UNDER THE UNCITRAL ARBITRATION RULES AND
SECTION B OF CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT

BETWEEN:

VITO G. GALLO

Investor

v.

GOVERNMENT OF CANADA ("Canada")

Party

**INVESTOR'S SUBMISSION ON
OWNERSHIP OF THE INVESTMENT**

CONFIDENTIAL VERSION

OVERVIEW: VITO G. GALLO HAS STANDING UNDER NAFTA Article 1117

1. In its correspondence dated August 30th, 2010 ("A30"), the Tribunal directed that a separate hearing occur with respect to the issue of Mr. Vito Gallo's standing to bring a claim on behalf of 1532382 Ontario Inc., (the "Enterprise"), based upon the issue of his ownership or control of the Enterprise as of April 5th, 2004.[1] This submission does not respond to the many erroneous allegations of fact and law contained in the Counter Memorial. This is because all of the facts contained within the Statement of Claim and Memorial – other than those which directly concern the ownership or control of the Enterprise – are to be presumed true *pro tempore* for the purposes of the preliminary hearing. As such, for the purposes of determining this preliminary issue, the Tribunal should proceed on the basis that the fair market value of the Adams Mine Site – as the date of passage of the *Adams Mine Lake Act* ("AMLA") – was $105,000,000.00, and that but for passage of the AMLA, the site would have been successfully developed.

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[1] The *Adams Mine Lake Act* was introduced into the Ontario legislature that day.

2. The affirmative evidence on the record supports only one conclusion: that Vito Gallo has been the holder of the sole common share issued by the Enterprise from the date of its incorporation. By virtue of his shareholding, Mr. Gallo controlled the Enterprise, as a matter of Ontario law. There have been no other shareholders and Mr. Gallo has never held the share in trust for any other person.

3. To raise the initial funding required to prepare the Adams Mine Site for use as a waste facility, Mr. Gallo had the Enterprise enter into a Limited Partnership. REDACTED

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4. The Respondent relies upon the alleged absence of documentation relating to the Claimant's participation in the Adams Mine site, before the AMLA was introduced into the Ontario Legislature. It ignores the obvious fact that very few steps needed to be taken by the Enterprise to develop the Adams Mine Site before the date upon which the AMLA was introduced. The Enterprise had already contracted local site management to Mr. Gordon McGuinty, as it began to prepare these lands for development. REDACTED

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5. Mr. Gallo did not need to raise all of the funds necessary to finance the entire project on the day he acquired ownership and control of the Enterprise, nor on the day that the Enterprise first obtained the Adams Mine Site. REDACTED REDACTED It was only at the point that construction was ready to commence that Mr. Gallo would be required to raise the much more substantial funding required to pay for construction and initial operation of the site. That point in time never arrived, because of the rushed passage and implementation of the AMLA.

6. The Counter-Memorial provides: "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." This allegation is flatly contradicted by the evidence of Mr. Philip Noto and Mr. Jeffery Belardi, who have both confirmed that they spoke with Mr. Gallo about raising these funds long before the AMLA was introduced. These witnesses have no stake in the outcome of this arbitration. Each provides confirmation that his discussion with Mr. Gallo about acquisition of the site, and his plans for its development, took place before the Mr. Gallo left his employment with the Government of Pennsylvania in early 2003.

7. Mr. Gallo had access to experienced and successful operators of major waste disposal facilities through his relationships with Mr. Philip Noto and Mr. Jeffrey Belardi. For example, through Mr. Noto, Mr. Gallo would have been able to approach Chrin Brothers Inc.; and through Mr. Belardi, he would have been able to approach Keystone Sanitary Landfill Inc. and Commonwealth Environmental Systems. Contact with these landfill operators only needed to take place after the site was ready for construction. The opportunity to make use of these contacts never did arise, however, because the Enterprise's right to employ of the Adams Mine Site in its highest and best use was illegally taken by the Government of Ontario in April, 2004 – before the Permit To Take Water (PTTW) had been issued and the Borderlands transferred.

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10. The Respondent is attempting to take advantage of the fact that the manner in which the AMLA was rushed into force prevented a much larger paper trail from being generated through further development of the Adams Mine Site. The Respondent knew that the Enterprise held a valuable asset in the permitted lands it was developing. Strategically, it had no choice; the only way to fully extricate the Government of Canada from its international obligation to effectively make good on the debt generated by passage of the AMLA was to improperly allege conduct akin to fraud on the part of Mr. Gallo.

11. While the Respondent appears to prefer somewhat more subtle terms such as intentional misrepresentation, there can be no doubt about the strategy it is pursuing. The Respondent is asking the Tribunal to find that Mr. Gallo, and all of the witnesses appearing at his request, are deliberating misrepresenting themselves to the Tribunal in order to allow him to claim that he had ownership or control of the Enterprise before the AMLA came into force. Its fallback position is to restrict its allegations of bad faith to Mr. Gallo, claiming – without evidence – that the only reason he acquired ownership and control of the Enterprise was to obtain jurisdiction to pursue a NAFTA claim on its behalf.

12. The Respondent has not proffered any affirmative evidence to support its conspiracy theories, which will necessarily encompass an ever-widening number of co-conspirators, as new witnesses step forward on Mr. Gallo's behalf. In contrast, the evidence supporting Mr. Gallo's ownership and his control of the Enterprise include the share certificates, the declaration of trust and the share transfer resolutions, all of which were contained within the Enterprise's Minute Book. In addition, there is the opinion of one of Canada's leading experts on corporate law. With this submission, the evidentiary record now also includes the witness statements of Mr. Gallo, Mr. Philip Noto, Mr. Jeffrey Belardi, Mr. Mario Cortellucci, Mr. Brent Swanick, and Mr. Frank Peri. Without any evidence and

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only improper allegations upon which its fraud allegations appear to be based, the Respondent has chosen to shower Mr. Gallo, and his counsel in this arbitration, with a stream of unsubstantiated character attacks and conjectures about how more evidence must "really" exist, if the Enterprise's claim is to be adjudged legitimate.

13. The standard of proof for claims of fraud and bad faith is onerous. Unless it can provide reasons to ignore all of the documentary evidence before the Tribunal, as well as all of the evidence provided by each of the witnesses appearing at Mr. Gallo's request, the Respondent's allegations of fraudulent conspiracy must be rejected by the Tribunal. The Enterprise's claim should proceed to a hearing on the merits.

PART I:
THE LEGAL STANDARD FOR A JURISDICTIONAL OBJECTION

14. In *Canfor Corp.* v. *U.S.A.* the Tribunal made the following observations about the manner in which jurisdictional issues are addressed under NAFTA Chapter 11:

> The above decisions make clear four points that a Chapter Eleven tribunal needs to address if and to the extent that a respondent State Party raises an objection to jurisdiction under the NAFTA:
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> – First, a mere assertion by a claimant that a tribunal has jurisdiction does not in and of itself establish jurisdiction. It is the tribunal that must decide whether the requirements for jurisdiction are met.
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> – Second, in making that determination, the tribunal is required to interpret and apply the jurisdictional provisions, including procedural provisions of the NAFTA relating thereto, i.e., whether the requirements of Article 1101 are met; whether a claim has been brought by a claimant investor in accordance with Article 1116 or 1117; and whether all pre–conditions and formalities under Articles 1118–1121 are satisfied.
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> – Third, the facts as alleged by a claimant must be accepted as true *pro tempore* for purposes of determining jurisdiction.

> – Fourth, the tribunal must determine whether the facts as alleged by the claimant, if eventually proven, are prima facie capable of constituting a violation of the relevant substantive obligations of the respondent State Party under the NAFTA.
> ...
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> Finally, with respect to the burden of proof, a claimant must satisfy the Tribunal that the requirements of Article 1101 are fulfilled, that a claim has been brought by a claimant investor in accordance with Article 1116 or 1117, and that all preconditions and formalities under Articles 1118–1121 are fulfilled (see second point at paragraph 171 above). However, where a respondent State invokes a provision in the NAFTA which, according to the respondent, bars the tribunal from deciding on the merits of the claims, the respondent has the burden of proof that the provision has the effect which it alleges.[3]

15. *The Canfor* Tribunal's approach is consistent with the manner in which other investment treaty tribunals have viewed their responsibilities in respect of addressing objections to jurisdiction.[4] Similarly, concerning disputes over the specific facts necessary to establish jurisdiction, the Tribunal in *Phoenix Action Limited* v *Czech Republic* observed:

> If the alleged facts are facts that, if proven, would constitute a violation of the relevant BIT, they have indeed to be accepted as such at the jurisdictional stage, until their existence is ascertained or not at the merits level. On the contrary, if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage.
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> ...To take a simple example, if under a BIT entered into by Italy, a tribunal only has jurisdiction if the claimant is an Italian investor and if, at the jurisdictional level, a claimant asserts that he is Italian, and the respondent alleges that he is not, the tribunal cannot simply accept the facts as asserted by the claimant and confirm its jurisdiction, but it has to make a decision in order to verify whether

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[3] *Canfor Corporation* v *United States*, Decision on Preliminary Question, Ad hoc—UNCITRAL Arbitration Rules, IIC 42 (2006), 6 June 2006, at para's. 171 & 176.

[4] See, e.g.: *Inceysa Vallisoletane, SL* v *El Salvador*, Award, ICSID Case No ARB/03/26, IIC 134 (2006), 25th July 2006, despatched 2nd August 2006, ICSID at para. 155; and *Saipem SpA* v *Bangladesh*, Decision on jurisdiction and recommendation on provisional measures, ICSID Case No ARB/05/7, IIC 280 (2007), (2007) 22 ICSID Rev-FILJ 100, 21st March 2007, ICSID, at para. 91.

or not it has jurisdiction *ratione personae* over the investor, based on his Italian nationality.[5]

16. In light of such practice, this submission is limited to addressing disputed allegations of fact which go directly to the question of Mr. Gallo's ownership or control of the Enterprise. Part II of this submission provides a narrative of the relevant facts, as a response to the Tribunal's request for any more pertinent information or evidence concerning Mr. Gallo's ownership or control of the Enterprise. Part III provides direct responses to the questions contained within the Tribunal's letter, A-30. Part IV contains specific rebuttals to allegations contained within the Counter Memorial, related to the Mr. Gallo's ownership or control of the Enterprise. Part V explains the burden of proof, which lies upon the Respondent, to substantiate its allegations in light of the *prima facie* case before it. Finally, Part VI explains briefly why jurisdiction has been established in this case, relating the fact of Mr. Gallo's ownership and control of the Enterprise to the applicable law under NAFTA Article 1117.

PART II:

MR. GALLO'S OWNERSHIP OF THE ENTERPRISE

A. Mr. Gallo Sought to Make an Investment in Canada

17. Mr. Gallo became interested in pursuing an investment in a North American waste disposal site because of his experience in government in Pennsylvania.[6] He worked as a Senior Policy Director for Government Affairs, Governor's Policy Office during the administrations of Governor Tom Ridge from 1995 to September, 2001 and Governor Schweiker from 2001 to 2003.[7] The Respondent has suggested that Mr. Gallo misrepresented himself about this experience, claiming that he was, in fact, a low-level bureaucrat in a couple of state

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[5] *Phoenix Action Limited* v *Czech Republic*, Award, ICSID Case No ARB/06/5, IIC 367 (2009), 9th April 2009, despatched 15th April 2009, ICSID, at paras. 61 & 63.
[6] Gallo Witness Statement, February 26, 2010, at paras. 30-39.
[7] Gallo Witness Statement, February 26, 2010 at paras. 23-24.

government departments.[8] As explained below, the evidence of the Honorable Barry Drew, as well as Mr. Gallo, flatly contradicts the Respondent's bald allegation.[9]

18. Mr. Gallo was looking for a business project following his expected departure from government, in early 2003, as a result of the election of a new governor and a change in administrations.[10] He was an "at will" employee, which, by tradition in Pennsylvania politics, means that he expected to leave office once the Governor's term was over.

