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IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT

and

THE UNCITRAL ARBITRATION RULES

between

VITO G. GALLO

(Claimant)

and

THE GOVERNMENT OF CANADA

(Respondent)

AWARD

ARBITRAL TRIBUNAL

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

Secretary to the Tribunal:
Mrs. Deva Villanúa Gómez

Registry:
Permanent Court of Arbitration
(Mr. Martin Doe)

TABLE OF CONTENTS

I. THE PARTIES 4

II. THE TRIBUNAL 5

III. PROCEDURAL HISTORY 6

IV. INTRODUCTION 18

V. POSITION OF THE PARTIES 19

1. The Claimant's case 19

2. The Respondent's case 22

VI. FACTS 25

1. *Dramatis Res et Personae* 25

2. The purchase of the Adams Mine 26

3. Incorporation of the Enterprise 30

4. The Limited Partnership and related Agreements 41

5. Management of the Enterprise and of the Adams Mine 43

6. Tax returns of Mr. Gallo and of the Enterprise 45

7. Mr. Gallo's activities in the US 46

8. Efforts to resell the Adams Mine: the REDACTED Agreement 47

9. Enactment of the AMLA 50

VII. ASSESSMENT OF EVIDENCE 53

1. Introduction: The burden of proof 53

2. Weighing of Evidence regarding the Factual Record 53

VIII. LEGAL ANALYSIS **62**

1. Introduction **62**

2. Lack of Jurisdiction *Ratione Temporis* **63**

IX. CONCLUSION **66**

X. COSTS **69**

1. The Costs of Arbitration **70**

2. The Costs of Legal Representation and Assistance **71**

XI. DECISION **72**

I. THE PARTIES

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III. PROCEDURAL HISTORY

1. On October 12, 2006, the Claimant submitted a Notice of Intent to submit a claim to arbitration by Mr. Vito G. Gallo on behalf of 1532382 Ontario Inc.

2. On March, 30, 2007, the Claimant submitted a Notice of Arbitration to the Respondent under the UNCITRAL Arbitration Rules of December 15, 1976 ["UNCITRAL Arbitration Rules"], wherein the Claimant appointed Prof. Jean-Gabriel Castel as first arbitrator.

3. On June 4, 2007 the Respondent appointed Mr. J. Christopher Thomas as second arbitrator.

4. By letter dated December 13, 2007, Prof. Juan Fernández Armesto informed the Parties and the co-arbitrators of his appointment by the International Centre for Settlement of Investment Disputes ["ICSID"] as the Presiding Arbitrator in the present case.

5. On January 14, 2008, a conference call was held between the Parties and the Arbitral Tribunal, in which it was agreed that a Preliminary Session would be held on March 7, 2008, in Toronto, starting at 9.00 a.m.

6. By e-mail sent on January 15, 2008, the Arbitral Tribunal provided the Parties with a draft Procedural Order no. 1 and a draft Confidentiality Order, on which the parties could comment.

7. By letter dated February 29, 2008 (Gal 4[1]), the Claimant submitted to the Arbitral Tribunal its Submissions on Procedural Matters, as did the Respondent on the same date.

8. By letter dated March 4, 2008 (A 3[2]), the Arbitral Tribunal acknowledged receipt of the joint communications from the parties where they submitted (1) draft versions of Procedural Order no. 1 and Confidentiality Order and agenda on the procedural issues where agreement could not be reached and (2) agreement on the venue of the Preliminary Session and on the equal allocation of costs associated with such session.

9. On March 7, 2008 the Arbitral Tribunal held a Preliminary Session with the parties, in which the draft versions of Procedural Order no. 1 and Confidentiality Order, as well as other procedural issues were discussed.

10. On March 10, 2008 (A 4), the President of the Arbitral Tribunal designated Mrs. Deva Villanúa as Administrative Assistant of the Arbitral Tribunal. On the same

[1] Communications from the Claimant will be numbered sequentially "Gal" followed by a number.
[2] Communications from the Tribunal will be numbered sequentially "A" followed by a number.

day, the President informed the PCA that the Parties had designated the PCA to act as Administrative Secretary to the arbitration, and further established the procedure to be followed should the PCA accept the designation.

11. By e-mail sent on March 12, 2008, the PCA accepted to serve as Administrative Secretary in this arbitration. The PCA further provided the terms under which it would so serve.

12. By letter dated March 14, 2009 (Can 5[3]), the Respondent accepted the PCA acting as Administrative Secretary as well as the conditions for such. And so did the Claimant by letter dated March 18, 2008 (Gal 6).

13. By letter dated May 14, 2008 (Can 8), the Respondent provided comments in response to the Claimant's letter Gal 9.

14. By letter dated June 4, 2008 (A 9), the Arbitral Tribunal informed the Parties that, given the choices available and absent agreement of the Parties, the Arbitral Tribunal decided that Vancouver B.C. would be the most appropriate place of arbitration. The Arbitral Tribunal further stated that the draft Procedural Order no. 1, ruling on the basic characteristics of the proceedings and incorporating the Provisional Calendar, as amended by the Parties and the draft Confidentiality Order were unanimously approved by the Arbitral Tribunal.

15. By letter dated June 23, 2008 (Gal 11), the Claimant submitted its Statement of Claim. The Claimant stated that the Statement of Claim contained confidential information and should not be publicly disclosed. On July 15, 2008 (Gal 12) the Claimant provided a redacted version.

16. By letter dated September 15, 2008 (Can 9), the Respondent submitted its Statement of Defence. Four days later, the Respondent submitted the public version.

17. By letters dated October 15, 2008 the parties submitted their respective Request for Documents.

18. By letter dated December 1, 2008 (Gal 14), the Claimant submitted its Redfern schedule with objections included. And on the same day (Can 12), the Respondent submitted a response to the Claimant's Documentary Request.

19. By letter dated December 19, 2008 (Can 13), the Respondent provided the Claimant with some of the requested documents.

20. By e-mail sent on January 12, 2009 (Can 14), the Respondent provided comments concerning the Claimant's Response to Canada's Request for Documents and its production of documents. On the same day (Gal 15), the Claimant provided a

[3] Communications from the Respondent will be numbered sequentially "Can" followed by a number.

response to the Respondent's objections to the Documentary Request of the Claimant.

21. On January 26, 2009 the parties made additional comments on the reply to the objections filed by the counterparty.

22. By letter dated January 30, 2009 (Can 17), the Respondent provided some of the requested documents.

23. On February 5, 2009, the PCA, on behalf of the Arbitral Tribunal, circulated an unsigned version of Procedural Order no. 2 on document production.

24. By letter dated February 26, 2009 (Gal 19), the Claimant provided the Respondent with the Claimant's set of productions, Volumes 15 – 19.

25. By letter dated February 27, 2009 (Can 19), the Respondent provided comments with regard to its production of documents.

26. By letter dated March 3, 2009 (Can 20/Gal 20) the Claimant and the Respondent sent a joint communication informing the Arbitral Tribunal of certain agreements concluded between them with regard to the privilege log and the documents to be provided in response to certain documents request.

27. By letter dated March 3, 2009 (Can 21), the Respondent provided the Arbitral Tribunal with Canada's privilege log and it further enclosed a copy of joint correspondence from the Claimant and the Respondent concerning the form of the privilege log, the organization of the productions and the production of documents from third parties.

28. By e-mail sent on March 3, 2009 (Gal 21), the Claimant provided comments with regard to its documentary production. The Claimant enclosed documents which had been requested and provided further comments with regard to certain document requests. The Claimant also enclosed its privilege log.

29. By letter dated March 6, 2009 (Can 22), the Respondent provided its observations on the privilege log filed by the Claimant on March 3, 2009.

30. By letter dated March 6, 2009 (Gal 22), the Claimant provided submissions on the inadequacy of the privilege log received from the Respondent with Can 21.

31. By letter dated March 10, 2009 (Gal 23), the Claimant submitted comments on Can 22.

32. By letter dated March 17, 2009 (Can 24), the Respondent provided a reply to Gal 22.

33. By letter dated March 20, 2009 (Can 25), the Respondent provided comments in rebuttal to Gal 23.

34. By letters dated March 21 and 22, 2009 (Gal 25 and 26), the Claimant provided its rebuttal to Can 24 and 25.

35. By letter dated March 24, 2009 (Can 26), the Respondent provided comments on the Claimant's correspondence Gal 25 and Gal 26.

36. By letter dated March 27, 2009 (Can 27), the Respondent informed the Arbitral Tribunal of the existence of additional documents that could be produced.

37. By letter dated April 8, 2009, the Arbitral Tribunal issued Procedural Order no. 3, deciding on the Claims of privilege which remained contested.

38. By letter dated April 29, 2009 (Can 30), the Respondent stated that it had forwarded further documents.

39. By letter dated May 27, 2009 (Can 32), the Respondent requested the Arbitral Tribunal's assistance in respect of two document production matters.

40. By letters dated May 27 and 29, 2009 (Gal 28 and 29), the Claimant requested a decision and order from the Arbitral Tribunal concerning the production of evidence and with regard to the dispute over the Respondent's production obligations.

41. By letters dated June 1, 2009 (Can 33 and 34, Gal 30), the parties provided comments.

42. By letter dated June 3, 2009, the PCA forwarded to the Parties a letter from Mr. J. C. Thomas Q. C. dated June 3, 2009 wherein Mr. Thomas disclosed certain changes in his professional situation.

43. By letter dated June 5, 2009 (Can 35), the Respondent provided a reply to the Claimant's motion concerning the production of the Cabinet submissions.

44. By letter dated June 7, 2009 (Gal 33), the Claimant provided comments on the Respondent's letter dated June 5, 2009.

45. By letters dated June 17, 2009 (Can 37 and 38), the Respondent provided a response to the Claimant's request that the Arbitral Tribunal order Canada to produce additional solicitor-privileged legal advice and argued that the Arbitral Tribunal should reject this request because the Claimant was not entitled to this solicitor-client privileged information under Procedural Order no. 3 and to the Claimant's letter Gal 32.

46. By letter dated June 17, 2009 (Gal 35), the Claimant provided a response to the Respondent's submissions in letter Can 36 regarding the issue of waiver of privilege. Two days later (Gal 36), the Claimant provided supporting documents to letters Gal 28, 29, and 35.

47. By letter dated June 24, 2009 (Can 39), the Respondent provided a response to the Claimant's correspondence Gal 35, concerning the inadvertent disclosure of solicitor-client privileged information.

48. By letter dated June 24, 2009 (Gal 37), the Claimant provided a reply to the Respondent's submission in its letter Can 37 dated June 17, 2009.

49. By e-mail sent June 25, 2009, the Claimant provided comments on the Respondent's letter Can 39 which it described as a surrebuttal to the Claimant's reply on the waiver of privilege motion provided in its letter Gal 35.

50. By e-mail sent on June 25, 2009, the President of the Arbitral Tribunal stated that for the time being the Tribunal was abstaining from reading Can 39 and asked the Respondent to briefly explain to the Arbitral Tribunal the content of Can 39 and to present a brief comment on the Claimant's e-mail.

51. By e-mail sent on June 25, 2009, the Respondent provided explanation of the content of its letter Can 39, alleging that such additional submission on the issues of inadvertent production was necessary due to the fact that the Claimant's rebuttal raised new arguments.

52. By e-mail sent on June 25, 2009, the Claimant provided a response to the Respondent's e-mail, alleging that its letter Gal 36 did not raise or contain new arguments, but rather responded to the Respondent's arguments raised in Can 35, Can 38, and Can 39.

53. By letters dated July 7, 2009 (Gal 38, 39 and 40), the Claimant requested that Mr. J. C. Thomas withdraw from his position as arbitrator in the present proceedings due to circumstances giving rise to justifiable doubts as to his impartiality and independence, informed Ms. Meg Kinnear, Secretary-General of ICSID about its challenge to Mr. Thomas and requested the Secretary General of the PCA exercise his authority under Art. 12(1)(c) of the UNCITRAL Arbitration Rules to designate a new appointing authority.

54. By letter dated July 8, 2009, Mr. Nassib G. Ziadé, Deputy Secretary-General of the ICSID, acknowledged receipt of the Claimant's letter Gal 39 and informed the parties that Ms. Kinnear was unable to perform as Secretary-General due to her prior involvement with the Government of Canada.

55. The parties provided comments (Gal 41 and Can 40) on the challenge of Mr. Thomas and on the authority to decide on such challenge.

56. By letter dated July 16, 2009, Mr. Ziadé advised that, pursuant to Art. 10(3) of the ICSID Convention, he would continue to act as appointing authority.

57. By letter dated July 27, 2009 (Gal 45), the Claimant provided the Arbitral Tribunal with its submissions on the challenge to Mr. Thomas.

58. By letter dated August 10, 2009, the Respondent submitted comments in Reply to the Challenge to Mr. Thomas.

59. By letter dated August 17, 2009, Mr. Thomas submitted a response to the Parties' submissions on the challenge.

60. By letters dated August 28, 2009, the parties provided comments on Mr. Thomas' letter dated August 17, 2009.

61. By letter dated October 14, 2009, Mr. Ziadé issued his decision on the challenge to Mr. Thomas. Mr. Ziadé rejected the Claimant's challenge but decided that Mr. Thomas was to inform him within seven days of his choice between continuing to advise Mexico and serving as an arbitrator in this case. Mr. Ziadé also decided that each party would bear its own costs for the challenge proceedings.

62. By letter dated October 21, 2009, Mr. Thomas informed Mr. Ziadé, the remaining members of the Arbitral Tribunal, and counsel of his resignation as arbitrator.

63. By letter dated October 22, 2009 (Can 43), the Respondent noted Mr. Thomas' resignation and proposed that, according to the UNCITRAL Arbitration Rules, it should be given a period of thirty days to appoint a replacement arbitrator.

64. By letter dated November 19, 2009 (Can 44) the Respondent appointed Dr. Laurent Lévy to replace Mr. Thomas as an arbitrator in these proceedings. The Respondent also attached a cover letter and curriculum vitae from Dr. Lévy.

65. By letter dated December 21, 2009 (A 20), the Arbitral Tribunal issued Procedural Order no. 4 on three specific document requests.

66. By letter dated January 15, 2010 (A 22), the Arbitral Tribunal issued a Protective Order with regard to the Draft Cabinet Decision and the Final Cabinet Decision.

67. By letter dated March 1, 2010 (Gal 50), the Claimant submitted the Claimant's Memorial (confidential version) and its two schedules. On the following day the Claimant submitted the two schedules to the Claimant's Memorial, Schedule A – Cabinet Decision Document and Schedule B – Adams Mine Lake Act.

68. By letter dated March 29, 2010 (Can 49), the Respondent requested the Arbitral Tribunal's assistance in reviewing the original tax records of 1532382 Ontario Inc. (the "Enterprise") for the taxation years 2002 to 2007 due to alleged

inconsistencies and contradictions. The Respondent requested, due to the Claimant's refusal to cooperate with it in reviewing the original records, that the Arbitral Tribunal require the Enterprise to consent to the Respondent's review of the original tax records pursuant to the *Canadian Income Tax Act.*

69. By letter dated April 5, 2010 (Gal 52), the Claimant provided a response to the Respondent's submissions in letter Can 49.

70. By e-mail sent on April 6, 2010, the Respondent requested that the Arbitral Tribunal grant the Respondent the opportunity to file a brief and prompt response concerning the Claimant's new proposal in correspondence Gal 52.

71. By letter dated April 23, 2010 (A 26), the Arbitral Tribunal issued a Decision on Production of Tax Records.

72. By letter dated April 28, 2010 (Can 51), further to the Arbitral Tribunal's communication A 26, which directed the Parties to submit a joint proposal for two specific types of letters which needed be sent, the Respondent provided the Arbitral Tribunal with the content of such letters that the Parties had agreed.

73. By letter dated June 18, 2010 (Can 52), the Respondent informed the Arbitral Tribunal that it had completed its review of the original tax records of 1532382 Ontario Inc. and submitted that the Claimant did not own the Enterprise prior to the introduction of the *Adams Mine Lake Act*. The Respondent requested that the Arbitral Tribunal grant it permission to file a response to the Claimant's reply following the filing of the Respondent's Counter-Memorial on June 29, 2010.

