PUBLIC VERSION

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

BETWEEN:

VITO G. GALLO
Claimant/Investor

AND:

GOVERNMENT OF CANADA
Respondent/Party

GOVERNMENT OF CANADA
SUBMISSION ON JURISDICTION
December 20, 2019

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1. **INTRODUCTION**

1. An unconvincing story, an assortment of unsatisfactory excuses, a few backdated and unreliable documents, and a handful of questionable witness statements—this is all that the Claimant has submitted in order to prove that he has a right to bring this arbitration against Canada. It is not enough, especially in light of what the Claimant should have been able to produce if he really did own an investment in Canada allegedly worth $195 million.

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

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

4. The Claimant has failed to provide any reliable or contemporaneous documentary evidence—not a single e-mail, letter, fax, presentation, or note—that reflects even his involvement with the Enterprise, let alone his alleged ownership of it, prior to the introduction of the AML Act. In his previous submissions, the Claimant relied upon the Enterprise’s Canadian tax returns, the Claimant’s U.S. tax returns, and the Enterprise’s corporate minute book, as contemporaneous evidence of his ownership of the Enterprise. However, he has now admitted that almost every single one of these documents was backdated, and that each was, in fact, signed months, if not years, after the AML Act. In some instances, the backdated documents were not signed until after this arbitration was commenced. In light of the complete absence of corroborating documentary evidence,
the witness statements he offers from his friends and other individuals with a direct stake in the outcome of his arbitration, are both insufficient and questionable. They are certainly no substitute for the basic documents that an investor with an alleged investment worth $105 million should have.

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

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

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

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

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

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1 See e.g., International Thunderbird Gaming Corp. v. United Mexican States (UNCITRAL) Final Award (26 January 2006) ¶ 102 (TAB-4 / BOA-82); Cementos Progreso S.A. v. Republic of Turkey (ICSID Case No. ARB (AF)/00/01; Award (September 17, 2009) ¶¶ 112-114 (“Cementos Progreso”) (TAB-2 / BOA-16); Europe Cement Investment d\'Entra\'e, S.A. v. Republic of Turkey (ICSID Case No. ARB (AF)/07/2) Award (August 1, 2009) ¶ 140, 166 (“Europe Cement”) (TAB-3 / BOA-27); Soufraki v. United Arab Emirates (ICSID Case No. ARB/W27) Decision on Jurisdiction (July 7, 2006) ¶ 58 (“Soufraki”) (TAB-4 / BOA-126).

has failed to prove those facts, tribunals have ruled that they do not have jurisdiction and have terminated the proceedings.1

8. Thus, for example, in Soufraki the tribunal held that the “Claimant . . . bears the burden of proving to the satisfaction of the Tribunal . . . [that] he belongs to the class of investors in respect of whom the Respondent has consented to . . . jurisdiction.”

Similarly, in Cementownia, the tribunal held that the claimant “bore the burden of proving” the facts on which it relied to establish jurisdiction. Likewise, in Europe Cement, the tribunal held that the claimant had “[t]he burden to prove” the facts on which it relied to prove jurisdiction. In all three cases, the tribunals dismissed the claims because the claimants failed to produce persuasive evidence that could prove the facts they alleged to establish jurisdiction.7

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

(Cambridge: Grotius Publications, 1987) (“Bis Cheng”) at 377, 399-331 (TAB-6 / BOA-138). This is also consistent with Article 24(1) of the UNCITRAL Rules, which states that “[e]ach party shall have the burden of proving the facts relied on to support his claim or defence.” UNCITRAL Arbitration Rules (TAB-7 / BOA-139).

1 See e.g., Cementownia, ¶ 149 (TAB-2 / BOA-166); Soufraki, ¶ 81 (TAB-4 / BOA-136); Europe Cement, ¶ 145 (TAB-3 / BOA-27).

