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PUBLIC VERSION

**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/Investor

AND:

GOVERNMENT OF CANADA

Respondent/Party

GOVERNMENT OF CANADA

SUBMISSION ON JURISDICTION

December 20, 2010

REDACTED

Departments of Justice and of
Foreign Affairs
and International Trade
Trade Law Bureau
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario
K1A 0G2
Canada

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I. INTRODUCTION

1. An unconvincing story, an assortment of unsatisfactory excuses, a few backdated and unreliable documents, and a handful of questionable witness statements—this is all that the Claimant has submitted in order to prove that he has a right to bring this arbitration against Canada. It is not enough, especially in light of what the Claimant should have been able to produce if he really did own an investment in Canada allegedly worth \$105 million.

2. The Claimant has challenged the *Adams Mine Lake Act* (the “*AMLA*”), an environmental measure introduced by the Government of Ontario in April, 2004. The *AMLA* prevented the development of a landfill at the site of an abandoned iron-ore mine in Northern Ontario called Adams Mine. The Claimant alleges that he has been the sole shareholder of the corporation which owns Adams Mine, 1532382 Ontario Inc. (the “Enterprise”), since September, 2002, approximately 20 months prior to the introduction of the *AMLA*. As a result of such alleged ownership, he argues that the Tribunal has jurisdiction to hear his \$105 million claim on behalf of the Enterprise.

3. In order for the Tribunal to exercise jurisdiction, the Claimant must prove that he owned the Enterprise prior to the introduction of the *AMLA*. Accordingly, the only issue to be decided now is whether the Claimant has met this burden. He has not.

4. The Claimant has failed to provide any reliable or contemporaneous documentary evidence—not a single e-mail, letter, fax, presentation, or note—that reflects even his involvement with the Enterprise, let alone his alleged ownership of it, prior to the introduction of the *AMLA*. In his previous submissions, the Claimant relied upon the Enterprise’s Canadian tax returns, the Claimant’s U.S. tax returns, and the Enterprise’s corporate minute book, as contemporaneous evidence of his ownership of the Enterprise. However, he has now admitted that almost every single one of these documents was backdated, and that each was, in fact, signed months, if not years, after the *AMLA*. In some instances, the backdated documents were not signed until after this arbitration was commenced. In light of the complete absence of corroborating documentary evidence,

the witness statements he offers from his friends and other individuals with a direct stake in the outcome of this arbitration, are both insufficient and questionable. They are certainly no substitute for the basic documents that an investor with an alleged investment worth \$105 million should have.

5. The Claimant has had years and ample opportunity to locate and produce the documentary evidence necessary to support his claim that he owned the Enterprise prior to the introduction of the *AMLA*. His failure to do so can mean nothing less than that he has failed to meet his burden. Moreover, even if the Tribunal somehow found adequate evidence of his ownership of the Enterprise prior to the introduction of the *AMLA*, such ownership would not constitute an investment under the NAFTA. And even if it did, in these circumstances, it would be an abuse of right for the Claimant to be able to proceed in this arbitration.

6. Accordingly, Canada respectfully requests that the Tribunal dismiss this claim for lack of jurisdiction.

II. THE CLAIMANT MUST SATISFY THE TRIBUNAL THAT HE OWNED THE ENTERPRISE PRIOR TO THE *AMLA*

A. The Claimant Bears the Burden of Proving that the Tribunal has Jurisdiction

7. A claimant in an investment arbitration bears the burden of proving that the tribunal has jurisdiction to hear his or her claims.¹ To satisfy this burden, a claimant must prove the facts on which he or she relies to establish jurisdiction.² Where the claimant

¹ See e.g., *International Thunderbird Gaming Corp. v. United Mexican States* (UNCITRAL) Final Award (26 January 2006) ¶ 102 (TAB-1 / BOA-82); *Cementownia "Nowa Huta" S.A. v. Republic of Turkey* (ICSID Case No. ARB (AF)/06/02) Award (September 17, 2009) ¶¶ 113-14 ("*Cementownia*") (TAB-2 / BOA-16); *Europe Cement Investment & Trade, S.A. v. Republic of Turkey* (ICSID Case No. ARB (AF)/07/2) Award (August 13, 2009) ¶¶ 140, 166 ("*Europe Cement*") (TAB-3 / BOA-27); *Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7) Decision on Jurisdiction (July 7, 2004) ¶ 58 ("*Soufraki*") (TAB-4 / BOA-136).

² See, e.g., *Soufraki*, ¶ 58 (TAB-4 / BOA-136); *Europe Cement*, ¶ 166 (TAB-3 / BOA-27); *Cementownia*, ¶ 113-114 (TAB 2 / BOA-16); *Reza and Shahnaz Mohajer-Shojaee and The Government of the Islamic Republic of Iran*, Decision No. DEC 95-273-1 (26 December 1990) ¶¶ 8-9 (TAB 5/ BOA-137). See also, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*

has failed to prove those facts, tribunals have ruled that they do not have jurisdiction and have terminated the proceedings.³

8. Thus, for example, in *Soufraki* the tribunal held that the “Claimant . . . bears the burden of proving to the satisfaction of the Tribunal . . . [that] he belongs to the class of investors in respect of whom the Respondent has consented to . . . jurisdiction.”⁴ Similarly, in *Cementownia*, the tribunal held that the claimant “bore the burden of proving”⁵ the facts on which it relied to establish jurisdiction. Likewise, in *Europe Cement*, the tribunal held that the claimant had “[t]he burden to prove”⁶ the facts on which it relied to prove jurisdiction. In all three cases, the tribunals dismissed the claims because the claimants failed to produce persuasive evidence that could prove the facts they alleged to establish jurisdiction.⁷

9. In the instant case, the Claimant contends that it is *Canada* that bears the burden of *disproving* the Tribunal’s jurisdiction. In particular, the Claimant asserts that Canada has alleged that he is part of a “fraudulent conspiracy,” and that, therefore, the burden of proof should be shifted to Canada.

(Cambridge: Grotius Publications, 1987) (“Bin Cheng”) at 327, 329-331 (TAB-6 / BOA-138). This is also consistent with Article 24(1) of the UNCITRAL Rules, which states that “[e]ach party shall have the burden of proving the facts relied on to support his claim or defence.” *UNCITRAL Arbitration Rules* (TAB-7 / BOA-139).

³ See e.g., *Cementownia* at ¶ 149 (TAB-2 / BOA-16); *Soufraki* at ¶ 81 (TAB-4 / BOA-136); *Europe Cement*, ¶ 145 (TAB-3 / BOA-27).

⁴ *Soufraki*, ¶ 58 (TAB-4 / BOA-136).

⁵ *Cementownia*, ¶ 113 (TAB-2 / BOA-16).

⁶ *Europe Cement*, ¶¶ 140, 166 (TAB-3 / BOA-27).

⁷ *Cementownia*, ¶ 149 (dismissing the case for lack of jurisdiction because “[t]he Arbitral Tribunal considers that the Claimant has not produced any persuasive evidence that could prove” the facts on which it relied to establish jurisdiction) (TAB-2 / BOA-16). See also *Europe Cement*, ¶ 145 (holding that the tribunal did not have jurisdiction “since the Claimant has failed to establish” the facts on which it relied to sustain jurisdiction) (TAB-3 / BOA-27); *Soufraki*, ¶ 81 (TAB-4 / BOA-136) (holding that because the “Claimant has failed to discharge his burden of proof,” the tribunal did not have jurisdiction).

10. The Claimant has mischaracterized Canada's objection to jurisdiction.⁸ Canada has not alleged that the Claimant engaged in a "fraudulent conspiracy." Rather, all that Canada has consistently maintained throughout this arbitration is that the Claimant has not adduced sufficient evidence to establish jurisdiction. Accordingly, the cases cited by the Claimant are simply inapplicable.⁹

B. The Claimant Must Demonstrate that He Owned the Enterprise Prior to the Introduction of the AMLA to Meet His Burden

11. The Claimant alleges that the Tribunal has jurisdiction under NAFTA Article 1117(1) of the NAFTA. This provision provides, in relevant part, that:

⁸ To pick but one of many examples, the Claimant asserted that "[i]n no uncertain terms, [Canada] has claimed that Mr. Gallo '... did not become connected in any way with the Enterprise until after the introduction of the AMLA in Ontario's Legislature.'" Investor's Submission on Ownership of the Investment (October 25, 2010) ¶ 117 ("Reply on Jurisdiction"). However, the Claimant appears to have intentionally omitted key words from Canada's submission. The Counter Memorial actually stated that "[t]he Claimant has offered no documentary evidence in his Memorial, and there is no such evidence, reliably to demonstrate any connection between the Claimant and the Enterprise prior to the introduction of the AMLA in April, 2004. To the contrary, the evidence on the record shows that the Claimant did not become connected in any way with the Enterprise until after the introduction of the AMLA in Ontario's legislature." See Counter Memorial, ¶ 215.

⁹ Arbitral tribunals have shifted the burden of proof to respondents only in cases in which fraud or an affirmative defence has been pled. For example, in *Dadras International and Per-Am Construction Corp. v. The Islamic Republic of Iran and Tehran Redevelopment Co.*, Award (November 7, 1995), in XXII Y.B. Comm. Arb. 504 (1997) ¶¶ 7, 23, 121-122 (TAB-8 / BOA-140), the respondent alleged that the claimant forged a contract to establish jurisdiction. Likewise, in *Westinghouse and Burns and Roe (U.S. v. National Power Co. and the Republic of the Philippines)*, (ICC Case No. 6401) Award (19 December 1991), p. 55 ("Westinghouse") (TAB-9 / BOA-141) and *Oil Field of Texas, Inc. v. The Government of the Islamic Republic of Iran*, Award No. 258-43-1 ¶¶ 24-25 (October 8, 1986) (TAB-10 / BOA-58), the respondents alleged that the contracts on which the claimants alleged jurisdiction should be based were obtained by bribery. The *Westinghouse* decision is also inapplicable as it applied the laws of Pennsylvania, New Jersey and the Philippines to the determination of this issue. See *Westinghouse*, pp. 30-35 (TAB-9 / BOA-141). Similarly, in *Saba Fakes v. Republic of Turkey* (ICSID Case No. ARB/07/20) Award (July 14, 2010) ¶¶ 44, 50 (TAB-11 / BOA-142), the respondent alleged that the claimant was "serving as a front, for jurisdictional purposes," and that the claimant was "simply acting as a 'dummy' shareholder, bringing this claim on behalf of [others]" over whom the tribunal could not exercise jurisdiction. Also, in *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador* (UNCITRAL) PCA Case No. 34877, Interim Award (December 1, 2008) ¶¶ 137-139 (TAB-12 / BOA-143), the respondent pled the affirmative defences of estoppel, waiver, and abuse of rights. Finally, the Claimant relies on paragraph 150 of *Aryeh (M) v. Iran*, Award (September 25, 1997) A.C.T. 368 at 381 (TAB-13 / BOA-144). However, the copy of that decision which the Claimant appended to his submission does not contain a paragraph 150 and there is no discussion of burden of proof in the paragraphs which are there.

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 to arbitration under this Section a claim that the other Party has breached an obligation under: (a) Section A [of Chapter 11] ...

12. NAFTA Article 1101(1) further provides that Chapter 11 applies to measures “adopted or maintained” by Canada that relate to investors of another Party or investments of investors of another Party.¹⁰ Accordingly, 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.

13. 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” when the challenged measure occurred. For example, in *Phoenix Action* the tribunal found that “bilateral investment treaty claims cannot be based on acts and omissions occurring prior to the claimant’s investment.”¹¹ Similarly, the tribunal in *Cementownia* noted, “[i]t is undisputed that an investor seeking access to international jurisdiction pursuant to an investment treaty must prove that *it was an investor at the relevant time, i.e., at the moment when the events on which its claim is based occurred.*”¹²

¹⁰ See also, NAFTA Article 1105(1) (“[e]ach Party shall accord to *investments of investors of another Party* treatment in accordance with international law, including fair and equitable treatment and full protection and security.”) (Emphasis Added); and NAFTA Article 1110(1) (“No Party may directly or indirectly nationalize or expropriate *an investment of an investor of another Party*”) (Emphasis Added). NAFTA Article 1101(1)(c) provides for broader coverage for Article 1106 (Performance Requirements) and Article 1114 (Environmental Measures).

¹¹ *Phoenix Action Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5) ¶ 68 (“*Phoenix Action*”) (TAB-14/BOA-63).