19. Waste disposal was an important issue in Pennsylvania during Mr. Gallo's tenure in the Office of the Governor – due to increasing shipments of New York waste into Pennsylvania, which followed the closure of the "Fresh Kills" waste disposal site.[11] This substantial increase in demand for waste disposal capacity in Pennsylvania occurred despite the fact that the tipping fees for Pennsylvania landfills had just been increased.[12] In 2002 Mr. Gallo knew that a similarly acute shortage of waste disposal capacity was growing in the Ontario market, thanks to his contacts within the Government of Michigan at the time, and his increasing familiarity with the industry. Of course, Mr. Gallo was also aware of the controversy brewing in Michigan, over the shipment of Ontario waste into the State for disposal, which had already fostered efforts in the Michigan legislature to ban future shipments.[13]

20. Mr. Cortellucci learned that an opportunity existed for somebody to acquire the rights to use the Adams Mine Site as a permitted waste landfill, by putting the

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[8] Counter Memorial, paras. 215 & 237 at pgs. 73 & 83.
[9] Mr. Drew confirms that Mr. Gallo held the position of Executive Policy Manager 3, that there are only seven such positions in the Government of Pennsylvania and was a Senior Policy Director in the Governor's office. Also see Gallo Second Witness Statement at para. 4.
[10] Gallo second Witness Statement, October 25th, 2010, at paras. 5-7.
[11] Vito Gallo Witness Statement, Feb 26th, 2010, Memorial Book D, Volume III, Tab 4, paras. 30-34.
[12] Ibid.
[13] Ibid., at paras. 40-44.

word out through his contacts.[16] He negotiated the transaction which led to the acquisition of the Adams Mine Site by the Enterprise on behalf of Mr. Gallo.[17] He also assisted the Enterprise in assembling the Limited Partnership, in order to provide preliminary financing.[18] Mr. Cortellucci's goal, which motivated him to provide such services to Mr. Gallo, was to obtain a lucrative annuity for himself that would last for at least twenty years, based upon the development of the South Pit of the Adams Mine alone.[19] As a land developer, Mr. Cortellucci was looking to diversify his business interests. He was not interesting in staking them all on one huge project, in an industry in which he had no experience. He did not plan to own or operate the Adams Mine waste disposal site.[20]

21. From Mr. Gallo's point of view, what made acquisition and development of the Adams Mine Site so attractive was that a Certificate of Approval had already been granted for use of the Adams Mine Site. It was the fact that the lands thereby acquired by the Enterprise were just a few administrative steps away permitted utilization. Nevertheless, the Respondent has consistently minimized the importance of the fact that the Adams Mine Site was already certified for waste disposal use,[21] notwithstanding the fact that this license was the *sine qua non* ingredient for any investment in a waste disposal facility. The remaining certificates needed to operate these lands as a waste disposal site were operational in nature, many of which would not be obtained until a much later stage in the development or the operation of the site.[22] It was expressly because

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[16] Mario Cortellucci Witness Statement, Feb 26th, 2010, Memorial Book D, Vol III, Tab 6 paras. 8-10.
[17] Mario Cortellucci Witness Statement, Oct 25th, 2010, para. 7.
[18] Mario Cortellucci Witness Statement, Feb 26th, 2010, Memorial Book D, Vol III, Tab 6 para. 27.
[19] Mario Cortellucci Witness Statement, Oct 25th, 2010, paras. 4 &17.
[20] Ibid., at para. 4.
[21] See, e.g.: Counter Memorial, at para. 73.
[22] William Balfour Witness Statement, sworn Feb 15th, 2010, Memorial Book D, which states in part:

> "31. The issuance of the Certificate of Approval entitled 1532382 Ontario Inc. to proceed with the development of the waste disposal site at the Adams Mine, in accordance with the terms and conditions established by that certificate. The remaining certificates and permits that were required as of June 16, 2004, the day before the Adams Mine Lake Act was enacted, were operational in nature.

the new Ontario Liberal government knew how quickly the site would be developed – because it already had the key certification in place – that the AMLA was rushed into existence.

B. The Enterprise's Acquisition of the Adams Mine Site and Associated Permits

22. The Memorial recounts the way in which Mr. Gallo met Mr. Cortellucci,[23] and the circumstances in which Mr. Cortellucci was introduced to the Adams Mine and the negotiation of the acquisition of the site.[24] The Memorial also explains the way in which the Enterprise was incorporated and organized, the formation of the Limited Partnership and the interest that the Limited Partners had in the profits of the Adams Mine.[25]

23. The Memorial explains how, after the Enterprise acquired the Adams Mine on September 9th, 2002, it moved actively to develop the Adams Mine waste disposal site.[26] Mr. McGuinty was retained[27] and the development approach was changed. Instead of waiting for a contract, the plan was to start construction and then offer the waste disposal capacity to any municipality in Ontario that had need of it, including those in the Greater Toronto Area.[28]

24. The Memorial then reviews the steps that were taken to develop the site,[29] including the purchase of the Borderlands,[30] the fact that the federal

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32. This means that the remaining certificates and permits would be obtained in the ordinary course of designing and building such a facility. In my experience, there were no unexpected or unusual conditions that were imposed for the development of the Adams Mine site."

[23] Memorial, at paras. 182-184 at pgs. 73-74.
[24] Memorial, paras. 183-203 at pgs. 64-70.
[25] Memorial, at paras. 204-214 at pgs 81-84.
[26] Memorial, at paras. 215-267 at pgs 84-106.
[27] Memorial, at paras. 215-216 at pg. 85.
[28] Memorial, at para. 217 at pg 86..
[29] Memorial, at Part Four: Development of the Site By the Enterprise, beginning at para. 215 at pg. 85.
[30] Memorial, at paras. 219-241 at pgs. 86-94.

environmental assessment was a legal red herring,[31] and the application for the PTTW.[32] The efforts to develop the site are also reviewed, including the Request for Expressions of Interest that was published by Mr. McGuinty in northern Ontario and the market review and forecast that was prepared by the Enterprise in partnership with Canadian National Railways.[33]

C. Management of the Site During the Development Phase

25. The Respondent has argued that there is an absence of documentation regarding the management and operation of the Enterprise by Mr. Gallo prior to the introduction of the *Adams Mine Lake Act* into the Ontario Legislature on April 5th, 2004.[34] These arguments not only confuse the difference between exercising control over an Enterprise with the management of property owned by the Enterprise. It also ignores the stage of development of the waste disposal site and the way in which it was managed as an entrepreneurial project.

26. The Limited Partnership assumed the risk of providing initial financing to the Enterprise – for the development of a permitted waste site owned by the Enterprise – during the early stages. Once the PTTW and the Borderlands had been obtained, and the site de-watered, construction could begin in earnest. Everyone associated with the project believed that the remaining certificates were operational in nature and expected that they would be obtained on fair and timely basis, as the project progressed.[35]

27. As stated above, Mr. Gordon McGuinty was retained to provide the day-to-day management of the development of the site. He brought with him all of the site's development history and the contacts he had established over the years. REDACTED over the duration of the

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[31] Memorial, at paras. 242-251 at pgs. 94-99.
[32] Memorial, at paras. 252-261 at pgs.100-113.
[33] Memorial, at paras. 262-267 at pgs. 103-106.
[34] Counter Memorial, at para. 215 at pg. 73.
[35] For instance, see William Balfour Witness Statement, sworn Feb 15th, 2010, Memorial Book D, paras. 31-32.

contract, for his services.[36] With Mr. McGuinty in place, there was relatively little management oversight required while the PTTW and Borderlands were being obtained.

28. There were few events in the development of the site which required Mr. Gallo's involvement before the AMLA was passed to render the Adams Mine Site inutile. The Bill 49 Submission dated October 12th, 2004 sets out the activities in which the Enterprise had been engaged, from the time of acquisition until April 5th, 2004. The activities listed were as follows, along with the individuals involved in each:

    a. Continued communication with Ministry of Environment on Certificate of Approval (C of A);[37] *[Gordon McGuinty]*

    b. Filing the annual reports on the landfill as required by the C of A;[38] *[Gordon McGuinty]*

    c. Technical reports as required for PTTW; [39] *[Gordon McGuinty, Gartner Lee]*

    d. Submission of application for PTTW; [40] *[Gordon McGuinty, Gartner Lee]*

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[38] Tab 4, Letter from Gordon McGuinty, Adams Mine Rail Haul, to James O'Mara, Environmental Assessment & Approvals Branch, MOE (Bates 01899 to 01925), March 22, 2004.

[39] Tab 5, Letter from Steven Usher, Gartner Lee, to Gordon McGuinty, Rail Haul North (Bates 00920 to 00922), June 11, 2003; Letter from Steven Usher, Gartner Lee Limited, to Perry Sarvas, Ministry of Environment (Bates 00998 to 01000), July 19, 2003; Fax from Steven Usher, Gartner Lee Limited, to Mr. Perry Sarvas, Ministry of Environment (Bates 01024), July 29, 2003; Letter from Steven Usher, Gartner Lee Limited, to Perry Sarvas, Ministry of Environment (Bates 01187 to 01195), September 10, 2003; Letter from Steven Usher, Gartner Lee, to Gordon McGuinty, 1532382 Ontario Inc. (Bates 01352 to 01353), October 9, 2003; and Information Notice, Adams Mine Permit to Take Water, EBR Registry Number: XA03E0019 (Bates 01400 to 01402), November 14, 2003.

[40] Tab 6, Application for Temporary Permit to Take Water (Bates 00931 to 00933), July 3, 2003; Letter from Steven Usher, Gartner Lee Limited, to David Hollinger, MOE, and Gordon McGuinty, 153238 Ontario Inc. (Bates 00941 to 00944), July 4, 2003; Letter from Gordon McGuinty, Adams Mine Rail Haul, to Dave Hollinger, Ministry of Environment (Bates 00945 to 00948), July 7, 2003; Fax from Catherine McLennon, Ministry of Environment, to Dave Hollinger, Ministry of Environment (Bates 00949 to 00964), July 9, 2003; Fax from Elizabeth Fournier, Notre Development Corporation, to Dave Hollinger, Ministry of Environment (Bates 00965 – 00976), July 10, 2003; Letter from Perry Sarvas, MOE, to Gordon McGuinty, Adams Mine Rail Haul (Bates 00993 to 00995), July 16, 2003; Letter from Perry Sarvas, Ministry of Environment, to Gordon McGuinty, Adams Mine Rail Haul (Bates 01026 to 01027), July 30, 2003; Letter from Ministry of Environment to Mr. Gordon McGuinty, Adams Mine Rail Haul (Bates 01082), August 26, 2003; Letter from Gordon McGuinty, Adams Mine Rail Haul, to Dave Hollinger, Ministry of Environment (Bates 01315), September 16, 2003; Letter

e. Meetings with Adams Mine Community Liaison Committee regarding PTTW;[41] *[Gordon McGuinty, Gartner Lee]*

f. Meetings with Kirkland Lake Council regarding status of project; *[Gordon McGuinty]*

g. Communications with MNR regarding sale of crown land tailing area;[42] *[Gordon McGuinty]*

h. Communications with Ontario politicians and residents regarding Ontario disposal capacity;[43] *[Mario Cortellucci, Gordon McGuinty]*

i. Production and distribution of the information as required including document "THE ONTARIO SOLUTION"; *[Gordon McGuinty]*

j. Administration and management functions of the company *[Mario Cortellucci, Gordon McGuinty]*.

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from Gordon McGuinty, Adams Mine Rail Haul, to James O'Mara, Environmental Assessment & Approvals Branch MOE (Bates 01316 to 01333), September 17, 2003; Letter from Gordon McGuinty, Adams Mine Rail Haul to Dave Hollinger, Northern Region, MOE (Bates 01338), September 29, 2003; Fax from Elizabeth Fournier, Adams Mine Rail Haul, to Dave Hollinger, Ministry of Environment (Bates 01354 to 01357), October 10, 2003; Letter from Gordon McGuinty, Adams Mine Rail Haul, to Frank Wilson, MOE (Bates 013914 to 01393), November 7, 2003; Letter from Steven Usher, Gartner Lee, to Gordon McGuinty, 1532382 Ontario Inc., and Dave Hollinger, MOE (Bates 01489 to 01490), November 28, 2003; Fax from Gordon McGuinty, Notre, Dave to McNaughton (Bates 01663 to 01664), January 6, 2004; Letter from Gordon McGuinty, Adams Mine Rail Haul, to Frank Wilson, MOE (Bates 01857 to 01858), February 9, 2004; and Letter from Frank Wilson, MOE, to Gordon McGuinty, Adams Mine Rail Haul (Bates 01881), February 20, 2004.

[41] Tab 7, Gartner Lee Presentation re South Pit Dewatering (Bates 01281 to 01303), September 11, 2003; Adams Mine Community Liaison Committee (Bates 01304), September 11, 2003; Adams Mine Community Liaison Committee Notes (Bates 01305 to 01311), September 11, 2003; and Report on Adams Mine Community Liaison Meeting (CLC) (Bates 01312), September 12, 2003.

[42] Tab 8, Letter from Gordon McGuinty, Adams Mine Rail Haul, to Craig Greenwood, MNR (Bates 00809 to 00813), April 10, 2003; Letter from Wishart Law Firm to Ministry of Natural Resources Re: Application to Purchase Crown Lands (Bates 00824 to 00825), May 20, 2003; Fax from Elizabeth Fournier to Mario re: MNR Land Purchase (Bates 00831 to 00833), May 27, 2003; Notice of Claim (Bates 01019 to 01023), July 28, 2003; and Affidavit of Gordon McGuinty (with Exhibits) (Bates 01731 to 01836), January 7, 2004.

