

**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. 6

30 August 2011

ARBITRAL TRIBUNAL

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

CONSIDERING

1. That Procedural Order no. 1 stated at para. 32 that the Procedural Order organising the hearing shall determine the publicity or confidentiality of transcripts.
2. That in a conference call held with the parties on 17 January 2011 the parties and the Arbitral Tribunal agreed that on 18 February 2011 the Respondent would provide the Arbitral Tribunal with information regarding precedents of UNCITRAL cases against Canada in which the hearing transcripts were made public; and that on 3 March 2011 the Claimant would file a reply.
3. That Procedural Order no. 5, issued on 19 January 2001, organising the hearing, included the above agreements.
4. That a jurisdictional hearing was held on 31 January through 4 February 2011. At the end of the hearing it was agreed that the submissions on the publicity or confidentiality of transcripts should be filed simultaneously on 29 April 2011¹.
5. That on 29 April 2011 the Claimant filed Gallo 78 and the Respondent Can 72. The Claimant complemented his submission with a brief communication, Gallo 79, dated 6 May 2011.

PROCEDURAL ORDER NO. 6

I. The Claimant's position

1. The Claimant argues that the parties agreed in Procedural Order no. 1 that the hearings be held *in camera*². In so agreeing the parties followed the principle enshrined in Art. 25.4 of the UNCITRAL Arbitration Rules, that hearings are not open to the public, unless the parties decided otherwise³.
2. The Claimant understands that this principle includes the transcripts of the hearing: i.e. unless the parties agreed to the contrary, transcripts are not to be made public. In support to this position, the Claimant cites the *Pope & Talbot* NAFTA Tribunal⁴.
3. Finally, the Claimant suggests that the publication of redacted pleadings, procedural orders and awards should be sufficient to satisfy any public interest in transparency⁵.

II. The Respondent's position

4. The Respondent has explained that its policy is to ensure the highest level of transparency in NAFTA Chapter 11 arbitration, including open hearings and

¹ Transcript of the Hearing, Day 5, p. 64.

² Para. 31.

³ Art. 25.4 of the UNCITRAL Arbitration Rules: "*Hearings shall be held in camera unless the parties agree otherwise ...*".

⁴ C 78, pp. 2 and 3.

⁵ C 78, p. 4.

public transcripts⁶, because investment arbitration implicates the public interest. The public has a fundamental interest in understanding the details of a challenge to the decisions of elected governments, how claims are defended and in some instances, their funds are awarded⁷.

5. The transparency of documents, including transcripts (if requested by the public), is consistent with Canadian law, including the federal *Access to Information Act* and the provincial *Freedom of Information and Protection of Privacy Act*⁸. The Respondent relies on this statutory obligation of disclosure to advocate for the transparency of the transcripts⁹. This was the argumentation followed by the Tribunal in the *Mondev v. United States* case¹⁰.
6. Additionally, the Respondent believes that Art. 25.4 of the UNCITRAL Arbitration Rules does not give the Claimant the right to unilaterally cloak the transcript of the hearing in secrecy. That article provides only that hearings shall be *in camera* unless the parties otherwise agree. It says nothing about the publicity of transcripts. And the disputing parties in NAFTA Chapter 11 arbitrations have consistently recognised the distinction between *in camera* hearings and secret transcripts¹¹.
7. Finally, the Respondent understands that permitting one party to publicly release witness testimony (the Claimant has produced public versions of the witness statements he submitted with his Memorial), while at the same time keeping the cross-examination of this testimony secret, creates an inequality that this Tribunal must guard against.

III. The Arbitral Tribunal's decision

8. Art. 25.4 of the UNCITRAL Rules provides as follows:

“Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined”.

9. The Claimant submits that this provision of the Rules offers parties the possibility to agree that arbitration hearings be held in public, but absent such agreement – as has happened in the present procedure – hearings must be held *in camera* and this choice also affects the transcripts.
10. The Tribunal agrees with the Claimant.
11. When Art. 25.4 of the UNCITRAL Rules offers the parties the option to hold hearings *in camera* or open to the public, such rule implies that the parties have

⁶ Can 72, p. 3.

⁷ Can 72, p. 4.

⁸ Can 72, p. 4.

⁹ Can 72, p. 4.

¹⁰ Can 72, p. 5.