¹² *Cementownia*, ¶ 112 (TAB-2 / BOA-16) (Emphasis Added). See also, *Europe Cement*, ¶ 140 (“... to have jurisdiction the Claimant would have to show that it has acquired ownership in an investment in Turkey at the time the alleged breaches ... took place.”), ¶ 166 (“The burden to prove ownership of the shares at the relevant time was on the Claimant.”) (TAB-3 / BOA-27); *Société Générale v. Dominican Republic* (UNCITRAL) (LCIA Case No. UN 7927) Preliminary Objections to Jurisdiction (September 18, 2008) ¶¶ 106-107 (“Thus, the investment could not be protected by this Treaty until ... [the] Claimant ... acquired the investment... [T]he Tribunal lacks jurisdiction over acts and events that took place before the Claimant acquired the investment ...”) (TAB-15 / BOA-145); *Limited Liability Company AMTO v Ukraine*, SCC Arbitration Case No. 080/2005 (March 26, 2008) ¶ 48 (TAB-16 / BOA-146); *Saluka Investments B.V. v Czech Republic* (UNCITRAL) Partial Award (March 17, 2006) ¶ 244 (TAB-17 / BOA-70).

14. Accordingly, in order for the Claimant to establish that this Tribunal has jurisdiction to hear his claims in respect of the *AMLA*, the Claimant must prove that he owned the Enterprise prior to the introduction of the *AMLA* in April, 2004.¹³

C. To Prove That He Owned the Enterprise Prior to the Introduction of the *AMLA*, the Claimant Must Introduce Contemporaneous Documentary Evidence

15. When establishing jurisdiction, claimants must generally introduce reliable and contemporaneous documentary evidence to prove the facts on which they rely.¹⁴ Bin Cheng has explained:

[D]ocumentary evidence stating, recording, or sometimes even incorporating the facts at issue, written or executed either contemporaneously or shortly after the events in question by persons having direct knowledge thereof, and for purposes other than the presentation of a claim or the support of a contention in a suit, is ordinarily free from this distrust and considered of higher probative value.¹⁵

16. On the other hand, arbitral tribunals have tended to give little weight, if any, to “uncorroborated witness testimony”¹⁶ and the testimony of “witness[es] who ha[ve] a

¹³ Remarkably, the Claimant contends that the Tribunal has jurisdiction even if he acquired the Enterprise *after* the introduction of the *AMLA*. See Reply on Jurisdiction, ¶ 152. This assertion is inconsistent with the text of the NAFTA. Further, the Claimant fails to provide a single reference to an arbitral award to support this assertion. This is hardly surprising, as there are none.

¹⁴ See e.g., Bin Cheng, p. 320 (“Where documentary evidence should be available, this must be produced. The party whose negligence has resulted in failure to produce documentary evidence must bear the consequences of such non-production.”) (TAB-6 / BOA-138); *Roy P.M. Carlson v. Government of the Islamic Republic of Iran and Melli Industrial Group*, (1991) 26 Iran-US CTR 193 Award (May 1, 1991) ¶ 31 (“*Carlson*”) (TAB-18 / BOA-147).

¹⁵ Bin Cheng pp. 318-319 (TAB-6 / BOA-138).

¹⁶ Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed. (London: Sweet & Maxwell, 2004) (“Redfern & Hunter”) pp. 307-308 (“In general, arbitral tribunals tend to give less weight to uncorroborated witness testimony than to evidence contained in contemporaneous documents.”) (TAB-19 / BOA-148). See also Mark Kantor, *Valuation For Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Alphen aan den Rijn: Kluwer, 2008) p. 280 (giving the following advice to the “careful arbitrator” engaged in valuing an asset: “Documents are better than verbal assertions/confirmations. Documents prepared by an independent third party are *better* than those prepared by the claimant/insured/defendant/insurer. Documents prepared contemporaneously (and prior to/immediately following the loss event) are better than those prepared after the date the claim

clear interest in the result of the case,”¹⁷ because “the frailty of human contingencies [makes testimonial evidence] most liable to arouse distrust.”¹⁸

17. Even where statements from witnesses with direct knowledge have been presented to establish jurisdiction, tribunals have refused to sustain jurisdiction on the basis of such testimony to the extent it is uncorroborated by contemporaneous documentary evidence. For example, in *Soufraki*, the claimant sought to establish the tribunal’s jurisdiction based on a statement of the claimant, a statement of the claimant’s “auditor whom [the claimant] has engaged over the years,”¹⁹ and a statement of a “receptionist at [the claimant’s] hotel.”²⁰ The tribunal held that the witness statements were insufficient to found the tribunal’s jurisdiction without corroborating documents because they did not constitute “disinterested and convincing evidence.”²¹

18. Likewise, in *Carlson v. Iran*, the Iran-US Claims Tribunal ruled that witness statements uncorroborated by documentary evidence were insufficient to found jurisdiction. In that case, the claimant alleged that the tribunal could exercise jurisdiction because he was the beneficial owner of shares in an Iranian company. In support, the claimant put into the record a draft agreement under which he agreed to repay a loan used

was submitted. Documents prepared absent any prospect of a claim are better than those created in response to (or with knowledge of) the extant claim.”) (emphasis in original) (TAB-20 / BOA-149).

¹⁷ Redfern & Hunter, pp. 307-308 (TAB-19 / BOA-148) (stating that “the untested evidence of a witness who has a clear interest in the result of the case may be given less evidentiary weight than the evidence of a witness who is truly independent.”). See also, Bin Cheng pp. 309 (stating that “the mere *ex parte* statements of the facts by [an] interested party in a dispute are not considered as evidence and do not constitute sufficient proof of the facts alleged.”) (TAB-6 / BOA-138).

¹⁸ Bin Cheng, pp. 318-319 (Quoting Mexico-U.S. Special Claims Commission, *Naomi Russell Case* (1931), *Opinions of Commissioners, Under the Convention concluded September 19, 1923, between the United States and Mexico*, p. 44 at p.184) (TAB-6 / BOA-138).

¹⁹ *Soufraki*, ¶ 78 (TAB-4 / BOA-136).

²⁰ *Ibid.* (TAB-4 / BOA-136). Mr. Soufraki sought to annul the award on the basis that the tribunal had manifestly exceeded its powers, in part, because it had not given sufficient weight to his documents and affidavits. His application was rejected. See the Decision of the *Ad Hoc* Committee on the Application for Annulment of Mr. Soufraki (ICSID Case No. ARB/02/7 (June 5, 2007) ¶¶ 109-113 (“*Soufraki*, Annulment Application Decision”) (TAB-24 / BOA-152).

²¹ *Soufraki*, ¶ 78 (TAB-4 / BOA-136).

to purchase the shares;²² a memorandum which outlined the terms of that agreement;²³ four witness statements, including his own, confirming that he beneficially owned the shares; a witness statement from his accountant that his tax returns indicated that he owned the shares;²⁴ and character references from the Mayor of Atlanta and two Governors of the State of Georgia.²⁵ The claimant explained that there were no further documents because “the arrangement ... was based on trust and confidence.”²⁶

19. The tribunal held that this was insufficient evidence to prove that the claimant beneficially owned the shares. In particular, the tribunal stated that there was no written contract of employment, a lack of reliable contemporaneous documentary proof,²⁷ and no minutes of shareholders meetings in the record which refer to the claimant’s alleged shareholding.²⁸ Moreover, the tribunal noted that the evidence was contradictory with respect to the date upon which the claimant allegedly obtained his shares and that this cast doubt on the existence of the transaction on which the claim was based.²⁹ Consequently, the tribunal held that “the claimant has not borne the burden of proving the existence of the arrangements on which he bases his direct claim.”³⁰

20. Tribunals have also been wary of witness statements containing hearsay evidence. The NAFTA tribunal in *Methanex* questioned whether hearsay evidence in a witness statement could be relied on to prove the facts alleged by the Claimant.³¹ Similarly, in

²² *Carlson* - Dissenting Opinion of Howard M. Holtzmann (“*Carlson – Dissent*”), ¶ 11 (TAB-18 / BOA-147).

²³ *Ibid.*, ¶ 17 (TAB-18 / BOA-147).

²⁴ *Carlson*, ¶¶ 33,44 and 46 (TAB-18 / BOA-147).

²⁵ *Carlson* – Dissent, ¶ 2 (TAB-18 / BOA-147).

²⁶ *Carlson*, ¶ 4 (TAB-18 / BOA-147).

²⁷ *Ibid.*, ¶ 31 (TAB-18 / BOA-147).

²⁸ *Ibid.*, ¶ 41 (TAB-18 / BOA-147).

²⁹ *Ibid.*, ¶ 41 (TAB-18 / BOA-147).

³⁰ *Ibid.*, ¶¶ 42, 50 (TAB-18 / BOA-147).

³¹ *Methanex v. United States* (UNCITRAL) Final Award (August 3, 2005), Part III, Chapter B, ¶ 49 (“*Methanex*”) (TAB-21 / BOA-43) The NAFTA Chapter 11 tribunal noted that the witness statement contained double hearsay and concerned a conversation that occurred four years after the fact.

Jalal Moin v. Iran, the Iran-US Claims Tribunal refused to accept a witness statement containing hearsay evidence as sufficient to establish jurisdiction because “the evidence [was] not substantiated.”³² Bin Cheng has also explained that “testimony even by ‘respectable’ persons would be given little, if any, weight if based on hearsay.”³³

21. In sum, the Claimant must prove that he owned the Enterprise prior to the introduction of the *AMLA* through reliable and contemporaneous documents in order to satisfy his burden to establish jurisdiction. Witness statements, uncorroborated by documents, and especially those based on hearsay, are insufficient to discharge this burden.

III. THE CLAIMANT HAS NOT MET HIS BURDEN TO ESTABLISH THAT HE OWNED THE ENTERPRISE PRIOR TO THE *AMLA*

22. The Claimant has failed to produce any reliable and contemporaneous evidence to establish that he owned the Enterprise prior to the introduction of the *AMLA*. There are no letters, e-mails, facsimiles, memoranda, records of conversations, or notes to evidence his ownership of the Enterprise. Nor is there a single document executed prior to the introduction of the *AMLA* which bears the Claimant’s 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*.

23. Instead, the Claimant has provided nothing but unsatisfactory excuses for the absence of reliable and contemporaneous documentary evidence. Ultimately, the reasons for the Claimant’s failure to produce sufficient evidence of his ownership of the Enterprise prior to the introduction of the *AMLA* are beside the point. This is a legal proceeding, and parties alleging facts on which they rely must adduce reliable evidence to

³² *Jalal Moin v Government of the Islamic Republic of Iran*, 30 Iran-US CTR 70, Award No. 557-950-2 (May 25, 1994) ¶19 (“*Jalal Moin*”) (TAB-22 / BOA-150) (holding that “vague and inconclusive” testimony based on “hearsay evidence” was evidence on which “[t]he Tribunal cannot rely, unless the evidence is substantiated ... [b]y documentary evidence, for example, in contemporary correspondence.”). See also *AHFI Planning Associates, Inc. v Government of Iran, Iran Housing Company and the Ministry of Health and Social Welfare of the Government of Iran*, 11 Iran-US CTR 168, Award No. 234-179-2 (May 8, 1986) ¶32 (“*AHFI*”) (TAB-23 / BOA-151).

³³ Bin Cheng, p. 315 (TAB-6 / BOA-138).

prove those facts. The absence of any such evidence in this case requires that the Tribunal dismiss the case for lack of jurisdiction.

A. There Is No Documentary Evidence That the Claimant Had Any Role With Respect To The Enterprise Prior To The AMLA

24. The absence of evidence produced by the Claimant to establish his ownership of the Enterprise prior to the introduction of the *AMLA* contrasts sharply with the evidence that someone in the Claimant's alleged role should be able to produce. REDACTED

REDACTED

Rather, he has testified that he, a REDACTED government employee from Pennsylvania, with no experience in the waste management business, was the invisible hand orchestrating a purportedly \$105 million venture by providing instruction and guidance to Mr. Mario Cortellucci, a successful and wealthy Canadian land developer.³⁵

25. If the Claimant did in fact have this role, and did indeed own the Enterprise prior to the introduction of the *AMLA*, one would expect that there would exist documentary evidence of the Claimant's involvement in:

- 1) the negotiations to purchase Adams Mine;

³⁴ See e.g. REDACTED

REDACTED

³⁵ See Mario Cortellucci, Confederazione degli Imprenditori nel Mondo – Confederation of Italian Entrepreneurs Worldwide online: <<http://www.ciimtorontoawards.ca/recipients/cortellucci/>> (TAB 4 / CAN-348).