74. By letter dated June 23, 2010 (Gal 54), the Claimant provided a response to the Respondent's letter Can 52 dated June 18, 2009.

75. By letter dated June 29, 2010 (A 27), the Arbitral Tribunal issued its Decision on the Request for the Authentication of Documents.

76. By letter dated June 29, 2010 (Can 53), the Respondent submitted the Confidential Version of Canada's Counter-Memorial dated June 29, 2010. On the next day the Respondent provided the Arbitral Tribunal with the Confidential Version of one of Canada's expert reports.

77. By letter dated July 14, 2010 (Gal 55), the Claimant submitted a response to the Arbitral Tribunal's letter A 27 and submitted a Supplementary Affidavit of Brent Swanick and an Affidavit of Frank Peri.

78. By e-mail sent on July 15, 2010, the Respondent provided its comments in respect of the Claimant's correspondence Gal 55 and by letter dated July 30, 2010 (Can 56), the Respondent informed the Arbitral Tribunal that it maintained its request for the production of the Claimant's original US personal income tax returns and submitted an explanation for why it could not agree to the Claimant's proposals

for a limited forensic examination of the corporate minute book of 1532382 Ontario Inc.

79. By letter dated August 25, 2010 (Gal 56), the Claimant provided comments on the Respondent's letter Can 57.

80. By letter dated August 25, 2010 (Can 58), the Respondent provided a response to the Claimant's correspondence Gal 56.

81. By letter dated August, 26 2010 (Gal 57), the Claimant provided a response to the Respondent's letter Can 58.

82. By e-mail sent on August 26, 2010, the Respondent expressed its disagreement with the Claimant's submissions contained in its correspondence Gal 57 and offered to make a further submission on the matter if the Tribunal so wished.

83. By letter dated August 30, 2010 (A 30), the Arbitral Tribunal informed the Parties of its decision to bifurcate the proceedings so as to address the jurisdictional issues in a Separate Procedure and proposed a schedule for that Separate Procedure. The Tribunal set forth a list of questions to be addressed in this Separate Procedure and also invited the Parties to hold a conference call in order to discuss the procedural aspects of the Separate Procedure.

84. By letter dated September 8, 2010 (Can 60), the Respondent provided comments on the Claimant's most recent proposal on (1) the forensic examination of the corporate minute book of 1532382 Ontario Inc., and (2) the procedure for the production of the original versions of the Claimant's US income tax returns from the Internal Revenue Service. The Respondent also informed the Tribunal that the Parties remained unable to reach an agreement on those issues.

85. By letter dated September 10, 2010 (Gal 59), the Claimant provided a response to the Respondent's letter Can 60.

86. By letter dated September 14, 2010 (Can 61), the Respondent provided a response to the Claimant's letter Gal 59.

87. By letter dated September 16, 2010 (Gal 60), the Claimant provided a response to the Respondent's letter Can 61.

88. By letter dated September 24, 2010 (Can 62), the Respondent stated that the Parties had reached an agreement to jointly retain Mr. Justice James Chadwick, a retired Ontario judge, as a third-party representative to receive the Claimant's US tax returns, and that the Parties also reached an agreement concerning the potential disclosure of third-party privileged information during the forensic examination.

89. By e-mail sent on October 30, 2010 (Gal 61), the Claimant made its Submission on the Issue of Ownership and noted that witness statements and additional documents would be posted on an FTP site as well.

90. By e-mail sent on October 28, 2010, the Claimant advised that all supporting documents had been submitted by FTP website and courier, with exception of the witness of Mr. Michael Wolf, who was unable to send his statement, but who would deliver his witness statement as soon as possible.

91. By letter dated November 5, 2010 (Can 64), further to its emails dated October 29, 2010, the Respondent provided comments concerning the yet-to-be submitted Witness Statement of Mr. Michael Wolf and, second, to the status of the forensic testing.

92. By e-mail sent on November 5, 2010 (Gal 63), the Claimant submitted the Witness Statement of Mr. Michael Wolf.

93. By e-mail sent on November 8, 2010 (Gal 64), the Claimant provided comments on the Respondent's request to conduct further forensic testing on the Enterprise's corporate minute book. The Claimant also consented to an extension to the deadline for the Respondent to respond to Mr. Wolf's statement.

94. By letter dated November 12, 2010 (A 32), the Arbitral Tribunal decided to accept Mr. Wolf's statement into evidence and to grant the Respondent an extension to file any comment on Mr. Wolf's witness statement until January 5, 2011. The Arbitral Tribunal also noted that the Respondent's submission on ownership of the investment must be filed on or before December 20, 2010 and that the rest of the Procedural Calendar set for in the Arbitral Tribunal's communication A 31 remained unaltered.

95. By e-mail sent on November 23, 2010, the Arbitral Tribunal took note of the Agreement reached by the Parties regarding the venue of the hearing at the JPR Arbitration Centre in Toronto and asked the Parties to take care of the logistics of the hearing.

96. By letter dated December 20, 2010 (Can 65), the Respondent provided the Arbitral Tribunal with the Confidential Version of Canada's Submission on Jurisdiction dated December 20, 2010, and the supporting materials and authorities, indicating that these materials had been placed on its FTP website. The Respondent submitted comments with regard to the forensic examination.

97. On January 17, 2011, a conference call took place between the Parties, the Arbitral Tribunal and the PCA in order to organise the hearing and to discuss last minute issues regarding the submission of additional expert reports and the examination of witnesses. Later the same day the Arbitral Tribunal advised of its decision to admit a rebuttal report from Mr. Kutner, provided that it does not

exceed three pages, is submitted by Friday, January 21, 2011, and is strictly limited to replying to the report prepared by Mr. Trusted.

98. By letter dated January 19, 2011 (A 36), the Arbitral Tribunal issued Procedural Order no. 5 with its decisions on the non-agreed issues discussed during the conference call held on January 17, 2011.

99. By letter dated January 20, 2011 (Gal 67), the Claimant submitted the affidavit of Ms. Anna Viggers and provided comments on the issue of the forensic reports and the witnesses.

100. By e-mail sent on January 21, 2011, the Respondent noted that it had received the Claimant's submission and witness statement and informed the Arbitral Tribunal of its objection to the Claimant's proposal to submit a new fact witness on the grounds that this was a late submission not contemplated by the procedural order governing the hearing. The Respondent also advised that it would be filing a formal objection by the next day, and further requested that the Arbitral Tribunal refrain from reviewing the new witness statement until it had an opportunity to review the Respondent's formal objection.

101. By e-mail sent on January 21, 2011 (Gal 68), the Claimant submitted the Deloitte Report dated January 1, 2011.

102. By letter dated January 21, 2011 (Can 68), the Respondent provided a response to the Claimant's submission of January 20, 2011, and requested that the Claimant's new evidence and witness introduced therein be excluded from the upcoming jurisdictional hearing. The Respondent requested that, in the alternative, the hearing be postponed at the Claimant's expense to accommodate his new witness and evidence.

103. By letter dated January 21, 2011 (Gal 69), the Claimant provided comments to the Respondent's letter Can 68 and argued that the Arbitral Tribunal should admit Ms. Viggers' witness statement.

104. By letter dated January 22, 2011 (Gal 70), the Claimant proposed a schedule with the order for the calling of his witness and on the same day he informed the Arbitral Tribunal that Mr. Bain had executed a second witness statement, which will filed as part of the Claimant's reply evidence submission on January 25, 2011 and that therefore, it would not be necessary for Mr. Bain to attend the hearing for examination on his first statement.

105. By letter dated January 25, 2011 (Gal 71), the Claimant submitted the expert report of Dr. Aginsky.

106. By letter dated January 26, 2011 (A 37), the Arbitral Tribunal informed the Parties of its decision to admit Ms. Viggers' affidavit and summoned her to the

hearing to be examined on those factual issues that the Claimant felt required additional evidence.

107. By e-mail sent on January 27, 2011, the Respondent requested that the Arbitral Tribunal summon Mr. Bain to testify following the examination of Mr. Belardi on January 31, 2011. The Respondent noted according to the Claimant's e-mail of January 22, 2011, that the Claimant had no objection to such examination. By e-mail sent on January 28, 2011 (A 38), the Arbitral Tribunal confirmed that Mr. Bain would be summoned on January 31, 2011, following the testimony of Mr. Belardi. The Arbitral Tribunal invited the Respondent to take the necessary steps to guarantee the presence of the witness.

108. From 31 January through 4 February 2011 a hearing was held in Toronto on the jurisdictional issues.

109. By letter dated February 11, 2011 (Can 70), the Respondent informed the Arbitral Tribunal that it did not believe that the submission of additional expert opinion evidence by Professor Welling was warranted and that it was its intention to fully address Professor Welling's assertions in its post-hearing submission by referring to relevant Canadian legal authorities. The Respondent further noted that the Claimant's request for the production of his original US income tax returns had been rejected by the US Internal Revenue Service and that the Claimant had indicated that he will resubmit this request to the US Internal Revenue Service as soon as possible.

110. By e-mails sent on April 8, 2011, the parties submitted their Post-Hearing Brief on Jurisdiction.

111. By letter dated April 21, 2011 (Gal 77), the Claimant requested that the Arbitral Tribunal give it the opportunity to reply to the Respondent's new evidence submitted in the form of Canadian jurisprudence and to permit Prof. Welling to address other new cases introduced by the Respondent in its Post Hearing Submission.

112. By letter dated April 28, 2011 (Can 71), the Respondent opposed to the Claimant's request to submit a supplemental witness statement from Prof. Welling responding to certain Canadian court cases referred to in Canada's Post Hearing Submission.

113. By letter dated April 29, 2011 (Can 72), the Respondent provided a response to the Claimant's request that the transcript of the hearing on jurisdiction not be published, maintaining that the Arbitral Tribunal should allow publication in light of the UNCITRAL Arbitration Rules and under the circumstances of the case, and public policy considerations.

114. By letter dated April 29, 2011 (Gal 78), the Claimant provided a response to the Respondent's letter Can 72 and its request to publish the transcripts of oral hearings in the matter.

115. By letter dated May 4, 2011 (A 38), the Arbitral Tribunal informed the Parties that it dismissed the Claimant's request with regard to the supplementary witness statement from Prof. Welling. The Arbitral Tribunal noted that if, during the course of this arbitration, the Arbitral Tribunal felt that further opinion on the available Canadian case law be needed, it would ask the Claimant to produce evidence and provide the Respondent with an opportunity to counter such evidence.

116. On August 30, 2011, the PCA, on behalf of the Arbitral Tribunal, circulated Procedural Order no. 6 on the publicity of the hearing transcripts.

117. By letter dated September 9, 2011 (Can 73/Gallo 80) the parties jointly informed the Arbitral Tribunal that the Forms 5471, which had been requested from the IRS in accordance with the Tribunal's communication A 31, could not be produced by the IRS, and that the parties looked forward to the release of the Award on September, 15.

118. The Arbitral Tribunal held deliberations in writing and through conference calls, in order to reach an agreement on the decisions taken in this Award.

IV. INTRODUCTION

119. In its decision A 30, the Arbitral Tribunal decided to bifurcate the proceedings and to open a Separate Procedure to address all jurisdictional objections raised by the Respondent, including the Claimant's legal standing. This Award adjudicates these jurisdictional objections, and concludes that the Claimant lacks legal standing, and the Tribunal lacks jurisdiction to decide the claims submitted by Mr. Vito G. Gallo.

120. The issue before the Tribunal can be described, in a nutshell, as follows:

121. On September 6, 2002 a Canadian company called 1532382 Ontario Inc. [the "Enterprise"] signed a purchase agreement for an abandoned mine in Ontario known as the "Adams Mine", which already had certain administrative approvals required for its use as a waste disposal site. Two years later, on April 5, 2004 the Ontario legislature passed the so called *Adams Mine Lake Act* ["AMLA"], prohibiting the disposal of waste at the Adams Mine, revoking the existing approvals and providing for limited compensation in favour of the Enterprise. The Claimant, Mr. Vito G. Gallo, an American citizen, avers that, at the time when the AMLA was promulgated, he owned and controlled the Enterprise, which suffered significant damages as a result of this legislation, which he estimates at Canadian Dollar ["C$"] 105 million. He seeks compensation for that damage, reasoning that by enacting the AMLA Canada violated NAFTA Arts. 1105[4] and 1110[5] and customary international law[6].

122. Canada denies that prior to the introduction of the AMLA Mr. Gallo was the owner of the Enterprise and an investor under the NAFTA, because there is no reliable contemporaneous evidence proving these allegations: the Claimant did not act as the owner of the Enterprise, took no interest in the risks and rewards of ownership, and it was in fact a wealthy Canadian real estate developer, Mr. Mario Cortellucci, rather than the Claimant, who organised, negotiated and assumed all the risks of purchasing the Adams Mine and was its real owner[7].

123. The Respondent's defence is, thus, essentially fact driven; the Tribunal's first task is to analyse the facts, and to weigh the extensive evidence submitted by both parties.

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[4] "Minimum Standard of Treatment".
[5] "Expropriation and Compensation".
[6] Claimant's Memorial ["CMem"], paras. 504 and 505.
[7] Respondent's Post-Hearing Submission ["RPHSub"], paras. 1 – 5.

V. POSITION OF THE PARTIES

1. THE CLAIMANT'S CASE

124. The Claimant submits that he is an American citizen who resides in Pennsylvania and that he has been the owner of the Enterprise since 2002.

Ownership of the Enterprise

125. The Shareholders Register of the Enterprise, contained in the corporation's Minute Book, confirms that Mr. Gallo is its sole shareholder. As Prof. Welling, the Claimant's legal expert explained, under Ontario law Mr. Gallo controls the Enterprise, being the only person authorised to appoint the directors or issue unanimous shareholders' resolutions. As an unassailable proposition of international law, the sole shareholder of a corporation also is the owner of such corporation[8]. This was the conclusion of the Tribunal in the *Yukos Trilogy* of Energy Charter Treaty ["ECT"] claims against the Russian Federation, which concerned treaty language identical to Art. 1117 of the NAFTA[9].

126. Prof. Welling also testified that the Enterprise's corporate record satisfies the statutory requirements and that the Courts of Ontario are the only courts vested with authority to determine the authenticity of corporate records[10]. Absent compelling documentary or forensic evidence to the contrary, an Ontario court would accept the Enterprise's share register as conclusive evidence of Mr. Gallo's status[11].

127. The Claimant alleges that he has clearly demonstrated that he exercises legal control over the Enterprise, as a matter of applicable law and that he has done so since the Enterprise was established in 2002. As found by the *Thunderbird*[12] Tribunal, proof of legal control under applicable law also presumptively satisfies the definition of "control" under Art. 1117 of the NAFTA[13].

128. Mr. Gallo's ownership and control of the Enterprise were established in 2002 – long before the Government of Ontario effectively took away the right to use the Adams Mine as a waste facility. But, subsidiarily, the Claimant alleges that Art. 1117 permits an investor of a NAFTA party to bring a claim on behalf of an investment enterprise that it owns or controls without any limitation as to when such ownership or control of the enterprise began. If there are *bona fide*

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[8] Claimant's Post Hearing Submission ["CPHSub"], para. 6.
[9] Claimant's Memorial on Jurisdiction ["CMemJ"], para. 138.
[10] Section 250 (1) Ontario Business Corporations Act.
[11] CPHSub, para. 7.
[12] *International Thunderbird Gaming Corporation v. The United Mexican States*, NAFTA arbitration under the UNCITRAL Arbitration Rules, paras. 105 and 106, Respondent's Book of Authorities ["BOA"] 82.
[13] CMemJ, para. 137.

commercial reasons for obtaining ownership or control of an enterprise that just so happened to be nursing a nascent NAFTA claim, there is nothing in Art. 1117 that would prevent a claim from being made on the enterprise's behalf – as long as ownership or control was transferred to a person who qualified as an "investor of a NAFTA Party"[14].

129. The Claimant adds that the agreements entered into by the Enterprise in order to finance and manage the Adams Mine do not have any bearing on Mr. Gallo's ownership or control. Directors have the authority to sign documents on behalf of the Enterprise, and consequently REDACTED REDACTED are consistent with the applicable law and cannot possibly affect the Tribunal's determination of whether Mr. Gallo owned or controlled the Enterprise within the meaning of Art. 1117 of the NAFTA[15]. Mr. Gallo did not lose control of the Enterprise, because he chose a financing model that included access to local funds. Prof. Welling also confirmed that REDACTED REDACTED REDACT was valid under Ontario law. The Claimant submits that a corporation like the Enterprise is allowed to enter into REDACTED REDACTED and/or to grant agents the authority to manage its business however it sees fit[16].