2 Soufraki, ¶ 58 (TAB-4 / BOA-136).

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

4 Europe Cement, ¶¶ 149, 166 (TAB-3 / BOA-27).

5 Cementownia, ¶ 149 dismissing the case for lack of jurisdiction because “[t]he Arbitral Tribunal considers that the Claimant has not produced any persuasive evidence that could prove” the facts on which it relied to establish jurisdiction) (TAB-2 / BOA-165). See also Europe Cement, ¶ 145 (holding that the tribunal did not have jurisdiction “since the Claimant has failed to establish” the facts on which it relied to sustain jurisdiction) (TAB-3 / BOA-27); Soufraki, ¶ 81 (TAB-4 / BOA-136) (holding that because the “Claimant has failed to discharge his burden of proof,” the tribunal did not have jurisdiction).
10. The Claimant has mischaracterized Canada’s objection to jurisdiction. Canada has not alleged that the Claimant engaged in a “fraudulent conspiracy.” Rather, all that Canada has consistently maintained throughout this arbitration is that the Claimant has not adduced sufficient evidence to establish jurisdiction. Accordingly, the cases cited by the Claimant are simply inapplicable.

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

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

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

5 Arbitral tribunals have shifted the burden of proof to respondents only in cases in which fraud or an affirmative defence has been pled. For example, in Dadran Internacional and Per-Con Construction Corp. v. The Islamic Republic of Iran and Teheran Reerevelopment Co., Award (November 7, 1995), in XXII Y.B. Comm. Arb., 508 (1997) ¶ 7, 23, 121-122 (TAR-8 / BOA-140), the respondent alleged that the claimant forged a contract to establish jurisdiction. Likewise, in Westinghouse and Burns and Roe (U.S. v. National Power Co. and the Republic of the Philippines), ICC Case No. 6683, Award (19 December 1991), p. 55 (“Westinghouse”) (TAR-9 / BOA-141) and Oil Field of Texas, Inc. v. The Government of the Islamic Republic of Iran, Award No. 258-43-1 ¶31-25 (October 8, 1986) (TAR-10 / BOA-58), the respondents alleged that the contracts on which the claimants alleged jurisdiction should be based were obtained by bribery. The Westinghouse decision is also inapplicable as it applied the laws of Pennsylvania, New Jersey and the Philippines to the determination of this issue. See "Westinghouse", pp. 36-35 (TAR-9 / BOA-141). Similarly, in Saha Pakco v. Republic of Turkey (ICSID Case No. ARB-07/30) Award (July 14, 2010) ¶ 44, 56 (TAR-11 / BOA-142), the respondent alleged that the claimant was "serving as a front, for jurisdictional purposes," and that the claimant was "simply acting as a 'dummy' shareholder, bringing this claim on behalf of [others]" over whom the tribunal could not exercise jurisdiction. Also, in Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador (UNCITRAL) PCA Case No. 34877, Interim Award (December 1, 2008) ¶ 137-139 (TAR-12 / BOA-143), the respondent pled its affirmative defences of estoppel, waiver, and abuse of rights. Finally, the Claimant relies on paragraph 150 of Arroyo (Mi v. Jean, Award (September 25, 1997) A.C.T. 368 at 381) (TAR-13 / BOA-144). However, the copy of that decision which the Claimant appended to his submissions does not contain a paragraph 150 and there is no discussion of burden of proof in the paragraphs which are there.
An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under: (a) Section A [of Chapter I] ... 

12. NAFTA Article 1101(1) further provides that Chapter 11 applies to measures “adopted or maintained” by Canada that relate to investors of another Party or investments of investors of another Party. Accordingly, for Chapter 11 to apply to a measure relating to an investment, that investment must be “of an investor of another Party,” at the time the measure is adopted or maintained.

13. Investment arbitration tribunals have also generally found that they do not have jurisdiction unless a claimant can establish that an investment was owned by an “investor of another Party” when the challenged measure occurred. For example, in Phoenix Action the tribunal found that “bilateral investment treaty claims cannot be based on acts and omissions occurring prior to the claimant’s investment.” Similarly, the tribunal in Cementownia noted, “[i]t is undisputed that an investor seeking access to international jurisdiction pursuant to an investment treaty must prove that it was an investor at the relevant time, i.e., at the moment when the events on which its claim is based occurred.”

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

Phoenix Action Ltd. v. Czech Republic (ICSID Case No. ARB/06-3) ¶ 68 (“Phoenix Action”) (TAB-14/BOA-63).