- 2) the organization and establishment of the Enterprise;
- 3) the Enterprise's acquisition of Adams Mine;
- 4) the business operations of the Enterprise;
- 5) the efforts to sell Adams Mine;
- 6) the raising of funds to develop Adams Mine;
- 7) the lawsuits brought by or against the Enterprise; and
- 8) the negotiations with respect to the compensation made available to the Enterprise under the *AMLA*.

26. However, as explained in greater detail below, there is no documentary evidence of the Claimant's involvement in any of the foregoing in the record of this arbitration. The absence of this evidence is fatal to the Claimant's effort to establish that he owned the Enterprise prior to the introduction of the *AMLA*. As Bin Cheng noted:

[W]here evidence of better quality should be available and its non-production is not satisfactorily explained, this will weigh against the party whose allegations may either be proved or disproved by such evidence. Where documentary evidence should be available, this must be produced. The party whose negligence has resulted in failure to produce documentary evidence must bear the consequences of such non-production.³⁶

27. Indeed, as the tribunal in *Carlson* observed, "when it appears that [the claimant] has failed to present any additional corroborating evidence and failed to offer any explanation as to its absence, the Tribunal will draw an adverse inference."³⁷

³⁶ Bin Cheng, p. 320 (TAB-6 / BOA-138).

³⁷ *Carlson*, ¶ 46 (TAB-18 / BOA-147). See also, *H.A. Spalding, Inc. v. Ministry of Roads and Transport of the Islamic Republic of Iran and the Islamic Republic of Iran*, Award No. 212-437-3 (February 24, 1986) ¶ 29 ("It would stand to reason that if a substantial corporation with extensive experience in road building were engaged over a period of four years not just in the soliciting of contracts in Tehran but also in the actual performance of material engineering, design and architectural services, as

1. There is No Documentary Evidence that the Claimant was Involved in the Negotiations to Purchase Adams Mine

28. All of the documents in the record show that Mr. Cortellucci, a Canadian citizen, negotiated the purchase of Adams Mine between February, 2002 and May, 2002.³⁸ The Claimant does not deny this, but alleges that Mr. Cortellucci did this on the Claimant's behalf. However, there are no documents to prove that the Claimant was involved in, or even informed of, the negotiations to purchase Adams Mine, let alone instructing Mr. Cortellucci.³⁹

29. The documents on the record show that in February, 2002, Notre Development Corporation ("Notre"), the then-owner of Adams Mine, approached Mr. Cortellucci, not the Claimant, to determine if Mr. Cortellucci might be willing to finance or participate in the development of Adams Mine.⁴⁰ Mr. Cortellucci was and is a well-known and successful real estate developer in Ontario.⁴¹ He was also one of the largest donors to the

alleged, it would have more extensive documentation at its disposal. ... Therefore even though Claimant's Tehran records are no longer available to the Claimant it does not follow that they are available to the Respondent and that inferences therefore may be drawn against them.") (TAB-25 / BOA-153); *Jalal Moin*, ¶¶ 12, 19 ("The Tribunal considers this to be hearsay evidence, on which it cannot rely, unless the evidence is substantiated. Such substantiation is missing...[T]he Tribunal would expect that any taking of the properties in question would be indicated in some documentary evidence, for example, in contemporary correspondence. In any event, the Tribunal must base its awards on probative evidence.") (TAB-22 / BOA-150); *Kathryn Faye Hilt v. The Islamic Republic of Iran and Shahid Chamran University*, Case No. 10427, Award No. 354-10427-2 (March 16, 1988), ¶ 21 ("In these circumstances, where it appears that the Claimant would have had access to corroborating evidence but failed to present it or offer any explanation as to its absence, the Tribunal determines that Ms. Hilt has not met the burden of proof required to establish the existence of, and her entitlement to, a 25% increase.") (TAB-26 / BOA-154).

REDACTED

³⁹ This is despite the fact that Canada asked for such documents in its document request. See Request for Documents From the Government of Canada, October 15, 2008, Request # 26.

REDACTED

REDACTED

political party in power at the time in Ontario and, as such, was a person with important political connections.⁴² His connections to local and provincial government were seen by Notre as a significant asset in the highly-regulated field of waste management.⁴³

30. Over the next several months, it was Mr. Cortellucci who engaged in frequent negotiations with Notre's principal, Mr. Gordon McGuinty, and another Notre shareholder, Mr. Blake Wallace. And it was Mr. Cortellucci who received nearly REDACTED REDACTED from Mr. McGuinty and Mr. Wallace concerning the purchase of Adams Mine.⁴⁴ The Claimant is not included on any of these pieces of correspondence, and there is no evidence any were communicated to him.

RE Mario Cortellucci, Confederazione degli Imprenditori nel Mondo – Confederation of Italian Entrepreneurs Worldwide online: <<http://www.ciimtorontoawards.ca/recipients/cortellucci/>> (TAB 4 / CAN-348)

⁴² See Robert MacDermid, "Funding the Common Sense Revolutionaries, Contributions to the Progressive Conservative Party of Ontario, 1995-97" (York University) pp. 37-39 (TAB-5 / CAN-405); Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. L023A (June 10, 2003) Oak Ridges Moraine Development, Conflict of Interest, pp. 1530-1600 (See, in particular, Ms. Pupatello and Mr. David Ramsay) (TAB-6 / CAN-406); Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. L054A (May 8, 2000) Ontario Realty Corp. Loans, pp. 1410-1420 (Dalton McGuinty) (TAB-7 / CAN-407); REDACTED

REDACTED

REDACTED

REDACTED

31. Ultimately, when the negotiations were concluded successfully, it was Mr. Cortellucci, on behalf of the Cortellucci Group of Companies (the “Cortellucci Group”), who on May 10, 2002, entered into an Agreement of Purchase and Sale to purchase Adams Mine for a price of \$1.8 million “in trust.”⁴⁵ The Cortellucci Group also undertook to pay Notre’s outstanding realty taxes on Adams Mine of approximately \$270,000, and to pay Mr. McGuinty \$1 million over the course of the following four years, as a consulting fee.⁴⁶

32. According to the documents on the record, REDACTED

REDACTED

33. The Claimant alleges the foregoing negotiations REDACTED

REDACTED

Yet, notwithstanding the fact that Mr. Cortellucci agreed to pay \$1.8 million for Adams Mine, pay \$270,000 in outstanding realty taxes, and pay \$1 million to Mr. McGuinty in

REDACTED

REDACTED

Supplementary Witness Statement of Mario Cortellucci (October 25, 2010) ¶ 7.

consulting fees, there does not exist a *single document* on the record that shows the Claimant authorized or participated in these negotiations in any way. It is simply not conceivable that Mr. Cortellucci would undertake more than \$3 million in obligations without receiving any written assurances from the Claimant.

34. Furthermore, there are no documents showing that Mr. Cortellucci sent the Claimant a single e-mail, fax or letter, let alone any of the negotiating documents, drafts of the purchase agreement, or other materials on Adams Mine provided by Notre. Similarly, there is no documentary evidence that the Claimant ever sent any written instructions to Mr. Cortellucci between the two during this period. In fact, there is no documentary evidence of *any* communications whatsoever taking place between Mr. Cortellucci and the Claimant.⁴⁹ Finally, there is no documentary evidence that the Claimant even travelled to Canada to personally inspect Adams Mine before he allegedly purchased it.⁵⁰

2. There is No Documentary Evidence that the Claimant was Involved in the Establishment or Organization of the Enterprise

35. The documents on the record show that after Mr. Cortellucci agreed to purchase Adams Mine “in trust,” Mr. Brent Swanick incorporated and organized the Enterprise on June 26, 2002 to be the vehicle that would acquire Adams Mine.⁵¹ The Claimant alleges

⁴⁹ This is particularly unbelievable given that Mr. Cortellucci’s negotiations with Mr. McGuinty and Mr. Wallace included communications in writing via e-mail and facsimile. REDACTED
REDACTED

⁵⁰ Supplementary Witness Statement of Vito G. Gallo (October 25, 2010), Exhibit H. The Claimant has produced copies of credit card receipts to show that he was at a few shopping malls in the Toronto area, after the Enterprise acquired Adams Mine in late September 2002. The Claimant and Mr. Cortellucci both testified that the Claimant was in Canada in 2001. However, he has offered no documentary evidence of this trip in 2001, and indeed, has not even offered an explanation as to why such evidence has not been provided. *Compare* Supplementary Witness Statement of Vito G. Gallo (October 25, 2010) ¶¶ 19-20.

REDACTED

that REDACTED

However, the Claimant has introduced no documentary evidence that he was in any way involved with the incorporation or organization of the Enterprise, or that he had any relationship whatsoever with Mr. Swanick prior to the introduction of the *AMLA*, let alone a relationship where Mr. Swanick acted as his solicitor.⁵³

36. If such a solicitor-client relationship did exist, and Mr. Swanick was retained by the Claimant to incorporate and organize the Enterprise on his behalf, one would expect a corresponding paper trail. Indeed, lawyers are in the business of generating paper trails: retainer agreements are typically written; instructions are typically requested in writing; reporting is typically done in writing; notes are typically taken of meetings and phone calls; a written file is maintained; and written invoices are prepared which reference and describe all work done, including communications with clients.

37. In this case, the Claimant has produced none of the above. Nor is there any record of a paper trail on the Privilege Log. Further, neither the Claimant nor Mr. Swanick has even attempted to explain why such basic documents do not exist.

38. First, there is no written retainer setting out the terms of Mr. Swanick's representation, despite the fact that Mr. Swanick and the Claimant were allegedly strangers. In fact, REDACTED

REDACTED

39. Second, there are no written instructions sent by the Claimant to Mr. Swanick with respect to the incorporation and organization of the Enterprise – or any other issue, for that matter – nor any written summary of any such instructions provided by Mr.

REDACTED

⁵³ Canada requested documents with respect to the legal relationship between Mr. Swanick and the Claimant, but the Claimant did not produce any. See Request for Documents From the Government of Canada, October 15, 2008, Request # 25.

REDACTED

Swanick to the Claimant. Further, there is no evidence that even oral instructions were given by the Claimant to Mr. Swanick – such as notes of conversations.

40. Third, there is not a single written communication from Mr. Swanick to the Claimant providing any legal advice with respect to the incorporation or organization of the Enterprise, or any other matter. Mr. Swanick alleges in sworn testimony that REDACTED
REDACTED
REDACTED in respect of the incorporation and organization of the Enterprise. Yet, there is no documentary evidence such advice was ever given to the Claimant.⁵⁸

41. Finally, there is a not a single invoice from Mr. Swanick in the record that supports the Claimant's contention that the incorporation and organization of the Enterprise was undertaken on his behalf or pursuant to his instructions. To the contrary, with respect to the incorporation and organization of the Enterprise, Mr. Swanick produced just REDACTED
REDACTED

REDACTED The Claimant is not mentioned REDACTED
REDACTED

REDACTED

⁵⁸ Cf. *Turi v. Swanick*, Transcript, 12:15, 25:20-30 (TAB-20 / CAN-417).

REDACTED

3. There is No Documentary Evidence that the Claimant was Involved in the Enterprise's Acquisition of Adams Mine

42. As stated above, the documents on the record show that the Enterprise was incorporated to be the vehicle to acquire Adams Mine from Notre. Thus, the documents on the record show that after the Cortellucci Group agreed to purchase Adams Mine on May 10, 2002,⁶¹ and the Enterprise was incorporated and organized by Mr. Swanick on June 26, 2002,⁶² Adams Mine was conveyed to the Enterprise on September 9, 2002.⁶³

REDACTED

REDACTED

Yet, there is no documentary evidence on the record that the Claimant was in any way involved in either the due diligence or the financing.⁶⁴

43. First, REDACTED

REDACTED

of Adams Mine by the Enterprise. There are no written communications from Mr. Swanick to the Claimant to inform him REDACTED

REDACTED

REDACTED

There is no evidence that any of the due diligence Mr. Swanick conducted on Adams Mine was communicated to, or completed on behalf of, the Claimant.

REDACTED

⁶³ Document number 0319677 in the Land Titles Office for Temiskaming (54) Haileybury (September 9, 2002), Claimant's Bates Numbers 00640-00643 (TAB 23 / CAN-269).

⁶⁴ No documents were produced despite Canada's request for them. See Request for Documents From the Government of Canada, October 15, 2008. Requests #25, 72, 73.

REDACTED

44. Second, there is no documentary evidence that the Claimant was involved in any way with respect to the Enterprise's financing of its purchase of Adams Mine. Indeed, there is no evidence that the Claimant paid anything for, or was in any way involved with arranging the financing for, the purchase of Adams Mine by the Enterprise. The financing for the purchase of Adams Mine was provided by REDACTED REDACTED REDACTED The Claimant is not mentioned in any of the financing agreements, and neither he nor the Enterprise offered any security for this loan.