130. The Claimant adds that the REDAC Agreement (which provides for the sale of the Mine site) also fails to demonstrate that Mr. Gallo did not own or control the Enterprise. As Prof. Welling confirmed, it was within Mr. Cortellucci's authority, as a matter of common law, to take the initiative and enter into such agreement on behalf of the Enterprise. If REDACTE had actually been successful in locating a suitable purchaser, the REDAC Agreement did not dictate how the proceeds from the sale of the Adams Mine would be distributed, not without first obtaining the approval of Mr. Gallo[17]. A shareholder vote would be required before the ownership of the Adams Mine could be sold and the Enterprise would have been the sole beneficiary of any such sale[18].

Mr. Gallo's contribution

131. Claimant acknowledges that he has made no financial contribution to the project. But in his opinion, the origin of funds used to develop an investment is simply not relevant, as the Tribunal in *Siag & Vecchi* has confirmed[19]. And there is nothing improper or unusual in funding an entrepreneurial venture through a limited partnership arrangement, as Prof. Welling confirmed. The limited partnership

[14] CMemJ, para. 155.
[15] CPJM, para. 8. See also paras. 222 *et seq. infra* for details.
[16] CPJM, para. 12.
[17] CPJM, para. 15.
[18] CPJM, para. 17.
[19] *Siag & Vechi v. Egypt,* ICSID case no. ARB/05/15. Respondent's Brief of Authorities ["BrofA"] 23, CMemJ, para. 144.

structure provided the potential for an immediate tax deduction to the limited partners investing funds, thereby reducing the cost of capital. Mr. Gallo did not lose control of the Enterprise because he chose a financing model that included access to local funds[20]. For good reason, the NAFTA Parties put no limitations on how investment could be financed. Arbitrarily constraining the sources of capital required to qualify an investment as foreign would run directly contrary to the stated objectives of the NAFTA.

132. Mr. Gallo's primary contribution to the project was his ability to secure the support of interested and experienced investors and/or buyers from the US, once the site was made ready for construction[21].

Art. 1117 of the NAFTA

133. Mr. Gallo is bringing this procedure pursuant to Art. 1117 of the NAFTA on behalf of the Enterprise – not on his own behalf. This is why he is not making a claim under Art. 1116 of the NAFTA. The purpose of Art. 1117 of the NAFTA is to escape the customary international law paradigm adopted by the International Court of Justice in the *Barcelona Traction* decision, and to permit claims to be brought on behalf of investment enterprises incorporated under the laws of the host state[22]. When an Art. 1117 claim is pursued, the claimant is not allowed to collect the damages himself, and these must flow to the investment enterprise. What the enterprise chooses to do with the proceeds of a damages award is not relevant to these proceedings. The investment enterprise would be at liberty to dispose of the proceeds of the award as it sees fit[23].

134. Art. 1139 of the NAFTA defines an "investor of a Party" as a national of a NAFTA Party who "seeks to make, is making or has made an investment". Art. 1139 defines "investment" as including "an enterprise" and Art. 201 of the NAFTA defines an "enterprise" as including a corporation "organised under applicable law". It is undisputed that the Enterprise is an entity constituted under the laws of Ontario, and the laws of Ontario are the "applicable law".

135. From the moment Mr. Gallo decided to establish the Enterprise and have it acquire the Adams Mine site, he became for the purposes of the NAFTA an "investor of a Party", because he was at that point seeking to make an investment. From the moment Mr. Gallo became the owner of the Enterprise, he qualified as an "investor of a Party" because he had made an investment in Canada.

136. The Claimant adds that the Respondent cannot be permitted to benefit from the alacrity with which Ontario acted against the Enterprise, namely to stop it from making use of a valuable piece of permitted land as a waste facility. Such result would be inequitable, not only because it would allow the Respondent to benefit

[20] CMemJ, para. 146.
[21] CPHSub, para. 35.
[22] CMemJ, para. 129; CPHSub, para. 31.
[23] CPHSub, para. 32.

from its own wrongdoing, but also because its argument misses the point of the claim before this Tribunal: as of the date it was taken from the Enterprise, the Adams Mine site was a highly valuable asset and worth a great deal of money as a permitted waste landfill[24].

137. The Claimant avers that he has met the burden to prove jurisdiction, and requests that the claim should now proceed to the merits[25].

2. THE RESPONDENT'S CASE

138. The Respondent starts its allegations submitting that a claimant in an investment arbitration bears the burden of proving that the tribunal has jurisdiction to hear its claims, including the facts on which it relies. Where the claimant has failed to prove those facts, tribunals have ruled that they do not have jurisdiction[26], as the Tribunals in *Soufraki*[27], *Cementownia*[28] and *Europe Cement*[29] have decided. In the instant case, the Claimant has alleged that Canada bears the burden of evidence, because the Claimant asserts that the Respondent has alleged that he is part of a "fraudulent conspiracy" and that therefore the burden of proof should be shifted to Canada. In fact, Mr. Gallo is mischaracterising Canada's objection to jurisdiction: the Respondent is not alleging that the Claimant engaged in a fraudulent conspiracy, but simply that he has not adduced sufficient proof to establish jurisdiction[30].

139. In order for the Claimant to establish that this Tribunal has jurisdiction to hear his claims in respect of the AMLA, he must prove that he owned the Enterprise prior to the introduction of the AMLA in April 2004, and he must do so through reliable and contemporaneous documents[31]. Mr. Gallo has failed to discharge this burden. There is no documentary evidence of his ownership, no single document executed prior to the introduction of the AMLA which bears his signature. Indeed, the Claimant has failed to even produce a single piece of contemporaneous evidence that reliably links him in any way with the Enterprise prior to the introduction of the AMLA[32]. There is no documentary evidence supporting that he was involved:

- In the purchase of the Adams Mine;
- In the establishment or organisation of the Enterprise;
- In the Enterprise's acquisition of the Adams Mine;

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[24] CPHSub, para. 33.
[25] CPHSub, para. 106.
[26] Respondent's Memorial on Jurisdiction ["RMemJ]", para. 7.
[27] *H.N. Soufraki v. The United Arb Emirates*, ICSID case no. ARB/02/7. Respondent's BOA 136.
[28] *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID case no. ARB(AF)/03/2. Respondent's BOA 16.
[29] *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID case no. ARB(AF)/07/2. Respondent's BOA 27.
[30] RMemJ, para. 10.
[31] RMemJ, para. 21.
[32] RMemJ, para. 22.

- In the business operations of the Enterprise;
- In the efforts to sell the Adams Mine;
- In the raising of funds for the development of the mine;
- In the litigation affecting the Enterprise;
- In the negotiations for compensation under the AMLA.

140. Furthermore, none of the explanations provided by the Claimant to justify the absence of documentary evidence are satisfactory[33].

141. The Respondent also submits that neither the Enterprise's tax filings nor those of the Claimant constitute contemporaneous and reliable evidence that the Claimant owned the Enterprise prior to the AMLA[34]. Both the Claimant and the Enterprise failed to file with the tax authorities before enactment of the AMLA any tax declaration stating that Mr. Gallo was the owner of the Enterprise. And the tax return eventually filed by the Enterprise REDACTED REDACT

142. The Claimant also failed to make the regulatory filings required to indicate his ownership of the Enterprise prior to the AMLA, both to the US Department of Treasury and to the Canadian government[36].

143. As regards the Enterprise's corporate documents, the Respondent alleges that the dates on such documents are unreliable, that several documents are missing from the Minute Book and that the witness statements presented by the Claimant are insufficient to establish that Mr. Gallo owned the Enterprise prior to the AMLA.

144. The Respondent dismisses the Claimant's explanation that he paid a nominal RE fee for a C$ 105 million dollar investment, without having to contribute other financial or management expertise, arguing that this is the type of economic nonsense that further undermines the Claimant's allegation that he owned the Enterprise pre AMLA[37].

[33] RMemJ, para. 75.
[34] RMemJ, paras. 77 and 81.
[35] RMemJ, para. 86.
[36] RMemJ, para. 98.
[37] RMemJ, para. 120.

Lack of contribution

145. Pursuant to NAFTA Article 1139, to be an "investment of an investor of a Party" it is necessary that the investment be "owned or controlled directly or indirectly by an investor of such Party". However, while ownership or control is necessary, it is not sufficient. This is made clear by the definition of an "investor of a Party" which imposes the additional requirement that the individual "seeks to make, is making or has made" the investment in question. An investment is made by an investor only where there is a commitment of resources to the economy of the host state by the claimant entailing the assumption of risk. In this case Mr. Gallo:

- Did not pay a REDACTE to acquire the Enterprise or the Adams Mine;
- Did not pay a single expense;
- Did not loan any money to the Enterprise;
- Did not contribute any technical, management or other expertise to the Enterprise;
- Did not bear any risk should the Enterprise fail;
- Did not stand to gain if the Enterprise succeeded in selling Adams Mine.

Abuse of right

146. The Respondent, subsidiarily, alleges that there is an abuse of right, which deprives the Claimant of legal standing. Mr. Gallo is using Article 1117 of the NAFTA to bring a claim on behalf of a Canadian investment to which neither he nor any other non-Canadian contributed. This is not the purpose of this article, whichis intended to give a right to a foreign investor to claim on behalf of a foreign investment. In light of the lack of contribution by the Claimant or assumption of any risk, the *quid pro quo* between the foreign investor and the host state, which is the cornerstone for the system of investment treaty arbitration, does not exist. This claim harms Canada, which has received no foreign investment in return for conveying the right on which the Claimant now relies. Since the Claimant has harmed others by using a right for a purpose other than that for which it was created, the Claimant has abused that right[38].

147. The Respondent requests that the Tribunal dismiss the Claimant's claims in their entirety and with prejudice and order that the Claimant bear the costs of this arbitration, including Canada's costs for legal representation and assistance, the Respondent expressly reserving its rights to make a submission on the costs to which it alleges to be entitled[39].

[38] RMemJ, para. 131.
[39] RMemJ, para. 132.

VI. FACTS

1. *DRAMATIS RES ET PERSONAE*

148. The Adams Mine site is located in Northern Ontario, within the Township of Boston. It is a former iron mine, which began operation in 1964 and closed in 1990. The ore was shipped by train from a rail head on the site[40]. In 1999, and after many efforts, the then owner of the Adams Mine, Notre Development Corporation ["Notre"], obtained a Certificate of Approval, which authorised the use of the mine for the storage of non-hazardous waste, with a capacity of 1,341,600 tons per year, up to a total of 21.9 million cubic meters[41].

Vito Gallo

149. The Claimant is Mr. Vito G. Gallo ["Mr. Gallo"], an American citizen resident in Pennsylvania. He holds a Degree in Business Management and a Juris Doctor. On September 9, 2002, when allegedly he became the sole owner of the Enterprise which owned the Adams Mine, he was a 33 year old government employee, who had recently become Senior Policy Director in the Pennsylvania Governor's Policy Office[42]. Mr. Gallo is currently Assistant Vice-President for State Government Relations at Lehigh University in Pennsylvania, and it is his responsibility to obtain funding from public and private sources for research and education programs[43]. He has no track record as investor or as entrepreneur, and no direct knowledge of or experience in the waste management industry[44].

Mario Cortellucci

150. Mr. Mario Cortellucci ["Mr. Cortellucci"] is a key player in the facts surrounding the Adams Mine. He was born in Italy in 1949 and immigrated to Canada at the age of 13, becoming in due course a wealthy and prominent real estate developer and entrepreneur in Ontario and other parts of Canada. It was he who learnt that an opportunity existed for somebody to acquire the right to use the Adams Mine as a permitted waste landfill, and it was he who negotiated the transaction and financed the deal[45]. One of Mr. Cortellucci's business associates and partner in numerous ventures is Mr. Saverio Montemarano, who also participated in the REDACTED. Mr. Montemarano in turn is a cousin of Mr. Gallo.

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[40] CMem, para. 45.
[41] CMem, para. 106.
[42] Hearing Transcripts Day 1 ["HT 1"], ps. 207 – 208.
[43] CMem, para. 157.
[44] HT 1, ps. 231 – 232.
[45] CMemJ, para. 20.
[46] RPHSub, para. 64

Brent Swanick

151. Mr. Brent Swanick ["Mr. Swanick"] is a lawyer with a small tax and corporate practice established in the Province of Ontario. He has been described as a busy professional, presiding over a very messy office[47]. Mr. Swanick had advised REDACTED REDACTED Mr. Swanick incorporated the Enterprise, was its founding shareholder and its President and Secretary. While performing these tasks, Mr. Swanick allegedly acted on behalf of Mr. Gallo. There is no evidence at all of any written agreements, communications, instructions or any other document, letter, fax or email exchanged between Mr. Swanick and Mr. Gallo[50]. And there is no evidence that Mr. Gallo ever paid any fees to Mr. Swanick. REDACTED REDACTED

152. Contemporaneously Mr. Swanick also created, REDACTED REDACTED RED Mr. Swanick has stated that there was no conflict of interest in REDACTED because the objectives were clear cut and none of them objected[51].

153. Besides his role as legal advisor both for Mr. Gallo and Mr. Cortellucci, Mr. Swanick also assumed the position of sole director and officer of the Enterprise, and of a special purpose corporation which holds the legal title to the partnership units owned by Mr. Cortellucci and his partners[52].

154. In 2002, Ms. Anne Viggers was the secretary to Mr. Swanick. She was the person who actually recorded in the shareholder register of the Enterprise that the shareholding had been transferred to Mr. Gallo. Ms. Viggers left her employment at some moment after the passage of the AMLA.

2. THE PURCHASE OF THE ADAMS MINE

155. Before the purchase of the Adams Mine, there had been almost no contact between Mr. Gallo and Mr. Cortellucci. They had only once met face to face, in the summer of 2001, at a social function[53] – Mr. Gallo a young American civil servant, without any business experience in the waste management industry,

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[47] CPHSub, para. 30.
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[50] RMemJ, para. 39.
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[52] Respondent's Counter-Memorial ["RC-Mem"], para. 97.
[53] CPHSub, para. 37.

Mr. Cortellucci a well-connected and wealthy entrepreneur with interests in real estate development and other sectors. Mr. Gallo submits that in the course of this meeting, he told Mr. Cortellucci about his idea that it was the right time to invest in the Ontario waste industry, and that he had contacts among American waste site developers in Pennsylvania[54]. Mr. Cortellucci reacted, promising Mr. Gallo that he would keep an eye out for any opportunity[55].

156. While the only evidence of this first meeting between Mr. Gallo and Mr. Cortellucci is their own testimony, there is a clear documentary record that proves that six months thereafter, in early 2002, Notre, the then owner of the Adams Mine, approached Mr. Cortellucci – not Mr. Gallo – to enquire whether he would be willing to finance or participate in the development of the project. Mr. Cortellucci, an important political donor and a personality well connected to local and provincial government, was seen as the right person to assist in the highly-regulated and politically charged field of waste management[56]. During the next few months it was Mr. Cortellucci – without any involvement of Mr. Gallo – who negotiated with Mr. Gordon McGuinty, Notre's main shareholder and manager. These negotiations led to a successful conclusion, and on May 10, 2002 an Agreement of Purchase and Sale[57] involving the Adams Mine [the "Purchase Agreement"] was signed.

The Purchase Agreement

157. Who were the parties to this Purchase Agreement?

158. There is no doubt surrounding the seller, Notre, the company owning the Adams Mine, which had invested time and effort to obtain the necessary authorisations to convert the old mine into a permitted waste disposal site.