Cementownia, ¶ 112 (TAB-2/ BOA-16) (Emphasis Added). See also, Europe Cement, ¶ 140 (“...to have jurisdiction the Claimant would have to show that it has acquired ownership in an investment in Turkey at the time the alleged breaches took place.”) ¶ 166 (“The burden to prove ownership of the shares at the relevant time was on the Claimant.”) (TAB-3 / BOA-27); Société Générale v. Dominican Republic (UNCITRAL) (LCIA Case No. UN 92/2) Preliminary Objections to Jurisdiction (September 18, 2008) ¶¶ 106-107 (“Thus, the investment could not be protected by this Treaty until ... [the] Claimant ... acquired the investment...”) (The Tribunal lacks jurisdiction over acts and events that took place before the Committee acquired the investment...”) (TAB-15 / BOA-148); Limited Liability Company AMTO v. Ukraine, SCC Arbitration Case No. 080/2005 (March 26, 2006) ¶ 48 (TAB-16 / BOA-146); Salka Investments B.V. v. Czech Republic (UNCITRAL) Partial Award (March 17, 2006) ¶ 244 (TAB-17 / BOA-70).
14. Accordingly, in order for the Claimant to establish that this Tribunal has jurisdiction to hear his claims in respect of the AMLA, the Claimant must prove that he owned the Enterprise prior to the introduction of the AMLA in April, 2004.13

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

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

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

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

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13 Remarkably, the Claimant contends that the Tribunal has jurisdiction even if he acquired the Enterprise after the introduction of the AMLA. See Reply on Jurisdiction, ¶ 135: This assertion is inconsistent with the text of the NAFTA. Further, the Claimant fails to provide a single reference to an arbitral award to support this assertion. This is hardly surprising, as there are none.

14 See e.g., Bin Cheng, p. 320 ("Where documentary evidence should be available, this must be produced. The party whose negligence has resulted in failure to produce documentary evidence must bear the consequences of such non-production."); see also "Carlson v. Government of the Islamic Republic of Iran and Mal Enterprise Group," (1991) 26 Iran-US CTR 199 (Award May 1, 1991); see also "Carlson" (TAB-18 / BOA-147).


16 Alias Reinfeld & Martin Hunter, Law and Practice of International Commercial Arbitration, 4th ed. (London: Sweet & Maxwell, 2004) ("Reinfeld & Hunter"). pp. 307, 308 ("In general, arbitral tribunals tend to give less weight to uncorroborated witness testimony than to evidence contained in contemporaneous documents."); see also Mark Kantor, Vindication For Arbitration: Compensation Standards, Valuation Methods and Expert Evidence (Alphen aan den Rijn: Kluwer, 2006) p. 280 (giving the following advice to the "careful arbitrator" engaged in valuing an asset: "Documents are better than verbal assertions/confirmations. Documents prepared by an independent third party are better than those prepared by the claimant/insured/defendant/insurer. Documents prepared contemporaneously (and prior to/ immediately following the loss event) are better than those prepared after the date the claim
clear interest in the result of the case,"[17] because "the frailty of human contingencies [makes testimonial evidence] most liable to arouse distrust."[18]

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

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

was submitted. Documents prepared absent any prospect of a claim are better than those created in response to (or with knowledge of) the extant claim."

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


[20] ibid (TAB-4 / BOA-136). Mr. Soufraki sought to annul the award on the basis that the tribunal had manifestly exceeded its powers, in part, because it had not given sufficient weight to his documents and affidavits. His application was rejected. See the Decision of the 2nd Hub Committee on the Application for Annulment of Mr. Soufraki (ICSID Case No. ARB/02/7 (June 5, 2007) ¶¶ 109-113 ("Soufraki, Annulment Application Decision") (TAB-24 / BOA-152).