45. Third, there is no evidence that the Claimant was even informed that title to Adams Mine had formally been transferred to the Enterprise on September 9, 2002. Rather, REDACTED REDACTED REDACTED There is no evidence that this communication was ever forwarded to the Claimant.

4. There is No Documentary Evidence that the Claimant was Involved in the Business Operations of the Enterprise

46. As stated above, the documentary evidence shows that the Enterprise was incorporated on June 26, 2002 and acquired Adams Mine on September 9, 2002. The *AMLA* was not introduced until April 5, 2004. However, there is no documentary evidence — not an e-mail, letter, memorandum, note or any other document — indicating that the Claimant was in any way involved in any of the business operations of the Enterprise in the two years between June, 2002 and April, 2004. If the Claimant was, in fact, the sole shareholder of the Enterprise from its inception, as he alleges, there should be documentary evidence of his involvement in at least some, and most typically all, of the following business activities:

⁶⁷ 1532382 Limited Partnership Registration Documents (September 10, 2002) (TAB-25 / CAN-273); REDACTED REDACTED REDACTED

- the hiring of managers to operate the Enterprise;⁶⁹
- communications with the managers of the Enterprise;⁷⁰
- the financial management of the Enterprise;⁷¹ and
- the formation of the Enterprise's business plan.⁷²

47. However, there are no documents on the record that show that he was involved in *any* of these business operations.

48. First, there is no evidence that the Claimant was involved in hiring the individuals responsible for managing the Enterprise. The day the Enterprise acquired Adams Mine,

REDACTED

⁶⁹ No documentary evidence was produced that refers to the Claimant, despite Canada's request for it. See Request for Documents From the Government of Canada, October 15, 2008, Requests #7, 18.

⁷⁰ No documentary evidence was produced involving the Claimant, despite Canada's request for it. See Request for Documents From the Government of Canada, October 15, 2008, Requests #18, 21, 25.

⁷¹ No documentary evidence was produced involving the claimant in the financial management of the Enterprise, despite Canada's request for it. See Request for Documents From the Government of Canada, October 15, 2008, Request # 20.

⁷² No documentary evidence was produced that included the Claimant in the Enterprise's business plan. See Request for Documents From the Government of Canada, October 15, 2008, Requests # 18, 25.

REDACTED

REDACTED In other words, within
hours of its acquisition of Adams Mine, the Enterprise REDACTED
REDACTED And yet,
there is not a single document that shows the Claimant was consulted on, involved in, or
even informed of these decisions. In fact, REDACTED
REDACTED

49. Second, there are no documents on the record that show that the Claimant ever communicated with the managers of the Enterprise, including with respect to supposedly key business activities, such as the Enterprise's application for its Permit to Take Water from Adams Mine, and its efforts to purchase the Crown Lands adjacent to Adams Mine (the "Borderlands"). There is not an e-mail, letter, facsimile, memorandum or other record of communication, written or oral, concerning these, or any other matters between the Claimant and the Enterprise's sole Director and Officer, Mr. Swanick, its comptroller, Mr. Tony Nalli, its accountant, Mr. Frank Peri,⁷⁸ or its Managing Director, Mr. McGuinty. The Claimant has offered no explanation as to why there is no documentary record of any communication with Mr. Swanick, Mr. Nalli or Mr. Peri. Further, his explanation for why there is no evidence of communications with Mr. McGuinty is unconvincing.

50. The Claimant has testified that there is no evidence of communications with Mr. McGuinty because REDACTED

REDACTED

⁷⁸ Mr. Peri has a longstanding professional and business relationship with Mr. Cortellucci. See e.g., *Environmental Protection Act*, Section 43 and 44, Order, Mammone Disposal Systems Ltd. ¶¶ 1.18-1.19 (March 20, 1995) (TAB-30 / CAN-420); LECG, Compliance Audit Report for the City of Vaughan, Re: Mayor Linda Jackson (June 18, 2008), ¶ 4.40-4.41 (TAB-31 / CAN-421).

REDACTED

REDACTED He offers two explanations for doing so, both of which are not persuasive.

To begin, the Claimant asserts that REDACTED

REDACTED

REDACTED

However, this does not explain why the Claimant did not communicate with Mr. McGuinty – the Managing Director of the Enterprise in which the Claimant alleges he was the sole shareholder – *after* the transaction was complete. Further, the Claimant has testified that REDACTED

REDACTED

REDACTED This is inconsistent with the testimony of the Claimant, Mr. Noto, Mr. Wolf and Mr. Drew that it was reasonable and unexceptional for political staffers to openly look for post-Government employment and business ventures.⁸² Moreover, it does not explain why there are no written communications between the Claimant and Mr. McGuinty *after* the Claimant left the Pennsylvania State Government in April 2003.⁸³ A full year elapsed between the time the Claimant left the Government and the introduction of the *AMLA*, yet there still does not exist a single document to prove that he communicated in any way with the Managing Director of the company he alleges he solely owned.

51. Third, there is no evidence that the Claimant was involved in the financial affairs of the Enterprise. In particular, there is no evidence he ever approved any budgets,

⁷⁹ Reply on Jurisdiction ¶¶ 32, 108; REDACTED
REDACTED

REDACTED
⁸² Witness Statement of Barry Drew (October 18, 2010), ¶ 16; Supplementary Witness Statement of Philip Noto (October 25, 2010), ¶ 12; Witness Statement of Michael Wolf (Undated), ¶ 8.

⁸³ Bureau of Human Resources, Department of Revenue, Employment History (May 24, 2010) (TAB-32 / CAN-366); Witness Statement of Barry Drew (October 18, 2010), ¶¶ 15, 17. Mr. Drew's witness statement conflicts slightly with the Claimant's employment record in that he suggests that the Claimant left the Government of Pennsylvania in February 2003. The Claimant would have also been aware that his tenure as a political staffer was effectively over when Edward G. Rendell, a Democrat, was elected Governor in November 2002. See Witness Statement of Vito G. Gallo (October 25, 2010), ¶ 7.

reviewed or approved any expenses, or was otherwise informed of the financial status of the Enterprise.⁸⁴ There is not a single letter, e-mail, facsimile, or other record of correspondence between the Claimant and the Enterprise's comptroller, Mr. Nalli, or its accountant, Mr. Peri. Further, there is no evidence of a single item of correspondence between the Claimant and the Limited Partners, who were the Enterprise's sole source of funds.

52. In fact, the Claimant did not even have signing authority for the Enterprise's bank account. REDACTED

REDACTED

REDACTED The Claimant asserts that he instructed Mr. Swanick to do so, but provides no documentary evidence of any such instruction. Moreover, REDACTED

REDACTED

⁸⁴ Canada requested documents with respect to what the Claimant paid on behalf of the Enterprise (or the LP) for June 26, 2002-June 17, 2004, but the Claimant did not produce any documents. See Request for Documents From the Government of Canada, October 15, 2008, Request # 20.

REDACTED

REDACTED

53. Finally, there is no documentary evidence that the Claimant was involved in developing the business plan for the Enterprise. By contrast, there is ample evidence in the record that REDACTED There is no documentary evidence that the Claimant ever discussed any of these business plans with anyone associated with the Enterprise, or even that he received any of the reports and analyses undertaken at the time.

5. There is No Documentary Evidence that the Claimant Was Involved in the Efforts to Sell Adams Mine

54. The documents on the record show that the Enterprise planned to sell Adams Mine.⁹¹ The Claimant has failed to produce any documentary evidence to show that he was involved in these efforts or that he would have received any proceeds from its sale. To the contrary, the documents on the record show that it was the *Cortellucci Group* and the *Limited Partnership* that would have received all the proceeds from a sale of Adams Mine.

REDACTED

REDACTED
REDACTED

REDACTED
REDACTED

REDACTED

REDACTED

55. For example, REDACTED
REDACTED
REDACTED
REDACTED There is no indication that the Claimant would have received any proceeds.

56. In April 2003, Mr. Cortellucci, on behalf of both Enterprise and the Limited Partnership, entered into an agreement with REDACTED pursuant to which REDACTED would seek purchasers for Adams Mine.⁹³ This agreement indicates that all of the sale proceeds would have become “gross revenues” of the Limited Partnership. Mr. Cortellucci’s decision to retain REDACTED to sell Adams Mine is in direct conflict with REDACTED
REDACTED Moreover, this agreement does not contemplate any of the proceeds from the sale of Adams Mine being paid to the Claimant.

57. Finally, REDACTED
REDACTED
REDACTED Again, there is no mention of any proceeds accruing to the Claimant.

58. The foregoing REDACTED show that the Enterprise planned to sell Adams Mine. Moreover, REDACTED show the proceeds accruing from the sale of Adams Mine going to either the Cortellucci Group or the Limited Partnership –

REDACTED
⁹³ Agreement among 1532382 Limited Partnership, REDACTED and 1532382 Ontario Inc. (April 1, 2003) p. 2 (TAB 39 / CAN-426).

REDACTED

not the Claimant. There is no indication that any of these critical planning documents were ever even provided to the Claimant.

6. There is No Documentary Evidence that the Claimant Attempted to Raise Funds to Develop Adams Mine

59. The Claimant alleges that his role in the Enterprise's operations, and indeed, the sole justification for his involvement with the Enterprise, REDACTED

REDACTED Yet, the Claimant has introduced no documentary evidence to show that he even attempted to fulfil this role. There are no e-mails, letters, facsimiles, presentations, pitch materials, or memoranda that were sent out or given to potential investors, and no records of any meetings or phone calls to substantiate any fundraising activities by the Claimant.⁹⁶

60. The only document that the Claimant has introduced to purportedly support his fundraising efforts is a personal calendar kept by his long-time friend, Mr. Noto.⁹⁷ This calendar records a number of meetings between Mr. Noto, who was not a potential investor, and the Claimant that took place throughout 2003.⁹⁸ Yet, not one of these entries mentions Adams Mine, the Enterprise, or even waste disposal in general terms. They also do not mention any potential U.S. investors or fundraising activities of any kind. Indeed, none of these entries indicate that these meetings were anything other than meetings between friends.

61. In his original sworn witness statement, the Claimant stated REDACTED

REDACTED

⁹⁶ Canada requested such documents from the Claimant but he produced none. See Request for Documents From the Government of Canada, October 15, 2008, Requests # 102, 108.

⁹⁷ Philip Noto Witness Statement (October 25, 2010), Exhibit B.

⁹⁸ *Ibid.*, Exhibit B.

REDACTED

REDACTED

He further testified as follows:

REDACTED

62. The Claimant also stated that REDACTED

REDACTED

REDACTED

Finally, the Claimant swore that REDAC

REDACTED

63. However, both his¹⁰³ and Mr. Noto's¹⁰⁴ most recent witness statements, and the witness statement of Mr. Belardi,¹⁰⁵ confirm that the Claimant's earlier testimony was not true. The Claimant, Mr. Noto and Mr. Belardi now all admit that *none* of them ever spoke to a U.S. investor about the possibility of raising the funds for the development of Adams Mine, much less secured their interest.¹⁰⁶

REDACTED

¹⁰³ Witness Statement of Vito G. Gallo (October 25, 2010), ¶ 23 ("The project never got to the stage where construction could begin with real interest from other potential U.S. investors.").

¹⁰⁴ Supplementary Witness Statement of Philip F. Noto (October 25, 2010), ¶ 16.

¹⁰⁵ Witness Statement of Jeffrey Belardi (October 25, 2010), ¶ 15.

¹⁰⁶ Supplementary Witness Statement of Philip F. Noto (October 25, 2010), ¶ 16 ("I spoke with Greg Chrin at first in a general nature to gauge his interest in a landfill project in Canada. After Mr. Chrin expressed interest, I had subsequent discussions with him focused on his consultation and participation as a 'subject matter expert' in all aspects of the landfill business, including financing."); Witness Statement of Jeffrey Belardi (October 25, 2010), ¶ 15. ("Mr. Gallo's strategy, which I agreed to, was to wait until the Northern Ontario site was ready for construction before approaching Keystone/Commonwealth.")

REDACTED

64. Without explaining this contradiction with his earlier witness statement, the Claimant has now attempted to explain away his inactivity on the grounds that it was *not necessary* for him to begin raising funds until it was time for construction to begin.¹⁰⁷ Given the financial situation of the Enterprise during the Claimant's purported ownership, however, this explanation for the lack of fundraising activity by the Claimant is unconvincing.

65. REDACTED REDACTED
REDACTED
REDACTED RED
REDACTED REDACTED
REDACTED

66. Further, in order to get to the stage where construction could begin, additional funding for the Enterprise would have been necessary. The management of the Enterprise was aware of this fact, and it was communicated to Mr. Cortellucci. In particular, REDACTED

REDACTED

¹⁰⁷ Supplementary Witness Statement of Vito G. Gallo (October 25, 2010), ¶ 23.

