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

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Dear Mesdames, dear Sirs,

Vito G. Gallo v. Government of Canada

1. As a preliminary remark, the Tribunal would kindly ask the parties to abstain from presenting *sua sponte* replies to submissions from the counterparty. It is for the Tribunal to provide each party with sufficient opportunity to present allegations and to decide when it has been sufficiently briefed.

I Procedural Calendar

2. The Arbitral Tribunal acknowledges receipt of Canada's communication CAN 59 and of the Claimant's communication GALLO 58 on the forthcoming procedural calendar.

3. The Arbitral Tribunal notes that the Claimant has asked to extend the time period for the presentation of the submissions by 14 additional days and to hold the

hearing a week later than originally proposed; and that Canada has suggested setting a deadline for the filing of Art. 1128 NAFTA submissions.

4. The Arbitral Tribunal accepts both proposals: the Claimant will be given until 25 October 2010 to provide his submission and the Respondent will be provided until 20 December 2010 to make its submission. Art. 1128 NAFTA submissions, if any, will be filed by 10 January 2011. Unfortunately, the Arbitral Tribunal can only make itself available for a hearing in the week starting on 31 January 2011. The parties are asked to agree at a later stage on the length and venue of the hearing and whether they wish to include a short rebuttal on the Art. 1128 NAFTA submissions, if any, at the beginning of their opening remarks.

II Forensic Examination and Tax Returns Production

5. The Arbitral Tribunal also acknowledges receipt of Canada's communication CAN 60 and of the Claimant's response filed with GALLO 59 on the forensic examination and production of the originals of the U.S. tax returns. Canada replied to the Claimant in its communication CAN 61 and Claimant filed a short rejoinder with GALLO 60.

6. The remaining points of disagreement among the parties are the following:

(i) Attendance to and video-recording of the forensic examination

7. The Claimant has asked that his Counsel be allowed to attend the forensic examination of the Minute Book by Canada's expert through a picture window overlooking the testing area, if available. This attendance would be in addition to that of the Claimant's forensic expert, which has been agreed to by Canada. The Claimant has also asked that one portion of the testing (the chemical preparation and procedures of the forensic ink investigation) be video-recorded. However, if all the examination is video-recorded, Counsel agrees not to attend.

8. Canada argues that videotaping is unnecessary and a highly unusual practice. Moreover, its expert has indicated that he will refuse to conduct a forensic examination under such disruptive conditions.

9. The Tribunal notes that the parties have agreed that the counterparty's expert can be present while the forensic examination is carried out. There is no agreement, however, regarding the presence of Counsel. Although the Tribunal acknowledges that the presence of Counsel at forensic examinations is unusual, the Tribunal is reluctant to curtail Counsel's fundamental right to take whichever actions are deemed necessary to better defend the client's interest, provided that Counsel abstain from causing interference with the forensic work.

10. With regard to the video-recording, the Arbitral Tribunal acknowledges that an expert cannot be forced against his will to perform his duties under video camera surveillance; besides, if the other party's expert, and, possibly Counsel is present during the examination, the Arbitral Tribunal would see no need for the recording.

11. The Arbitral Tribunal asks the parties to confer and try to agree on one of the two following solutions: either (a) Counsel are present during the examinations and no video-recording is allowed; or (b) the examinations are video-recorded and Counsel are not to attend the examinations.

(ii) Determination of the tests

12. Canada has requested that its expert have the freedom to conduct the tests that he deems necessary, provided that the testing of the document does not prejudice the ability of the Claimant's forensic expert to fully examine the Minute Book after Canada's expert has completed his examination.

13. Of the four tests that Canada wishes to carry out, one is an ink comparison analysis. The Claimant argues that such test should not be performed because it is both destructive and will render inconclusive results, according to the Claimant's experts. He also claims that the tests to be conducted by Canada should not be kept secret until the report is served. Finally, the Claimant suggests that both experts discuss the testing to be undertaken directly with each other.

14. Canada has confirmed that its expert is willing to consult and cooperate with the Claimant's ink expert with respect to how much and what portions of ink he will remove during any semi-destructive testing. However, Canada's expert cannot agree to the Claimant's expert dictating or vetoing the tests Canada's expert undertakes.

15. It is the Tribunal's opinion that each party is free to perform the forensic tests it deems necessary to present its case. The right of a party to perform tests is, however, subject to two conditions: (a) before carrying out any tests, each party's expert shall inform the counterparty's expert of the tests he wishes to perform; and (b) the possibility of the counterparty to run its own tests in the future cannot be jeopardised. The Tribunal trusts that the experts of both parties will be able to find a solution on the test procedures and, given the limitations of the ink sample, suggests that the experts explore the possibility to run common tests. If agreement among experts proves impossible, the Tribunal asks them to submit their dispute to the Tribunal's decision.

(iii) Third-party privileged information

16. The Claimant argues that ESDA scanning may reveal impressions of handwriting made on a few pages placed on top of a Minute Book page. The Claimant notes that it is possible that such handwritten notes may relate to one of Mr. Swanick's other clients, and as such may constitute privileged information.

17. Canada suggests that, in the unlikely event that any third-party information is revealed, it will have been inadvertently disclosed. Canada confirms that it will not circulate or discuss any of the information which Mr. Swanick asserts is the privileged information of a third-party client, until the issues of privilege have been resolved.

18. Canada has further informed that the parties are very close to reaching an agreement with respect to the potential disclosure of third party privileged information during the forensic examination. The Arbitral Tribunal requests the parties to confirm by 24 September 2010 whether such agreement has been reached. Otherwise, the Arbitral Tribunal shall decide.

(iv) Production of original U.S. tax returns

19. Canada has requested that the original 5471 Forms be delivered to it directly. According to Canada, the only possible process to obtain such forms and the date on which they were filed is by way of IRS Form 8821. The Claimant would thus authorise the IRS to disclose the information identified in such form to Canada.

20. The Claimant believes that Form 8821 would allow Canada to make direct inquiries and attend an IRS office to review the tax information identified, which may result in inadvertent disclosure. The Claimant suggests that a solicitor be hired for this purpose.

21. The Arbitral Tribunal agrees with the Claimant that the recourse to an intermediary is a reasonable approach. The Arbitral Tribunal asks both parties to confer and jointly nominate a solicitor or another third-party representative to act as intermediary before the IRS by 24 September 2010. If the parties are unable to reach an agreement, they shall submit the names and CVs of two solicitors each by 28 September 2010. The Arbitral Tribunal will then choose one name among them. The costs would initially be split among both parties, without prejudice to the Tribunal's final decision on the awarding of costs.

On behalf of the Arbitral Tribunal,

Juan Fernández-Armesto
President