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

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

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

[23] Ibid., ¶ 17 (TAB-18 / BOA-147).
[27] Ibid., ¶ 51 (TAB-18 / BOA-147).
[28] Ibid., ¶ 41 (TAB-18 / BOA-147).
[29] Ibid., ¶ 41 (TAB-18 / BOA-147).
[31] Methane v. United States (UNCITRAL) Final Award (August 3, 2005), Part III, Chapter B, ¶ 49 ("Methane") (TAB-21 / BOA-43) The NAFTA Chapter II tribunal stated that the witness statement
contained double hearsay and concerned a conversation that occurred four years after the fact.
Jaal Moos v. Iran, the Iran-US Claims Tribunal refused to accept a witness statement containing hearsay evidence as sufficient to establish jurisdiction because “the evidence [was] not substantiated.” Bin Cheng has also explained that “testimony even by ‘respectable’ persons would be given little, if any, weight if based on hearsay.”

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

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

22. The Claimant has failed to produce any reliable and contemporaneous evidence to establish that he owned the Enterprise prior to the introduction of the AMLA. There are no letters, emails, facsimiles, memoranda, records of conversations, or notes to evidence his ownership of the Enterprise. Nor is there a single document executed prior to the introduction of the AMLA which bears the Claimant’s signature. Indeed, the Claimant has failed to even produce a single piece of contemporaneous evidence that reliably links him in any way with the Enterprise prior to the introduction of the AMLA.

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

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22. Jaal Moos v Government of the Islamic Republic of Iran, 30 Iran-US CTR 70, Award No. 557-950-2 (May 25, 1994); ¶18 ("Jaal Moos") (TAB-22 / BOA-150) (holding that "vague and inconclusive" testimony based on "hearsay evidence" was evidence on which "[t]he Tribunal cannot rely, unless the evidence is substantiated ... [by] documentary evidence, for example, in contemporary correspondence."). See also AHIF Planning Associates, Inc. v Government of Iran, Iran Shipping Company and the Ministry of Health and Social Welfare of the Government of Iran, 11 Iran-US CTR 168, Award No. 234-179-2 (May 8, 1986) ¶52 ("AHIF") (TAB-23 / BOA-151).

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

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

24. The absence of evidence produced by the Claimant to establish his ownership of
the Enterprise prior to the introduction of the AMLA contrasts sharply with the evidence
that someone in the Claimant’s alleged role should be able to produce. Rather, he has testified that he, a
government employee from Pennsylvania, with no experience in the waste management business, was the invisible hand
orchestrating a purportedly $105 million venture by providing instruction and guidance to
Mr. Mario Cortellucci, a successful and wealthy Canadian land developer. 33

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

1) the negotiations to purchase Adams Mine;

33 See Mario Cortellucci, Confederazione degli Imprenditori nel Mondo – Confederation of Italian Entrepreneurs Worldwide online: <http://www.cimonternoadians.org/recipients/cortellucci> (TAB 4/CAN-340).
2) the organization and establishment of the Enterprise;
3) the Enterprise’s acquisition of Adams Mine;
4) the business operations of the Enterprise;
5) the efforts to sell Adams Mine;
6) the raising of funds to develop Adams Mine;
7) the lawsuits brought by or against the Enterprise; and
8) the negotiations with respect to the compensation made available to the Enterprise under the AMLA.

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

[W]here evidence of better quality should be available and its non-production is not satisfactorily explained, this will weigh against the party whose allegations may either be proved or disproved by such evidence. Where documentary evidence should be available, this must be produced. The party whose negligence has resulted in failure to produce documentary evidence must bear the consequences of such non-production. 26

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

27 Carlson, ¶ 46 (TAB-18 / BOA-147). See also, H.A. Spalding, Inc. v. Ministry of Roads and Transport of the Islamic Republic of Iran and the Islamic Republic of Iran, Award No. 212-437-3 (February 24, 1986) ¶ 29 (“it would stand to reason that if a substantial corporation with extensive experience in road building were engaged over a period of four years not just in the soliciting of contracts in Tehran but also in the actual performance of material engineering, design and architectural services, at
1. There is No Documentary Evidence that the Claimant was Involved in the Negotiations to Purchase Adams Mine