REDACTED

REDACTED

67. REDACTED the budget to begin development of Adams Mine would have required the injection of significant new funds into the Enterprise. If the Claimant was indeed the sole shareholder of the Enterprise at this time, one would have expected him to be fundraising to meet the Enterprise's financial needs. Again, however, there is no evidence in the record that he was doing so.

7. There is No Documentary Evidence of the Claimant's Involvement in Litigations Involving the Enterprise

68. In the time between the Enterprise's acquisition of Adams Mine on September 9, 2002, and the introduction of the *AMLA* in April 2004, the Enterprise was involved in two major litigations. Once again, however, there is *not a single document* in the record to show that the Claimant was involved in, or even informed of, these lawsuits. There is no evidence that the Claimant – a law school graduate himself – ever received any legal opinions with respect to the risk of the litigations, was forwarded any legal pleadings for review or even for information, or that he ever met with litigation counsel. Further, there is no evidence that he provided any instruction, was provided any reporting on the status of the proceedings, or was even forwarded crucial decisions of the courts. Finally, the Claimant himself is not referenced a single time in either litigation by any of the parties.

69. In the first litigation, brought against the Enterprise by Canadian Waste Services Inc. ("CWS") in February 2003, CWS sought to invalidate the Enterprise's title to Adams Mine.¹¹² CWS had objected to the sale of Adams Mine to the Enterprise by Notre prior to the transaction closing, on the basis that it had a right of first refusal on the site. REDACTED

REDACTED

REDACTED

REDACTED

¹¹² *Canadian Waste Services Inc. v. Notre Development Corp. et al.*, Court File No. 03-CV-244717 CM2, Statement of Claim (February 28, 2003) (TAB-43 / CAN-288). As Justice Iacobucci has opined, this lawsuit had a significant likelihood of success. Justice Iacobucci, Expert Report, (June 29, 2010), ¶ 52.

REDACTED

REDACTED Further, the Cortellucci Group
also REDACTED
REDACTED

REDACTED There is no documentary evidence that the Claimant
was consulted or even informed of REDACTED

REDACTED

70. The CWS litigation persisted for three years, until March 2006.¹¹⁵ The
Enterprise’s counsel in the CWS litigation was Reuter Scargall Bennett LLP (“Reuter
Scargall”). There is no documentary evidence in the record that the Claimant was
involved in this retainer or even informed of it. It also appears that REDACTED

REDACTED Further, there
is no evidence, documentary or otherwise, that Reuter Scargall ever communicated a
single time with the Claimant, or that any information at all concerning the lawsuit was
ever forwarded on to him by anyone.

REDACTED

¹¹⁵ *Canadian Waste Services Inc. v. Notre Development Corp. et al* Court File No. 03-CV-244717
CM2, Order (March 3, 2006) (TAB-46 / CAN-428).

REDACTED

REDACTED The Cortellucci Group of Companies
Inc. is referred to by the defined term “Cortellucci” in the factum. See *Canadian Waste Services Inc. v.
Notre Development Corp. et al*, Court File No. 03-CV-244717CM2, Factum of Cortellucci Group of
Companies and 1532382 Ontario Inc. (January 27, 2004) ¶ 11 (TAB-48 / CAN-430).

71. The second litigation involving the Enterprise was launched by the Enterprise on October 9, 2003 (the “Borderlands Litigation”).¹¹⁷ In that case, the Enterprise sued the Ontario Ministry of Natural Resources over the delay in transferring the Borderlands. The transfer of these lands was a condition of the site’s Certificate of Approval. Without it, the development could not move forward. This litigation persisted until it was settled by the Enterprise as part of its negotiations with Ontario with respect to amendments to the *AMLA*. In the several months that it was ongoing, there is no evidence that Gordon Acton, the Enterprise’s litigation counsel in the Borderlands Litigation, ever communicated with the Claimant, or that any information with respect to the Borderlands Litigation was ever forwarded to him by anyone.

8. There Is No Documentary Evidence That the Claimant Was Involved In the Enterprise’s Negotiation for Compensation under the *AMLA*

72. On April 5, 2004, the *AMLA* was introduced into the provincial Legislative Assembly in Ontario.¹¹⁸ As introduced, the *AMLA* offered the Enterprise compensation for all of the expenses that the Enterprise and Notre had paid in relation to Adams Mine since 1989.¹¹⁹ This effectively amounted to an offer by the Government of Ontario to pay directly to the Enterprise millions of dollars more than the Enterprise had spent acquiring

¹¹⁷ *1532382 Ontario Inc. v. Minister of Natural Resources*, Court File No. 22368/A3 (Ont. Sup. Ct.) Statement of Claim (October 9, 2003) (TAB-97 / CAN-107).

¹¹⁸ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 26A (April 5, 2004) pp. 1246-1247 (TAB-49 / CAN-326); Bill 49, *An Act to prevent the disposal of waste at the Adams Mine site and to amend the Environmental Protection Act in respect of the disposal of waste in Lakes*, 1st See. 38th Leg., Ontario, 2004 (1st Reading) (TAB-50 / CAN-431).

¹¹⁹ *Ibid.* (TAB-50 / CAN-431) Legislative Assembly of Ontario, First Session 38th Parliament, *Official Report of Debates (Hansard)* (April 20, 2004) p. 1617 (“Bill 49 provides for a mechanism for the owner to obtain compensation. ... What this means is that our government is being fair and dealing openly with everyone, including the owner of the land. This is an open and transparent process. We are doing the right thing and taking the action desired by the majority, but we are also being fair to all parties and clear from the outset on how to conclude this issue.”) (TAB-51 / CAN-402).

and managing Adams Mine, because it entitled the Enterprise not only to its own expenses, but to those of Notre as well.¹²⁰

73. After the *AMLA* was tabled, the Enterprise's litigation counsel in the Borderlands Litigation, Mr. Acton, negotiated certain amendments on behalf of the Enterprise.¹²¹ One of the requests made by the Enterprise was REDACTED

REDACTED

74. All of the Enterprise's requested amendments were adopted. Thus, the Enterprise was REDACTED

REDACTED

REDACTED If the Claimant was the sole shareholder of the Enterprise prior to the *AMLA*, he should have been consulted with respect to such a major decision. Yet, there is not a single document that shows the Claimant gave instructions, received reports or was in any way involved in this decision.

9. The Explanation Provided by the Claimant for the Absence of Documentary Evidence is Not Satisfactory

75. The Claimant asserts that there are no documents proving his ownership of the Enterprise prior to the introduction of the *AMLA* because REDACTED

REDACTED

¹²⁰ Confirmation of Settlement and Full and Final Release from Notre Development Corporation to Her Majesty the Queen in Right of Ontario (November 7, 2005) (TAB-52 / CAN-432); REDAC
REDACTED

¹²¹ Counter-Memorial, ¶¶ 194-204.

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REDACTED is not a satisfactory explanation for why the Claimant, a law school graduate, *never once* sent written instructions or obtained *anything* in writing from Mr. Cortellucci. REDACTED and was considering the purchase of an abandoned mine – allegedly worth some \$105 million – that he had never visited and which was in a foreign country. In these circumstances, there should be a paper trail. As stated by the Iran-US Claims Tribunal in *Carlson*,¹²⁵ the “trustworthiness” of individuals provides no credible excuse for the lack of a paper trail when a claimant is seeking to establish a tribunal’s jurisdiction.

76. Moreover, it is no explanation as to why there are no documents evidencing communications between the Claimant and other individuals. It does not explain why there are no documents evidencing his relationship with his alleged personal counsel, Mr. Swanick. It does not explain why there are there are no documents evidencing communications with the Enterprise’s management, including its Managing Director, Mr. McGuinty. It does not explain why there are no documents evidencing communications with potential investors in the project. It does not explain why there are no documents evidencing communications with his litigation counsel in two significant lawsuits. And it does not explain why there are no documents evidencing communications with Mr. Acton REDACTED

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REDACTED Supplementary Witness Statement of Vito G. Gallo (October 25, 2010), ¶ 21 (“I was very confident in Mr. Cortellucci as a trusted agent and advisor...”).

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¹²⁵ *Carlson*, ¶ 42 (TAB-18 / BOA-147).

B. Neither the Claimant's nor the Enterprise's Tax Filings are Contemporaneous or Reliable Evidence that the Claimant Owned the Enterprise Prior to the AMLA

1. The Claimant Did Not File Those Portions of His Tax Returns Which Indicate His Ownership of the Enterprise until Long After the AMLA

77. The Claimant, as a U.S. resident, is required by U.S. tax law to file his Individual Federal Tax Return Form 1040, and any accompanying Forms and Schedules, with the U.S. Internal Revenue Service (the "IRS") by April 15 of each year.¹²⁶ Under U.S. tax law, a U.S. resident who is the sole shareholder of a foreign corporation must declare his ownership in two separate places on his personal income tax return: on a Form 5471, called a "Information Return of U.S. Persons with Respect to Certain Foreign Corporations" ("Form 5471")¹²⁷ and on a "Schedule B."¹²⁸ The failure to make such a declaration when required can result in both civil and criminal penalties, including a "\$10,000 penalty for each annual accounting period."¹²⁹

78. The Claimant appears to have REDACTED

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When the Claimant first produced

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¹²⁶ *Internal Revenue Code*, 26 U.S.C. § 6072. (TAB-55 / CAN-433).

¹²⁷ The instruction for the basic return provides that "you may have to file Form 5471 if, in 2002, you owned 10% or more of the total (a) value of a foreign corporation's stock...." *Ibid.*, p. B-1. (TAB-56 / CAN-434). The specific instructions for Form 5471 specify that a sole shareholder of a foreign corporation is required to file a Form 5471 along with his basic tax return. IRS, *Instructions for Form 5471 (Rev. January 2003), Information Return of U.S. Persons With Respect to Certain Foreign Corporations*, pp. 1-3. (TAB-57 / CAN-435).

¹²⁸ According to the instructions for Schedule B, Interest and Ordinary Dividends, a U.S. citizen is required to complete Part III of Schedule B, titled Foreign Accounts and Trusts, if he "own[s] more than 50% of the stock in any corporation that owns one or more foreign bank accounts." IRS, *Instructions for Schedules to Form 1040: 2002 Instructions for Schedule B, Interest and Ordinary Dividends*, p. B-2. (TAB-56 / CAN-434).

¹²⁹ *Ibid.*, p. 3 (TAB-57 / CAN-435).

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Moreover, REDACTED

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as

contemporaneous evidence of his ownership of the Enterprise prior to the AMLA REDACTED

79. However, the Claimant has now admitted that REDACTED

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This was revealed when Canada moved for the production of the Claimant's original U.S. tax returns on June 18, 2010 to determine when the Forms 5471 were actually filed with the IRS.¹³⁴ The Claimant initially refused to address the substance of Canada's motion.¹³⁵ The Tribunal then compelled the Claimant to respond to Canada's concerns about the dates on which the Forms 5471 were actually filed.¹³⁶ It was only then that the Claimant finally admitted that, REDACTED

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¹³² See e.g. Correspondence Gallo 32 (June 5, 2009) p. 10 (TAB-61 / CAN-439). (“[A]ll of the tax returns filed by 1532382 Ontario Inc. and Vito Gallo, in both Canada and the USA, confirm that Vito Gallo was the 100 percent shareholder of the Enterprise.”)

¹³³ Correspondence Gallo 55 (July 14, 2010) p. 6 (TAB-64 / CAN-442). Pursuant to the Tribunal's Order, Canada and the Claimant have retained an independent agent, Mr. Justice Chadwick, to obtain the original Forms 5471 filed by the Claimant with the IRS. The results of his work are still pending.

¹³⁴ Correspondence Can 52 (June 18, 2010) (TAB-62 / CAN 440).

¹³⁵ Correspondence Gallo 54 (June 23, 2010), p. 1 (TAB-63 / CAN-441).

¹³⁶ Correspondence A27 (June 29, 2010), ¶ 9.

¹³⁷ Correspondence Gallo 55 (July 14, 2010) p. 6 (TAB-64 / CAN-442).

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This was more than REDACTED after the AMLA, REDACTED after the Claimant received Canada's Request for Documents, and REDACTED before he was required to produce his U.S. tax returns in this arbitration. As such, they are not contemporaneous evidence of his alleged ownership of the Enterprise prior to the AMLA. Moreover, the Claimant admitted on August 11, 2010,¹³⁸ that as of that date, he *still* had not REDACT

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80. The Claimant has not offered a credible explanation for his failure to file these required forms prior to the AMLA, especially in light of the substantial penalties that could be applied. In fact, he himself has offered no testimony at all on this issue.^R

Moreover, the explanation offered by Mr. Swanick REDACTED

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— is not convincing.