[43] Tab 9, Memo from Gordon McGuinty, Adams Mine Rail Haul, to Liberal MPP's (Bates 01341 to 01342). October 6, 2003; Memo from Gordon McGuinty, Notre, to David McNaughton (Bates 01491 to01492), November 28, 2003; and Memorandum from Gordon McGuinty to David McNaughton, Principal Secretary re: Michigan Legislation (Bates 01926 to 01931), March 28, 2004.

29. Mr. McGuinty was responsible for the entire management of the development project and he did so as the "Managing Director" of the Adams Mine Rail Haul, which was established by the Enterprise.[44] Mr. Cortellucci spent little time on the project. His office administered the funds required by Mr. McGuinty for development and, while he did promote the Adams Mine to local politicians, he did so only when the opportunity presented itself - rather than as part of an active or sustained lobbying campaign akin to Mr. McGuinty's.

30. Apart from the activities listed above, Mr. McGuinty also managed the lawsuit commenced in October 2003 against the Province of Ontario after it reneged on its agreement with the Enterprise to transfer ownership of the Borderlands. Mr. Gordon McGuinty retained Mr. Gordon Acton to act as counsel on this matter. Mr. McGuinty naturally served as the affiant in support of the Motion for Summary Judgment.[45]

31. Mr. Mario Cortellucci provided Mr. Gallo with updates about the Enterprise's law suit against the Province of Ontario and kept him advised of its progress.[46] Mr. Cortellucci also informed Mr. Gallo about the action commenced against the Enterprise by CWS.[47] This action was managed out of Toronto with Reuter & Scargill, a Toronto law firm, which represented the Enterprise.

32. There was no need for Mr. Gallo to be personally involved in administering the funds for the Enterprise. A bank account had already been established prior to the acquisition of the Adams Mine Site and, at the time, Mr. Gallo was desirous of maintaining a low political profile while he served out his term in the Pennsylvania Governor's Office. The funds were administered out of Mario Cortellucci's office

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[44] Memorial, at para. 218 at pg. 86.
[45] Tab 8, Affidavit of Gordon McGuinty, sworn January 7th, 2004, in Ontario Superior Court of Justice action, Court File No 22368/A3, Claimant's Production Tab 196, at bates no 1731-1836.
[46] Vito Gallo Witness Statement, February 26, 2010, para. 82, Book D, Vol III.
[47] Vito Gallo Witness Statement Oct 25 2010, para. 21.

in Woodbridge, as he had the staff to arrange payment of the expenses on a month-to-month basis.R

D. Plans for Further Development of the Site

33. Mr. Gallo planned to begin raising the funds necessary for developing the site after the PTTW had been obtained and the Borderlands secured. It was his plan to contact the owners of major waste disposal sites in Pennsylvania through Messrs. Noto and Belardi. These owners are very experienced in the construction and operation of waste disposal sites and they understand the economics of waste disposal sites.

34. As indicated in the Memorial, Mr. Gallo discussed the Adams Mine site with Mr. Philip Noto on various occasions during the period from 2002 to 2004.[49] Their discussions included preparations to pursue funding for the construction of the waste disposal site. They discussed a number of Mr. Noto's clients who might be prepared to invest in the project. One of these potential funders was the owners of the Chrin Brothers Sanitary Landfill located in the Lehigh Valley, Pennsylvania. The Chrin Brothers Sanitary Landfill is one of the largest landfill operations in Pennsylvania, licensed to accept 2,000 tonnes per day. The Charles Chrin Companies, a family-owned business, oversees a solid waste hauling, quarry, recycling and disposal business. They also provide a full line of site contracting services and manage a land development entity. [50] In his first witness statement, Mr. Noto stated:

> 7. To the best of my recollection, on various occasions during the period from 2002 to 2004, Mr. Gallo and I discussed efforts to pursue clients/ funding/investments and other possible

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[50] Tab 11, www.chrin.org, (last visited October 24, 2010).

> business interests in funding the construction of the waste disposal site that Mr. Gallo owned in Ontario, Canada.
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> 8. Mr. Gallo and I had discussed a number of possible clients that we agreed might be prepared to invest in the project. One of these notable clients was the Chrin Brothers Sanitary Landfill, located in the Lehigh Valley, Pennsylvania. The Chrin Brothers Sanitary Landfill is one of the largest landfill operations in Pennsylvania.
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> 9. The Charles Chrin Companies, a family-owned business, oversees a solid waste hauling, quarry, recycling and disposal business. They also provide a full line of site contracting services and manage a land development entity.[51]

35. In Mr. Noto's second statement, which responds to the allegations made by the Respondent in its Counter Memorial, provides:

> "16. Mr. Gallo and I spoke at length about lining up possible contacts in my home part of the state for him to discuss investment in his Ontario waste disposal site. For example, I spoke with Mr.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 area expert" in all aspects of the landfill business, including financing. We had another discussion at which time Mr. Chrin confirmed his willingness to travel to Toronto with me, if need be, to provide direct on site consultation for the project. At no time did I identify the project by name or provide any specific details discussed between Mr. Gallo and myself as I felt that there would be adequate time to do so in the future once we became more fully involved in the project. The goal was to secure Mr. Chrin's involvement into the site.
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> 17. Linking Mr. Chrin, a senior manager currently running a landfill operation in Pennsylvania, to Mr. Gallo's needs in Toronto, Ontario, Canada, was at its very essence a task that I was eminently qualified to do, whether I was employed by the state or not."[52]

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36. Mr. Gallo also spoke to Mr. Jeffrey Belardi regarding the Adams Mine waste development site.[53] Mr. Jeff Belardi, a lawyer with his own law practice, was directly involved in the waste disposal industry at the time that he had his discussions with Mr. Gallo, operating eight waste management trucks haulage of waste from New York City to the Keystone Sanitary Landfill in Pennsylvania.[54] Mr. Belardi also counts among his clients the owners of the Keystone Sanitary Landfill Incorporated, (a 720 acre facility licensed to take 5,000 tons per day),[55] and Commonwealth Environmental Systems Landfill (a 235 acre facility located in Hegins, Pennsylvania, which can accept 2,350 tons per day). These are two of the largest landfill sites in Pennsylvania and among some of the largest landfill sites in the United States.[56]

37. Mr. Belardi states that he spoke to Mr. Gallo before the Adams Mine site was acquired. Mr. Belardi states:

> 10. I knew before Mr. Gallo bought the waste disposal site in Northern Ontario that he was considering an investment in Canada. Mr. Gallo did not have a specific project in mind when he asked my initial views on whether a waste disposal site would be a good investment. I recall that I told him that I thought that a licensed waste disposal facility could be very lucrative and that he should seize the opportunity if it was available but in my experience these opportunities are rare.[57]

38. He also spoke to Mr. Gallo after the Adams Mine site had been acquired:

> 13. I also spoke to Mr. Gallo after he acquired the Northern Ontario the waste disposal site while Mr. Gallo was still working for the State of Pennsylvania. Mr. Gallo and I discussed introducing Mr. Gallo's project to the clients that I had in the waste disposal industry, particularly Keystone and Commonwealth. The owner of the Keystone waste disposal site is

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[55] Tab 12, http://www.keystonelandfill.com/aboutus.htm, last visited October 24, 2010.

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> very entrepreneurial and it was my view that he would have been very interested in this investment.
>
> 14. I am confident that if Mr. Gallo's project was ready for investment, my clients had REDACTED REDACTED in the development of the site in Northern Ontario if they had determined it was a valuable project and safe investment.
>
> 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.[58]

39. The evidence of Mr. Belardi and Mr. Noto directly contradict the Respondent's assertion that "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."[59]

40. As a result of Mr. Gallo's discussions with these business associates, by the time the application had been made for the PTTW, and the acquisition of the Borderlands was underway, Mr. Gallo was prepared to solicit funding for further development of his Enterprise's asset from two of the largest waste disposal site operators in the State of Pennsylvania. Given their proximity to the New York City, these two sites remain among the most important and valuable of waste disposal sites throughout the United States.

41. Beyond the special access he would have enjoyed to waste industry magnates, through his contacts with Messer's. Belardi and Noto, Mr. Gallo would have also had access to venture capital markets in the United States which was much stronger in 2002 to 2004 than they are today.

42. REDACTED

REDACTED

[59] Counter Memorial, at para. 215, at pg. 73.

REDACTED

43. REDACTED

REDACTED

44. In summary, the Respondent complains that there is no record of any advance of funds on the part of Mr. Gallo. It also complains that no specific steps were taken personally by Mr. Gallo to proactively raise funds for construction of the site. The Respondent does so in spite of the fact that it was the Government of Ontario's stealthfully crafted and rapidly implemented measure that was responsible for precluding Mr. Gallo from ever having the opportunity to engage in such activity. The Respondent should not be permitted to rely on the fruits of an expropriation, which was designed to terminate the project, as proof that the project never really proceeded to the point of investment as defined under the NAFTA. Such an argument is not only incorrect as a matter of law; its being granted would work a fundamental inequity under the Enterprise whose asset has been rendered effectively inutile in the process.

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PART III:
ANSWERS TO THE TRIBUNAL'S QUESTIONS, A30

45. In paragraph 8(a) of its correspondence dated August 30th, 2010 (A30), the Tribunal requested information about:

> 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.

46. REDACTED

REDACTED t funded all of the expenses from the date of purchase to the date the AMLA was introduced. It was planned that the funding from the Limited Partnership would take the project to the point when construction would begin.

47. In paragraph 8(b), the Tribunal asked about:

> 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.

48. The amounts paid by the Enterprise prior to the AMLA being introduced into the Legislature REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

49. The expenses incurred prior to April 5th, 2004 but not paid before that date, are also found in the Enterprise's submissions. The totals incurred were as follows:

	AMOUNT	GST	NET
REDACTED			
REDACTED			

50. The documentation supporting these expenses was included in the Submission.

51. The total obligations arising from the acquisition of the Adams Mine waste disposal site was estimated at REDACTED REDACTED The documentation in support of this figure includes: (a), the May 10th, 2002 acquisition agreement; and (b), Kirkland Lake Agreement. This does not include certain additional obligations, such as the generation of electricity from the methane gas vented from the site, the development of the additional capacity of 20 million tonnes capacity in the adjoining pits, as well as the sale of gravel from the site which was to be back-hauled by train into Toronto.

52. In paragraph 8(c), the Tribunal asked for confirmation of:

> "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."

REDACTED

53. The amounts or commitments which the Enterprise received REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

54. These funds were used for the purposes of funding the expenditures referred to in answer to question 8(b) listed above.

REDACTED

55. In paragraph 8(d), the Tribunal asked for information concerning:

> 8(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.

56. From the date of acquisition of the Adams Mine site until April 5th, 2004, REDACTED

57. REDACTED

REDACTED

REDACTED

58. REDACTED

59. As of April 5th, 2004, Mr. Gallo would be entitled to receive the balance of the profits through his share ownership of the Enterprise.

REDACTED

60. The question set forth above also asks how the profits would be distributed pursuant to a hypothetical sale. These agreements do not expressly contemplate how the profits would be distributed on a hypothetical sale of the Adams Mine waste disposal site. However, it would involve the following:

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61. In paragraph 8(e), the Tribunal asked for:

> 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.

62. REDACTED

63.

REDACTED

REDACTED

64. The claim made on behalf of the Enterprise crystallized on the enactment of the *Adams Mine Lake Act* on June 17, 2004.

65. REDACTED

PART IV:
RESPONSE TO ALLEGATIONS IN REPLY MEMORIAL

66. One of the ways in which the Respondent has attempted to impugn Mr. Gallo's credibility has been to belittle his record of public service. It has done so notwithstanding the paucity of evidence it has been able to muster in support of its allegations. The following facts confirm the truth about Mr. Gallo's role in the Office of the Governor of Pennsylvania.

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A Evidence of the Honorable Barry T. Drew

67. The Counter-Memorial states that Mr. Gallo was not a "Senior Policy Director" in the Governor's policy office from 1995 to 2003.[73] The Respondent states that Mr. Gallo was merely a low-level policy specialist in Pennsylvania's Department of Revenue and Department of Military and Veteran's Affairs. This allegation is blatantly untrue.

68. The Honorable Barry T. Drew confirms that Mr. Gallo held the position of Executive Policy Manager 3, which was a very senior policy position within the Government of Pennsylvania:

> I have known Mr. Vito G. Gallo since approximately October 2, 1995 when he joined the Department's Policy Office as an Executive Policy Specialist 1. We were colleagues in state government during the period of October 1995 until April 2003, while Mr. Gallo served in the Pennsylvania governor's Policy office. At the time of his termination Mr Gallo held the position of Executive Policy manager 3.

