

**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. 5

19 January 2011

ARBITRAL TRIBUNAL

**Professor Juan Fernández-Armesto (President)
Professor Jean-Gabriel Castel, OC, Q.C.
Dr. Laurent Lévy**

CONSIDERING

1. That communication A 30 provided for the opening of a new separate procedural stage, which would only deal with the jurisdictional objections, including the Claimant's legal standing, and with the additional information requests posed by the Tribunal [the "Separate Procedure"].
2. That communication A 30 also provided that a hearing would be held in which the relevant witnesses (including experts) would be examined.
3. That Procedural Order no. 1¹ stipulated that the Tribunal was to issue specific Procedural Orders organising hearings² and regulated the presentation and examination of facts and expert witnesses³.
4. That a conference call was held on 17 January 2011 in order to identify those procedural issues on which the parties agreed as well as those on which the Tribunal had to decide.

PROCEDURAL ORDER NO. 5

Date, venue and time

1. The hearing will be held on 31 January through 4 February 2011 at JPR Meeting Rooms, 390 Bay Street – 3rd Floor, Toronto.
2. The hearing will take place from 9 a.m. through 6 p.m., with two coffee and one lunch breaks.

Attendance list

3. By 26 January 2011 the parties shall exchange a list of persons attending the hearing, with a confirmation that each of those persons has signed the Confidentiality Order.

Hearing bundle

4. Each party shall prepare its own comprehensive document brief for all of the witnesses it intends to examine, which can be supplemented at the hearing if necessary, so long as the supplementing documents are already in the record.
5. Each party may prepare individual document briefs for any witness it intends to examine.

¹ As amended on 10 March 2009.

² Section G). c).

³ Section H). c) and d).

6. The Tribunal would appreciate receiving three copies of each document which is shown to witnesses and experts.
7. Demonstrative exhibits shall be allowed, provided they are communicated by Thursday, 27 January 2011 to the other party and do not include any new evidence, not already in the record.

Opening remarks

8. The hearing will commence with a one hour opening statement from each party.
9. The opening statements should refer to the issues discussed in this Separate Procedure.

Witnesses and experts examination

10. Witnesses and experts will be divided in blocks: (i) Third party witnesses⁴ with agenda difficulties; (ii) Mr. Gallo and Mr. Swanick; (iii) experts on document examination; (iv) fact witnesses and (v) other experts. The sequence of blocks indicates, to the extent possible, the order of examination.

(i) Third party witnesses with agenda difficulties

- Mr. Jeff Belardi (proposed by the Claimant)
- Mr. Philip Noto (proposed by the Claimant)
- Mr. Michael Wolf (proposed by the Claimant)
- Mr. Robert Bain⁵ (proposed by the Respondent)

These witnesses will be heard at any moment they become available.

(ii) Mr. Gallo and Mr. Swanick

Except if “third party witnesses with agenda difficulties” become available, Mr. Vito Gallo will be the first witness to be examined, followed by Mr. Brent Swanick.

Mr. Swanick is subject to special rules regarding his sequestration. As an exception to the general rule that witnesses are allowed to attend the hearing after their examination (see para. 17 *infra*), Mr. Swanick is excluded from attending the examination of experts on document examination (block (iii)).

(iii) Experts on document examination

- Mr. Brian Lindblom (proposed by the Respondent)

⁴ The expression “third party witness” is used for convenience and does not intend to express any view on the possible relationship of any such witness with any of the parties.

⁵ The Claimant indicated the possibility of also submitting a witness statement from Mr. Bain. Mr. Bain’s presence at the hearing would, in such case, not be necessary.

- Mr. Marc Gaudreau (proposed by the Respondent)
- Mr. Luc Brazeau (proposed by the Respondent)
- Mr. Valery Aginsky (proposed by the Claimant)

On this issue, Respondent's experts shall, in principle, be examined before Claimant's experts.

(iv) Fact witnesses

- Mr. Mario Cortellucci (proposed by the Claimant)
- Mr. Frank Peri (proposed by the Claimant)

(v) Other experts

- Mr. Bruce Welling (proposed by the Claimant)
- Mr. Perry Truster (proposed by the Respondent)
- Mr. Lorn Kutner (proposed by the Claimant)

11. The Claimant shall indicate by Saturday, 22 January 2011, 12 a.m., the order of appearance of fact witnesses within block (iv). The Respondent shall do the same with respect to the experts presented by it in block (iii). The Tribunal encourages the parties to reach an agreement by the same date on the order of appearance within block (v). This order of appearance should not be altered, except if authorised by the Tribunal for good cause.
12. The Claimant and the Respondent will be granted respectively 11 hours for witness and expert examination. Counsel to both parties will be entitled to conduct direct examination and cross-examination as felt appropriate under the control of the Tribunal. The time used by each party for each examination will be deducted from the 11 hours global time allocation.
13. Prior to his testimony:
 - (i) Each witness shall swear the following oath: "*I solemnly affirm, under penalty of perjury, that I shall speak the truth, the whole truth, and nothing but the truth*";
 - (ii) Each expert shall swear the following oath: "*I solemnly affirm, under penalty of perjury, that my statement will be in accordance with my sincere belief*".
14. Pursuant to Procedural Order no. 1⁶, the examination of witnesses 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-

⁶ Para. 54.

- 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.
15. The same shall apply to expert examination, save for the first examination by the party who summoned them, which may (reasonably) be more extensive than the brief examination of witnesses.
16. In accordance with Procedural Order no. 1⁷, fact witnesses are prevented from being present in the hearing room during the hearing of oral testimony, discussing the testimony of any other witness who has already testified prior to giving their testimony, or reading any transcript of any oral testimony, prior to their examination, except with the express permission of the Arbitral Tribunal upon request from a party or *sua sponte*. This condition does not apply to experts. For good cause, the Arbitral Tribunal may change this rule.
17. Fact witnesses may be present at the hearing after being examined. Experts, however, will be permitted to be present throughout the hearing, and shall not be sequestered prior to their testimony.
18. Witnesses may be recalled.
19. In addition to the facts and opinions contained in their respective reports, Respondent's experts shall be permitted to respond to the forensic report submitted by Dr. Aginsky. Further, to the extent that any witness testifies to facts or opinions not in his previous witness statement(s), experts shall be entitled to offer testimony in response.
20. Each party shall guarantee that the witnesses and experts presented by him or it in this procedure are available to appear in person before the Arbitral Tribunal.

Transcript

21. Real-time reporting will be available. Costs will be advanced and, possibly, split as agreed among the parties.
22. At the end of the hearing the parties and the Tribunal will agree on a time schedule for the correction of transcripts.
23. The Tribunal will decide whether transcripts will be published with the appropriate redactions, or otherwise will be kept confidential, once sufficiently briefed by the parties.

⁷ Para. 55.

Conclusions

24. By close of the hearing session of Wednesday, 2 February 2011, the Arbitral Tribunal and the parties will discuss whether conclusions shall be held orally and/or in writing, and the details of the post-hearing submissions, if any.

[signed]

Juan Fernández-Armesto

[signed]

Jean-Gabriel Castel, OC, Q.C.

[signed]

Laurent Lévy