REDACTED the penalties for the failure to file these Forms have existed since before the Claimant allegedly acquired the Enterprise.¹⁴¹

2. The Enterprise's Canadian Tax Returns Are Neither Contemporaneous Nor Reliable Evidence of His Ownership of the Enterprise Prior to the Introduction of the AMLA

a) The Enterprise's Canadian Tax Returns Were Not Filed Until After the AMLA

81. As an Ontario corporation with a financial year ending December 31,¹⁴² the Enterprise was, during the relevant period, required to file a federal T2 tax return and a

¹³⁸ Letter from Charles Gastle to Michael Owen, Re Gallo vs. Government of Canada (August 11, 2010) (TAB 65 / CAN-443).

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¹⁴¹ See e.g., IRS, *Instructions for Form 5471 (Rev. May 2001), Information Return of U.S. Persons With Respect to Certain Foreign Corporations*, at pp. 3-4 (TAB-66 / CAN-444).

¹⁴² Truster Zweig LLP, Re: V.G. Gallo v. Canada (December 17, 2010), p. 2. ("Truster Report").

provincial CT23 tax return, by no later than June 30 of each year with the Canada Revenue Agency (the “CRA”), and the Ontario Ministry of Finance, respectively. RE

82. In this arbitration, the Claimant produced REDACTED

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In his Memorial and in other

submissions to the Tribunal, the Claimant REDACTED

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83. On January 11, 2010, Canada requested that the Claimant consent to the release of original versions of the Enterprise’s federal tax returns from the CRA. In particular, Canada sought to confirm the date on which the returns were actually filed, and whether any amendments had been made.¹⁴⁶

84. The Claimant initially refused to consent to the release of the original returns from the CRA directly to Canada. As such, on March 29, 2010, Canada moved the Tribunal to compel the Claimant to produce the returns directly to Canada.¹⁴⁷ Ultimately,

¹⁴³ *Ibid.* As Mr. Truster explains, beginning with the 2009 tax year, the federal and Ontario corporate returns were harmonized and thus, a separate filing no longer need be made with the Ontario Ministry of Finance.

¹⁴⁴ As explained by Mr. Truster, there was no corresponding Schedule on Ontario corporate tax return that required the identification of shareholders. *Ibid.*, p. 4.

¹⁴⁵ REDACTED See also Correspondence Gallo-32 (June 5, 2009) p. 10 (TAB-61 / CAN-439). (“[A]ll of the tax returns filed by 1532382 Ontario Inc. and Vito Gallo, in both Canada and the USA, confirm that Vito Gallo was the 100 percent shareholder of the Enterprise.”); REDACTED REDACTED

¹⁴⁶ Letter from Michael Owen to Charles Gastle (January 11, 2010) (TAB-67 / CAN-445). Correspondence Can 49 (March 29, 2010) p. 2. (TAB-68 / CAN-446).

¹⁴⁷ The Claimant took the position that he was, in fact, cooperating and that Mr. Swanick himself made a request of the Canada Revenue Agency in January 2010. See E-Mail Message from Charles Gastle to Michael Owen (March 10, 2010) (TAB-69 / CAN-447); Reply on Jurisdiction, ¶ 98. There is absolutely no evidence that such a request was ever made by Mr. Swanick in the files produced by the Canada Revenue Agency. Moreover, when Canada asked the Claimant to see a copy of the request, the Claimant refused to produce it as Canada was “not entitled to it.” See E-Mail Message from Charles Gastle to Michael Owen (March 15, 2010) (TAB-70 / CAN-448); Email from Charles Gastle to Michael Owen (March 18, 2010) (TAB-71 / CAN-449).

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the Tribunal directed the Claimant to do so, and Canada received the returns from the CRA on May 13, 2010. REDACTED

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REDACTED This was not only REDACTED after the *AMLA*, but also REDACTED the Claimant began his preparations to commence this arbitration.¹⁴⁹

85. After Canada obtained original versions of the Enterprise's federal returns from the CRA, REDACTED

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Therefore, the Enterprise's returns are not contemporaneous evidence of the Claimant's ownership of the Enterprise prior to the introduction of the *AMLA*.

b) The Enterprise's Tax Returns Indicate REDACTED
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86. In both its federal and provincial tax returns, the Enterprise is legally required to provide certain information concerning the residency of its shareholders. First, in both returns, a Canadian corporation is required to indicate whether it is a "Canadian Controlled Private Corporation" (a "CCPC"). As Canada's accounting expert, Mr. Perry Truster, explains, a CCPC is "a private Canadian corporation in which *residents of Canada* have significant shareholdings."¹⁵¹ Second, in both returns, the Enterprise is legally required to separately state whether it has *any* shareholders who are not residents

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¹⁵⁰ Witness Statement of Frank Peri (July 14, 2010), ¶ 4 ("The tax returns for 1532382 Ontario Inc. for the 2002 and 2003 tax years were prepared on October 7th, 2004 and they were filed on October 8th, 2004").

¹⁵¹ Truster Report, p. 3.

of Canada.¹⁵² Finally, the Enterprise is legally required in its federal returns to identify in a schedule (“Schedule 19”) any shareholders who are not residents of Canada.¹⁵³

87. In this case, the Enterprise’s federal and provincial returns for the 2002 and 2003 taxation years REDACTED

REDACTED

Further, the federal tax

returns REDACTED

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In other words, the Enterprise’s federal and provincial returns for the 2002 and 2003 taxation years REDACTED

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Claimant’s allegation that he was the sole shareholder of the Enterprise prior to the introduction of the *AMLA*.

88. The Claimant and his witnesses now contend that these designations were simply made in error. However, their explanations for how such an error was made are implausible.

89. First, Mr. Peri, the Enterprise’s accountant who prepared all of the Enterprise’s returns,¹⁵⁶ testifies that even though he knew that the Claimant was the Enterprise’s sole shareholder, he:

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¹⁵² *Ibid.*, p. 4.

¹⁵³ *Ibid.*

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¹⁵⁶ Witness Statement of Frank Peri (July 14, 2010), ¶ 2.

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90. As Mr. Truster explains in his expert report, “Mr. Peri’s testimony that he designated REDACTED REDACTED represents such a fundamental misunderstanding of one of the most basic Canadian tax rules, that is not credible.”¹⁵⁸ Whether a corporation with only a sole shareholder is a CCPC is determined by the residence of that shareholder – not its Directors.¹⁵⁹

91. Furthermore, as Mr. Truster explains in his expert report, Mr. Peri’s “explanation does not explain why Mr. Peri [separately] indicated on both the federal and provincial REDACTED

92. Second, Mr. Swanick’s explanation REDACTED REDACTED is also implausible. Mr. Swanick REDACTED REDACTED REDACTED However, as Mr. Truster explains, Mr. Swanick’s statement that REDACTED REDACTED In any event, when Canada received the original versions of the Enterprise’s federal returns from the CRA, these returns REDACTED REDACTED

¹⁵⁷ *Ibid.*, ¶¶ 3 and 7.

¹⁵⁸ Truster Report, p. 4.

¹⁵⁹ *Ibid.*, p. 3.

¹⁶⁰ *Ibid.*

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93. Faced with this incontrovertible evidence, the Claimant and Mr. Swanick had no choice but to change their story. In a Supplemental Witness Statement, Mr. Swanick conceded that he had signed the federal returns, but that because the returns he signed were in a “General Index of Financial Information” (“GIFI”) format, he did not notice the CCPC designation.¹⁶⁴ Mr. Swanick also alleged that he did not notice the CCPC designation because the certification on the GIFI returns relate solely to the “amount of taxable income reported,” and not to other items identified on the returns.

94. While it is true that a GIFI return is a list of numerical codes on which it would be difficult to locate a CCPC designation without consulting the “narrative version” of a return, Mr. Truster states that “it is not credible that Mr. Swanick would sign the GIFI versions without first reviewing the narrative versions.”¹⁶⁵ Indeed, Mr. Truster states that “it would be unusual and improper for a sole Director and Officer of a closely-held corporation not to be concerned about the corporation making any false statements in its federal return ... [because] the making of a false statement or of an omission in a return can result in serious penalties to a taxpayer.”¹⁶⁶ Mr. Truster further states that “[i]t would also be highly unusual for Mr. Peri not to review with Mr. Swanick at least the initial tax filings, so that Mr. Swanick could confirm that Mr. Peri had not made any errors.”¹⁶⁷

95. Mr. Swanick’s explanations are further undermined by the Enterprise’s provincial returns, which Canada discovered he signed and certified, even though he previously denied signing these returns as well. These provincial returns indicate “in words, not number codes” REDACTED

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¹⁶⁴ Supplementary Witness Statement of Brent William Swanick (July 14, 2010), ¶ 5.

¹⁶⁵ Truster Report, p. 5.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*, p. 6.

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96. Faced with this fact, Mr. Swanick changed his story again. In his most recent witness statement, he testified that he did not notice the designation of the Enterprise as a CCPC on the Enterprise's provincial return because it appears on the second page and his signature does not appear until the seventeenth page.¹⁷⁰ The fact that fifteen pages separated these statements is as weak an excuse as it is irrelevant. Indeed, as Mr. Truster states, it is "highly incredible that Mr. Swanick would sign this certification on the provincial return without reviewing the statements made in the return, particularly with respect to CCPC status and shareholder residency."¹⁷¹

97. In sum, the Enterprise's federal and provincial returns are not only not contemporaneous evidence of the Claimant's ownership of the Enterprise prior to the introduction of the *AMLA*, but they are also unreliable evidence of this fact REDAC

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C. The Claimant Did Not Make Regulatory Filings Required to Indicate His Ownership of the Enterprise Prior to the *AMLA*

98. If he was the sole shareholder of the Enterprise, the Claimant was required to notify both the U.S. and Canadian governments. There is no evidence that he did.

99. First, the U.S. Department of Treasury requires that a U.S. person who is the sole shareholder of a corporation which owns foreign bank accounts that exceed \$10,000 at any point during the year must file a "Report of Foreign Bank and Financial Accounts."¹⁷²

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¹⁷⁰Supplementary Witness Statement of Brent Swanick (October 19, 2010), ¶ 9.

¹⁷¹ Truster Report, p. 6.

¹⁷² U.S. Department of the Treasury, *Form TD F 90-22.1 (Rev. 7/00) Report of Foreign Bank and Financial Accounts*, OMB No. 1506-0009, Instructions (TAB-81 / CAN-457).

The failure to file this report can result in civil penalties of up to \$50,000, and criminal penalties of up to five years in prison and fines as high as \$250,000.¹⁷³ The Claimant has provided no evidence that he filed this report.

100. Second, under the Canadian *Investment Canada Act*, a foreign national must notify Industry Canada when establishing a new business in Canada. In particular, a “non-Canadian” is required to submit a notification at any time prior to his intended investment in Canada or within thirty days thereafter.¹⁷⁴ A non-Canadian investor who fails to submit the required notification could be required to sell his Canadian business or to pay a fine of up to \$10,000 for each day that he fails to file the notification.¹⁷⁵ No such notification has ever been made in respect of the Enterprise by the Claimant.

D. The Enterprise’s Corporate Documents Are Not Reliable Evidence of his Ownership of the Enterprise Prior to the AMLA

101. The Claimant relies on a handful of documents in the Enterprise’s Corporate Minute Book (“Minute Book”) as evidence that he owned the Enterprise prior to the introduction of the *AMLA*. However, the admissions of the Claimant, and the forensic examination of the Minute Book show that the Minute Book is unreliable evidence.¹⁷⁶ In particular, the dates indicated on documents in the Minute Book are unreliable. It also appears that a number of documents have been removed from the Minute Book.

1. The Dates on the Corporate Documents are Unreliable

102. The Minute Book contains eight documents that REDACTED
REDACTED The Claimant REDACTED

¹⁷³ *Money and Finance*, 31 U.S.C. § 5321. (TAB-82 / CAN-458).

¹⁷⁴ *Investment Canada Act*, R.S.C. 1985 (1st Supp.), c. 28, s. 12 (TAB-83 / CAN-459).

¹⁷⁵ *Ibid.*, s. 39-40 (TAB-83 / CAN-459).

¹⁷⁶ Canada does not contest the date of Master Business Licence and the Articles of Incorporation, which were both filed with the Government of Ontario.