69. Mr. Drew is currently the Deputy Secretary or Administration for the Pennsylvania Department of Revenue. He oversees the Bureau of Administrative Services, the Equal Opportunity Office, the Bureau of Human Resources, the Bureau of Fiscal management and the Bureau of Imaging and Document Management. He states that Executive Policy manager 3 position is utilized in large agencies and, reflecting how senior a role it is, Mr. Drew confirms that "[a]t the current time there are only 7 filled, Executive Policy Manager 3 positions in state government." He goes on to explain:

> 9. It is my opinion that the inaccuracies are based upon the Government of Canada's lack of a general understanding of the organizational structure in the Commonwealth of Pennsylvania, including how the Governor's Policy Office Network functioned and was organized during the years 1995-2003.

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[73] Counter Memorial, para. 237 at pg. 83.

> 10. Based on my 15 plus years experience and high level employment for the Commonwealth, I will explain how Mr. Gallo was indeed an integral part of the governor's Policy Network, performing high level professional policy analysis while functioning as Director of Policy for the Departments of Revenue, Government Affairs, which included the Departments of Military and Veterans Affairs, State and General Services.[74]

70. Mr. Drew states that, instead of relying on an inaccurate phone book listing of more than 15 years in age, he attaches a copy of Mr. Gallo's Office of the Governor Photo identification card, issued on September 13, 2001 to Vito G. Gallo, Policy Director for Government Affairs. He also attaches an undated business card for Vito G. Gallo, Policy Director for Government Affairs, Governor's Policy Office. He attests to the fact that Mr Gallo served as an "at-will" employee during the length of his tenure with the Governor's Office and he confirms that, even though they are considered permanent staff, "at will" employees are practically no less term-limited that the Governor at whose pleasure they serve. Mr. Drew notes how, "[traditionally], they are a select group of highly-skilled people brought in by the Governor to assist in the advancement of Governor's highest policy priorities." Mr. Drew goes on to explain:

> 15. Another commonly known fact about "at will" employees is that they know that when an Executive administration changes, there is very little chance of continuing in the appointed position unless the "at will" employee is asked to remain in service by the new incoming Governor's administration. Mr. Gallo was not asked to continue his employment and was subsequently terminated in February 2003, as Ms. Kohout's document attests.
>
> 16. Furthermore, this practice is generally limited to the highest ranking closest staff individuals who serve at the pleasure of the Governor in "policy-making" roles. Consequently, there is a great deal of planning by such "at will" employees in the last two years of an administration as to future employment and/or business ventures once the administration comes to an end.[75]

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[74] Barry T. Drew, Witness Statement, sworn October 18, 2010, paras. 9-10.
[75] Barry T. Drew, Witness Statement, sworn October 18, 2010, paras. 15-16.

71. Mr. Drew accordingly concludes:

> 17. During the Administrations of both Governors Ridge and Schweiker from 1995-2003, the Governor's Policy Office Network had the mandate to perform the following high level policy functions for the Commonwealth of Pennsylvania:
>
> > The Governor's Policy Office coordinates program and policy development among the Executive Branch Agencies. The Office works closely with the Governor's Budget, Legislative and Washington DC Offices to ensure that federal and state policy options are thoroughly examined for their fiscal, legislative and programmatic consequences. The Governor's Policy Office also directs and coordinates the policy advisors of the various executive branch agencies in order to provide overall guidance and direction to the policy planning and development for the Commonwealth; develops new program initiatives and suggest changes to existing Commonwealth programs to improve the efficiency and effectiveness of services; assesses the feasibility and desirability of proposed program changes; coordinates the implementation of Commonwealth policies and to assess the effectiveness of those policies; monitor and develop responses to federal actions affecting the Commonwealth; fosters the development and implementation of collaborative projects between executive agencies and foundations. The Policy office works on special projects for the Governor, particularly those involving more than one department or agency.
>
> Finally, from my personal knowledge and experience in Pennsylvania government, I know that Mr. Gallo successfully performed those functions listed above and successfully served in the Governor's Policy Office from 1995 until February, 2003, as Policy Director for not only the Department of Revenue, but also "Government Affairs," which includes the Departments of Military and Veterans Affairs, General Services and State during his tenure in state government. As a senior member of the Governor's Policy Office, Mr. Gallo was responsible for accomplishing numerous goals and priorities for two Governors as they related to the various agencies under the jurisdiction of the Governor.[76]

[76] Barry T. Drew, Witness Statement, sworn October 18, 2010, para. 17.

72. It is clear from Mr. Drew's evidence that the Respondent made erred by speculating in its Counter-Memorial that Mr. Gallo was not a "Senior Policy Director" in the Governor's policy office but rather nothing more than a junior policy employee in one of America's fifty state governments.

B Response of Vito Gallo

73. As noted above, the Counter-Memorial contains several allegations against Mr. Gallo.[78] It claims that Mr. Gallo is lying about having been the sole shareholder of the Enterprise since 2002. As noted above, the Respondent also claims that Mr. Gallo was lying about having served as a Senior Policy Director in the Office of the Governor of Pennsylvania.

74. Mr. Gallo confirms that he was an "at will" employee of the State of Pennsylvania, initially under the administration of Governor Tom Ridge, and later under the administration of Governor Mark Schweiker. Mr Gallo could only serve so long as the Governor wanted him to serve. "At will" employees must plan for the next career opportunities as their employment will terminate when the Governor's term ends.[79]

75. Mr. Gallo describes the positions he held as part of the Governor's team in the following terms:

> 8. While in government I was part of the Governor's team and reported to the Governor as well as appointed Cabinet Officials in various agencies under the jurisdiction of the Governor. During my tenure, I did professional policy work on behalf of the Governor for the Departments of Revenue, State, General Services, and Military and Veteran's Affairs. I also served on numerous professional Councils, Boards, and Committees – all at the appointment of the Governor and in some cases the Cabinet Secretary...

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[78] Counter Memorial, paras. 215-253 at pgs. 73-79.
[79] Vito Gallo, Supplementary Witness Statement, sworn October 25, 2010, para 5.

> 10. Specific agencies, over which I directed policy on behalf of the Governor for eight years, included, but were not limited to, the department of Military and Veteran Affairs, which oversees the men and women serving in the Pennsylvania National Guard.
>
> 11. The Pennsylvania National Guard began overseas deployments following 9/11/2001. After 9/11, with Gov. Ridge answering the call of the President to become the nation's first Homeland Security Director, Gov. Schweiker increased the involvement of the Pennsylvania National Guard in the various military deployments into Afghanistan and the Middle East as necessary. I continued to serve Gov. Schweiker in a similar manner as Gov. Ridge, while working closely with the Adjutant General, who is the Commanding Officer of the Pennsylvania National Guard, and the appointed Cabinet Official of the Department of Military and Veterans Affairs. [80]

76. Mr. Gallo has produced a copy of his Office of the Governor of Pennsylvania's Identification card dated September 13th, 2001[82], along with one of his business cards at that time. He states further:

77. The degree of Mr. Gallo's involvement in these overseas military deployments was recognized by the National Guard Association of the United States, which represents over 500,000 citizen soldiers in the United States. The organization recognized Mr. Gallo's post 9/11 work by granting him their Patrick Henry Award, which is the highest award that a citizen may receive from that organization. The criteria for this award includes:

> An individual must have distinguished him/herself over an extended period of time in their support of the Armed Forces of the United States, the National Guard or NGAUS. Superior performance of normal duty alone will not justify award of this honor. An individual must have provided exceptionally strong support for the National Guard to clearly merit this award. The support of the individual must be such that the readiness and the future of the Guard have been

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[80] Vito Gallo, Supplementary Witness Statement, sworn October 25, 2010, at paras 8-11.
[82] Ibid., at para 9, Exhibit "A".

> positively affected and the results of the support should remain beyond the individual's affiliation with the National Guard.[84]

78. Mr. Gallo's work history, his activities and accomplishments are not to be found in a fifteen year old phonebook. It is also not to be found in a bureaucratic printout of general employment history, which was probably originally formulated for purposes relating to public pension administration. These activities and accomplishments are also clearly not the work of an anonymous, low-level bureaucrat – as the Respondent would allege.

79. Mr. Gallo also rejects the Respondent's allegation that he had no connection to the Enterprise until after the AMLA was introduced to the Ontario Legislature on April 5th, 2004. He confirms that he was the sole shareholder of the Enterprise from the time it was incorporated and that he did not hold the share in trust for anyone.[85]

80. Mr. Gallo states that he did not need to have significant involvement in the various steps taken by the Enterprise or its agents, in Canada from 2002 to April 2004, in order to get the project to the point where construction could begin.[86] Mr. McGuinty had been retained to manage the day-to-day affairs of the Enterprise. Mr. Cortellucci and Mr. Gallo had discussed the hiring of Mr McGuinty at the time the site was acquired and his retainer was obviously required as he brought with him thirteen years of history of the project.[87] Mr. Cortellucci periodically updated Mr. Gallo on the progress of the various initiatives to get the project to the point where construction could begin and Mr. Gallo could start to raise funding to complete the construction phase.[88]

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[84] Ibid., para 12.
[85] Ibid., para 16.
[86] Ibid., para 17.
[87] Ibid.
[88] Ibid.

81. Mr. Gallo came to Toronto twice in 2002, once in September shortly after the closing of the acquisition and once in December, 2002.[89] Mr. Gallo visited Mr. Cortellucci at his office in Woodbridge and reviewed the status of the Adams Mine site on each occasion. They discussed the fact that construction could not begin until such time as the Enterprise obtained its Permit to Take Water to dewater the site and acquired the Borderlands surrounding the site. Mr. McGuinty was to manage both of these initiatives as part of his responsibility to manage the day-to-day management of the Enterprise. They also discussed Mr. Gallo's contacts with waste site operators in Pennsylvania and discussed that the contact would be made with them during the early stages of construction.

82. In response to the Respondent's suggestion that Mr. Gallo had never even been to Canada prior to the introduction of the AMLA into the Ontario Legislature, he has produced a copy of some of the credit card charges he incurred in purchasing the airline tickets for one of his trips to Ontario as well as certain expenses incurred while he was in Toronto in September, 2002. He also provides a photograph of himself, taken by C.N. Tower staff dated September 20th, 2002. In addition, Mr. Gallo has produced a copy of expenses paid during his trip to Toronto in December, 2002. Similar visits to Toronto occurred as necessary in 2003 and 2004.[91]

83. Mr. Gallo added a great deal of experience in the development of large-scale projects through his work with regional economic development agencies, especially using tax-free incentives such as Keystone Opportunity Zones in Pennsylvania. He is a member of the Board of Directors for the Lehigh Valley Economic Development Corporation, or LVEDC. LVEDC is one of only 24

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economic development organizations in the world accredited by the elite International Economic Development Council, or IEDC. His work in government and after government introduced Mr. Gallo to credible and substantial private land development contacts who are also involved in the economic development efforts in Pennsylvania.[92]

C Response of Phil Noto

84. With his first witness statement, Mr. Noto explained that he is a retired army officer (holding the rank of Lt. Col.) and that he worked with Mr. Gallo from 1998 until 2002, during which time Mr. Gallo worked in the office of the Governor of the State of Pennsylvania. Mr. Noto further stated:

> 7. To the best of my recollection, on various occasions during the period from 2002 to 2004, Mr. Gallo and I discussed efforts to pursue clients/ funding/investments and other possible business interests in funding the construction of the waste disposal site that Mr. Gallo owned in Ontario, Canada.
>
> 8. Mr. Gallo and I had discussed a number of possible clients that we agreed might be prepared to invest in the project. One of these notable clients was the Chrin Brothers Sanitary Landfill, located in the Lehigh Valley, Pennsylvania. The Chrin Brothers Sanitary Landfill is one of the largest landfill operations in Pennsylvania.
>
> 9. The Charles Chrin Companies, a family-owned business, oversees a solid waste hauling, quarry, recycling and disposal business. They also provide a full line of site contracting services and manage a land development entity.[93]

85. The Respondent claims that Mr Noto could not possibly have discussed the Adams Mine waste disposal site before April 5th, 2004 because he was not a lobbyist but rather an employee of the Pennsylvania government. As such, it is

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[92] Ibid., para 22-26.

