

**THE ARBITRAL TRIBUNAL  
IN THE ARBITRATION BETWEEN  
VITO G. GALLO V. GOVERNMENT OF CANADA**

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**A 30**

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Dear Mesdames, dear Sirs,

Vito G. Gallo v. Government of Canada

**I Bifurcation of the Procedure**

1. The Arbitral Tribunal has had the opportunity to preliminarily review Respondent's Counter-Memorial. In it Respondent has contested Claimant's investor status, and thus the Tribunal's jurisdiction, based on different lines of argumentation:
  - (i) The Claimant did not make an investment
2. Canada suggests that the Claimant did not pay anything to acquire the Enterprise or Adams Mine, nor did he pay a single expense of the Enterprise or Adams Mine,

loan any money to the Enterprise, or contribute any technical, management or any other expertise<sup>1</sup>.

(ii) The Claimant did not act as an investor prior to the AMLA

3. Canada affirms that there is not a single document on the record reflecting that the Claimant, as sole shareholder of the Enterprise, gave out instructions in respect of the acquisition, management and financing of the Enterprise<sup>2</sup>. Canada adds that the Claimant's Privilege Log does not contain any reference to the Claimant prior to 20 May 2004, which is over a month after the introduction of the AMLA<sup>3</sup> and ten days before the drafting of the Notice of Intent to initiate this arbitration<sup>4</sup>.

(iii) The Claimant was not the owner of the Enterprise at the time of the AMLA

4. Canada submits that the Claimant has based his allegation that he was the single shareholder of the Enterprise at the time of the AMLA on his U.S. tax returns, the Enterprise's tax returns, on a share certificate and on shareholders' resolutions of the Enterprise<sup>5</sup>.
5. Canada submits that the tax returns were presented after the introduction of the AMLA, and that the share certificate and shareholders' resolutions were backdated. According to Canada, the Claimant has confirmed the late presentation and backdating<sup>6</sup>. In Canada's opinion the available evidence does not prove that the Claimant was the owner of the Enterprise at the time of the AMLA.

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6. In view of the arguments contained in Respondent's Counter-Memorial and of Respondent's allegation that key documents to establish jurisdiction have been either backdated or late presented by the Claimant, the Arbitral Tribunal has decided to bifurcate the proceedings and to open a separate procedural stage to address all jurisdictional objections, including the Claimant's legal standing, raised by Canada.

## **II The Arbitral Tribunal's Requests of Information**

7. Without prejudice to the parties' right to address the jurisdictional objections in the manner they deem most appropriate, the Arbitral Tribunal feels that certain issues affecting the legal standing of the Claimant and the jurisdiction of the Tribunal and the compliance with the requirements set for an investor and an investment to qualify under Chapter 11 of the NAFTA, should at this stage be the object of additional clarification.

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<sup>1</sup> Counter-Memorial, para. 219.

<sup>2</sup> Counter-Memorial, para. 245.

<sup>3</sup> Counter-Memorial, para. 245.

<sup>4</sup> Counter-Memorial, para. 247.

<sup>5</sup> Counter-Memorial, paras. 222, 231-235.

<sup>6</sup> Communication Can 57.

8. The Claimant is thus invited to further develop and provide additional evidence regarding the following issues:
- a) The amounts which the Claimant paid (whether by way of equity, loan, or otherwise), committed or otherwise provided to the Enterprise. The date and circumstances of each payment or other operation of investment should be identified, and appropriate evidence should either be produced or referred to, if already available in the file;
  - b) The amounts which the Enterprise paid for the acquisition and the development of the Adams Mine. The date, source and circumstances of each payment should be identified, and appropriate evidence should either be produced or referred to, if already available in the file;
  - c) The amounts or commitments which the Enterprise received from the Limited Partnership by way of loans or otherwise. The date and circumstances of each payment should be identified, and appropriate evidence should either be produced or referred to, if already available in the file;
  - d) The agreements existing between the Enterprise, the Limited Partnership and the Limited Partners and any other third party regarding the distribution of future profits from the operation or hypothetical sale of the Adams Mine. The Tribunal would like to have precise understanding of how the future profits from operating or reselling the Adams Mine would have been distributed between the various persons and entities participating in the transaction;
  - e) A precise description of all agreements (oral and written) and a copy of any written agreements not already disclosed (or a specific declaration that there are no further agreements) entered into, directly or indirectly, separately or all together, among or between the Claimant, Mr. Mario Cortellucci, the Enterprise and/or the Limited Partnership (or any entity or person controlled by or acting on behalf of any of them) relating to the Adams Mine, the investment or to this arbitration.
9. The Claimant submits that, after becoming shareholder, he acted as such and in that capacity held conversations with Messrs. Cortellucci and Swanick and paid visits to Canada regarding the operational timeline and progress of the Adams Mine project<sup>7</sup>. Mr. Gallo further declares that Mr. Cortellucci consulted with him regarding decisions to be made, in particular, the renewal of the Permit to Take Water and the need for a lawsuit after Ontario failed to transfer the surrounding lands<sup>8</sup>. Consequently, the Claimant is invited to provide further evidence on how he participated in the decision making process of the Enterprise and the Adams Mine prior to the AMLA. The Tribunal is especially interested in understanding how Mr. Gallo participated in key decisions regarding the project, e.g. the Permit to Take Water, the acquisition of the Borderlands, the possible lawsuit after the failure to transfer the Borderlands, and the CWS lawsuit.