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REDACTED These documents include REDACTED REDACTED are the only documents in the record dated prior to the introduction of the *AMLA*, which bear the Claimant's signature.¹⁷⁹ The Minute Book also contains REDACTED

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103. However, after Canada brought a motion for the forensic examination of the Minute Book,¹⁸⁰ the Claimant admitted that the Shareholder Resolutions that were dated *before* the introduction of the *AMLA* were not in fact prepared until afterwards.¹⁸¹ The Claimant, REDACTED initially produced REDACTED

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REDACTED Even when Canada began to suspect that these documents were not

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¹⁷⁹ The Claimant initially provided Canada with a list of documents for forensic examination that did not include *any* of the Shareholders Resolutions. Counsel for the Claimant wrote to Canada a few days later and admitted that the Claimant and Mr. Swanick had backdated the Shareholder's Resolutions for 2002 and 2003. In explaining his failure to list these documents as part of the Minute Book, the Claimant asserted that they were "kept separately" from the Minute Book. See Correspondence Gallo 56 (August 25, 2010), p. 4 (TAB-92 / CAN-468). However, REDACTED

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¹⁸⁰ Correspondence Can 52 (June 18, 2010) (TAB-62 / CAN-440).

¹⁸¹ See Letter from Charles Gastle to Michael Owen, Re Gallo v. Canada (August 20, 2010) (TAB-93 / CAN-469).

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prepared until after the introduction of the *AMLA*, the Claimant was adamant that this was not the case.¹⁸³ The Claimant even went so far as to introduce sworn testimony from Mr. Swanick which expressly “den[ie]d that these documents were signed after the Adams Mine Lake Act was enacted.”¹⁸⁴

104. Just over a month after submitting that testimony to the Tribunal, as the forensic examination was ongoing, the Claimant finally admitted that *all* of the Shareholder Resolutions were not only prepared *after* the *AMLA*, but that they were in fact not prepared until 2008, long after this arbitration began.¹⁸⁵ In the same letter, the Claimant also admitted that the *six* Director Resolutions in the Minute Book that were dated as having been signed in the same years as the Shareholder Resolutions were also not actually signed until 2008, well after this arbitration was underway.¹⁸⁶ Thus, the Shareholders Resolutions for 2002 and 2003 are neither contemporaneous, nor reliable evidence that the Claimant owned the Enterprise prior to the *AMLA*.

105. Initially, the Claimant took the position that the corporate documents in the Minute Book were prepared shortly after they were dated. Mr. Swanick testified that “[i]n accordance with my typical practice in respect of documents that do not leave my office, I signed the documents listed above within 60 days of the ‘as of’ date indicated on the face of the document, or in the case of the transfer of any share certificate, within 60 days of the date thereof.”¹⁸⁷ Subsequently, not only did the Claimant admit that the

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¹⁸³ Correspondence Gallo 55 (July 14, 2010) p. 7 (TAB-64 / CAN-442) (“The Claimant has already produced the Minute Book for 1532382 Ontario Inc., including the original documents upon which his ownership of 1532382 Ontario Inc. is based. These include: ... Resolution of the Shareholder of 1532382 Ontario Inc. (Tab 17); Resolution of the Shareholder (Tab 18) ...”).

¹⁸⁴ Supplementary Witness Statement of Brent Swanick (July 14, 2010), ¶¶ 14-15.

¹⁸⁵ See Letter from Charles Gastle to Michael Owen (October 5, 2010) (TAB-94 / CAN-470). It is unclear when in 2008, these documents were prepared and unfortunately, it is likely to remain unclear. The Claimant alleges that Mr. Swanick forwarded him copies of these Shareholder Resolutions via email and that he then sent signed electronic copies back to Mr. Swanick. The Claimant now asserts that all of these emails and the electronic copies of these resolutions from 2008 no longer exist.

¹⁸⁶ *Ibid.* (TAB-94 / CAN-470)

¹⁸⁷ Supplementary Witness Statement of Brent Swanick (July 14, 2010), ¶ 16.

Shareholder Resolutions and the Directors Resolutions¹⁸⁸ were dated as much *as five years* after the date on the face of these documents, he also admitted that it was not clear when *any* of the documents in the Minute Book were prepared (while still maintaining that certain documents were prepared prior to the *AMLA*).¹⁸⁹ These admissions cast considerable doubt on the reliability of Mr. Swanick's testimony concerning the date of preparation of these documents. These admissions also cast doubt on whether the remaining documents in the Minute Book can be considered to be reliable contemporaneous evidence that the Claimant owned the Enterprise prior to the *AMLA*.

106. Moreover, the forensic examination of the Minute Book has uncovered additional inconsistencies and anomalies that suggest that the dates on these documents are not reliable. These anomalies include, for example:

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107. As a result of the foregoing forensic findings and admissions by the Claimant, none of the dates on the Minute Book documents are reliable. Therefore, they provide no proof of the Claimant's ownership of the Enterprise prior to the introduction of the *AMLA*.

¹⁸⁸ Mr. Swanick in his Supplemental Witness Statement did not list the Directors Resolutions as one of the documents that were prepared within 60 days of the "as of" date. Supplementary Witness Statement of Brent Swanick (July 14, 2010), ¶ 16.

¹⁸⁹ Correspondence Gallo 56 (August 25, 2010), p. 3 (TAB-92 / CAN-468).

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2. Several Documents are Missing from the Minute Book

108. Canada's forensic examination has also revealed several anomalies that suggest a number of documents have been removed from the Minute Book produced by the Claimant. In particular, REDACTED

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109. These REDACTED appear to suggest a number of signed documents have been removed from the Minute Book. However, REDACTED
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110. Further, the manufacturer of the Minute Book has confirmed that several documents and tabs included by the manufacturer with the Minute Book appear to have

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¹⁹⁶ Email from Charles Gastle to Michael Owen (October 4, 2010) (TAB-95 / CAN-471).

been removed.¹⁹⁷ These missing documents and tabs include a Securities Register, a Share Transfer Register, a tab for Shareholders Agreements and up to 10 Share Certificates.¹⁹⁸ The *Ontario Business Corporations Act* requires every Ontario Corporation to maintain certain books and records concerning its share ownership,¹⁹⁹ including both a Securities Register and a Share Transfer Register.²⁰⁰ The Minute Book manufacturer has also confirmed that the Directors Register and List of Corporate Officers supplied with the Minute Book have been removed and replaced with near, though not exact, duplicates.²⁰¹

111. Through admissions of the Claimant over the course of several months and the forensic examination, it has become clear that the documents in the Minute Book are unreliable. Accordingly, the Minute Book offers no support for the Claimant's assertion that he owned the Enterprise prior to the introduction of the *AMLA*.

E. The Witness Statements in this Case are Insufficient to Establish That the Claimant Owned the Enterprise Prior to the *AMLA*

112. As shown above, there is no reliable and contemporaneous documentary evidence to support the Claimant's contention that he owned the Enterprise prior to the introduction of the *AMLA*. Such documentary evidence should exist in this case, and the Claimant has failed to present any satisfactory explanation for its absence. Accordingly,

¹⁹⁷ Indeed, the manufacturer of the Minute Book also testifies that nearly *a full month after* the Claimant represented to Canada that there were no documents missing from the Minute Book, the Claimant's counsel visited the manufacturer to inquire whether documents were missing from the Minute Book. Witness Statement of Robert Bain, ¶ 5.

¹⁹⁸ *Ibid.*, ¶ [10].

¹⁹⁹ Section 140(1) of the *Ontario Business Corporations Act* requires that the Enterprise maintain, *inter alia*, a Register of Securities that conforms to the requirements of Section 141. Subsection 141(1) sets out the requirements for a Securities Register. Subsection 141(2) requires an Ontario corporation to maintain a separate Securities Transfer Register. See *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 140-141 (TAB-96 / CAN-472).

²⁰⁰ The Securities Register (Shares) and the Securities Transfer Register (Shares) that were supplied with the Minute Book appear to have both been replaced with the Shareholders Register.

²⁰¹ Witness Statement of Robert Bain, ¶ 10.

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in these circumstances, witness statements are simply not enough to support a finding of jurisdiction.

113. Moreover, the witness statements submitted by the Claimant do not “constitute[] disinterested and convincing evidence,”²⁰² and as such, they are insufficient to prove that the Claimant owned the Enterprise prior to the introduction of the *AMLA*.²⁰³ As stated above, international tribunals and commentators have consistently noted that witness statements of interested parties which are not corroborated by any documentary evidence cannot be accorded much weight.²⁰⁴

114. Here, the Claimant and Mr. Cortellucci believe – unjustifiably – that they each stand to gain tens of millions of dollars from this arbitration, and thus, they have a direct financial interest in its outcome. Moreover, their witness statements are unconvincing in that they are inconsistent with their own previous witness statements²⁰⁵ and the evidence on the record.²⁰⁶

²⁰² *Soufraki*, ¶ 78 (TAB-4 / BOA-136).

²⁰³ The witness statement submitted by Mr. Drew and the Report submitted by Prof. Welling are irrelevant to, and do not include testimony on, the factual issue of whether or not the Claimant owned the Enterprise prior to the introduction of the *AMLA*. As such, they will not be addressed further here.

²⁰⁴ Bin Cheng p. 309 (stating that “the mere *ex parte* statements of the facts by [an] interested party in a dispute are not considered as evidence and do not constitute sufficient proof of the facts alleged.”) (TAB-6 / BOA-138); Redfern & Hunter, pp. 307-308 (TAB-19 / BOA-148) (stating that “the untested evidence of a witness who has a clear interest in the result of the case may be given less evidentiary weight than the evidence of a witness who is truly independent.”).

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Compare Witness Statement of Jeffery Belardi (October 25, 2010), ¶ 15. (“Mr. Gallo’s strategy ... was to wait until the Northern Ontario site was ready for construction before approaching Keystone/Commonwealth”). See also Witness Statement of Mario Cortellucci, ¶ 38 (“Mr. McGuinty spoke to me on one occasion about selling the Adams Mine site to turn a quick profit. ... Unknown to Mr. McGuinty, an American citizen (Mr. Gallo) was already involved in the project and, accordingly, there was no need to pursue the sale to others.”). *Compare* Agreement among 1532382 Limited Partnership, REDACTED and 1532382 Ontario Inc. (April 1, 2003) p. 2 (TAB 39 / CAN-426).

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115. Mr. Swanick's witness statements are also insufficient to prove that the Claimant owned the Enterprise prior to the introduction of the *AMLA* without corroborating documentary evidence. To begin, his testimony, like that of the Claimant and Mr. Cortellucci, is not "disinterested." He is the sole Director and Officer of the Enterprise on which behalf this arbitration has been brought. REDACTED

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Moreover, as stated above, Mr. Swanick's testimony is unconvincing and unreliable as he has repeatedly made inaccurate statements to this Tribunal.²⁰⁸

116. Mr. Peri's testimony is also not "disinterested or convincing evidence." Mr. Peri was the Enterprise's accountant for 8 years. As the tribunal in *Soufraki* recently held, the witness statement of "an auditor [the Claimant] has engaged over the years," did not constitute "disinterested and convincing evidence"²⁰⁹ upon which jurisdiction could be founded. Public records also show that Mr. Peri has had a long-standing personal and professional relationship with Mr. Cortellucci since at least 1995.²¹⁰ Moreover, Mr. Peri's evidence is unconvincing and unreliable for the reasons described above.²¹¹

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²⁰⁸ *Supra*, ¶¶ 92-96 (with respect to the tax returns), and ¶¶ 103-105 (with respect to the corporate minute book).

²⁰⁹ *Soufraki*, ¶ 78 (TAB-4/ BOA-136).

²¹⁰ See e.g., *Environmental Protection Act*, Section 43 and 44, Order, Mammone Disposal Systems Ltd. ¶¶ 1.18-1.19 (March 20, 1995) (TAB-30 / CAN-420). This Order which concerns illegal waste disposal that was occurring on lands adjacent to a transfer station that were owned by 682017 Ontario Ltd.

117. The witness statements of Mr. Belardi, Mr. Wolfe, and Mr. Noto should also be accorded little weight. All are long-time friends or colleagues of the Claimant,²¹² and are, thus, not “disinterested” parties.²¹³ Moreover, none have direct, first-hand knowledge that the Claimant *actually* owned the Enterprise prior to the *AMLA*. Their testimony is based on hearsay from more than 8 years ago,²¹⁴ and is the type of general and vague testimony that tribunals have found should not be accorded much weight, especially where it is not corroborated by any documentary evidence.²¹⁵

Mr. Peri and Mr. Cortellucci were both Officers and Directors of 682017 Ontario Ltd. LECG, Compliance Audit Report for the City of Vaughan, Re: Mayor Linda Jackson (June 18, 2008), ¶ 4.40-4.41 (TAB-31 / CAN-421). This report indicates that: “Frank Peri, CA, on behalf of Four-Valleys Excavating & Grading Ltd., confirmed that the two companies are associated for income tax purposes. He also advised that the contributions were intended to be made on behalf of Mario and Nick Cortellucci, the shareholders of the two companies, as opposed to by the corporations.”