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alleged that Mr. Noto would not have had any clients from whom Mr. Gallo could have solicited funds.[94]

86. In his second witness statement, Mr. Noto confirms that he did not make any misrepresentations or any misleading statements in his first witness statement. He also observes that the Respondent must not understand how government and private enterprise function in Pennsylvania.[95]

87. Like Mr. Gallo, Mr. Noto was an "at will" employee of Pennsylvania, although his position was not as senior as Mr. Gallo's position until early 2004. Mr. Noto's employment lasted one year longer than the change of administration, the point at which Mr. Gallo left government for the private sector. He was asked to stay longer because of the important, military role he played in the Pennsylvania State Government, given how many members of the Pennsylvania National Guard were serving their country overseas during that period.[96]

88. In any event, as an "at will" employee, Mr. Noto had been taking steps to establish himself in a 'post-Government' role in 2003. He did so on his own time. As he still does today, Mr. Noto kept a day timer and a written calendar in 2003. He kept track of the personal days he used to prepare for a lobbying career after his tenure in Government was over. These records also demonstrate how Mr. Noto spoke or met with Mr. Gallo on several occasions, including March 12th, 13th, July 17th, 18th, 19th, 20th, August 8th, October 2nd, 9th, November 11th, and December 9th, 2003. Mr. Noto has no dates regarding meetings with Mr. Gallo in his 2002 calendar although he recalls that he had discussions with Mr. Gallo that year.[97]

89. Mr. Noto began assembling clients and contacts long before he registered his business, Rutherford Eggers International Consulting and Lobbying, on April 6th,

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2004. He did not register as a lobbyist until January 2008, when the 2007 Pennsylvania Lobbying Disclosure Act became effective.[98]

90. To conclude, Mr. Noto did not mislead the Tribunal in his original witness statement as alleged by the Respondent.

D Response of Brent Swanick

91. The Respondent has attacked Brent Swanick's character relentlessly, going so far as to state that Mr. Swanick has given false testimony to the Tribunal. Mr. Swanick denies these allegations.[99]

92. To review Mr. Swanick's evidence, he has testified that Mr. Gallo was the owner of the sole share issued by the Enterprise. He also confirms that Mr. Gallo has never held this share in trust for anyone.[100]

93. The Respondent submits in its Counter-Memorial that Mr. Swanick represented Mr. Cortellucci at all stages, implying that he was not representing Mr. Gallo.[101] This is also untrue. Mr. Swanick was contacted and retained by Mr. Gallo, in 2002, on the recommendation of Mario Cortellucci.[102] Mr. Gallo indicated that he was interested in arranging the purchase of the Adams Mine. Mr. Gallo's understanding was that the Adams Mine Site was a licensed site which had gone through the environmental approval process.[103] Mr. Gallo hoped that he and a group of American investors would acquire and operate the Adams Mine as a waste disposal site.[104]

[redacted]
[99] Tab 14, Respondent's Correspondence to Tribunal, June 18, 2010 (CAN 52).
[100] Brent Swanick, Witness Statement, sworn February 26, 2010, para. 5, Memorial, Book D, Vol 3, Tab 7.
[101] Counter Memorial, paras. 97, 213, 218, Footnote 341 at pgs. 33, 72, & 74.
[102] Brent Swanick, Witness Statement, sworn February 26, 2010, para. 7, Memorial, Book D, Vol. 3, Tab 7.
[103] Ibid., at paras. 9-10.
[104] Ibid., at para. 9.

94. Mr. Swanick subsequently advised Mr. Gallo and Mr. Gallo's agent, Mr. Cortellucci, REDACTED

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95.

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97. As the Enterprise is a private corporation, there is no public registry of shareholders. It is also very common for periods of time to elapse before a private corporation is organized with the passage of by-laws, the issuance of shares and the signing of Director's and Shareholder's resolutions. It is common for corporate taxpayers in the position of the Enterprise (a private corporation incurring losses) to file returns for a number of years at one time.[109]

98. The tax returns for the Enterprise for the years 2002 and 2003 were prepared in October, 2004 and filed to bring the Enterprise up to date at the time that the Submission pursuant to Bill 49 was filed.[110] The Respondent has argued that these tax returns "back-dated" as a result, in order to claim that Mr. Gallo attempted to mislead the Tribunal. The fact is that these returns were not "back-dated" at all. Rather, they were dated on the same day the financial statements for the years in question were prepared. It is Mr. Peri's practice to date returns in just such a manner.[111] Further evidence of the fact that there was never any attempt to mislead the Tribunal with respect to the tax returns exists in the evidence of how Mr. Brent Swanick actually requested production of the original versions of the Enterprise's tax returns, from the Federal Government on January 20th, 2010 – months before Mr. Gallo's memorial was filed with the Tribunal.[112] The Respondent confirmed in its correspondence that this request should have been answered within thirty days.[113]

99. The Respondent has also pointed to the fact that REDACTED REDACTED as if it were somehow proof that these allegedly "backdated" returns were nonetheless *also* prepared in a manner that revealed the 'true nature' of the owners of the Enterprise.[114] The simple fact is that Mr. Frank Peri made a mistake

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[109] Brent Swanick, Supplementary Witness Statement, sworn July 14, 2010, para. 6.

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when he was preparing the tax returns in October, 2004, REDACTED REDACTED These returns were prepared after the AMLA was adopted. REDACTED REDACTED

100. The same mistake was made both in the Federal Tax returns and the Provincial tax returns filed with the Government of Canada. Mr. Brent Swanick did not notice and amend the wrong legal conclusion had been made at the time that he signed the tax returns.[116] The Federal tax form signed by him was a GIFI ("General Index Financial Information"), in which the information is presented in a computer friendly format with numerical codes and no explanation of what they represent. It is understandable that Mr. Swanick would not have realized that the corporation REDACTED With respect to the provincial returns, the identification of the Enterprise can be found on page 2 of the return, whereas Mr. Swanick's signature appears on page 17.[117][118]

101. Mr. Swanick was involved in the incorporation of the Enterprise, the acquisition of the Adams Mine and the structuring of the Limited Partnership. After this was completed, apart from signing the Application for Crown land and the application for the PTTW, he had little involvement with the Enterprise until after the *Adams Mine Lake Act* was introduced into the Ontario Legislature.[119]

E. Response of Frank Peri

102. Mr. Frank Peri is a Chartered Accountant, receiving his certification in 1982. He prepared the Enterprise's financial statements and tax returns. RE REDACTED

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[119] Brent Swanick, Supplementary Witness Statement, sworn October 19, 2010, para. 3.

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103. Mr. Peri further confirms that the tax returns were filed on October 8th, 2004 at the time that the expense recovery submission under Bill 49 was delivered to the Ontario Ministry of the Attorney General.[121] Brent Swanick and he believed that 1532382 Ontario Inc. should be up to date on its filing sat the time of the submission.

104. Mr. Peri denies that the ownership was transferred to Mr. Gallo after the passage of the *Adams Mine Lake Act*. He further denies that he is part of a fraudulent conspiracy to effect that change in ownership.[122]

F. Response of Mario Cortellucci

105. To summarize Mr. Cortellucci's evidence in his original witness statement, he emigrated to Canada in 1962 and started his first construction company at the age of 22. He and his family have construction companies in Ontario and agricultural and hospitality businesses in Ontario and other parts of Canada. [123] Mr. Cortellucci met Mr. Gallo at a social function in 2001.[124] Mr. Gallo told Mr. Cortellucci that one of his ideas was to bring Pennsylvania (American) waste management companies to Ontario to take advantage of what he called an impending crisis for Ontario. He was convinced that if the right opportunity presented itself, it could bring about an attractive investment opportunity. Mr.

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[122] Ibid., para. 9.
[123] Mario Cortellucci, Witness Statement, sworn February 26, 2010, paras. 1-2, Memorial Book D, Volume 3, Tab 6.
[124] Ibid., para. 4.

Cortellucci had little experience or exposure to the Ontario waste industry at that time.[125]

106. Mr. Gallo explained how valuable waste disposal facilities could be considering the scarce licensed capacity to serve an ever increasing market demand. Ontario's market demand was constantly increasing, he said, and there would be a major crisis in Ontario, once (as he thought would happen) the State of Michigan stopped Ontario waste from entering Michigan.[126]

107. Mr. Gallo told Mr. Cortellucci that his work in government had introduced him to people and contacts in the waste industry; they shared his opinion about the challenges of Ontario and the opportunities that an Ontario waste disposal site would represent. Mr. Gallo said that he knew of prospective contacts interested in investing in Ontario if the right opportunity arose.[127]

108. Mr. Cortellucci learned of the Adams Mine opportunity a number of months later from Blake Wallace.[128] Mr. Cortellucci contacted Mr. Gallo and this, in turn, led Mr. Gallo to contact Mr. Swanick.[129] Mr. Cortellucci subsequently negotiated the acquisition of the Adams Mine waste disposal site from Notre and Gordon McGuinty. Mr. Cortellucci comments:

> I suggested to Mr. Gallo that it might be advantageous to keep his involvement confidential to avoid having Mr. McGuinty offer a higher price than otherwise necessary. Mr. Gallo agreed and also said that since he was a government official in Pennsylvania, he would prefer that his name not be disclosed. As a result, Mr. McGuinty was not made aware of Mr. Gallo's involvement.[130]

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[125] Ibid., para. 5.
[126] Ibid., para. 6.
[127] Ibid., para. 7.
[128] Ibid., paras. 9-10.
[129] Ibid., para. 15.
[130] Ibid., para. 17.

109. He states further:

> The Agreement of Purchase and Sale was signed in trust for a corporation to be incorporated. Mr. Swanick subsequently incorporated 1532382 Ontario Inc. which later obtained title to the Adams Mine site. REDACTED
> REDACTED
> REDACTED

110. Mr. Cortellucci swears to this fact again in his Supplementary Witness Statement.[132]

111. Mr. Gallo appointed Mr. Swanick to be the sole director and officer of 1532382 Ontario Inc. Mr. Cortellucci remained the main contact for Mr. McGuinty because "[a]bout this time, Mr. McGuinty's tendency to speak with people not involved in the project or to speak with the press became a cause for concern; and this was a further reason why Mr. Gallo's involvement was kept confidential, especially given his employment as a government official in Pennsylvania."[133]

112. With respect to his business relationship with Mr. Swanick, Mr. Cortellucci states:

> 5. In the Counter-Memorial, the Respondent appears to argue that Brent Swanick is my closest business partner and that he is my key legal advisor in all of my business activities. This is untrue. I am involved in no business venture with Brent Swanick and he has no role as an officer or director in my companies. Also, without waiving legal privilege, the only work that he has done for me is with respect to tax related estate planning. I recommended him because he was working with me, on estate planning, at the time and I thought that he would be a good contact for Mr. Gallo.
>
> 6. The Counter-Memorial appears to argue that Brent Swanick represented me personally and exclusively in all

[131] Ibid., para. 24.

REDACTED

> matters regarding the Adams Mine. The allegation is that he represented me almost as my agent from the time of negotiation of the acquisition agreement for the Adams Mine signed May 27th, 2002 through the settlement meeting that occurred on November 24th, 2005 regarding the compensation that should have been paid to the Enterprise pursuant to Bill 49. The allegation is misleading. REDACTED
> REDACTED
> REDACTED On November 24th, 2005, he attended the [settlement meeting with the government] as President of 1532382 Ontario Inc. REDACTED
> REDACTED

113. REDACTED
REDACTED

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114. Concerning the allegations set forth in paragraph 218 of the Counter-Memorial, Mr. Cortellucci has already explained, with his original witness statement, that Mr. McGuinty was not made aware of Mr. Gallo's involvement because of Mr. McGuinty's reputed lack of discretion, at a time when Mr. Gallo was still employed in the Governor's Office in Pennsylvania. Mr. Cortellucci was located in Toronto and it made sense for him to conduct negotiations with Mr. McGuinty as Mr. Gallo's agent. REDACTED
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[134] Mario Cortellucci, Supplementary Witness Statement, sworn October 25, 2010, paras. 5-6.
[135] Mario Cortellucci, Witness Statement, sworn February 26, 2010, para 27, Memorial Book D, Vol. 3, Tab 6.

REDACTED

115. Finally, the Respondent questions, in paragraph 244, why Mr. Cortellucci would allow a relatively young, government policy official in a state government to assume a role of ownership of the Adams Mine waste disposal site? Mr. Cortellucci states

> 17. ... I had the advantage and privilege of meeting Mr. Gallo and evaluating his accomplishments, his abilities, vision and business acumen. I built my businesses at a very young age and have spent a lifetime recognizing entrepreneurs with whom I have built various projects. In many circumstances, the enthusiasm and drive of a young entrepreneur is one of the key characteristics that can make a project successful. Others recognized this quality in me when I was even younger than Mr. Gallo. He impressed me, especially in his role as a senior policy advisor to Governor Tom Ridge. From our discussions and observations, I was convinced that Mr. Gallo had what it would take, as well the connections in Pennsylvania that would make this project a success. While I was fully confident in Mr. Gallo's ability to bring this project to successful conclusion, I also clarify that my "large investment" was in reality not that large as I was a Limited Partner investor; the tax write off would reduce my risk exposure and on the payout side I would get revenues that would span over a minimum period of twenty years.[137]

116. REDACTED if the remaining pits at the Adams Mine site were developed into waste disposal sites.[138] In his original witness statement, Mr. Cortellucci explained how it was his intention that, once the Adams Mine site was operating, he would have no direct involvement in it.[139]

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[137] Mario Cortellucci, Supplementary Witness Statement, sworn October 25, 2010, para. 17.