159. There is less clarity regarding the buyer: in the printed version of the Purchase Agreement, REDACTED
REDACTED

[54] CPHSub, para. 37.
[55] CMem, para. 183.
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[57] Canada's Comprehensive Document Brief ["CCDB"], Tab 9, p. 1.
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Purchase price

160. In accordance with the Purchase Agreement, Notre agreed to transfer to the Cortellucci Group the Adams Mine for a purchase price of C$ 1.8 million, plus payment of the outstanding realty taxes on the mine. The purchaser also agreed to pay to Mr. McGuinty, Notre's manager and shareholder, C$ 1.25 million over a five year period in return for a non-competition and consulting agreement[60]. In total, signature of the Purchase Agreement committed the Cortellucci Group to C$ 3.25 million in unconditional payments (and significant additional variable fee payments, once the Adams Mine started operating).

Was Mr. Cortellucci Claimant's agent?

161. The Claimant alleges that, although formally the negotiations which led to the purchase of the Adams Mine, were undertaken by Mr. Cortellucci, in actual fact Mr. Cortellucci was acting on the Claimant's behalf: Mr. Cortellucci was Mr. Gallo's agent[61]. Although no written agreement has been produced, Mr. Gallo and Mr. Cortellucci submit that the contractual relationship was established orally, over the telephone[62], Mr. Cortellucci adding that this is his preferred business practice – a simple hand shake with people he believes he can trust[63]. There is thus no doubt that Mr. Cortellucci and Mr. Gallo must have entered into some sort of agreement [the "Cortellucci-Gallo Agreement"]; however, since there is no written record of such agreement and there is a lack of any other evidence, it is impossible to establish when such Agreement was entered into; it may have been in 2002 or thereafter, and before or after the introduction of the AMLA. Mr. Gallo and Mr. Cortellucci additionally aver that the Cortellucci-Gallo Agreement created an agency relationship, in which Mr. Gallo was the principal and Mr. Cortellucci was his agent.

162. The alleged Cortellucci-Gallo Agreement is surrounded by unusual features.

Absence of written evidence

163. (i) The first problem which the Tribunal faces is that there is no written evidence, direct or circumstantial, which supports the oral depositions now being made by Mr. Gallo and Mr. Cortellucci. The record shows that in other circumstances, Mr. Cortellucci was rather diligent in the written formalization of his agreements. For example, when he recorded the agreements REDACTED REDACTED REDACTED he chose to do so in rather detailed and technically complex documents, which have been duly presented in this procedure. This contrasts with

[60] CCDB, Tab 9, p. 5 letter (j).
[61] Mr. Gallo WS, paras. 64, 74 and 77; Mr. Cortelluci WS, paras. 31 and 35; Mr. Swanick WS, para. 8 and Mr. Cortellucci WS, para. 7.
[62] Hearing Transcript Day 4 ["HT 4"], ps. 104 – 107.
[63] HT 4, ps. 228 – 229.

the Cortellucci-Gallo Agreement, in which Mr. Cortellucci allegedly accepted to act as Mr. Gallo's agent, in a business as contentious and risky as waste management disposal, simply on the basis of a "hand shake". The Tribunal acknowledges that sometimes businessmen rely on trust, and do not formalise their agreements in writing. But these situations typically arise when the partners know each other well, have undertaken together a number of transactions, and have learnt to trust each other. None of these conditions existed in the relationship between Mr. Gallo and Mr. Cortellucci.

Absence of personal involvements

164. (ii) Mr. Gallo has admitted that he never visited the Adams Mine, before or after the signing of the Purchase Agreement[64], that he never did any due diligence, nor engaged any engineer or consultant to do a due diligence[65], that he never saw any documentation referring to the mine, not even the Certificate of Approval which authorised its use as a waste disposal facility. According to the Claimant, he entrusted to Mr. Cortellucci every single aspect in the negotiation of the complex multi-million purchase of the Adams Mine.

165. Mr. Cortellucci accepted to sign an agreement implying unconditional payments of at least C$ 3,25 million and requiring additional investments amounting to tens of millions of C$ without any written instruction. Mr. Cortellucci did all this, acting in his own name and assuming vis-à-vis third parties full responsibility, but secretly being the agent of an American civil servant with unknown wherewithals, whom he had only met at a social function, who never visited the Adams Mine, with whom he only communicated through a few telephone conversations, and with whom he never established a written contract.

Absence of circumstantial evidence

166. (iii) An additional surprising element is that, further to the fact that the Cortellucci-Gallo Agreement was never formalized in writing, there is a total lack of any type of written communication between Mr. Gallo and Mr. Cortellucci. Mr. Cortellucci never sent a single e-mail, fax or letter, any negotiating documents, any drafts of the purchase agreement, any materials on the Adams Mine[66], or any copy of the actual Purchase Agreement to Mr. Gallo[67]. Similarly, there is no written evidence that Mr. Gallo ever sent any written instruction to Mr. Cortellucci.

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[64] HT 1, p. 232.
[65] HT 1, ps. 232 – 233 and 235.
[66] Mr. Gallo stated for the first time during the hearing that he did receive a short presentation on the Adams Mine from Mr. Cortellucci (HT 1, p. 225). This fact was not mentioned in his WS, and Mr. Gallo either did not keep a copy of the presentation or subsequently lost it, and has been unable to produce it (HT 1, p. 227).
[67] CMemJ, para. 34. Mr. Gallo testified that he had reviewed the Purchase Agreement before it was signed (HT 1, p. 242), but Mr. Cortellucci admitted that he neither sent Mr. Gallo drafts of the Purchase Agreement (HT 4, p. 138) nor a copy of it before he signed (HT 4, p. 138).

No revelation of Mr. Gallo's identity

167. (iv) The existence of the Cortellucci-Gallo Agreement and the fact that Mr. Gallo was the principal, and Mr. Cortellucci the agent acting on his behalf, was never revealed to any independent third party before the enactment of the AMLA.

168. It is especially surprising that Mr. Gallo's identity was never disclosed to the vendor, Mr. McGuinty, who throughout this period believed that it was the Cortellucci group which was purchasing the Adams Mine – a supposition which made sense, because it was Mr. Cortellucci who had first been approached as a possible purchaser and had the political contacts which could be helpful for the successful development of the waste disposal facility[68]. After the purchase of the Mine, Mr. Cortellucci entrusted its former owner, Mr. McGuinty, with the day to day management of the site. But the existence of Mr. Gallo, and the fact that Mr. Cortellucci was not the actual owner, but merely the agent of a US owner, was kept secret from Mr. McGuinty. It was only after the promulgation of AMLA that the existence of a US investor, on whose behalf Mr. Cortellucci was acting, became public knowledge.

169. Mr. Gallo has tried to explain this secrecy, stating that if Mr. McGuinty had believed that a US citizen was interested in the site, he would have driven up the price. The argument is unconvincing, because the participation in the deal of a 33 year old civil servant from Pennsylvania would in any case have been eclipsed by the presence of Mr. Cortellucci, a wealthy and well-connected local millionaire who was providing the money. Mr. Gallo has offered a second argument: he was concerned that publicity regarding his ownership of a waste management facility in Ontario would have a negative impact upon his position as a policy officer for the Governor of Pennsylvania[69]. But this reason can only justify the secrecy until February 2003, when he left the Governor's office, but not that it was kept until the approval of the AMLA in 2004.

3. INCORPORATION OF THE ENTERPRISE

170. The Cortellucci group signed the Purchase Agreement of the Adams Mine on May 10, 2002, and shortly thereafter, on June 26, 2002, Mr. Swanick, REDACTED REDACTED incorporated the Enterprise, the company which was to act as purchasing vehicle[70]. At the time of incorporation, Mr. Swanick was appointed President, Secretary and Director of the Enterprise, his offices were listed as the business address and he received the single common REDACTED REDACTED In one word,

[68] CPHSub, para. 41.
[69] CPHSub, para. 41.
[70] CCDB, Tab 9.

Mr. Swanick was the initial incorporator, director, officer and only shareholder of the Enterprise[71].

171. This is as far as the undisputed facts surrounding the incorporation of the Enterprise go.

172. All other facts, and especially if and when ownership of the Enterprise was acquired by Mr. Gallo, have been the subject of fierce debate among the parties and their experts, the Claimant submitting that on September 9, 2002 Mr. Swanick transferred the share which represents the capital of the Enterprise to Mr. Gallo, while the Respondent alleges that there is no certainty that the transfer took place in such manner and on such date.

Scarcity of written evidence

173. The debate is fueled by the scarcity of written evidence. Claimant's allegation that Mr. Gallo acquired ownership of the Enterprise in 2002 is founded on the depositions as witnesses of Messrs. Gallo, Cortellucci and Swanick and Ms. Viggers. The Respondent has stressed that these testimonies have been provided by interested parties and that there is no written evidence confirming these allegations.

174. In fact, the only contemporaneous documentary evidence in the file, which provides evidence of the Claimant's case, is a single hand written, non-signed line in the shareholders register of the Enterprise, plus two share certificates signed by Mr. Swanick, the endorsement transfer of the share to Gallo signed by Mr. Swanick, the Resolution of the Director transferring this share to Gallo and the Declaration of Trust for Mr. Gallo allegedly signed on June 26, 2002 by Mr. Swanick. No further written evidence has been produced, corroborating that before enactment of the AMLA Mr. Gallo already was the owner of the Enterprise:

- No document bearing Mr. Gallo's signature;
- No agreement, no deed, no letter, no e mail, no written instruction;
- No bank transfer;
- No commercial registry entry;
- No certificate from any authority;
- Not even an invoice from Mr. Swanick in which Mr. Gallo's name appears[72].

There are also no contemporaneous

- Shareholders resolutions;
- Tax returns;

[71] Hearing Transcript, Day 5 ["HT 5"], p. 24.
[72] This has been specifically confirmed by Mr. Swanick: HT 2, ps. 298 – 299.

- Official documents of any kind

in relation to the Enterprise, which bear Mr. Gallo's name or signature.

175. In order to settle the debate between the parties, and weigh the available evidence, the Tribunal will proceed chronologically, separating for each date those facts which can be deemed proven and those which cannot.

A. June 26, 2002

176. It is a proven fact that on this date Mr. Swanick incorporated the Enterprise – as shown by the Master Business Licence[73], issued by the Ministry of Consumer and Business Services of Ontario, with its attached Articles of Incorporation[74]. But this official Licence only includes references to Mr. Swanick – he is the only shareholder, the only officer and the only person whose name appears. There is no specific mention that Mr. Swanick was acting "in trust" for a third person, nor is there any reference whatsoever to Mr. Gallo.

Was Mr. Swanick acting as REDACTED ?

177. The Claimant has testified that REDACTED
REDACTED
REDACTED Mr. Swanick has confirmed that he did so and additionally
REDACTED
But he has also acknowledged that before the AMLA he had never met Mr. Gallo in person[77]. REDACTED
REDACTED

[73] Minute Book, Tab Charter.
[74] Minute Book, Tab Charter.
REDACTED
[77] HT 2, p. 302.
[78] Testimony of Mr. Swanick, HT 2, p. 264.

178. Mr. Swanick and Mr. Gallo have tried to explain this lack of paper trail, arguing that t[REDACTED] their subsequent communications took place exclusively over the phone. This explanation, however, is inconsistent with two other pieces of evidence:

- Ms. Viggers, Mr. Swanick's assistant for 17 years, testified that she never spoke on the phone with Mr. Gallo[79]; [REDACTED] normally end up speaking at some time or other with the lawyer's assistant; Mr. Gallo never spoke with Ms. Viggers;
- On August 31, 2002 Mr. Swanick submitted [REDACTED] there is however no reference at all to calls from or to Mr. Gallo.

179. Another surprising fact is that, while there are no letters or emails exchanged between Mr. Swanick and Mr. Gallo before the AMLA, there is evidence that in 2008 – after the AMLA – Mr. Swanick emailed certain corporate resolutions for Mr. Gallo's signature[80].

Content of the Minute Book

180. Further to the Master Business Licence and the Articles of Association, the Minute Book also contains a number of documents which are dated "as of [RED] and which were all prepared by Ms. Viggers and signed by Mr. Swanick. These include:

- [REDACTED]
-
-

Actual dating

181. The Claimant does not dispute and Mr. Swanick acknowledges that these corporate documents were prepared and signed at a later date than the official "as of" date shown. It is thus undisputed that these documents were backdated. But it is impossible to ascertain the degree of backdating: neither Mr. Swanick nor Ms.

[79] HT 5, p. 43.
[80] Testimony of Mr. Swanick, HT 2, p. 187.

Viggers can remember the exact date when these documents were actually prepared and executed.

182. There is thus no documentary evidence in the record showing when the documents dated as of June 26, 2002 were actually prepared and signed.

183. The only evidence in the record is in the negative sense: it is impossible that the June 26, 2002 documents were actually signed before September 9, 2002. The reason is that Mr. Lindblom, Respondent's expert, has shown that the signature on one of the June 26, 2002 documents appears indented on a document which bears the September 9, 2002 date[81]. But Mr. Lindblom' analysis only proves that the June 26, 2002 were signed at the earliest on September 9, 2002; they do not prove when they were actually executed, especially bearing in mind that it is proven that the September 9, 2002 documents were backdated[82]. And there is no other evidence in the file clarifying this issue. The signature could have taken place within 60 days from September 9, 2002, as Mr. Swanick avers was the practice of his law firm, or at a later date, before or after enactment of the AMLA. There simply is no evidence in the file.

Number of writing episodes

184. Another surprising feature of the set of documents signed as of June 26, 2002 is that Mr. Swanick used five different pens to write his name. This has been established by ink test performed by the expert Mr. Lindblom[83], who added that "in many thousands of documents that I've looked at, it's very unusual that such a small number of documents would be executed with so many pens"[84]. The implication is that Mr. Swanick must have signed the set of documents which all bear the same date in more than one writing episode, spread out over various days.

185. Mr. Swanick, however, has explained that it was his custom to have a number of pens on his desk, that he would use them at random, that he was frequently interrupted during the signature of documents, and that it could well have occurred that he used five pens in total even if all documents were signed in one writing episode. And he avers that this is what has happened[85]. Ms. Viggers confirmed Mr. Swanick's allegations that he had many pens, that he was frequently interrupted while signing and that he was extremely busy[86].

186. Although it certainly seems unusual that a small set of documents is signed with five different pens, the Tribunal cannot exclude that things may have happened as Mr. Swanick alleges. And since both Mr. Swanick and Ms. Viggers accept that

[81] Hearing Transcript Day 3 ["HT 3"], p. 31; Report Chart 5 (d).
[82] See para. 196 *infra*.
[83] HT 3, p. 27.
[84] HT 3, ps. 27 – 28.
[85] HT 2, ps. 114, 115, 226, 227, 273 and 274.
[86] HT 5, ps. 9 and 20.

the documents were backdated, whether they were signed in one or more writing episodes, and on one or more days, does not affect the substance of the facts.

B. REDACTED the General Banking Resolution

187. REDACTED

REDACTED and not Mr. Gallo, the only shareholder, nor Mr. Swanick, the President and only signing officer – had full and exclusive control over the Enterprise's bank accounts.

188. There are a number of rather unusual elements surrounding this General Banking Resolution:

REDACTED

- Secondly, the Claimant asserts that he instructed Mr. Swanick to adopt the Resolution, but there is no documentary evidence of such instruction; it borders on the unbelievable that an experienced lawyer like Mr. Swanick was prepared to issue a resolution REDACTED REDACTED REDACTED without obtaining some written instruction (or at least an *ex post facto* ratification) from the Enterprise's actual owner, Mr. Gallo;
- Finally, there are doubts regarding the identity of the signatory or signatories: the General Banking Resolution purports to have been signed by the Enterprise's President and by its Secretary; consequently, it should have been signed twice by Mr. Swanick, who held both positions.

REDACTED

REDACTED

REDACTED

192. The Respondent has suggested the possibility that there were, at some point, other directors or officers of the Enterprise that were listed in the Officers' and Directors' Registers of the Minute Book, REDACTED
REDACTED

193. In the Respondent's opinion, this possibility is reinforced by additional evidence. It is a fact that the original Officers' and Directors' Registers, which came with the Minute Book, were removed, and that a new version was printed by Ms. Viggers[90]. Ms. Viggers explained that she did so because the original Registers were missing from the Minute Book. But this statement is contradicted by Mr. Bain, the manager of the company manufacturing the Minute Book, who deposed as a witness, and averred that the possibility that a specific ledger had been left out from a delivered Minute Book was extremely unlikely and that he was not aware of that ever having happened[91].

