 of the IBA Rules, excepting Article 3.12, concerning confidentiality, which shall be governed by the Confidentiality Order);
 - the presentation of evidence by fact and expert witnesses (Articles 4 and 5 of the IBA Rules);
 - on site inspection (Article 7 of the IBA Rules);
 - the conduct of the evidentiary hearing (Article 8 of the IBA Rules); and
 - the admissibility and assessment of evidence (Article 9 of the IBA Rules).

b) Document production

42. The disputing parties may request documents from each other. Any request shall identify a specific document or a narrow and specific category of documents and establish the relevance of each document or category of documents. The parties may refer any dispute to the Arbitral Tribunal. These requests, which may be made only after the disputing parties have exchanged their Statements of Claim and Defence (as provided in para. 35), shall be presented in the form of a table (“Redfern Schedule”) comprising four columns:
- first column: identification of the document(s) or the category or categories of document(s) that have been requested;
 - second column: short presentation of the reasons of each request;
 - third column: a summary of the objections by the other disputing party to the production of the requested document(s);
 - fourth column: left blank for the decision of the Arbitral Tribunal.
43. The third column shall be completed at the time of the filing of the objections to production (December 1, 2008). The second column may be supplemented at the time of the responses to objections (January 12, 2009).
44. The Arbitral Tribunal may then, in its discretion, order one disputing party to communicate to the other documents or limited categories of documents. In the exercise of its discretion, the Arbitral Tribunal will have regard to the specificity of the request, the relevance of the requested documents, the fact that they are in the possession, power or control of the disputing party from whom they are requested, the legitimate interests of the opposing disputing party, including any applicable privileges, and all surrounding circumstances.
45. Documents so communicated shall not be considered on record unless and until the requesting disputing party subsequently produces them.
46. In addition, the Arbitral Tribunal may of its own motion order a disputing party to produce documents at any time.
- c) Fact Witnesses**
47. Any person may present evidence as a witness, including a disputing party or its officials, officers, employees or other representatives.
48. For each witness, a sworn or affirmed witness statement shall be submitted to the Arbitral Tribunal in accordance with the schedule set out above, unless the disputing parties cannot obtain such a statement from a witness for a legitimate reason which such party shall explain to the Arbitral Tribunal. Each witness statement shall state the witness’s name, birth date, present address and involvement in, or relation to, the case.
49. Each party shall be responsible for calling its own witnesses to an oral hearing, except when the other disputing party has waived cross-examination of a witness or expert and the Arbitral Tribunal does not direct his or her appearance.

50. Each party shall advance the costs of appearance of its own witnesses. The Arbitral Tribunal will decide upon the appropriate allocation of such costs in its final award.
51. At the request of a disputing party or on its own initiative, the Arbitral Tribunal may call a witness to appear.
52. If a witness fails to appear when first called to an evidentiary hearing, the Arbitral Tribunal may call the witness to appear a second time if it is satisfied that there was a valid reason for the first failure to appear and that the testimony of the witness is relevant and material to the outcome of the case.
53. The Arbitral Tribunal may consider the witness statement of a witness who provides a valid reason for failing to appear, when called to an evidentiary hearing or whose cross examination has been waived, having regard to all the surrounding circumstances.
54. At oral hearings, the examination of each witness shall proceed as follows:
- (i) the party summoning the witness may briefly examine the witness;
 - (ii) the adverse party may then cross-examine the witness;
 - (iii) the party summoning the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination, with re-cross examination to be granted only with leave from the Arbitral Tribunal; and
 - (iv) the Arbitral Tribunal may examine the witness at any time, either before, during or after examination by one of the disputing parties.
55. A fact witness shall not be present in the hearing room during the hearing of oral testimony, discuss the testimony of any other witness who has already testified prior to giving his/her testimony, or read any transcript of any oral testimony, prior to his or her examination, except with the express permission of the Arbitral Tribunal upon request from a party. This condition does not apply to expert witnesses. For good cause, the Arbitral Tribunal may change this rule.
56. The Arbitral Tribunal shall, at all times, have complete control over the procedure for hearing a witness. The Arbitral Tribunal may in its discretion:
- refuse to hear a witness if it considers that the facts with respect to which the witness will testify are either proven by other evidence or are irrelevant;
 - limit or refuse the right of a disputing party to examine a witness when it appears that a question has been addressed by other evidence or is irrelevant; or
 - direct that a witness be recalled for further examination at any time.
57. It shall not be improper for counsel to meet witnesses and potential witnesses to establish the facts, prepare the witness statements, and prepare the examinations.
- d) Expert Witnesses**
58. Each party may retain and submit the evidence of one or more experts to the Arbitral Tribunal. The procedural rules set out above shall apply to the evidence of experts.

59. Subject to NAFTA Article 1133, the Arbitral Tribunal may, at the request of a disputing party, or unless the disputing parties disapprove, on its own initiative, appoint one or more experts to address one or more of the matters listed in that Article. The Arbitral Tribunal shall consult with the disputing parties on the selection, terms of reference (including expert fees) and conclusions of any such expert. The Arbitral Tribunal may, on its own initiative or at the request of any disputing party, take oral evidence of any such expert(s). The procedural rules set out above shall apply by analogy.

This Procedural Order was originally issued in the Place of Arbitration, on June 4, 2008 and reissued on March 10, 2009. Upon consultation with the parties and for good cause, the Arbitral Tribunal may at any time amend this Procedural Order.

[signed]

Juan Fernández-Armesto

[signed]

Jean-Gabriel Castel, O.C., Q.C.

[signed]

John Christopher Thomas, Q.C.