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[139] Mario Cortellucci, Witness Statement, sworn February 26, 2010, para. 28, Memorial Book D, Volume 3, Tab 6.

PART V:
THE RESPONDENT HAS ALLEGED A FRAUDULENT CONSPIRACY AND ABUSES OF RIGHTS

117. Both with the allegations contained within the Counter Memorial and in its many submissions throughout the course of 2010, the Respondent has alleged nothing less than that Mr. Gallo is attempting to defraud the Government of Canada by lying to the Tribunal about whether, when and/or why he owned the Enterprise. In no uncertain terms, the Respondent 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."[140] It has also argued that Mr. Gallo has relied upon false evidence;[141] and that he has engaged in a deliberate pattern of obfuscation with respect to the disclosure of evidence. R

118. REDACTED

REDACTED

REDACTED On numerous occasions it has further

[140] Counter Memorial, para. 215 at pg. 73.

[141] Counter Memorial, paras. 18, 236-237 & 239 at pgs. 4, 83-84. See, e.g.:
"239. The foregoing facts also reveal misrepresentations or, at the very least, misleading statements in Mr. Noto's Witness Statement."

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claimed that Mr. Brent Swanick, managing officer of the Enterprise, has repeatedly given false evidence in an attempt to mislead the Tribunal about evidence relevant to REDACTED

REDACTED

119. This is not a case in which the Respondent has only argued that the evidence led on behalf of the Enterprise is unconvincing, implausible or otherwise lacking credibility. In this case the Respondent has crossed the line between putting claimant's allegations to the test in a professional, legal dispute and claiming that, should the claimant succeed, the Tribunal will have unwittingly suborned a multimillion-dollar fraud against the Government of Canada.

120. The maxim that the one who asserts must prove certainly applies to Mr. Gallo and the Enterprise, *actori incumbit probatio*. It is submitted that Mr. Gallo and the Enterprise *have certainly met the prima facie* burden of proof in this case. It now lies for the Respondent to provide compelling, affirmative evidence, which fully supports the allegations of fact underlying its defences of fraud and abuse of process.

REDACTED

121. As Judge Higgins once observed: "... the graver the charge the more confidence must there be in the evidence relied on." The Tribunal in *Chevron & Texaco* v. *Ecuador* cited Judge Higgins in its Decision on Jurisdiction, in which it denied the respondent's objection based upon of alleged abuse of process by the claimant. The Tribunal observed:

> In the present case, the question is whether a particular claimant is undeserving of having its claim heard because of the circumstances surrounding that claim. A false positive finding that the claim was estopped or brought for improper purpose would therefore have the Tribunal deny jurisdiction because the Claimants had not been able to disprove doubts regarding the exercise of its right to submit a claim. Meanwhile, a false negative finding that the claim was not abusive would simply allow the claim to proceed on its merits where the Respondent may continue to object on this basis and apply for costs to compensate for the false negative finding... The potential for unfairness in this situation weighs in favor of diminishing the risk of a false positive finding by shifting the burden to the Respondent.[145]

122. International tribunals set a high threshold for evidence supporting the existence of an alleged fraud or act of bad faith, such as an abuse of rights.[146] "Clear and convincing evidence is required, because allegations of fraud cannot be sustained on the basis of conjecture or mere speculation.[147] As the Tribunal in *Oil Field of Texas v. Iran* observed: "[if] reasonable doubts remain, such an allegation cannot be deemed to be established."[148]

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[145] *Chevron Corporation and Texaco Petroleum Corporation v Ecuador*, Interim Award, IIC 355 (2008), 1st December 2008, Ad Hoc Tr (UNCITRAL), paras. 141-152.

[146] Indeed, "...the burden of proof of any allegations of impropriety is particularly heavy." *Fakes* v *Turkey*, Award, ICSID Case No ARB/07/20; IIC 439 (2010), para. 131. As distinguished from the instant case, in the *Fakes* claim, there was no evidence in the corporate record that the claimant had become the majority owner of the investment enterprise, which was Turkey's largest mobile phone operator. In addition, the claim was not being brought on behalf of that Enterprise, but rather on the allegation that the claimant himself had suffered losses for which he personally deserved compensation from the Government of Turkey.

[147] *Westinghouse and Burns and Roe (U.S.) v. Natnl. Power Co. and The Republic of The Philippines*, ICC Case No. 6401, Award, 19 December 1991, at 34 in: 7 (January 1992) Mealey's Int'l Arb. Rep. At B-21.; and *Aryeh (M.) v. Iran*, Award, 25 September 1997 I.U.S.C.T.R. 368 at 381 para 150.

[148] *Oil Field of Texas, Inc. v. Iran*, 12 Iran-U.S. Cl. Trib. Rep. 308 (1986) para. 25.

123. For example, In *Dadras International* v. *Iran*, the Respondent alleged that the contract, from which the Tribunal's jurisdiction flowed, has been forged. The Tribunal confirmed the general principle that the party asserting a fact bears the burden of proof, including the facts required to sustain an affirmative defense of forgery.[149] It also observed:

> In these Cases, the Tribunal is confronted with allegations of fraud and forgery that, because of their implications of fraudulent conduct and intent to deceive, are particularly grave ... The allegations of forgery in these Cases seem to the Tribunal to be of a character that requires an enhanced standard of proof ... The minimum quantum of evidence that will be required to satisfy the Tribunal may be described as 'clear and convincing evidence.'[150]

124. It is not just that the Respondent has failed to provide any affirmative evidence demonstrating either that Mr. Gallo intends either to defraud the Government of Canada, by convincing this Tribunal that he owned and controlled the Enterprise at all relevant times. It is not just that the Respondent has failed to adduce any affirmative evidence demonstrating that Mr. Gallo is attempting to abuse the rights granted to him under NAFTA Article 1117. In fact, the Respondent has failed to provide the Tribunal with the evidence prescribed under Ontario law, which would prove its allegations that Mr. Gallo did not own or control the Enterprise as indicated on the share certificate. Section 250 of the *Ontario Business Corporations Act* invests exclusive jurisdiction in the Courts of Ontario to rectify corporate records. The only way the Respondent can impugn the status of the share certificate, as a matter of applicable (i.e. Ontario) law, is by submitting evidence to the Tribunal that it has sought and obtained an order for rectification of the information contained within the Enterprise's corporate records, issued by an Ontario Court.[151]

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[149] *Dadras International and Per-Am Construction Corp. v. The Islamic Republic of Iran and Tehran Redevelopment Co.*, Award, dated November 7th 1995, in XXII Y.B. Comm. Arb. 504 (1997) para. 122.
[150] Ibid, paras. 123-124.
[151] Expert Opinion of Professor Bruce Welling, 25 October 2010, paras. 31-39.

PART VI:
NAFTA JURISDICTION HAS BEEN ESTABLISHED

125. In its Counter Memorial, the Respondent advanced two arguments as to why the Tribunal allegedly lacks jurisdiction to hear the claim. The first argument was that Mr. Gallo does not have standing to advance a claim on behalf of the Enterprise because he did not own the Enterprise on the date that the AMLA was enacted, April 4, 2004.[152] The second argument actually goes to the admissibility of the claim, rather than the Tribunal's jurisdiction *per se*, but it can easily be addressed during this preliminary hearing. Its argument was that the claim must be dismissed because Mr. Gallo abused the rights granted to him under NAFTA Article 1117. The Respondent says that, as a US national, Mr. Gallo acquired ownership and/or control of the Enterprise after the AMLA came into force, solely for the purpose of manufacturing standing to bring a NAFTA claim on behalf of the Enterprise.[153]

126. In its correspondence to the parties, A-30, the Tribunal identified three factual arguments made by the Respondent, which are to be addressed on a preliminary basis. They were:

a. That Mr. Gallo has allegedly failed to make any 'actual' investment in Canada;[154]
b. That Mr. Gallo allegedly failed to "act as an investor prior to the AMLA";[155] and
c. That Mr. Gallo allegedly did not own the Enterprise on April 5, 2004.

127. The fact that Mr. Gallo did indeed own the Enterprise on April 5, 2004 has already been proved conclusively above. What remains, therefore, are the Respondent's two other factual arguments and its admissibility claim, premised

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[152] Counter Memorial, paras. 224-251 at pgs. 78-89.
[153] Counter Memorial, paras. 252-253 at pgs. 89-90.
[154] Counter Memorial, para. 219 at pg. 75.
[155] Counter Memorial, para. 245 at pg. 87.

upon an alleged abuse of right. As explained further below, all three of these arguments appear to be premised upon a marked mischaracterization of the basis upon which NAFTA Article 1117 claims are founded.

A. Mr. Gallo Did Not Bring a Claim on His Own Behalf

128. From the start, the Respondent has attempted to confuse the difference between claims made behalf of an investment enterprise, under Article 1117, and claims made by investors on their own behalf, under Article 1116. One presumes the objective is to use the phantom Article 1116 claim as part of a straw man strategy. The bottom line, however, is that Mr. Gallo is not entitled to receive a penny from this Tribunal, nor has he attempted to claim any losses directly for himself. The Enterprise is the only person who can be compensated under NAFTA Article 1117, in accordance with the provisions of NAFTA Article 1135(2) and applicable international law.

129. As observed by the Tribunal in *Mondev* v. *U.S.A.*, when a claim is made on behalf of an investment enterprise, any award of damages rendered by a Tribunal must be paid to the enterprise; not to the investor.[156] This is obviously because claims made under NAFTA Article 1117 simply do not include any loss suffered by the investor on his own behalf. For an investor to recover any losses he claims to have suffered on his own behalf, he must make such claim under NAFTA Article 1116. For example, in *Pope & Talbot* v. *Canada,*[157] the

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[156] *Mondev International Limited* v *United States*, Award, ICSID Case No ARB(AF)/99/2, IIC 173 (2002), (2004) 6 ICSID Rep 192, (2003) 42 ILM 85, (2004) 125 ILR 110, (2003) 15(3) World Trade and Arb Mat 273 , despatched 11th October 2002, ICSID, para. 86. "Having regard to the distinctions drawn between claims brought under Articles 1116 and 1117, a NAFTA tribunal should be careful not to allow any recovery, in a claim that should have been brought under Article 1117, to be paid directly to the investor."

[157] *Pope & Talbot Incorporated* v *Canada*, Award in Respect of Damages, IIC 195 (2002), (2002) 41 ILM 1347, (2005) 7 ICSID Rep 148, 31st May 2002, Ad Hoc Tr (UNCITRAL). In the this case, the Respondent argued that the claimant/investor – an American corporation – was not entitled to obtained any damages for harm suffered by its wholly-owned Canadian subsidiary because it failed to bring a claim on behalf of the enterprise under NAFTA Article 1117. The argument was dismissed, but only because the claimant/investor was the 100% owner of its Canadian

Respondent confirmed that if a claimant/investor fails to bring a claim under Article 1117, it is not entitled to an award for any of the damages suffered by an enterprise it established in the host State.[158]

130. NAFTA Article 1117 provides as follows:

> **Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise**
>
> 1. 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 or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.
>
> 2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

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subsidiary enterprise, and as such any losses suffered by the enterprise would "flow back" to the investor itself.

[158] Paras. 50 & 52 of its Memorial on Damages in *Pope & Talbot, Inc.* v. *Canada*, dated 18 August 2001, the Respondent stated:

> "Each article serves a distinct purpose and relates to different losses. Article 1116 provides for claims for loss or damage incurred by an investor. Article 1117, on the other hand, addresses claims for loss or damage to an enterprise owned or controlled by an investor.
> ...
> The drafters of [the] NAFT A included Article 1117 to provide a remedy for injuries to enterprises that would otherwise be barred from bringing a claim by the customary international law rule prohibiting claimants from filing international claims against their own governments. It supplements customary international law by creating a derivative right of action for the benefit of an investor. By doing so, Article 1117 addresses the situation where the alleged violation of Chapter Eleven directly affects a locally-incorporated subsidiary and also ensures that the claimant will be of a nationality different from that of the respondent State.

> 3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.
>
> 4. An investment may not make a claim under this Section.
> Emphasis Added

131. Paragraph 3 of Article 1117 confirms the plain meaning of the preceding two paragraphs. It provides that, whenever an investor seeks to bring a claim on her own behalf, in addition to the claim she has brought on behalf of an enterprise that she owns or controls, directly or indirectly, all such claims must be consolidated under NAFTA Article 1126. NAFTA Article 1126 contemplates the potential consolidation of independent claims "that have a question of law or fact in common." That is why Article 1117(3) refers to consolidation under NAFTA Article 1126 rather than simply stipulating that claims brought under Articles 1116 and 1117 must be brought together.