194. The issuance of the General Banking Resolution is surrounded by unusual circumstances. It is strange that Mr. Gallo, the alleged owner, a REDACTED
REDACTED

REDACTED And it is an odd coincidence that the Minute Book delivered to the Enterprise was incomplete, an incident which the manufacturer asserts had never occurred before.

C. September 9, 2002

195. The third and most relevant date is September 9, 2002, because the Minute Book records three significant corporate acts allegedly performed on September 9, 2002:

196. (i) The first is the endorsement of the original share certificate, issued by Mr. Swanick, in favour of Mr. Gallo; this was done by Mr. Swanick signing on the back of the certificate; Mr. Gallo did not sign the (acceptance of) the endorsement; the date is stated as "September 9, 2002", but it is plainly visible that the original date had been "September 2, 2002" and that it was corrected by

REDACTED

[90] Testimony of Mr. Bain, Manager of Sterling Marking Products, the manufacturer of the Minute Book, HT 1, p. 154; Ms. Viggers WS, p. 11.
[91] HT 1, p. 156.

hand to read "September 9, 2002"; September 2, 2002 had been Labour Day, a national holiday, and a date when a share transfer was unlikely to have occurred; the signature was made "in presence" of a witness, whose signature appears on the endorsement; this witness was Ms. Laura Querin, an assistant in Mr. Swanick's law firm[92]; Claimant has not called Ms. Querin to depose in this procedure and her presence on September 2, 2002, a holiday, would have been highly unlikely.

197. (ii) The second is the issuance of a new share certificate, in favour of Mr. Gallo; again, this document is only signed by Mr. Swanick; there is no signature from Mr. Gallo or any other person; the date is September 9, 2002.

198. (iii) The third is the registration of the transfer in the Shareholders Register: the name "Brent W. Swanick in trust" was deleted and the name Vito Gallo inserted; the date of the transfer is September 9, 2002, but again it is plainly visible that the original date had been September 2, 2002, and that this was corrected subsequently to September 9, 2002.

199. These three documents are crucial for proving Claimant's standing: they are the only written evidence in the record, purporting to prove that he was the Enterprise's owner of record at the time when the AMLA was enacted. And of the three, the Shareholders Register is the most important document, because under Ontario law it is determinative of the ownership in the shares of a corporation[93].

201. Two questions arise: (i) who drafted these documents, and (ii) when were they prepared or signed?

(i) Who drafted the documents?

202. As regards the first question, the evidence shows that the Shareholders Register – which is not signed – was written by Ms. Viggers of her own hand. This has been

[92] Testimony of Mr. Swanick, HT 2, ps.125 – 126.
[93] Testimony of Mr. Swanick, HT 2, p. 153.

confirmed by Mr. Swanick[94] and by Ms. Viggers herself[95]. And the two share certificates were filled in by Ms. Viggers, and signed by Mr. Swanick.

(ii) When were the documents prepared?

203. Both Mr. Swanick and Ms. Viggers acknowledge that the transfer of the share capital in favour of Mr. Gallo did not occur on the date stated in the Shareholders Registry – i.e. September 9, 2002 – but at a later date[96], and that the entry in the Shareholders Registry, the endorsement of the first share certificate and the issuance of the second certificate, which all bear the date September 9, 2002, in fact were all prepared and signed on a later date, and then backdated.

204. What was the actual date of transfer of the share capital in favour of Mr. Gallo?

205. Neither Mr. Swanick nor Ms. Viggers have a precise recollection, and consequently they cannot testify as to a precise date[97]. The only testimony they did offer is that the documents must have been signed in accordance with the routine adopted in the Swanick law firm. It is submitted that this routine implied that corporate documents were systematically backdated. But there have been significant divergences regarding the extent of the backdating:

206. In his witness statement, Mr. Swanick averred that documents were prepared and signed within 60 days after the date indicated thereon[98]; he reiterated the same position during the hearing[99].

207. Ms. Viggers declared in her witness statement that it was her practice to organise the Minute Book after Form 1[100], which informs the Ministry of the identity of the officers and directors of a newly incorporated company[101], had been sent to the authorities (which in the case of the Enterprise was done on September 12, 2002); during the hearing, she changed her position and declared that the Minute Book was organised "within a month or so after the initial incorporation"[102] (i.e June 26, 2002), not after the delivery of Form 1[103].

The 2002/3 Resolutions

208. In fact, the Swanick law firm seems to have lacked clear instructions or accepted routines regarding the (back) dating of corporate documents.

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[94] HT 2, p. 280.
[95] HT 5, p. 11.
[96] HT 2, p. 109; HT 5, ps. 24 and 25.
[97] HT 2, p. 109; HT 5, ps. 22 – 23.
[98] Supplementary WS, p. 16.
[99] HT 2, p. 110.
[100] WS, para. 5.
[101] HT 5, p. 11.
[102] HT 5, p. 16.
[103] HT 5, p. 22.

209. The record shows two corporate resolutions which were backdated by periods of time which significantly exceed the periods referred to by Mr. Swanick and Ms. Viggers in their testimonies: these are two "Resolutions of Shareholders" dated as of March 8, 2003 and of March 9, 2004, signed by Mr. Gallo, approving the financial statements for 2002 and 2003 [the "2002/3 Resolutions"] and included in the Enterprise's Minute Book.

210. The 2002/3 Resolutions are significant for this procedure, because if they had actually been signed by Mr. Gallo before the promulgation of the AMLA, they would have represented an important piece of evidence proving that Mr. Gallo indeed was the contemporaneous shareholder.

211. In his supplementary witness statement, Mr. Swanick categorically affirmed that the 2002/3 Resolutions had not been backdated and that they had been approved before the AMLA:

> "I deny that these documents [[104]] were signed after the Adams Mine Lake Act was enacted. I further deny that they were signed then as part of a fraudulent conspiracy to transfer the ownership to Mr. Gallo so that this proceeding could commence"[105].

At the hearing, Mr. Swanick had to acknowledge that this statement was false[106]. In fact, the 2002/3 Resolutions had been signed by Mr. Gallo in 2008, and then backdated to 2003 and 2004.

The Swanick practice of backdating

212. The Tribunal finds that the Swanick firm incurred in a systematic practice of backdating corporate documents: resolutions and other decisions were dated not as of the date of actual preparation or signature, but as of the date when a related transaction had been carried out, or when the corporate resolution should have been adopted. The practice of backdating involves a risk: the actual date of a corporate resolution or of the registration in the share register of a share transfer also produces effects vis-à-vis third parties. In our case, whether the share transfer occurred before or after promulgation of the AMLA has deep implications for the legal standing of the Claimant. In these cases, what must count is, of course, the actual date of the transfer, not the formal date *ex post* inserted into the corporate records by the company secretary.

The actual date of the transfer

213. This leads to the problem of establishing the actual date when Mr. Gallo became the owner of the Enterprise. There is no doubt that Mr. Gallo now is the

[104] The category includes six types of documents, two of which are the 2002/3 Resolutions.
[105] Supplementary WS, p. 15.
[106] HT 2, ps. 149 – 153; the falsehood of the Supplementary WS had been anticipated in a letter sent by Claimant's counsel to the Tribunal before the Hearing.

shareholder of record of the Enterprise. But this is not the issue relevant for establishing his standing in this arbitration. The relevant question is when he achieved ownership.

214. The official date of acquisition stated in the Shareholders Register was September 2, 2002, a date which was then corrected by hand to read September 9, 2002. But it is undisputed that none of these is the real date, and that the Register was backdated. Can the actual date of acquisition be established?

215. In fact, there is no evidence in the file proving the date when Mr. Gallo actually became the owner of the Enterprise.

216. First of all, there is a total absence of written circumstantial evidence. The record lacks any document of any type proving that Mr. Gallo became the shareholder of the Enterprise before the enactment of the AMLA; there is not even a reference to Mr. Gallo in any contemporaneous document of any kind.

217. The only available evidence regarding the actual date are the testimonies of Mr. Swanick and Ms. Viggers.

218. Mr. Swanick cannot remember the date of his signature. His only recollection is that, on the date when the AMLA was approved, he went to the corporate records of the Enterprise, and they were complete[107]. But Mr. Swanick is not an unbiased and uninterested witness. He was – and still is – REDACTED REDACT And he has not been the most consistent of witnesses.

219. Furthermore, it is not true that on the date of enactment of the AMLA the corporate records of the Enterprise were complete. The Minute Book should have included the 2002/3 Resolutions, approving the financial statements for 2002 and 2003, duly signed by Mr. Gallo. It is now undisputed that, on the date of the AMLA, these Resolutions were not there, and Mr. Swanick has now acknowledged that they were signed in 2008 and backdated.

220. Ms. Viggers also does not remember the exact date when she filled in the Shareholders Registry, but she has deposed that her practice was to do it within a short period of time since incorporation. Ms. Viggers was also adamant that in her 17 years in the Swanick law firm she had never been asked to manipulate a minute book in any way[108].

221. The Tribunal has no reason to doubt Ms. Viggers' straightforwardness. It will thus accept that no one asked her to handle minute books in such a way that she would see a palpable manipulation. But Ms. Viggers admitted that she frequently took instructions from lawyers in the office to prepare documents to reflect past events and to date such documents not as of the date of preparation, but as of the

[107] HT 2, ps. 111 and 112.
[108] HT 5, p. 50.

date she was told the event had happened[109]. It should be remembered that in our case September 9, 2002 – the official date of the share transfer – coincides with the closing date for the sale of the Adams Mine (see next paragraph). Moreover, Ms. Viggers testified that she was not aware of the enactment of the AMLA[110], and thus an instruction to record the Claimant's ownership as of an earlier date, even if such instruction was given after the AMLA, would not have raised her attention and seemed unusual. Therefore her practice of backdating but not manipulating documents is consistent with the possibility that she included the Claimant's name in the Shareholders Register after the AMLA[111].

4. THE LIMITED PARTNERSHIP AND RELATED AGREEMENTS

222. *Pro memoria*: on May 10, 2002 Mr. Cortellucci had signed the Purchase Agreement, undertaking to buy the Adams Mine against payments totaling approximately C$ 3.25 million. The closing of the transaction and actual transfer of the mine were postponed until the acquisition vehicle had been incorporated and the requisite financing obtained. This was accomplished in the first days of September 2002.

223. On September 9, 2002 Notre conveyed the Adams Mine to the Enterprise – the vehicle which had been created by Mr. Swanick on June 26. The conveyance was documented[112] in a standard form ("Transfer/Deed of Land"), with Notre as the transferor, the Enterprise as the transferee and a purchase price of C$ 1.8 million.

224. On the following day Mr. Swanick formed a Limited Partnership [redacted]

[redacted]

225. [redacted]

[109] HT 5, ps. 48 – 49.
[110] HT 5, p. 47.
[111] RPHSub, para. 32.
[112] Tab 269.
[redacted]

226. REDACTED

The Loan Agreement

227. The Loan Agreement documented a loan REDACTED REDACTED

The Management Agreement

228. REDACTED

229. REDACTED

REDACTED

REDACTED

230. The consequence of signing these two agreements is that the role of Mr. Cortellucci and his group was dramatically increased: REDACTED REDACTED

5. MANAGEMENT OF THE ENTERPRISE AND OF THE ADAMS MINE

231. The acquisition of the Adams Mine by the Enterprise was closed on September 9, 2002, with the transfer of the ownership over the real estate from Notre to the Enterprise and payment of the purchase with funds REDACTED REDACTED

232. After the purchase, Mr. Cortellucci and his partners continued to provide REDA REDACTED

233. There is a significant dispute among the parties regarding the nature of such deposits.

Did Mr. Cortellucci make a REDACTED to the Enterprise?

234. The Claimant submits that all these deposits represent REDACTED REDACTED

235. The Respondent, however, alleges that the Enterprise's contemporaneous business records reflect that the Partnership REDACTED REDACTED

REDACTED

236. REDACTED

237.

238. The proper way to ascertain whether the f REDACTED REDACTED requires looking at the Enterprise's financial statements for 2003. The problem here is that these statements are not contemporaneous: they were prepared in 2008 and then backdated, and the information consequently is not reliable.

239. It is impossible for the Tribunal to establish with absolute certainty whether the REDACTED

Management of the Adams Mine

240. The day to day management of the Adams Mine was entrusted to its former owner, Mr. McGuinty, acting through a corporation called Christopher Gordon Associates Ltd. ["Gordon"]. For this purpose, f REDACTED REDACTED

241. One of the unusual aspects of the facts as presented by the Claimant is that Mr. Gallo, the alleged owner of the Enterprise and of the Mine, not only failed to visit the Mine at any time, but he did not even once meet with or speak over the telephone with Mr. McGuinty, its managing director[123]. The lack of knowledge was reciprocal: the existence of Mr. Gallo was never disclosed to Mr. McGuinty, who only met with and reported to Mr. Cortellucci, and who believed throughout this period that the Cortellucci Group was the actual owner of the Adams Mine[124].

242. Mr. Gallo's lack of participation is total. He left everything in the hands of Mr. Cortellucci, never asked for information and never gave any instructions. There is no documentary evidence – not an email, not a letter, not a fax, not a memorandum, not a note, absolutely no document – showing that the Claimant was in any way involved in any of the business operations of the Enterprise, that he gave any instructions or that he was informed of what was being done or what had been accomplished[125].

243. This situation is the more astonishing, because in the two years between the purchase of the property and the promulgation of the AMLA a number of significant events affecting the Adams Mine happened: the Enterprise attempted to obtain permits which were outstanding, to purchase the border lands surrounding the site, it was involved in two serious litigations and there were several efforts to resell the Adams Mine.

244. Mr. Gallo's lack of interest stands in stark contrast with the activity shown by Mr. Cortellucci. It was Mr. Cortellucci who engaged Mr. McGuinty, and to whom Mr. McGuinty reported[126], it was Mr. Cortellucci who twice visited the site[127], who received reports from Mr. Swanick[128], and who discussed with Mr. Swanick

REDACTED

6. TAX RETURNS OF MR. GALLO AND OF THE ENTERPRISE

245. Both Mr. Gallo and the Enterprise were under legal obligations to file annual income tax declarations in the U.S.A. and in Canada. If Mr. Gallo, as he avers,

[123] HT 1, ps. 233 and 269.
[124] HT 4, p. 189.
[125] RMemJ, para. 46
[126] Mr. McGuinty WS, para. 91, Mr. Cortellucci WS, paras. 19, 25, 30, 34.
[127] HT 4, p. 248.
[128] HT 1, p. 249.

REDACTED

was the true and only owner of the Enterprise, and Mr. Cortellucci was simply his agent, Mr. Gallo's ownership of the Enterprise must have had some impact on his own and on the Enterprise's tax declarations.

Mr. Gallo's personal income tax returns

246. US tax residents are required by US tax law to file an annual income tax declaration to the IRS, together with accompanying forms and schedules. The law requires that, if the US resident is the sole shareholder of a foreign corporation, he make a separate declaration using Form 5471.

247. Mr. Gallo, a US citizen with residence in the U.S.A., REDACTED REDACTED

After some procrastination, Mr. Gallo finally acknowledged that he had failed to submit Form 5471 jointly with his annual statements, and that in November 2008 he filed with the IRS Forms 5471 for all the relevant years; i.e. the IRS was not informed that Mr. Gallo was the owner of the Enterprise until after the commencement of this arbitration and one month after Mr. Gallo had received Canada's request for documents.

248. Failure to present Form 5471 when due can result in substantial fines[132].

Tax filing by the Enterprise

249. The Claimant initially relied on the Enterprise's 2002 and 2003 Canadian tax returns to prove that he owned the Enterprise prior to the introduction of the AMLA[133]. Later on the Claimant acknowledged that these returns had been filed in October 2004, i.e. after the enactment of the AMLA. Moreover, the returns, although they indicated that Mr. Gallo was the only shareholder, described the Enterprise as a "Canadian Controlled Private Corporation" ("CCPC") – a statement which is not compatible with Mr. Gallo's alleged ownership.

7. MR. GALLO'S ACTIVITIES IN THE US

250. Mr. Gallo submits that, after the acquisition of the Adams Mine, he contacted several individuals in the US waste industry to sound out if they would be prepared to participate as partners in the venture. For these purposes, he used Mr. Jeffrey Belardi, a lawyer from Pennsylvania specialised in the waste management sector and his personal friend, and Mr. Philip Noto, a retired Lieutenant Colonel now working as a consultant and also personal friend of Mr. Gallo. There is no record that the Claimant either contacted other US individuals or performed additional activities promoting the investment in the Adams Mine[134].