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<sup>7</sup> Witness Statement of Vito Gallo, paras. 76 and 77, Tab 4 Book D of the Investor's Memorial.

<sup>8</sup> Witness Statement of Vito Gallo, para. 82, Tab 4 Book D of the Investor's Memorial.

### **III The Separate Procedure regarding Jurisdiction**

10. The Arbitral Tribunal will open a new separate procedural stage, which will only deal with the jurisdictional objections, including the Claimant's legal standing, and with the additional information requests posed by the Tribunal [the "Separate Procedure"]. Analysis of the merits is postponed, until the Separate Procedure has been closed. Consequently, the Claimant's request for an extension of time to submit his Reply Memorial has at this stage become moot.
11. The Separate Procedure will commence with a submission to be presented by Claimant. The scope of the submission shall be limited to addressing the jurisdictional objections, including the Claimant's legal standing, and the information requests; all relevant evidence, not already contained in the file, shall be annexed. Thereafter, Canada will have the opportunity to file a submission in response, with the possibility of attaching evidence not already submitted. The Tribunal feels that a hearing will be necessary, in order to examine the relevant witnesses. Conclusions could be presented either orally at the end of the hearing or in writing at a later stage. The Arbitral Tribunal will close the Separate Procedure either rendering a Partial or Final Award on Jurisdiction, or otherwise deciding to join such decision to the Final Award on the merits.
12. The Arbitral Tribunal is desirous that the Special Procedure should move forward as fast as possible and without any undue delay. Since the issues to be discussed are discrete, the Tribunal feels that the submissions from the parties should not be too voluminous, and that the time required to submit them could be limited. The Tribunal proposes that Claimant present his submission by 11 October 2010 and Canada by 22 November 2010 and that a hearing be held in the week commencing on 17 January 2011. The Tribunal invites the parties to comment on this proposed timetable, and the number of days which should be reserved for the hearing by 6 September 2010.

### **IV. Forensic and Pending Evidence**

13. The Arbitral Tribunal notes that Respondent has contested the authenticity of certain pieces of the evidence submitted by the Claimant and wishes to perform a forensic examination of the Minute Book of the Enterprise. The parties will attempt to reach an agreement on such performance by the end of the week.
14. The Arbitral Tribunal understands that the parties are also trying to reach an agreement on the production of the original versions of the Claimant's U.S. tax returns.
15. The parties should inform the Tribunal by 6 September 2010 whether an agreement on the forensic examination and on the production of the U.S. tax returns has been reached or otherwise request the Tribunal's assistance.
16. Once forensic examination is performed, the Tribunal will provide the parties with an opportunity to present allegations to the expert's report and to examine the expert in an oral hearing. Since at this stage it is still uncertain how forensic examination will be performed, the Separate Procedure will go forward in

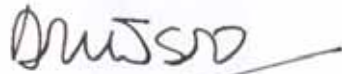
accordance with the schedule to be agreed and will be adapted as necessary once the forensic evidence has become available.

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17. The Arbitral Tribunal feels that it may be helpful to the parties if a conference call is held, in order to discuss the procedural aspects of the Separate Procedure. Upon request of any of the parties, the Arbitral Tribunal will set up an appropriate date.

In due course the Arbitral Tribunal will issue a Procedural Order regulating the new Separate Procedure and amending the procedural calendar provided for in communication A 21.

On behalf of the Arbitral Tribunal,

A handwritten signature in black ink, appearing to read "J. Fernández-Armesto", is written above a horizontal line.

Juan Fernández-Armesto  
President