132. A claim brought under Article 1117 is jurisdictionally distinct from a claim brought under Article 1116. Article 1117 serves an entirely different purpose than Article 1116. Rather than providing only that an investor may recover damages for any losses he may have personally sustained as a result of a NAFTA breach, Article 1117 ensures that any enterprise owned or controlled by an investor of another NAFTA Party – whether directly or indirectly – may also receive damages for losses it has sustained arising from a NAFTA breach. Paragraph 4 of the provision further clarifies that no right lies for an enterprise to bring a claim on its own behalf. The only claim that can be made under the NAFTA for losses sustained by an enterprise, which was established under the laws of the host State, is that which has been made by an "Investor of a Party" who either owns or controls it (whether directly or indirectly) at any time while such claim is pending.

133. The Respondent has continually attempted obscure the legal distinctions between the role of Mr. Gallo, as an investor of a Party, and the Enterprise, as the investment vehicle he chose for the acquisition and development of a waste facility in Ontario. For example, at paragraph 413 of the Counter Memorial, it erroneously states: "Under Article 1117, the Claimant may only recover damages for harm caused by the alleged breach of the NAFTA."[159] In so doing, the Respondent attempts to subvert the plain meaning of NAFTA Article 1117, by treating the claim before the Tribunal as if Mr. Gallo had brought it on his own behalf, rather than on behalf of the Enterprise.

134. The Respondent's approach must be rejected because it is premised upon a construction of Article 1117 that renders the provision redundant vis-à-vis the requirements of Article 1116. As such, the Respondent's approach is inconsistent with principle of effectiveness in treaty interpretation, which must be observed as an applicable rule of international law, as per NAFTA Article 1131(1).[160]

135. This is not the first time that a NAFTA Tribunal has been confronted with issues surrounding interpretation of Article 1117. In *Thunderbird* v. *Mexico*, the United States of America elegantly explained the distinction that must be drawn between the two claiming provisions as follows:

> 4. Articles 1116 and 1117 provide separate jurisdictional bases and

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[159] This error is repeated at paragraph 417. But see footnote 471 (page 104 of the Counter Memorial), in which the Respondent states: "Moreover, this arbitration is brought pursuant to Article 1117 of the NAFTA, under which the Claimant brings this arbitration on behalf of the Enterprise. Therefore, again, it is the Enterprise's expectations that are relevant, not the Claimant's alone." Of course, the expectations of the person who exclusively owns and controls an enterprise – whose investment has been indirectly taken by a government measure – are indeed very relevant, as they reflect the views of that enterprise. Any director who disagrees with the unanimous shareholder of a corporation over its expectations will obviously not be a director of that corporation for very long.

[160] See, e.g.: *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R, 20 March 1996, at 23; and *Japan—Taxes on Alcoholic Beverages*, WTO Doc. WT/DS8/AB/R, 1 November 1996, at 12.

serve distinct functions. Article 1116 provides for claims for loss or damage incurred by an investor of a Party, Article 1117 addresses claims for loss or damage to an enterprise in the territory of the respondent State that is owned or controlled by an investor.

5. The derivative right of action provided by Article 1117 is unavailable under customary international law for two reasons. First, it is well established that corporations have a legal existence separate from that of their shareholders. That a wrong done to the corporation also indirectly injures the shareholders does not in and of itself, give the latter standing to bring a claim for compensation.

6. Second, it is well established under customary international law that an international claim may not be asserted against a State on behalf of the State's own nationals.

7. The NAFTA was drafted with this background in mind. The drafters of the NAFTA were aware of the difference between direct injury to an investor and injury to an investment. The drafters also recognized that investors often choose to carry out their investment activities in a State through a locally incorporated entity. However, because of the customary international law principle of non-responsibility, customary international law remedies were not available to remedy injuries to such locally incorporated entities.

8. To address this situation, the drafters of Chapter Eleven created a derivative right of action under Article 1117 that derogates from customary international law. The language of the article provides that it can be exercised only in cases where "*the enterprise* [not the investor] has incurred loss or damage by reason of, or arising out of, the breach." Article 1117 thus addresses the situation where the alleged violation of Chapter Eleven causes loss or damage to a locally organized enterprise.

9. Without Article 1117, the investor would be denied a remedy where a locally organized enterprise that it owns or controls has suffered an injury, because the enterprise itself does not have standing to bring a claim against the respondent State. The inclusion of Article 1117 in the NAFTA remedies this problem without eliminating the distinction between direct and derivative injuries or altering the general principle that the corporation, as opposed to its individual shareholders, may alone take action on behalf of the corporation. [Footnotes omitted][161]

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[161] *International Thunderbird Gaming Corp.* v. *The United Mexican States*, Submission of the United States under NAFTA Article 1128, 21 May 2004. And in *Pope & Talbot, Inc.* v. *Canada*, Submission of the United States under NAFTA Article 1128, 6 November, 2001, the difference between Articles 1116 and 1117 was described as follows:

136. The *Thunderbird* Tribunal also defined the test by which the term "control" should be construed, explaining:

> The question arises whether "control" must be established in the legal sense, or whether *de facto* control can suffice for the purposes of Chapter Eleven of the NAFTA. According to Mexico, **to determine what constitutes "control" of a corporation, the Tribunal must turn to the corporate law of the Party under whose laws the enterprise was incorporated, and Article 1117 of the NAFTA therefore requires that legal control be demonstrated under Mexican corporate law.**
>
> 106. The Tribunal does not follow Mexico's proposition that Article 1117 of the NAFTA requires a showing of legal control. The term "control" is not defined in the NAFTA. Interpreted in accordance with its ordinary meaning, control can be exercised in various manners. Therefore, a showing of effective or "*de facto*" control is, in the Tribunal's view, sufficient for the purposes of Article 1117 of the NAFTA3. **In the absence of legal control however, the Tribunal is of the opinion that *de facto* control must be established beyond any reasonable doubt.** [162]
> **[Emphasis Added]**

137. In the instant case, Mr. Gallo has clearly demonstrated that he exercises legal control over the Enterprise, as a matter of applicable law (i.e. the law of Ontario), and that he has done so since the Enterprise was established in 2002.[163] As found by the *Thunderbird* Tribunal, proof of legal control under applicable law also presumptively satisfies the definition of "control" under NAFTA Article 1117. The Tribunal in GAMI v. Mexico has made a similar observation.[164]

"[While] harm to an investment may very well result in harm to the investor, this does not support the contention that – despite the plain language of the NAFTA – an investor can bring a claim under Article 1116 for loss or damage incurred by an enterprise because an enterprise is an investment. Rather, as reflected in Article 1121(1)(b), where an investor incurs loss or damage to its "interest in an enterprise" because of loss or damage incurred by that enterprise, the investor's recourse is to bring a claim under Article 1116 for the loss or damage to its "interest," and a claim under Article 1117 on behalf of the enterprise to recover for the loss or damage incurred by the enterprise."

[162] *International Thunderbird Gaming Corp.* v. *The United Mexican States*, Award, 26 January 2006 NAFTA/UNCITRAL Tribunal, paras. 105-106.

[163] Expert Opinion of Professor Bruce Welling, 25 October 2010, paras. 11-14.

[164] *GAMI Investments, Incorporated* v *Mexico*, Final Award, IIC 109 (2004), 15 November 2004, Ad Hoc Tr (UNCITRAL), para. 37. "NAFTA Article 1117 would have allowed GAMI as a 100% shareholder of GAM to seek relief for alleged breaches of the treaty by Mexico."

138. Moreover, as a matter of international investment law, a person who is considered a "shareholder" under applicable law is regarded an owner of an investment. This was the conclusion of the Tribunal in *Yukos Trilogy* of ECT claims against the Russian Federation, which concerned treaty language identical to that which is found in NAFTA Article 1117:

> The Tribunal finds that the ECT, by its terms, applies to an "Investment" owned nominally by a qualifying "Investor," and that nothing more is required. Respondent's submission that simple legal ownership of shares does not qualify as an Investment under Article 1(6)(b) of the ECT finds no support in the text of the Treaty. The breadth of the definition of Investment in the ECT is emphasized by many eminent legal scholars. As defined in Article 1(6) of the ECT, an "Investment" includes "every kind of asset" owned or controlled, directly or indirectly, and extends not only to shares of a company but to its debt (Article 1(6)(b) of the ECT), to monetary claims and contractual performance as well as "any right conferred by law" (Article 1(6)(f) of the ECT, emphasis added). The Tribunal recalls again that, according to Article 31 of the VCLT, a treaty is to be interpreted in good faith in accordance with the ordinary meaning of its terms. The Tribunal reads Article 1(6)(b) of the ECT as containing the widest possible definition of an interest in a company, including shares (as in the case at hand), with no indication whatsoever that the drafters of the Treaty intended to limit ownership to "beneficial" ownership.[165]

139. The *Cementownia* Tribunal considered it "trite" that a shareholder is to be considered an owner of an investment enterprise.[166] Other tribunals have reached the same conclusion.[167] It only stands to reason, therefore, that a

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[165] *Veteran Petroleum Limited* v *Russian Federation*, Interim Award on Jurisdiction and Admissibility, PCA Case No AA 228, IIC 417 (2009), 30 November 2009, PCA, para. 477 and at 491: "Claimant is organized 'in accordance with the law applicable' in the Republic of Cyprus and owns shares of Yukos. Thus, Claimant owns an 'Investment' protected by the ECT and the Tribunal so finds. The Tribunal is not entitled, by the terms of the ECT, to find otherwise." See, also: *Hulley Enterprises Ltd* v *Russian Federation*, Interim Award on Jurisdiction and Admissibility, PCA Case No AA 226, IIC 415 (2009), 30 November 2009, PCA, at paras. 499-536; and *Yukos Universal Limited* v *Russian Federation*, Interim Award on Jurisdiction and Admissibility, PCA Case No AA 227, IIC 416 (2009), 30 November 2009, PCA, paras. 500-537.

[166] *Cementownia "Nowa Huta" SA* v *Turkey*, Award, ICSID Case No ARB(AF)/06/2, IIC 390 (2009), 11th September 2009, despatched 17 September 2009, para. 116.

[167] See, e.g.: *GAMI Investments, Incorporated* v *Mexico*, Final Award, IIC 109 (2004), 15 November 2004, Ad Hoc Tr (UNCITRAL), paras. 26-33; citing: *S.A.R. L Benvenuti & Bonfant SRL* v.

person who holds 100% of the shares of a corporation is considered its sole owner. Indeed, it is generally accepted that one satisfies the ownership requirement by controlling no more than 51% of an enterprise.

140. Because the claim has been brought under NAFTA Article 1117, any argument the Respondent makes that conflates or confuses the jurisdictional distinction between an Article 1116 claim and an Article 1117 must be disregarded.

(i) The Argument that Mr. Gallo has not made any 'actual' investment in the Territory of Canada

141. As noted above, the Respondent alleges that because Mr. Gallo has not made any 'actual' investment in Canada he cannot maintain a claim on behalf of the Enterprise under Article 1117. This argument is wrong. Article 1117 permits an "investor of a party" to bring a claim on behalf of an "enterprise of another Party" which he owns or controls, whether directly or indirectly. In relevant part, Article 1139 defines an "investor of a Party" as a national of a NAFTA Party who "seeks to make, is making or has made an investment." Article 1139 defines "investment" as including "an enterprise." NAFTA Article 201 defines "an enterprise" as:

> ... any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association.

142. It appears undisputed that the Enterprise is an entity constituted under the laws of Ontario, and that the laws of Ontario are the "applicable law" for the

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People's Republic of the Congo, Award, 3 (1999) ICSID Reports 330 at 359 para. 89; and *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina*, Decision on request for supplementation and rectification of decision concerning annulment of the award, ICSID Case No ARB/97/3, IIC 71 (2003), (2004) 19 ICSID Rev—FILJ 139, 2005) 8 ICSID Rep 490, 28 May 2003, despatched 28 May 2003, ICSID, para. 50.

question of establishing ownership of the Enterprise. It also appears undisputed that the enterprise constitutes an "investment" under NAFTA Article 1139. There is also no doubt that, as a matter of Ontario law, Mr. Gallo is the "owner" of the Enterprise; that he was the owner of the Enterprise on the day he brought a claim on its behalf under Article 1117; and that he has also controlled the Enterprise throughout his period of ownership.[168] Accordingly, it simply makes no sense to argue that Mr. Gallo has not made an investment in the territory of Canada. His "investment" is the Enterprise, which he owns and which he controls, both as a matter of applicable municipal law and as a matter of international law.