[132] RMemJ, para. 77.
[133] RMemJ, para. 21.
[134] HT 1, p. 214.

251. Mr. Belardi's main client was REDACTED owner of significant landfills in the US. At some point in 2002 Mr. Gallo submits that he told Mr. Belardi that he had purchased a waste disposal site in Toronto, and they discussed the general characteristics of the site. Thereafter, Mr. Belardi approached REDACTED and asked him in general terms whether he would be interested in investing in a waste disposal project in Ontario. Mr. Belardi did not mention to REDACTED the name or location of the site he was referring to[135]. Mr. Belardi has testified that REDACTED was excited about the possibility of investing in the project and "ready to go"[136]. REDACTED never met Mr. Gallo, no written documents of any kind were exchanged, and no formal bid or offer was ever made.

252. Mr. Philip Noto and Mr. Gallo allegedly discussed the possibility of investing in a waste disposal project in Canada at the beginning of 2002 – at a time when both Mr. Gallo and Mr. Noto were still "at-will" employees of the Pennsylvania Government. Mr. Noto had contacts in the waste disposal industry, promised to help and approached REDACTED a well-known entrepreneur in the sector[137]. As in all other previous occasions, there is no document trail confirming these contacts: Mr. Gallo never provided Mr. Noto with a single document[138], and he also did not provide him with any details about the size or permitted capacity of the Adams Mine[139], not even with the name of the site[140]. The potential investor could only have a very vague, general idea of the venture he was allegedly invited to participate in.

253. Summing up, the Tribunal concludes that Mr. Gallo did contact two of his friends in the US and these friends have deposed that they contacted two US entrepreneurs with experience in the waste management sector. No documents were forwarded, no precise details were shared, not even the name of the mine seems to have been conveyed to the prospective investors. The purpose of the contacts seems to have been limited to asking if, assuming that a good investment opportunity in a waste disposal site in Ontario appeared, the US investors would be prepared to participate. To which the US entrepreneurs gave the obvious answer: if the project is promising, they would be ready to commit funds.

8. EFFORTS TO RESELL THE ADAMS MINE: THE REDACT AGREEMENT

254. After the acquisition of the Adams Mine by the Enterprise, and before the enactment of the AMLA, Mr. Cortellucci – allegedly acting as Mr. Gallo's agent – tried on several occasions to resell the Mine with a substantial profit. For example, REDACTED
REDACTED

[135] Mr. Belardi WS, para. 15.
[136] HT 1, p. 124.
[137] CPJM, para. 55.
[138] HT 4, p. 80.
[139] HT 4, ps. 78, 87 and 89.
[140] HT 4, p. 76.

REDACTED

255. The possibility of reselling the Mine to the Toronto authorities at a huge profit was no chimera: it should be remembered that Mr. Cortellucci was a very well connected millionaire, had extensive experience in property dealings, was one of the biggest donors to the party then in power in the provincial government[142] and there was an acute need to solve the waste disposal problem in Ontario.

Sharing of profits between Mr. Gallo and Mr. Cortellucci

256. An important question to be addressed is how profits generated by the resale would have been shared between Mr. Gallo and Mr. Cortellucci (and the other limited partners). Would the capital gain accrue to Mr. Cortellucci and his investors, or would it flow to Mr. Gallo? The Tribunal posed this very question to the Claimant in the Tribunal's communication A 30, and in due course the Claimant gave the following answer[143]:

257. REDACTED

The REDACTED Agreement

258. On April 1, 2003 the Enterprise and the Partnership signed an agreement [the REDACTE Agreement"] with REDACTED , a

REDACTED

[142] RMemJ, para. 29.
[143] CMemJ, para. 60.

REDACTED

company belonging to REDACTED REDACTED In its Whereas clauses, the REDAC Agreement correctly states that the Enterprise is the owner of the Adams Mine, and that the Enterprise has entrusted management of the site to the Partnership.

259. The purpose of the REDAC Agreement was to retain RED in order to sell the Adams Mine to an unspecified third party, for a "gross revenue" of more than C$ 30 million, plus a fee of C$ 6.25 per metric ton of solid waste (since the capacity of the Mine is stated to be 23 million metric tons[146], the variable fee would amount to more than C$ 140 million).

260. To whom should this bounty flow?

261. The REDAC Agreement categorically states that both the gross revenue and the variable fee were to be paid to the Partnership, not to the Enterprise[147]. As *quid pro quo*, if the transaction was successfully concluded, RED would be entitled to a significant fee.

262. There are a number of unusual features surrounding the REDACT Agreement:

263. (i) The first is that the contract is signed by Mr. Cortellucci on behalf of both the Enterprise and the Partnership. Mr. Cortellucci was the principal partner in the Partnership, and that may have justified that he signed on the Partnership's behalf[148]. But how could he sign on behalf of the Enterprise?

264. Mr. Cortellucci testified that he believed that he had the authority to do so[149]. But in fact he did not. The only authorised signing officer of the Enterprise was Mr. Swanick. And Mr. Swanick testified that he was never informed of the signing of the REDAC Agreement – he only got to know about its existence shortly before the hearing in 2011[150]. Mr. Cortellucci did have REDACTED REDACTED but these clearly did not authorise the execution of a contract like the REDAC Agreement, which committed the sale of the Enterprise's only asset. Mr. Cortellucci was acting *ultra vires*[151].

265. (ii) The second problem is that the REDAC Agreement states that the sales price of the Adams Mine (the C$ 30 million initial gross revenue plus the C$ 140 million variable fee) were to be paid to the Partnership, i.e. to the company owned

[146] Definition of "Landfill" in the REDA Agreement.
[147] Clause 2 REDA Agreement.
[148] Although by law the managing partner of the Partnership was the Enterprise, and the only authorised signing officer of the Enterprise was Mr. Swanick.
[149] HT 4, p. 225.
[150] HT 2, p. 263.
[151] Prof. Welling, Claimant's legal expert, was questioned about Mr. Cortellucci's authority, and concluded that Mr. Cortellucci probably was holding an "ostensible authority" and was consequently binding the Enterprise vis-à-vis RE HT 2, p. 30). The Tribunal concurs with Prof. Welling. But this is not really the issue at hand. The issue is that Mr. Cortellucci, without being an officer of the Enterprise, *de facto* acted as if he was such officer.

by Mr. Cortellucci and his partners, and not to the Enterprise (the company owned by Mr. Gallo).

266. This arrangement is totally in contradiction with the allegations made by the Claimant in his submission[152], and confirmed by Mr. Gallo, Mr. Cortellucci and Mr. Swanick in their testimonies[153]. All of them had averred that in case of sale of the Adams Mine, REDACTED REDACTED The REDACT RED Agreement, signed by Mr. Cortellucci, states exactly the opposite: for to earn its commission, a transaction must be entered into in which the Partnership (not the Enterprise) receives the agreed minimum price (of approximately C$ 170 million). It should be stressed that the requirement that the monies flow to the Partnership (and not to the Enterprise) cannot be a simple mistake, because the Whereas clause of the REDAC Agreement clearly differentiates the roles of Enterprise and Partnership.

267. (iii) The inconsistencies created by the REDAC Agreement are not limited to Mr. Cortellucci acting *ultra vires*, and depriving the Enterprise of REDACTED REDACTED There is an additional inconsistency: Mr. Gallo was not even made aware of the facts. Apparently, Mr. Cortellucci only informed Mr. Gallo, again orally over the telephone, that he was retaining REDACTED for the sale of the Adams Mine[154]. But he never showed Mr. Gallo the REDAC Agreement, and never explained to Mr. Gallo the essential details of the transaction. Mr. Gallo never got to know that the purchase price would flow to the Partnership, and not to his own company, and that Mr. Cortellucci, allegedly acting as his agent, in fact was giving away his ownership rights[155].

9. ENACTMENT OF THE AMLA

268. On 2 October 2003 a new liberal government was elected in Ontario and Mr. David Ramsay, MPP, was the newly appointed Minister of Natural Resources. Mr. Ramsay was a virulent opponent of the Adams Mine waste disposal site, and the local MPP for the area for more than a decade[156]. He was so opposed to the development of the Adams Mine as a waste disposal site, that he threatened to resign as a Minister, if the plans were not stopped[157]. Thus the new Liberal government was under significant political pressure from Mr. Ramsay to shut the project down and take away the Certificate of Approval which had already been issued to the site.

269. On July 7, 2003 the Enterprise had filed an application to obtain the Permit to Take Water, an important step for the actual commencement of the works, and it

[152] CMemJ, para. 3.
[153] See para. 257 *supra*.
[154] HT 1, p. 295.
[155] HT 1, ps. 304 and 305.
[156] CMem, para. 269.
[157] CMem, para. 276.

was expected that the authorisation would actually be issued by early April 2004[158]. This made immediate legislative action unavoidable, if the project was to be successfully stopped. On April 5, 2004 the AMLA was introduced into the Ontario legislature and it was duly enacted on June 17, 2004. Before enactment, the bill was referred to the Standing Committee of the Legislative Assembly, an independent legislative committee comprised of members of all parties. The Enterprise was provided with an opportunity to make a presentation to the Standing Committee, and Mr. McGuinty appeared on its behalf[159]. He made a well drafted and well argued presentation, criticised the proposed legislation, and asked for an amendment regarding the calculation of compensation. Mr. McGuinty at no moment mentioned that the Enterprise was owned by an American investor, protected by the NAFTA.

270. The purpose of the AMLA was a total prohibition for the Adams Mine to be used as a waste disposal site[160]. To achieve this aim, all environmental approvals which had been obtained by Notre and the Enterprise (both companies being mentioned *nominatim*) were revoked *imperio legis*[161]. Additionally, all agreements already signed between Notre and the Crown in right of Ontario, for the purchase of certain land adjacent to the Mine (the so called "Borderlands") were also declared extinguished *imperio legis*[162].

271. The AMLA specifically stated that these actions do not "constitute an expropriation or injurious affection"[163]. Notwithstanding the above, the AMLA acknowledged that Notre and the Enterprise were entitled to some limited compensation, to be established in accordance with a formula. In essence, the compensation was limited to the amount of reasonable expenses incurred by Notre and the Enterprise, minus the fair market value of the Adams Mine site, on the day when the AMLA came into force[164]. The law added that "for greater certainty, no compensation is payable ... for any loss of goodwill or possible profits"[165]. The AMLA allowed the Enterprise to apply to a domestic Court, but only to determine any issue of "fact or law" concerning compensation[166].

272. Finally, the law also included a section, purporting to extinguish all causes of action against the Crown, the Executive Council or its employees, that existed at the time of enactment of the AMLA, or which had arisen between 1989 and the enactment[167].

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[158] CMem, para. 295.
[159] Doc Can 330; RC-Mem, para. 200.
[160] Section 2.
[161] Section 3.
[162] Section 4.
[163] Section 5 (10).
[164] Section 6.
[165] Section 6 (8).
[166] Section 6 (6).
[167] Section 5 (1) and (2).

273. Notre eventually reached an agreement with the Government of Ontario, and agreed to a compensation of REDACTED The Enterprise entered into negotiations, Ontario apparently offered nearly REDACTED no agreement was reached, and finally this arbitration was commenced.

Was Ontario informed of the existence of a US investor?

274. An issue (going to the evidence in the record) for this Tribunal to consider is whether, at some time before the enactment of the AMLA, the fact that the Enterprise was owned by a US investor, protected by the NAFTA, was ever disclosed to the Ontario authorities. It would possibly bring some credibility that, before the enactment of AMLA, Mr. Gallo had some part in the Enterprise. There is no evidence of this having happened. The Respondent has averred that the Government of Ontario was not aware that there was a US investor[170] and the Claimant has also implicitly accepted that he never told the authorities about his situation[171].

275. The only pre AMLA reference to the REDACTED
REDACTED

276. The conclusion that the existence of a US investor was never disclosed to a third party pre AMLA is confirmed by Claimant's Privilege Log. The AMLA was introduced into the Ontario legislature on April 5, 2004. REDACTED
REDACTED

[168] RMemJ, para. 74.
[169] RC-Mem, para. 408.
[170] RC-Mem, para. 386.
[171] CMemJ, para. 158.
REDACTED

VII. ASSESSMENT OF EVIDENCE

1. INTRODUCTION: THE BURDEN OF PROOF

277. Both parties submit, and the Tribunal concurs, that the maxim "who asserts must prove", or *actori incumbit probatio*, applies also in the jurisdictional phase of this investment arbitration[174]: a claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted. If jurisdiction rests on the existence of certain facts, these must be proven at the jurisdictional stage – only the alleged violations of the treaty affording jurisdiction (in this case the NAFTA) can be accepted *pro tem*[175]. But the principle *actori incumbit probatio* is a coin with two sides: the Claimant has to prove its case, and without evidence it will fail; but if the Respondent raises defences, of fraud or otherwise, the burden shifts, and the defences can only succeed if supported by evidence marshalled by the Respondent.

278. The Claimant has added a twist: in his opinion, if the Respondent raises defences of fraud and abuse of process, it lies with the Respondent to provide compelling, affirmative evidence, which fully supports its allegations[176]. In the Claimant's opinion, international tribunals should set a high threshold for evidence supporting the existence of an alleged fraud or acts of bad faith, such as an abuse of right[177]. The Respondent has challenged these conclusions, asserting that the Claimant is mischaracterising Canada's position, and that Canada has never alleged that the Claimant has engaged in a fraudulent conspiracy.

279. In the Tribunal's opinion, given the Respondent's acknowledgement that it is not pleading fraud, the issue raised by the Claimant has become moot and it is not necessary to address whether the standard for proving fraud should be more demanding or more relaxed than the usual standard.

2. WEIGHING OF EVIDENCE REGARDING THE FACTUAL RECORD

280. The first task which the Tribunal has to face is that of weighing the evidence regarding the factual record. Mr. Gallo has presented extensive pleadings explaining how the facts developed, and has submitted evidence in an effort to prove his case. The Respondent has devoted important efforts, trying to destroy the plausibility of the factual record as presented by Mr. Gallo. Thus the Tribunal has to establish to what extent the facts actually happened as Mr. Gallo is now averring they did.

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[174] CMemJ, para. 120; RMemJ, para. 7.
[175] The conclusion has been confirmed by numerous awards: see *Phoenix Action Limited v. Czech Republic*, ICSID case no. ARB/06/5, Respondent's BrofA 17.
[176] CMemJ, para. 120.
[177] CMemJ, para. 122, quoting *Fakes vs Turkey*, ICSID case no. ARB(AF)/07/2, Respondent's BrofA 8, and *Oil Field of Texas vs Iran*, Respondent's BrofA 16.