²¹¹ *Supra*, ¶¶ 89-91.

²¹² Witness Statement of Jeffery Belardi (October 25, 2010), ¶ 9 (“One of my clients has been and is, Mr. Vito Gallo, whom I know on a professional and on a personal level. I have known Mr. Gallo for 25 years.”); Witness Statement of Michael Wolf (Undated), ¶ 2 (“I have personally known Mr. Vito G. Gallo ... since the early 1990’s as we’d met through mutual friends. We worked together in the Pennsylvania state government until 2002 ...”); Witness Statement of Philip Noto (February 26, 2010), ¶¶ 2-3 (“I have known Mr. Vito Gallo ... since 1998. We worked together in state government during the period of 1998 until 2002 ...”).
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²¹³ See e.g. Bin Cheng, p. 317 (stating that when determining how much weight to give to witness testimony by third parties, “the personal, business or other relations between the individual claimant and the third persons whose testimony is offered may be legitimately considered by the tribunal.”) (TAB-6 / BOA-138).

²¹⁴ Durward Sandifer, *Evidence Before International Tribunals*, Revised Ed., University Press of Virginia, 1975, p. 18 (explaining that “Tribunals may refuse to base an award on evidence taken long after the event, if uncorroborated by other evidence.”) (TAB-27 / BOA-155). See also, *Studer v. Great Britain* (U.S. v. U.K.), 6 R.I.A.A. 149, p. 152 (American and British Claims Arbitration Tribunal 1925) (stating that “statements prepared many years after the event ... allowances must be made for infirmities of memory ...”) (TAB-28 / BOA-156).

²¹⁵ *Methanex*, Part III, Chapter B, ¶ 49 (TAB-21 / BOA-43); *Jalal Moin*, ¶¶ 12, 19 (“The Tribunal considers this to be hearsay evidence, on which it cannot rely, unless the evidence is substantiated. Such substantiation is missing.”) (TAB-22 / BOA-150); *AHFI*, ¶ 32 (TAB-23 / BOA-151); Bin Cheng, p. 315 (TAB-6 / BOA-138). In his witness statement, Mr. Noto states that his day timer and written calendar indicate a number of meetings with the Claimant throughout 2003. However, those entries only indicate that Mr. Noto allegedly met with the Claimant. It does not state that those meetings were with respect to the Enterprise, Adams Mine, or any waste disposal facility in Canada. Consequently, these entries are of limited relevance to this arbitration. See Supplementary Witness Statement of Philip Noto (October 25, 2010), Exhibit B.

F. The Claimant's Ownership of the Enterprise Prior to the AMLA is "Economic Nonsense"

118. Recent investment arbitration awards have considered the significant difference between the value of an investment and the amount allegedly paid for it by a claimant as a factor when deciding the claimant did not own the investment. For example, in *Europe Cement*, a Polish claimant sought to establish jurisdiction through its ownership of shares in two Turkish corporations. The claimant alleged that it purchased shares "valued at millions of dollars" for only "US\$45,000, deferred for up to eight years."²¹⁶ The tribunal held that paying such an insignificant amount for such a valuable investment was "economic nonsense"²¹⁷ and held that the claimant did not own the shares.

119. Similarly, in *Fakes*, a Dutch claimant alleged that the tribunal had jurisdiction because the claimant had purchased shares in a Turkish company. The claimant alleged that he paid US\$3,800 for shares valued at US\$19 billion. In ultimately deciding that the claimant failed to prove it owned the shares, the tribunal found that:

Had the Claimant acquired any genuine legal rights in the transactions, no doubt he would have been expected to make a contribution (either financial or managerial) beyond the US \$3,800 cash payment allegedly made in July 2003. Such a figure cannot be reconciled with the significance of the underlying business and the Claimant's valuation of his alleged shareholding at US \$19 billion for the purposes of his claim in this arbitration.²¹⁸

120. As in *Europe Cement* and *Fakes*, the gulf between the alleged value of the investment and the amount which the Claimant allegedly paid is extreme. Specifically, the Claimant alleges that he paid a nominal \$1 for an Enterprise that he now asserts is worth \$105 million. Moreover, as in *Fakes*, the Claimant here also made no managerial contribution to the Enterprise.

²¹⁶ *Europe Cement*, ¶ 161 (TAB-3 / BOA-27).

²¹⁷ *Ibid.* (TAB-3 / BOA-27).

²¹⁸ *Fakes*, ¶ 139 (TAB-11 / BOA-142).

121. Indeed, the evidence in the record suggests that the Claimant would *never* have had to contribute financially or managerially to the Enterprise. According to the Claimant, his only role was to REDACTED in order to develop Adams Mine into a landfill. However, as explained above, the Enterprise was trying to sell Adams Mine, undeveloped. In such circumstances, the Claimant would not have been required to contribute any of his alleged fundraising expertise, and yet, according to the Claimant's story, he still would have been entitled to receive the profits from such a sale.

122. Accordingly, the Claimant's explanation that he paid a nominal \$1 fee for a \$105 million dollar investment, without having to contribute other financial or management expertise, and indeed, with no expectation that he would ever have to contribute such expertise, is the type of "economic nonsense" that further undermines his allegation that he owned the Enterprise before the *AMLA*.

IV. EVEN IF THE CLAIMANT DID OWN THE ENTERPRISE PRIOR TO THE *AMLA*, THE TRIBUNAL STILL DOES NOT HAVE JURISDICTION

A. The Enterprise Is Not an Investment Protected by the NAFTA

123. NAFTA Chapter 11 does not protect every investment in Canada. Rather, it only requires Canada to accord certain treatment to "investments of investors of another Party."²¹⁹ Thus, the Claimant's argument that the Enterprise qualifies as a protected investment merely because Article 1139 defines an "investment" as including "an enterprise"²²⁰ misses the point. As the tribunal in *Romak v. Uzbekistan* explained when interpreting a similarly broad definition of the term "investment" in the Switzerland-Uzbekistan investment treaty, such a "mechanical application" of the definition would produce "a result which is manifestly absurd or unreasonable."²²¹ Ultimately, whether or not the Enterprise is an investment is not the question. The question is whether the Enterprise was *the Claimant's* investment. There is no evidence that it was.

²¹⁹ NAFTA Article 1101(1) (emphasis added).

²²⁰ Reply on Jurisdiction, ¶ 141.

²²¹ *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, ¶ 184 (TAB 29 / BOA-157).

124. 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.

125. An investment is “made by” an investor where there is a “commitment of resources to the economy of the host state by the claimant entailing the assumption of risk”²²² As Zachary Douglas explains in his leading treatise on investment arbitration:

Given that the stated objective of investment treaties is to stimulate flows of private capital into the economies of the contracting states, the claimant must have contributed to this objective in order to attain the rights created by the investment treaty. This contribution must be clearly ascertained by the tribunal if its existence is challenged by the host state; for otherwise the procedural privilege conferred by the investment treaty might be utilised by a claimant who has not fulfilled its side of the bargain.²²³

126. In this case, as shown above, there is no documentary evidence that the Claimant:

- paid a single dollar to acquire the Enterprise or Adams Mine;²²⁴
- paid a single expense of the Enterprise or Adams Mine;²²⁵
- loaned any money to the Enterprise;²²⁶

²²² Zachary Douglas, *The International Law of Investment Claims*, (Cambridge: Cambridge University Press, 2009) Rule 23, p. 189 (“Z. Douglas”) (TAB 30 / BOA-158).

²²³ *Ibid.*, p. 162, ¶ 336 (TAB 30 / BOA-158).

²²⁴ The Claimant has not even demonstrated that he paid the nominal \$1 in consideration for his share in the Enterprise.

²²⁵ The Claimant produced no documents in response to the request in Document Request 20, for documents concerning “expenses the Claimant paid on behalf of the Enterprise....” See Claimant’s Response to Document Request Sorted by Issue, Request # 20.

²²⁶ Canada requested in Document Request 19 that the Claimant produce “Documents indicating the dates and amounts of capital the Claimant has invested in the Enterprise ... by way of loans or contributions of capital.” The Claimant indicated in his list of responsive documents that the Shareholders

- contributed any technical, management or other expertise to the Enterprise;²²⁷
- bore any risk should the Enterprise fail;²²⁸ or
- stood to gain if the Enterprise succeeded in selling Adams Mine.²²⁹

127. Accordingly, even if the Tribunal accepts the evidence that the Claimant was the sole shareholder of the Enterprise prior to the introduction of the *AMLA* – which it should not – there is still insufficient evidence in the record to prove that the Enterprise was an “investment of” or “made by” the Claimant.

B. The Claimant has Abused Any Right to Claim

128. Even if the Claimant had a right to claim under the NAFTA, he abused that right by claiming damages of \$105 million to an Enterprise to which he contributed nothing. A claimant abuses a right to claim when he harms others by using the right for a purpose other than the purpose for which it was created.²³⁰ Where such an abuse of rights exists, even the Claimant agrees that there is no jurisdiction.²³¹

Register was the only document that was responsive to this document request. See Claimant’s Response to Document Request Sorted by Issue Request #19.

²²⁷ Canada requested in Document Request 21 that the Claimant produce any documents that show that he made a non-financial contribution such as providing technical or management expertise to the Enterprise” The Claimant indicated in his list of responsive documents that the annual shareholders resolutions were the only documents responsive to this request. These documents were actually signed in 2008 after the commencement of this arbitration. See Claimant’s Response to Document Request Sorted by Issue, Request #21.

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²³⁰ B. O. Iluyomade, “The Scope and Content of a Complaint of Abuse of Right in International Law”, 16 Harv. Int’l L.J. 47, p. 61 (“The concept of abuse of right implies that the exercise of a given right, or power, or discretion, should be for the end for which the right or discretion is conferred. Where the right or discretion has been used ostensibly for such an end but in reality for another purpose, and this has

129. In this case, the Claimant 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-Canadians contributed. This is not the purpose of this Article. To the contrary, Article 1117 is intended to give a right to a *foreign* investor to claim on behalf of a *foreign* investment. Accordingly, 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.²³² There is no evidence that the Claimant “contribut[ed] to the flow of capital into the economy of [Canada]” and, thus, the Claimant should not be permitted to exercise “the right to bring international arbitration proceedings against [Canada]” pursuant to NAFTA.²³³

130. This claim harms Canada, which has received no foreign investment in return for conveying the right on which the Claimant now relies. The Claimant asks Canadian taxpayers to pay millions of dollars defending this arbitration and to assume the risk of paying \$105 million in damages, in exchange for nothing. Allowing the claim equally harms all the NAFTA parties by forcing them to provide the rights and protections of Chapter 11 without receiving foreign investment in return.

131. 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.

resulted in injury or harm to another, there has occurred an actionable abuse of right, or *détournement de pouvoir*.”) (TAB 31 / BOA-159). See also: H. Lauterpacht, *The Function of Law in the International Community*, 2d. (Hamden: Archon Books, 1966), p. 286 (“The essence of the doctrine is that, as legal rights are conferred by the community, the latter cannot countenance their anti-social use by individuals; that the exercise of a hitherto legal right becomes unlawful when it degenerates into an abuse of rights; and that there is such an abuse of rights each time the general interest of the community is injuriously affected as the result of the sacrifice of an important social or individual interest to a less important, though hitherto legally recognized, individual right.”)(TAB 32 / BOA-160).

²³¹ Reply on Jurisdiction, ¶ 153.

²³² Z. Douglas, p. 161, ¶ 335 (TAB 30 / BOA-158).

²³³ *Ibid.*, 162, ¶ 336 (TAB 30 / BOA-158).

V. RELIEF REQUESTED

132. 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,²³⁴ and grant any further relief it deems just and necessary.

Dated: December 20, 2010

*Respectfully submitted
on behalf of Canada,*



Michael Owen
Shane Spelliscy
Vasilis F.L. Pappas
Yasmin Shaker
Nick Gallus
Marie-Claude Boisvert

Department of Foreign Affairs and
International Trade
Trade Law Bureau
125 Sussex Drive
Ottawa, Ontario
CANADA K1A 0G2
Tel: 613-943-2803

²³⁴ To the extent the Tribunal dismisses this case for lack of sufficient evidence to establish jurisdiction, Canada expressly reserves its rights to make a submission on the costs to which it is entitled.