¹¹ Can 72, p. 2.

the same choice with regard to the transcripts: parties may opt for transcripts to be kept confidential or to be made public. In the present case the parties decided to hold the hearings *in camera* and could not find an agreement regarding the nature of the transcripts. The Tribunal finds that, absent an express agreement to the contrary, there is a strong presumption that the choice for an *in camera* hearing also covers the content of the hearings, i.e. the transcripts. Otherwise, the *in camera* principle would be completely undermined: the public, excluded from the hearing, would nevertheless enjoy access (possibly even in real time) to a written transcript, in which every word said during the hearing would be faithfully recorded. The *in camera* hearing would cease to be *in camera*. The Tribunal's conclusion is consistent with standard international arbitration practice: "*In international arbitration, most hearings are confidential. ... This means not only that the hearings themselves are confidential, but that also the transcripts of the hearings should be treated as confidential as well*"¹².

12. The Respondent has referred to a significant number of Chapter 11 NAFTA arbitrations in which the hearings were not open to the public, whilst the transcripts were disclosed. To the Respondent, this evidences that hearings and transcripts are subject to different rules.
13. The Tribunal, however, does not think that the case law produced by the Respondent actually addresses the issue discussed in this Procedural Order¹³. The Respondent has not produced any decision in which a tribunal ordered transcripts to be made public without both parties' consent. In most of the cases produced, it was the parties who agreed to make the transcript public¹⁴. In those cases in which it was the Tribunal who ordered the publicity of transcripts, the decisions do not record that the parties had shown any objections to such publicity¹⁵ and the rest of the case law has no relevance to the present decision¹⁶.

Canadian law on publicity of transcripts

14. The Respondent has argued that according to the *Federal Access to Information Act* and the *Provincial Freedom of Information and Protection of Privacy Act* Canada and Ontario are required by law to release documents, including transcripts, if requested by the public.

¹² T. H. Webster: "*Handbook of UNCITRAL Arbitration*", Sweet & Maxwell, 2010, pp. 410 and 411.

¹³ *Chemtura Corporation v. Canada*; *Mondev v. United States*; *GAMI v. Mexico*; *Thunderbird v. Mexico*; *Fireman's Fund v. Mexico*; *UPS v. Canada*; *Merrill & Ring Forestry v. Canada*; *Bilcon of Delaware et al. v. Canada*; *Mobil Investments Canada Inc et al, v. Canada*; *Apotex v. United States*; *Grand River Enterprises et al. v. United States*; *Canfor Corporation v. United States*; *Cattlemen v. United States* and *Methanex v. United States*.

¹⁴ *UPS v. Canada*; *Merrill & Ring Forestry v. Canada*; *Bilcon of Delaware et al. v. Canada*; *Grand River Enterprises et al. v. United States*; *Cattlemen v. United States*. In *Chemtura Corporation v. Canada* the Claimant has explained – and the Respondent has not denied – that the claimant has not objected to the publicity of transcripts.

¹⁵ *Thunderbird v. Mexico*; *Mobil Investments Canada Inc et al, v. Canada*, *Apotex v. United States*;

¹⁶ In *Mondev v. United States* the Tribunal ordered the publicity of certain of the Respondent's written submissions, however there is no ruling on the publicity of transcripts. In *GAMI v. Mexico* *Fireman's Fund v. Mexico* hearings would be close to the public and there is no provision on the publicity of transcripts. In *Glamis Gold Ltd. v. United States* the hearings were not held *in camera* and there is no explicit provision that the transcripts are made available to the public. In the *Canfor Corporation v. United States* and *Methanex v. United States* cases the hearing was open to the public.

15. The present arbitration procedure is governed by the UNCITRAL Rules, and it is the UNCITRAL Rules which the Tribunal must apply. And under the UNCITRAL Rules, hearings are held *in camera*, and the Tribunal has already found that confidentiality also covers the transcripts of such *in camera* hearings. The issue whether the public has, under relevant Federal or Provincial law, a right to request the release of the transcript is purely hypothetical, because no such request has been filed. Only if and when such request is formulated, will the Tribunal be able to adopt the appropriate decision, weighing the specific circumstances of the case.

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16. In view of the above, the Arbitral Tribunal decides that the *in camera* nature of the jurisdictional hearing implies that transcripts should not be released to the public.

[signed]

Juan Fernández-Armesto

[signed]

Jean-Gabriel Castel, OC, Q.C.

[signed]

Laurent Lévy