281. It is evident to the Tribunal that the acquisition, financing and management of the Adams Mine was not structured nor documented in the way one would expect experienced business people to act when making a significant M&A (merger & acquisition) transaction. The factual record is full of unusual circumstances and outright mistakes:

- It is unusual that Mr. Gallo, although he incorporated a corporation and allegedly purchased the Adams Mine for more than C$ 3 million, never signed any document whatsoever; there is not one single document in the file, dated pre AMLA, which bears Mr. Gallo's signature;
- It is even more unusual that Mr. Gallo's name does not even appear in any unchallenged contemporaneous document;
- It is also unusual that Mr. Gallo and Mr. Cortellucci, who only met once at a social event, later on agreed, over the telephone, on the Cortellucci-Gallo Agreement; this Agreement was never formalised in writing, everything being agreed orally over the telephone, without a single scrap of paper documenting their dealings; this contrasts with Mr. Cortellucci's practice in other circumstances, where contractual arrangements were properly formalised;
- It is surprising that the Purchase Agreement was REDACTED REDACTED
- Mr. Gallo's lack of curiosity and interest is also surprising: he never went to see the mine, never asked for any document, never reviewed any contract or memorandum; he entrusted the management of the mine to Mr. Cortellucci, and never gave any written instructions;
- It is unusual that Mr. Swanick, an experienced lawyer, REDACTED REDACTED
- More unusual yet is that Mr. Swanick accepted to act as the only officer of the Enterprise, a company operating a prospective land fill, without written instructions and without indemnity from the actual owner;
- It is also highly unusual that Mr. Cortellucci, who publicly acted as the owner of the mine with respect to third parties, was not the actual owner of the mine, while the true owner, Mr. Gallo, was kept absolutely secret from everyone, including the general manager of the Adams Mine and the Government of Ontario;
- It is unusual that Mr. Swanick signed the small set of corporate documents relating to the Enterprise dated REDACTED with five different pens and in five writing episodes;
- It is surprising that the Minute Book sent by the printers for use by the Enterprise was incomplete, a situation which the printing company had never encountered before;
- It is surprising that Mr. Gallo gave REDACTED REDACTED

- It is unusual that Mr. Swanick issued the REDACTED REDACTED
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- Many corporate documents of the Enterprise have been backdated at different periods of time;
- REDACTED
- It is surprising that Mr. Cortellucci was prepared to sign the REDAC Agreement on behalf of the Enterprise, although he lacked any power to bind the Enterprise; it is even more surprising that in accordance with the REDAC Agreement the up to C$ 170 million to be collected from reselling the mine would flow to Mr. Cortellucci and his partners, not to Mr. Gallo;
- It is unusual that Mr. Gallo, a trained jurist, did not mention in his US tax filings that REDACTED in clear violation of US tax rules – an omission which could lead to significant fines;
- It is also surprising that the Enterprise failed to file its Canadian corporate tax declarations when due, REDACTED REDACTED Canadian tax authorities after the enactment of the AMLA;
- Finally, it is unusual that Mr. Peri, an experienced accountant, when preparing the Enterprise's Canadian tax declaration committed the error of REDACTED

282. Notwithstanding all these unusual circumstances and apparent mistakes, the Respondent has specifically stated that it is not alleging that the Claimant may have acted fraudulently[178]. In view of the Respondent's pleading, the Tribunal is ready to accept that the Claimant has not participated in any fraudulent conspiracy and that the contracts and agreements on which the Claimant bases his allegations are neither false nor fraudulent. The Tribunal thus accepts that the Enterprise and the Partnership were duly incorporated. REDACTED REDACTED were actually entered into, on the dates set forth in each document. The Tribunal is also prepared to accept that Mr. Gallo became at some unproven time the Enterprise's owner of record.

283. But there are two distinct sets of facts, where the Tribunal's interpretation diverges from the position defended by the Claimant. The first set refers to (A) the date of acquisition of the Enterprise and the second to (B) the nature of the Cortellucci-Gallo Agreement.

[178] See para. 138 *supra*.

A. The date of acquisition of the Enterprise

284. In accordance with the principle *actori incumbit probatio*, it is for the Claimant to marshal convincing evidence showing the date when he acquired ownership of the Enterprise's share capital, in accordance with applicable law, in this case Ontario corporate law.

285. Ontario law provides that a corporation is required to maintain a securities register at its registered office, or elsewhere in Ontario at a place designated by the Board of Directors[179]. The corporation is entitled to treat the person named in the register "as the person exclusively entitled to vote, to receive notices, to receive any interest, dividend or other payments in respect of the security, and otherwise to exercise all the rights and powers of a holder of the security"[180]. The registration in the securities register maintained by the corporation is consequently the relevant factor for establishing ownership.

286. The Shareholders' Register of the Enterprise states that on September 9, 2002 Mr. Gallo became the owner of the Enterprise's only share and the person controlling the corporation. *Prima facie* it would thus seem that Mr. Gallo has proven that as of that date he became the owner and controller of the Enterprise.

287. But this *prima facie* evidence only creates a rebuttable presumption, which must give way if undisputable proof is marshalled, showing that the transaction took place at a date different from that stated in the Shareholders' Registry[181]. And this undisputable proof has been provided: the Enterprise's secretary, Mr. Swanick, the person legally responsible for keeping the Enterprise's records, and his assistant, Ms. Viggers, the person who actually filled in the Shareholders' Registry, have both deposed under oath that the transfer of the share in favour of Mr. Gallo did not happen on the date stated in the Registry, but at a later date[182]. In view of this acknowledgement, the Tribunal concludes that Mr. Gallo did not acquire the share capital of the Enterprise on September 9, 2002, the date shown in the Shareholders' Registry.

288. If the acquisition did not take place on that date, when did it happen? Before or after the enactment of the AMLA? Neither Mr. Swanick nor Ms. Viggers were able to testify as to the precise date when the transfer was actually registered in the Shareholders' Registry[183]. Ms. Viggers did not remember the enactment of the AMLA, so that her testimony cannot prove whether the acquisition occurred pre or post AMLA[184]. The only evidence purporting to prove that the transfer was

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[179] Section 140 (1) OBCA.
[180] Section 93(1) of the Act (as amended by the November 25, 2005 *Act to amend certain Acts in relation to financial institutions*); see Expert WS of Prof. Welling, para. 8.
[181] Prof. Welling, Claimant's legal expert, accepted that the presumption created by the share register could be overcome with documentary evidence, HT, 2, p. 10
[182] See para. 181 *supra*.
[183] See para. 181 *supra*.
[184] HT 5, ps. 27 and 28.

performed before the AMLA is the testimony of Mr. Swanick that on the date of introduction of the Act, he went to the file and he found that the Minute Book was complete[185].

289. But this testimony does not carry sufficient evidentiary conviction, neither from a subjective nor from an objective point of view. Subjectively, the deposition is not made by an independent and unbiased witness, but by the Claimant's lawyer, who also was the Enterprise's secretary, and who has a personal interest in the matter[186]. Objectively, the Tribunal would expect Mr. Swanick's testimony to be corroborated by some circumstantial evidence. There is none. In an age where almost every human action leaves a written record, it is simply unconceivable that the Claimant, after extensive discovery, has not been able to produce one single shred of documentary evidence, confirming the date when Mr. Gallo acquired ownership: no agreement, no contract, no confirmation slip, no instruction letter, no memorandum, no invoice, no email, no file note, no tax declaration, no submission to any authority – absolutely nothing. In addition, as noted in paragraph 219 *supra*, it is not true that on the date of enactment of the AMLA the corporate records of the Enterprise were complete. It is now undisputed that, on the date of enactment of the AMLA, the Minute Book did not include the 2002/3 Resolutions approving the financial statements for 2002 and 2003, which Mr. Swanick has acknowledged were signed in 2008 and backdated.

The Tribunal's conclusion

290. The Tribunal, after carefully reviewing the extensive evidence marshalled by the parties, has reached the conclusion that the Claimant has not proven the date on which Mr. Gallo acquired ownership and control of the Enterprise. And from the evidentiary record submitted in this case it is not possible to ascertain whether this happened before or after the enactment of the AMLA.

291. There are two additional elements of persuasion which weigh heavily in the Tribunal's determination: the inexistence of contemporaneous corporate resolutions and the absence of contemporaneous tax filings.

Inexistence of contemporaneous corporate resolutions

292. In the time period between the purported acquisition of the Enterprise by Mr. Gallo and the enactment of the AMLA (i.e. between September 9, 2002 and April 5, 2004), the Enterprise should have approved the so-called 2002/3 Resolutions, i.e. the Shareholders' Resolutions approving the 2002 and 2003 financial statements[187]. And these Resolutions should have been signed by the Enterprise's only shareholder, Mr. Gallo. In fact, the 2002/3 Resolutions were approved in 2008, when this arbitration procedure had already been filed, and

[185] See para. 218 *supra*.
[186] See *Hussein Nuaman Soufraki v. The United Arab Emirates*. Case No. ARB/02/7. Respondent's BOA 136, para. 78.
[187] See para. 219 *supra*.

then backdated, purporting to have been signed on March 8, 2003 and March 9, 2004.

293. It is a basic duty of every corporation to have its annual financial statements approved in a general shareholders meeting[188], to be held at the beginning of the next fiscal year[189], and every minimally diligent corporate secretary is aware that the appropriate resolutions must be approved by the shareholders[190]. Mr. Swanick, an experienced lawyer with an extensive corporate and tax practice, must have been aware of this legal obligation. If Mr. Gallo indeed was the only shareholder of the Enterprise, he should have signed the 2002/3 Resolutions contemporaneously – and not with a delay of more than four years.

Absence of contemporaneous tax filings

294. The absence of personal and corporate tax returns filed in the period between the acquisition of the Adams Mine and the enactment of the AMLA further weakens the plausibility of the Claimant's allegations. Both Mr. Gallo and the Enterprise should have presented tax declarations for the fiscal years 2002 and 2003 to the US and to the Canadian tax authorities, Mr. Gallo disclosing that he was the owner of the Enterprise and the Adams Mine, and the Enterprise identifying Mr. Gallo as its only shareholder. Both Mr. Gallo and the Enterprise were under a legal obligation to do so, and both failed to comply. After the enactment of the AMLA, the Claimant submits that he became aware of his failure and belatedly did what the law required him to do.

295. Mr. Gallo has tried to explain why he failed to comply with the requirements of US tax law. REDACTED

REDACTED

296. It may be that Mr. Gallo was unaware of his US taxpayer reporting obligations. However, it seems implausible that Mr. Gallo, a trained lawyer, who should have been aware of US tax law and of the penalties for non-compliance, and a civil servant with a political appointment, who should have been worried about the reputational risk, never gave thought to possible tax implications of being the owner of the Adams Mine in Canada – a waste disposal site which he had just purchased for a price of at least C$ 3.25 million and which potentially could develop into a business worth tens of millions of Dollars. His conduct is thus not

[188] Section 155(1) *Canada Business Corporations Act*.
[189] Not later than 15 months after holding the last preceding annual meeting but not later than six months after the end of the corporation's preceding financial year. Sections 133(1)b) *Canada Business Corporations Act*, 93(1) *OBCA* and 6(1) of the *By laws of the Enterprise*.
[190] Section 104 *OBCA*.

consistent with what he would have been expected to do given his involvement in what could have become a considerable investment.

* * *

297. In summary, the burden of proving that at the relevant time he was the only shareholder of the Enterprise rests with the Claimant. The Tribunal finds that the Claimant has proven that he is the owner of record of the only share issued by the Enterprise and, thus, formally the sole owner of the corporation and the person who controls it. But he has not been able to discharge his duty of proving the date when he acquired ownership and control. There cannot be any dispute that the purported date stated in the Shareholders' Registry – September 9, 2002 – is not the date when the registration was performed and the transfer of the shares took place. The burden of proving the actual date of transfer, and proving that this date predates the AMLA, falls on the Claimant. He has not succeeded.

B. The nature of the relationship between Mr. Gallo and Mr. Cortellucci

298. Both Mr. Gallo and Mr. Cortellucci have accepted that, at the time of the acquisition of the Adams Mine, they entered into the oral Cortellucci-Gallo Agreement, in which Mr. Gallo allegedly acted as principal, and Mr. Cortellucci as agent[192].

299. The record confirms that a contractual relationship indeed arose between Mr. Gallo and Mr. Cortellucci, and that this relationship seems to fit the pattern of a fiduciary relationship.

300. But the Tribunal rejects that this fiduciary relationship was structured in the way the Claimant and Mr. Cortellucci now aver. Except for their own depositions, there is no evidence that Mr. Cortellucci, a wealthy, experienced business man, who was providing all the funding required by the Enterprise, who was taking decisions without requesting or receiving instructions, who was publicly appearing as the owner of the Adams Mine, in fact was the agent of a young American civil servant, whom he had only met once at a social function, and with whom he only spoke on the telephone.

301. The basic theory of the agency device is to enable a person, through the services of another, to broaden the scope of activities and receive the product of another's efforts, possibly paying such other for what he does, but retaining for himself the risk of and the benefit from the work performed by the agent. In an agency relationship, it is the principal who takes the decisions and the agent who follows the principal's instructions, it is the principal who assumes the risk and the reward, and it is normally the principal who provides the funding.

[192] See para. 161 *supra*.

302. In the Cortellucci-Gallo Agreement, it was Mr. Cortellucci and his partners who provided REDACTED
REDACTED

303. What about the upside? What would happen with the profits generated by the resale or the Adams Mine?

304. Mr. Gallo, Mr. Cortellucci and Mr. Swanick have deposed that REDACTED
REDACTED
there are very strong indications that this written understanding in actual terms was superseded by the oral Cortellucci-Gallo Agreement.

305. *Pro memoria*: it was Mr. Cortellucci who:

- Had found the investment opportunity;
- Had provided all REDACTED
- Was performing all of the management tasks;
- Was taking the reputational risk surrounding the development of the site;
- And had all the political and personal connections necessary for a successful completion of the sale.

306. What was Mr. Gallo's contribution to the deal?

307. Mr. Gallo had, during a family ceremony, whispered into Mr. Cortellucci's ear that investing in the waste management sector was a good idea – a thought which Mr. Cortellucci could easily have developed on his own. Further to that, the record does not show that Mr. Gallo made any additional contribution (no money, no personal activity, no contacts, no third party funds). Mr. Gallo even denied authorisation for his name to be made public, so that Mr. Cortellucci had to face all the bad publicity caused by the plans to transform a mine into a hazardous waste management facility. But in fact – if we are to accept Mr. Gallo's and Mr. Cortellucci's story – the true owner of the Adams Mine was not the person being publicly blamed, but rather a young US civil servant, who for reasons of his own did not want his name to become known.

308. In view of the contributions made by each of the parties, the REDACTED distribution of profits between Mr. Gallo and Mr. Cortellucci borders on the unbelievable: it is hard to believe that Mr. Cortellucci, a seasoned and very experienced business man, accepted a business deal so skewed in favour of the

REDACTED

counterparty. And this alleged distribution stands in stark contradiction with the REDAC Agreement.

309. The REDAC Agreement[194], which foresaw that the Adams Mine would be resold with a huge profit (the amounts to be received would have exceeded C$ 170 million in total), clearly provides that profits from the resale of the Adams Mine should flow to Mr. Cortellucci and partners – not to Mr. Gallo.

310. In the Tribunal's opinion, the REDAC Agreement reflects what must have been the real terms of the deal: while the written agreements provided for REDACTED of the profits, the oral Cortellucci-Gallo Agreement between Mr. Gallo and Mr. Cortellucci must have established that in case of sale of the Adams Mine the totality (or at least a very substantial part of the profits) would flow to Mr. Cortellucci and partners and not to Mr. Gallo.

311. This conclusion confirms the Tribunal's opinion that the rights and obligations assumed by Mr. Gallo in the Cortellucci-Gallo Agreement, cannot be characterised as those of a principal, nor those assumed by Mr. Cortellucci as those of an agent; in fact, it was Mr. Cortellucci who gave instructions, who provided funds, who assumed the risk and reward of the business.

* * *

312. Summing up the Tribunal concludes that there are two aspects in the Claimant's factual allegations which must be qualified:

- First, the Claimant has not been able to discharge his duty of proving the date when he acquired ownership of the Enterprise and that this acquisition predates the AMLA, and
- Second, the oral Cortellucci-Gallo Agreement does not fit the pattern of an agency agreement, in which Mr. Gallo is the principal and Mr. Cortellucci is acting as his agent.

[194] See para. 258 *supra*.

VIII. LEGAL ANALYSIS

1. INTRODUCTION

313. The Tribunal must decide whether it has jurisdiction to hear the claim brought pursuant to Art. 1117 of the NAFTA by the Claimant, Mr. Gallo, on behalf of the Enterprise, against the Respondent, Canada.

NAFTA provisions

314. At the outset it is important to list the provisions of the NAFTA which bear most relevance upon the issue under adjudication:

315. Article 1101.1 of the NAFTA defines the "Scope and Coverage" of Chapter 11:

> "This Chapter applies to measures adopted or maintained by a Party relating to:
>
> (a) Investors of another Party;
> (b) Investments of investors of another party in the territory of the Party;
> (c) ..."

316. Article 1117.1 of the NAFTA is the cornerstone of Claimant's allegation:

> "An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit... a claim that the other Party has breached an obligation [defined in Section A of Chapter 11 of the NAFTA] ... and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach".