28. All of the documents in the record show that Mr. Cortellucci, a Canadian citizen, negotiated the purchase of Adams Mine between February, 2002 and May, 2002.19 The Claimant does not deny this, but alleges that Mr. Cortellucci did this on the Claimant’s behalf. However, there are no documents to prove that the Claimant was involved in, or even informed of, the negotiations to purchase Adams Mine, let alone instructing Mr. Cortellucci.20

29. The documents on the record show that in February, 2002, Note Development Corporation (“Note”), the then-owner of Adams Mine, approached Mr. Cortellucci, not the Claimant, to determine if Mr. Cortellucci might be willing to finance or participate in the development of Adams Mine.21 Mr. Cortellucci was and is a well-known and successful real estate developer in Ontario.22 He was also one of the largest donors to the

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19 This is despite the fact that Canada asked for such documents in its document request! See Request for Documents From the Government of Canada, October 15, 2008, Requist # 26.
political party in power at the time in Ontario and, as such, was a person with important political connections. His connections to local and provincial government were seen by Notre as a significant asset in the highly-regulated field of waste management.

30. Over the next several months, it was Mr. Cortellucci who engaged in frequent negotiations with Notre's principal, Mr. Gordon McGuinty, and another Notre shareholder, Mr. Blake Wallace. And it was Mr. Cortellucci who received nearly 60% from Mr. McGuinty and Mr. Wallace concerning the purchase of Adams Mice. The Claimant is not included on any of these pieces of correspondence, and there is no evidence any were communicated to him.

Mario Cortellucci, Confederazione degli Imprenditori del Mondo - Confederation of Italian Entrepreneurs Worldwide online: [http://www.cimomontreal.ca/recipients/cortellucci](http://www.cimomontreal.ca/recipients/cortellucci) (TAB 4 / CAN-342)

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

32. According to the documents on the record,  

33. The Claimant alleges the foregoing negotiations.  

Yet, notwithstanding the fact that Mr. Cortellucci agreed to pay $1.5 million for Adares Mine, pay $270,000 in outstanding realty taxes, and pay $1 million to Mr. McGuinty in
consulting fees, there does not exist a single document on the record that shows the Claimant authorized or participated in any way. It is simply not conceivable that Mr. Cortellucci would undertake more than $3 million in obligations without receiving any written assurances from the Claimant.

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

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

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

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** This is particularly unbelievable given that Mr. Cortellucci's negotiations with Mr. McGuirt and Mr. Wallace included communications in writing via e-mail and facsimile.

*** Supplementary Witness Statement of Vito G. Gallo (October 25, 2010), Exhibit H. The Claimant has produced copies of credit card receipts to show that he was at a few shopping malls in the Toronto area, after the Enterprise acquired Adams Mine in late September 2002. The Claimant and Mr. Cortellucci both testified that the Claimant was in Canada in 2001. However, he has offered no documentary evidence of this trip in 2001, and indeed, has even offered an explanation as to why such evidence has not been provided. Compare Supplementary Witness Statement of Vito G. Gallo (October 25, 2010) ¶¶ 19-20.
However, the Claimant has introduced no documentary evidence that he was in any way involved with the incorporation or organization of the Enterprise, or that he had any relationship whatsoever with Mr. Swanick prior to the introduction of the AMLA, let alone a relationship where Mr. Swanick acted as his solicitor.\footnote{Canada requested documents with respect to the legal relationship between Mr. Swanick and the Claimant, but the Claimant did not produce any. See Request for Documents From the Government of Canada, October 15, 2008, Request #25.}

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

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

38. First, there is no written retainer setting out the terms of Mr. Swanick’s representation, despite the fact that Mr. Swanick and the Claimant were allegedly strangers. In fact,\footnote{Canada requested documents with respect to the legal relationship between Mr. Swanick and the Claimant, but the Claimant did not produce any. See Request for Documents From the Government of Canada, October 15, 2008, Request #25.}

39. Second, there are no written instructions sent by the Claimant to Mr. Swanick with respect to the incorporation and organization of the Enterprise – or any other issue, for that matter – nor any written summary of any such instructions provided by Mr.
Swanick to the Claimant. Further, there is no evidence that even oral instructions were
given by the Claimant to Mr. Swanick — such as notes of conversations.