143. One final aspect of the Respondent's 'no actual investment' argument needs to be addressed: the nascent argument that Mr. Gallo did not make an investment in Canada because he did not physically transfer any funds from the United States into Canada. While it has yet to name this argument, the Respondent has nevertheless relied heavily upon it to misconstrue the nature of what it means to have "made an investment" under the NAFTA. The common name for this argument is the 'origin of capital' theory.

144. The Tribunal in *Siag & Vecchi v. Egypt* resoundingly rejected this theory for construction of a typical "investment" provision, in this case under the Italy – Egypt BIT. In doing so, it cited the award in *Tokios Tokeles* v. *Ukraine*, where the same conclusion was reached about the definition of investment under both another BIT and under the ICSID Convention. As reprinted in the *Siag* Award, the Majority in *Tokios Tokeles* observed:

> Even assuming *arguendo*, that all of the capital used by the Claimant to invest in Ukraine had its ultimate origin in Ukraine, the resulting investment would not be outside the scope of the Convention. The Claimant made an investment for the purposes of the Convention when it decided to deploy capital under its control in the territory of Ukraine instead of investing it elsewhere. The origin of the capital is not relevant to the existence of an investment. [...]

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[168] Expert Opinion of Professor Bruce Welling, 25 October 2010, at paras. 11-25.

> [T]he Claimant in the present case owns and controls the assets in Ukraine that have given rise to this dispute. The origin of the capital used to acquire these assets is not relevant to the question of jurisdiction under the Convention.
>
> In our view, the ICSID Convention contains no inchoate requirement that the investment at issue in a dispute have an international character in which the origin of the capital is decisive.[169]

145. Indeed, even the Respondent in the *Siag* case took the position that its complaint was not based solely upon the fact that the investor in that case had obtained local financing for every penny of the permitted land he acquired as well as its planned development. It argued that the reason for the result in *Tokios Tokeles* v. *Ukraine* was that the enterprise established to perform the role of investor in that case (by prudent Ukrainian investors) was itself "foreign" from the start. Egypt argued (unsuccessfully) that there was nothing "foreign" about the claimants in *Siag & Vecchi v. Egypt*. Canada, by contrast, cannot even make Egypt's unsuccessful argument about the origin of capital in this case. There is no dispute that Mr. Gallo is a U.S. national.

146. When Mr. Gallo decided to invest in Canada, his Enterprise elected to obtain financing for its acquisition of the Adams Mine Site and the Borderlands, and for the initial development of these assets, from Canadian funders. The structure chosen for this initial tranche of financing was a limited partnership. This financing model was chosen because all Canadian members of the LP were entitled to deduct the value of their contributions from income, thereby greatly diminishing the cost of raising this capital.

147. For good reason, the NAFTA Parties put no limitations on how investments could be financed. Arbitrarily constraining the sources of capital required to qualify an investment as 'sufficiently foreign,' so as to deserve NAFTA protection,

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[169] *Siag & Vechi* v. *Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007, at para. 208; citing: *Tokios Tokeles v Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, 20 ICSID Rev. FILJ 205 (2005), paras. 81-82.

would run directly counter to the stated objectives of the Agreement. Article 102(1) explicitly provides, in relevant part:

> 1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:
> ...
> (b) promote conditions of fair competition in the free trade area;
> (c) increase substantially investment opportunities in the territories of the Parties;

148. It is submitted that the definitions of "investor of a Party" and "investment," stealthily employed by the Respondent in its argumentation, are simply not reconcilable with the object and purpose of the NAFTA, which is to promote and protect investment; not to protect arbitrary and confiscatory government conduct. There is no "origin of capital requirement" for investment enterprises established by an "investor of another Party" in the NAFTA.

(ii) The Argument that Mr. Gallo failed to "act as an investor" in the Territory of Canada Prior to Enactment of the AMLA

149. The Respondent argues that Mr. Gallo somehow failed to "act as an investor" prior to the imposition of the AMLA. Both the evidence on the record and the definition of "investor of another Party" refute this baseless allegation.

150. Moreover, the Respondent's argument is irreconcilably inconsistent with the definition of "investor of a Party" found in NAFTA Article 1139. An "Investor of a Party" is a person who "seeks to make, is making or has made an investment in [the territory of] another NAFTA Party." From the moment Mr. Gallo decided to establish the Enterprise and have it acquire the Adams Mine Site, he became an "Investor of a Party" because he was at that point seeking to make an investment. Moreover, from the moment Mr. Gallo became the owner of the Enterprise, he qualified as an "investor of a Party" because he had made an investment in Canada. Finally, Mr. Gallo remained an "Investor of a Party" as his

counsel took the necessary steps to establish the Enterprise; arrange for the acquisition of the Adams Mine Site; arrange for preliminary financing and on-site management; and acquired the right to own the Borderlands – because he was then continuing to engage in the process of making an investment.

(iii) The Argument that Mr. Gallo only Became an Investor in the Enterprise in order to facilitate a claim under the NAFTA, after the AMLA had been implemented.

151. In making the argument that Mr. Gallo is attempting to engage in an abuse of his rights as a US national under the NAFTA, the Respondent relies upon its erroneous allegation that Mr. Gallo acquired ownership of the Enterprise after the AMLA was introduced.[170] Given that the Respondent has failed to provide any positive evidence in support of the allegation that the acquisition occurred after the AMLA came into place, this argument must fail. Moreover, the Respondent has failed to produce a scintilla of evidence in support of the scurrilous allegation that Mr. Gallo acquired ownership of the Enterprise for the purpose of pursuing a NAFTA claim against the Government of Canada.

152. In any event, the Respondent's alternative pleading demonstrates how even the Government of Canada accepts, albeit implicitly, that Article 1117 contemplates the acquisition of ownership or control of an investment after conduct alleged to constitute a breach of the NAFTA has occurred. We believe that this is a correct interpretation of Article 1117, whose terms do not evidence any intent to bar the pursuit of a valid NAFTA claim on behalf of an investment enterprise, simply because its ownership or control changed hands after the breach occurred. To be sure, in Mr. Gallo's case ownership and his control of the Enterprise were established in 2002 – long before the Government of Ontario effectively expropriated its right engage the Adams Mine Site in its highest and best use as a waste facility. Nevertheless, a proper construction of the text of Article 1117 demonstrates the desperation of the Respondent's position.

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[170] Counter Memorial, para. 253 at pg. 90.

153. The parties appear to agree that the doctrine of abuse of rights should be applied to the construction of <u>any</u> right at international law – including rights granted under treaty provisions.[171] Application of the doctrine represents nothing less than a manifestation of the fundamental international law principle of good faith.[172] As such, there is no question that is theoretically possible for an abuse of rights, granted to an investor under Article 1117, to occur.

154. On the plain face of its terms, Article 1117 permits an Investor of a Party to bring a claim on behalf of an investment enterprise that it owns or controls, directly or indirectly, without any limitation as to when such ownership or control of the enterprise began. Application of the doctrine would prevent an erstwhile "Investor of a Party" from acquiring ownership or control of an enterprise for the sole purpose of manufacturing standing to bring a NAFTA claim. Such a claim could be struck on the grounds of inadmissibility.

155. On the other hand, if there were *bona fide* commercial reasons for obtaining ownership or control of an enterprise that just so happened to be nursing a nascent NAFTA claim, there is nothing in Article 1117 that would prevent a claim from being made on the enterprise's behalf – so long as ownership or control was transferred to a person who qualified as an "Investor of a NAFTA Party."

156. This case provides a much simpler scenario, however. Simply put, there is no room for an abuse of rights argument in the instant case. Mr. Gallo is an "Investor of a Party" because he is a national of the United States who – starting in 2002 – sought to make, and subsequently made, an investment in Canada.

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[171] The parties also appear to be in agreement that the right granted to an Investor of a Party under Articles 1116 or 1117 are just that: rights granted to an individual. They are not merely rights granted as between States, with customary international law espousal replaced by a jury-rigged self-help mechanism for investors under the watchful eye of their home State. After all, if the rights granted under Article 1117 were actually not meant to be granted to investors, it would not be possible to accuse an investor of abusing them.

[172] Bin Cheng, *General Principles of Law* (Grotius Press: 1987, Cambridge UK) at 123-124.

His investment was the Enterprise, which he directed to acquire the ownership of the Adams Mine Site, along with all of its associated land use permits. Mr. Gallo cannot be accused of committing an abuse of rights under Article 1117 because he was already the owner of the Enterprise at the time the events giving rise to the claim transpired.

157. In addition, it is a commonly held tenant of international investment law that investors may structure the corporate nationality of their investments in such a manner as to qualify for protection under a BIT, absent a specific exclusion to the contrary.[173] Indeed, the raison d'être of NAFTA Chapter 11 was to instill an added sense of legal security for all potential investors about prospective investments in the territories of the North American Free Trade Area. American nationals who seek to invest in Canada accordingly enjoy a legitimate expectation that any enterprise they establish in the territory of Canada will be entitled to recover an award of damages under Article 1117, so long as it remains owned or controlled by a qualified "Investor of a Party."

158. REDACTED

REDACTED

[173] See, e.g.: S. Schill, The Multilateralization of Investment Law (Cambridge: CUP, 2009) at 234-236.

REDACTED

B. Other Cases Inappropriately Cited by the Respondent

159. As noted above, in its Counter Memorial the Respondent includes gratuitous citations to ICSID cases in which claimants fraudulently attempted to obtain losses, which they claimed to have personally suffered, by way of investment treaty claims. Unlike the present case, in *Phoenix* v. *Czech Republic*,[175] the claim was brought under a general claiming provision by a corporation established in Israel for the sole purpose of pursuing an ICSID claim against the Czech Republic. It was a Czech national who owned the putative Israeli claimant enterprise, and it was this same Czech national who had previously owned the assets upon which his recently incorporated "investor" was basing its so-called claim.

160. In addition to being markedly distinguishable on the facts, there are other noticeable differences between the law applicable in the *Phoenix* case and the instant claim. To begin, Article I of the *Czech – Israel* Treaty provides that the term "investor" includes "legal entities incorporated or constituted in accordance with Israeli laws and having their permanent seat in the territory of Israel." As such, the definition of "investor" applicable in the *Phoenix* case was premised upon the continental *siège social* theory, rather than the place of incorporation theory favoured in North American practice and clearly specified by the drafter of NAFTA Articles 1139 and 201 of the NAFTA. More to the point, however, Mr. Gallo is not accused of being a Canadian who incorporated an enterprise in the USA so as to obtain retroactive protection of an investment he personally made in Canada. What he is seeking is proper protection for the enterprise he – an American national – established in Canada in order to develop a significant investment in the waste industry.

161. Further, the provision upon which the *Phoenix* claim was based (Article 6) provides exclusively for the right of an "investor" to bring a dispute arising under

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[175] *Phoenix Action Ltd* v *Czech Republic*, Award, ICSID Case No ARB/06/5; IIC 367 (2009), 9 April 2009.

the treaty to arbitration. There is no provision for an investment enterprise established in the Czech Republic to obtain damages for losses it sustained on its own behalf. Neither can it bring its own claim under the treaty, nor can its owner. Similarly, in both of the *Cementonia* v. *Turkey* and *Europe Cement* v. *Turkey* cases,[176] alleged Polish investors brought claims under Article 26 of the *Energy Charter Treaty* (ECT), which also does not provide for claims made on behalf of an enterprise established in the host State.

162. In fact, Article 26 of the ECT does not even limit the remedies available from a tribunal to compensatory damages. Moreover, it does not require the person making the claim to prove that she has suffered any loss or damage as a result of a treaty breach to pursue the dispute. Rather, paragraphs 1-3 of ECT Article 26 indicate that a dispute may be pursued by an "investor" – through arbitration – so long as the dispute 'relates' to its investment in the territory of the host State and "concern[s] an alleged breach" of the ECT. Both of these cases involved specific claims, made by each putative investor on its own behalf, for damages allegedly suffered due to Turkey's breach of the ECT. Along with a third investor, whose claim has not been dismissed, all three claimed to have suffered the exact same loss from the exact same conduct.

163. The instant case does not involve sham investment enterprises vying with each other to obtain the chance to pursue a multi-billion dollar ECT claim against Turkey. It does not involve the issue of which of three putative investors could actually produce the bearer bonds that would identify it as a legitimate claimant. The instant case does not even concern a damages claim pursued by an investor. The only claim pending in the instant case is that of the Enterprise, brought on its behalf by Mr. Gallo under NAFTA Article 1117, for damages arising from the Respondent's illegal taking of its effective rights of ownership in the Adams Mine Site – whose highest and best use was as a waste facility.

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[176] *Cementownia "Nowa Huta" SA* v *Turkey*, Award, ICSID Case No ARB(AF)/06/2; IIC 390 (2009) 11 September 2009; and *Europe Cement Investment & Trade SA* v *Turkey*, Award, ICSID Case No ARB(AF)/07/2; IIC 385 (2009) 13 August 2009.

All of which is respectfully submitted,

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