317. Equally relevant are various definitions contained in Arts. 201 and 1139 of the NAFTA:

318. (i) "Investment": Art. 1139 defines "investment", including (among other assets)

- An "enterprise",
- An "equity security of an enterprise",
- An "interest in an enterprise that entitles the owner to share in income or profits of the enterprise", or
- "[R]eal estate ... acquired in the expectation or used for the purpose of economic benefit or other business purposes".

"Enterprise" means "any entity constituted or organized under applicable law, whether or not for profit, and whether privately owned or governmentally owned,

including any corporation, trust, partnership, sole proprietorship, joint venture or other association". And "Enterprise of a Party" is "an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there".

319. (ii) "Investor of a Party" means, in accordance with the same provision, "a national or an enterprise of such Party, that seeks to make, is making or has made an investment".

320. (iii) "Investment of an investor of a Party" is defined by Art. 1139 to mean "an investment owned or controlled directly or indirectly by an investor of such Party".

2. LACK OF JURISDICTION *RATIONE TEMPORIS*

321. The Tribunal has already found[195] that the Claimant has not been able to discharge his duty of proving the date when he acquired ownership and control of the Enterprise, and that this acquisition predates the AMLA. Does this finding imply that the Tribunal lacks jurisdiction *ratione temporis*?

The Claimant's allegations

322. The Claimant has submitted that, even if the Tribunal found that Mr. Gallo had acquired the share of the Enterprise after the promulgation of the law, the Tribunal would still be vested with authority to decide this case. In Claimant's opinion, Art. 1117 of the NAFTA permits an investor of a party to bring a claim on behalf of an investment enterprise that it owns or controls, directly or indirectly, without any limitation as to when such ownership or control of the enterprise began[196]. If there were *bona fide* commercial reasons for obtaining control or ownership of an enterprise that just so happened to be nursing a nascent NAFTA claim, there is nothing in Art. 1117 that would prevent a claim from being made by the new shareholder on the enterprise's behalf[197].

The Respondent's position

323. The Respondent disagrees. In Canada's opinion, for Chapter 11 to apply to a measure relating to an investment, that investment must be of an investor of another Party, at the time the measure is adopted or maintained[198]. The Respondent adds that investment arbitration tribunals have also generally found that they do not have jurisdiction unless a claimant can establish that an investment was owned by an investor of another party.

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[195] See para. 312 *supra*.
[196] RMemJ, para. 154.
[197] RMemJ, para. 155.
[198] CMemJ, para. 12.

The Tribunal's decision

324. The Tribunal without hesitation sides with the Respondent.

325. Art. 1117 of the NAFTA authorises "[a]n investor of a Party, on behalf of an enterprise of another Party, that is a juridical person that the investor owns or controls directly or indirectly" to submit a dispute to arbitration. And Art. 1101(1) limits the scope of Chapter 11 protection "to measures adopted or maintained" by Canada that relate to "investors of another Party" and "investments of investors of another Party". Accordingly, for Chapter 11 of the NAFTA to apply to a measure relating to an investment, that investment must be owned or controlled by an investor of another party, and ownership or control must exist at the time the measure which allegedly violates the Treaty is adopted or maintained. In a claim under Art. 1117 the investor must prove that he owned or controlled directly or indirectly the "juridical person" holding the investment, at the critical time.

326. As the Tribunal in *Phoenix* declared, it does not need extended explanation to assert that a tribunal has no jurisdiction *ratione temporis* to consider claims arising prior to the date of the alleged investment, because the treaty cannot be applied to acts committed by a State before the claimant invested in the host country[199]. In the present case, the Claimant must have owned or controlled the Enterprise at the time when the AMLA was enacted. And since the Tribunal has already found that the Claimant has failed to marshal the evidence necessary to prove such ownership and control at the relevant time, the necessary consequence is that his claim must fail for lack of jurisdiction *ratione temporis*.

327. The Claimant has submitted a second line of argument: Art. 1117 permits an investor of a party to bring a claim on behalf of an investment enterprise that it owns or controls, directly or indirectly, without any limitation as to when such ownership or control of the enterprise began[200]. If there were *bona fide* commercial reasons for obtaining ownership or control of an enterprise that just so happened to be nursing a nascent NAFTA claim, there is nothing in Art. 1117 that would prevent a claim from being made on the enterprise's behalf – so long as ownership or control was transferred to a person who qualified as an "investor of a NAFTA party"[201]. This argument is circular: if the obtaining of control or ownership is made after the alleged breach of the Treaty, the acquired enterprise cannot be "nursing a nascent NAFTA claim"; there cannot be any enterprise nursing such a nascent claim, if the enterprise is not already at the time of acquisition under the control or in the ownership of a NAFTA-protected person, a circumstance which patently did not arise in this arbitration.

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[199] *Phoenix Action Limited v. Czech Republic*, ICSID case no. ARB/06/5, Respondent's BrofA 17, para. 68.
[200] CMemJ, para. 154.
[201] CMemJ, para. 155.

Case law

328. Investment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted.

329. *Amto*[202] is a case under the Energy Charter Treaty ["ECT"] which shows similarities with the present arbitration. The State argued that the investor's contractual right to purchase shares did not qualify as an investment under the ECT, and that the jurisdiction of the Tribunal should commence only as of the date that Amto could show ownership of the shares. In fact, the tribunal put the date of the investment at the time on which the records of the corporation in which a 16% investment had been made, showed Amto's actual ownership of 16% of the shares in the investment; it was on that date that the tribunal decided that the jurisdiction *ratione temporis* began[203]. All other known investment arbitration decisions have followed the same line of reasoning[204].

330. The Claimant has not been able to provide a single reference to an arbitral award supporting his position.

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[202] *Limited Liability Company Amto v. Ukraine*, Stockholm Chamber of Commerce Arbitration No. 080/2005,Respondent's BOA 146.
[203] Final Award, (March 26, 2008), para. 48.
[204] *Cementownia "Nowa Huta" SA v. Turkey*, ICSID case no. ARB(AF)/06/2, Respondent's BrofA 3, para. 112; *Société Générale v. Dominican Republic*, Respondent's BOA 145, paras. 106 – 107, *Saluka Investments B.V. v. Czech Republic*, BOA 70, para. 244. (See RMemJ, para. 13).

IX. CONCLUSION

331. Investment treaties confer rights to foreign investors, which are unavailable to nationals of the host country. Legitimate policy reasons justify this differential treatment. But the same policy reasons mandate that the boundaries between foreign and domestic investors be respected, and that the privileged rights conferred to the former are not abused by the latter, in violation of the stated objectives of the international treaty.

332. This general principle is reflected in Art. 1117 of the NAFTA, which requires that any claimant seeking to successfully file an arbitration on behalf of a domestic "juridical person", must pass a first hurdle: the plaintiff must prove that at the time when the alleged treaty violations occurred he or she owned or controlled the "juridical person" holding the investment.

333. The case at hand is an excellent example of the tension between claimants' requests to expand treaty protection to substantially-domestic investment structures, and the Tribunal's obligation to apply the treaty on the terms and with the subjective scope agreed between the NAFTA contracting parties.

334. The Claimant was asserting that the AMLA, a law enacted by the Legislature of Ontario, violates certain obligations assumed by Canada under the NAFTA. The AMLA prohibits the Adams Mine, which is owned by the Enterprise, from being used as a waste disposal site[205], revokes all existing environmental approvals which had been obtained by Notre and the Enterprise[206] and annuls all agreements already signed between Notre and Ontario, for the purchase of certain land adjacent to the Mine[207]. The AMLA specifically states that these actions do not "constitute an expropriation or injurious affection"[208] and limits compensation to the reasonable expenses incurred by Notre and the Enterprise, minus the fair market value of the Adams Mine site, on the day when the AMLA came into force[209]. The law adds that "for greater certainty, no compensation is payable ... for any loss of goodwill or possible profits"[210]. The AMLA allowed the Enterprise to apply to a domestic Court, but only to determine any issue of "fact or law" concerning compensation[211].

335. If the Enterprise were owned or controlled by a person who does not qualify as a protected investor under the NAFTA, such person, if dissatisfied with the AMLA, would be restricted to the causes of action provided for under Canadian law. The situation would be different if the Enterprise were owned or controlled, at the

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[205] Section 2.
[206] Section 3.
[207] Section 4.
[208] Section 5 (10).
[209] Section 6.
[210] Section 6 (8).
[211] Section 6 (6).

relevant time, by a US or Mexican investor, since in such case it would enjoy an additional level of protection: the investor would be entitled to the same instruments open to Canadian citizens, or alternatively the investor could draw protection from the international law rights conferred by the NAFTA. The different treatment applied to foreign and domestic investors is a natural consequence of the Treaty. However, this unequal treatment is not without justification: justice is not to grant everyone the same, but *suum cuique tribuere.* Foreigners are more exposed than domestic investors to the sovereign risk attached to the investment and to arbitrary actions of the host State, and may thus, as a matter of legitimate policy, be granted a wider scope of protection.

336. But for investors to enjoy this additional right, there must be a *quid pro quo*: Given that the stated objective of investment treaties is to stimulate flows of private capital into the economies of contracting states, the claimant in any investment arbitration must prove that he or she is a protected foreign investor, who at the relevant time owns or controls an investment in the host country. And Mr. Gallo has only partially succeeded: he has shown that he is a US citizen, but he has failed to marshal convincing evidence that at the time of enactment of the AMLA he was the owner of the Enterprise. In these circumstances access to the additional level of protection afforded by the NAFTA cannot be available, and the Claimant and the Enterprise must resort to the general remedies available to investors under Canadian law in general and under the AMLA in particular.

* * *

337. The Claimant included in his Statement of Claim the following prayer for relief[212]:

> "As set out above, Claimants seek the following:
>
> (i) Damages of not less than C$ 104,919,250.00 for interference with the Enterprise's use and enjoyment of the Adams Mine Site, to the extent of its approved landfill capacity;
> (ii) Costs associated with these proceedings, including all professional fees and disbursements;
> (iii) An award of compound interest a rate to be fixed by the Tribunal, both on a pre-award, and on a post-award, basis;
> (iv) Payment of a sum of compensation equal to any tax consequences of the award, in order to maintain the award's integrity; and
> (v) Such further relief as counsel may advise and that the Tribunal deems appropriate."

338. In his Memorial on Jurisdiction and Post-Hearing Brief, the Claimant did not include a specific prayer for relief.

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[212] CMem, para. 505.

339. The Respondent has sought, throughout its submissions, the same relief[213]:

> "For the foregoing reasons, Canada respectfully requests that the Tribunal dismiss the Claimant's claims in their entirety and with prejudice, order that the Claimant bear the costs of this arbitration including Canada's costs for legal representation and assistance, and grant any further relief it deems just and proper".

340. The Tribunal notes that the Claimant has only sought a relief as to the merits of the claim and the Respondent has requested the Tribunal to dismiss such claim, with prejudice. Both parties have then asked for the awarding of costs.

341. Since the Tribunal has decided that is has no jurisdiction over the present dispute, it will make no decision as regards the merits of the claim – be it with or without prejudice and it will address costs in the following section.

[213] RC-Mem, para. 521.

X. COSTS

342. There is one final request which has to be addressed: the awarding of costs, the Claimant and the Respondent having requested[214] that the Tribunal order the counterparty to pay all fees and costs incurred in these preliminary proceedings.

343. The Tribunal observes that, with respect to costs, Article 1135(1) of the NAFTA simply states that the Tribunal "may also award costs in accordance with the applicable arbitration rules". The provisions regarding the Tribunal's decision in the matter of costs are therefore to be found in Articles 38 to 40 of the UNCITRAL Arbitration Rules. Article 38 defines the "costs of arbitration" as follows:

> "(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
> (b) The travel and other expenses incurred by the arbitrators;
> (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
> (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
> (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
> (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague".

344. Meanwhile, paragraphs 1 and 2 of Article 40 of the UNCITRAL Rules provide the criteria to be applied by the Tribunal in awarding costs:

> "1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
> 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable".

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[214] See paras. 337 *et seq. supra.*

345. The UNCITRAL Arbitration Rules contain two separate rules on the awarding of costs: (1.) one rule concerning the costs of arbitration, and (2.) another rule for the costs of the parties' legal representation and assistance.

1. THE COSTS OF ARBITRATION

346. Article 40(1) of the UNCITRAL Arbitration Rules stipulates as follows:

> "Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case".

347. Thus, the UNCITRAL Arbitration Rules provide that, if there is a winning party, it should "in principle" be exonerated from paying the costs of arbitration. This principle should only be broken if the Tribunal determines that apportionment as between the parties is "reasonable."

348. The Tribunal has decided that it has no jurisdiction over the claims submitted to it by the Claimant and so the Respondent has been successful in its jurisdictional objections. The Tribunal sees no basis upon which it might be concluded that it would be reasonable for the parties to share the costs of arbitration. Accordingly, as the unsuccessful party, the Claimant shall bear the full costs of arbitration.

349. The Parties deposited a total of USD 900,000 (USD 450,000 by the Claimant; USD 450,000 by the Respondent) with the PCA to cover the costs of arbitration.

350. The fees and expenses of Prof. Jean-Gabriel Castel, OC, QC, the arbitrator appointed by the Claimant, amount to USD 273,425.68 and USD 1,483.29, respectively. The fees and expenses of Dr. Laurent Lévy, the arbitrator appointed by the Respondent, amount to USD 175,232.85 and USD 28,395.35, respectively. Dr. Lévy's fees and expenses are in addition to those of Mr. J. Christopher Thomas, who served as the arbitrator appointed by the Respondent through October 21, 2009. The fees and expenses of Mr. Thomas amount to USD 52,855.00 and USD 3,995.72, respectively. The fees and expenses of Prof. Juan Fernández-Armesto, the Presiding Arbitrator, amount to USD 253,097.47 and USD 12,788.82, respectively.

351. Pursuant to the order of the Tribunal and agreement of the Parties, Mrs. Deva Villanúa was designated as Administrative Assistant of the Arbitral Tribunal and the International Bureau of the PCA was designated to act as Registry in this arbitration. Mrs. Villanúa's fees amount to USD 60,466.02. The PCA's fees for registry services amount to USD 36,447.70.

352. Other tribunal costs, including transcription services, courier deliveries, conference calling expenses, bank charges, and all other expenses relating to the arbitration proceedings, amount to USD 1,818.10.

353. Based on the above figures, the combined tribunal costs, comprising the items covered in Articles 38(a) to (c) of the UNCITRAL Arbitration Rules, total USD 900,000.

354. Summing up, the Tribunal decides that the Claimant shall bear the full costs of the arbitration, and consequently orders the Claimant to reimburse to the Respondent the deposit towards the arbitration costs already made by the Respondent, in the amount of USD 450,000.

2. THE COSTS OF LEGAL REPRESENTATION AND ASSISTANCE

355. The costs of legal representation and assistance are the subject of a distinct rule set out at Article 40(2) of the UNCITRAL Arbitration Rules:

> "With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable".

356. Costs of legal representation and assistance are thus not subject to the general principle that costs shall be borne by the unsuccessful party. Rather, the UNCITRAL Rules grant the Tribunal discretion as to the allocation of these costs as between the parties.

357. The terms of Article 40(2) allow the Tribunal to decide that all the costs of legal representation and assistance shall be borne by one party (the words "which party shall bear such costs" referring to a party in the singular) or to apportion such costs "between the parties". If the latter path is to be followed, the only guidance provided by the UNCITRAL Arbitration Rules is that the Tribunal must "tak[e] into account the circumstances of the case".

358. The traditional position in investment arbitration, in contrast to commercial arbitration, has been to follow the practice under public international law that the parties shall bear their own costs of legal representation and assistance. The Tribunal, taking the conduct of the parties, the expenses incurred during the procedure and all other circumstances of the case into consideration, decides to adhere to such traditional position and finds it equitable that each side bear its own costs of legal representation and assistance.

XI. DECISION

359. In view of the foregoing reasons, the Tribunal unanimously decides:

1. The Tribunal does not have jurisdiction over the claims submitted to it by the Claimant.

2. The Claimant shall pay to the Respondent the amount of USD 450,000 as costs of this arbitration. Each party shall bear its own costs of legal representation and assistance.

Place of Arbitration: Vancouver, Canada

Date of the decision: 15 September 2011

Prof. Juan Fernández-Armesto

Prof. Jean-Gabriel Castel, OC, Q.C.

Dr. Laurent Lévy