40. Third, there is not a single written communication from Mr. Swanick to the
Claimant providing any legal advice with respect to the incorporation or organization of
the Enterprise, or any other matter. Mr. Swanick alleges in sworn testimony that in
respect of the incorporation and organization of the Enterprise. Yet, there is no documentary evidence such advice was ever given to the Claimant.88

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

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

42. As stated above, the documents on the record show that the Enterprise was incorporated to be the vehicle to acquire Adams Mine from Notre. Thus, the documents on the record show that after the Cortellucci Group agreed to purchase Adams Mine on May 10, 2002, and the Enterprise was incorporated and organized by Mr. Swanick on June 26, 2002, Adams Mine was conveyed to the Enterprise on September 9, 2002. Yet, there is no documentary evidence on the record that the Claimant was in any way involved in either the due diligence or the financing.

43. First, of Adams Mine by the Enterprise. There are no written communications from Mr. Swanick to the Claimant to inform him. That is no evidence that any of the due diligence Mr. Swanick conducted on Adams Mine was communicated to, or completed on behalf of, the Claimant.

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54 No documents were produced despite Canada’s request for them. See Request for Documents From the Government of Canada, October 15, 2008, Requests #25, 72, 73.
44. Second, there is no documentary evidence that the Claimant was involved in any way with respect to the Enterprise’s financing of its purchase of Adams Mine. Indeed, there is no evidence that the Claimant paid anything for, or was in any way involved with arranging the financing for, the purchase of Adams Mine by the Enterprise. The financing for the purchase of Adams Mine was provided by REDACTED. The Claimant is not mentioned in any of the financing agreements, and neither he nor the Enterprise offered any security for this loan.

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

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

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

67 [522387 Limited Partnership Registration Documents (September 10, 2007)] (GB-25/ CAN-273) REDACTED
the hiring of managers to operate the Enterprise; 19
communications with the managers of the Enterprise; 19
the financial management of the Enterprise; 71 and
the formation of the Enterprise’s business plan. 72

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

48. First, there is no evidence that the Claimant was involved in hiring the individuals responsible for managing the Enterprise. The day the Enterprise acquired Adams Mine,
In other words, within hours of its acquisition of Adams Mine, the Enterprise
And yet, there is not a single document that shows the Claimant was consulted on, involved in, or even informed of these decisions. In fact,

49. Second, there are no documents on the record that show that the Claimant ever communicated with the managers of the Enterprise, including with respect to supposedly key business activities, such as the Enterprise’s application for its Permit to Take Water from Adams Mine, and its efforts to purchase the Crown Lands adjacent to Adams Mine (the “Borderlands”). There is not an e-mail, letter, facsimile, memorandum or other record of communication, written or oral, concerning these, or any other matters between the Claimant and the Enterprise’s sole Director and Officer, Mr. Swanick, its comptroller, Mr Tony Nalli, its accountant, Mr. Frank Peri,7 or its Managing Director, Mr. McGuinty. The Claimant has offered no explanation as to why there is no documentary record of any communication with Mr. Swanick, Mr. Nalli or Mr. Peri. Further, his explanation for why there is no evidence of communications with Mr. McGuinty is unconvincing.

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

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7 Mr. Peri has a longstanding professional and business relationship with Mr. Cunelucci. See e.g., Environmental Protection Act, Section 43 and 44, Order, Mammmone Disposal Systems Ltd. §§ 1.18-1.19 (March 20, 1995) (TAB-30 / CAN-420); LECG, Compliance Audit Report for the City of Vaughan, Re: Mayor Linda Jackson (June 18, 2008), ¶ 4.40-4.41 (TAB-31 / CAN-421).
He offers two explanations for doing so, both of which are not persuasive. To begin, the Claimant asserts that the Claimant did not communicate with Mr. McGuinty – the Managing Director of the Enterprise in which the Claimant alleges he was the sole shareholder – after the transaction was complete. Further, the Claimant has testified that this is inconsistent with the testimony of the Claimant, Mr. Noto, Mr. Wolf and Mr. Drew that it was reasonable and unexceptional for political staffers to openly look for post-Government employment and business ventures. Moreover, it does not explain why there are no written communications between the Claimant and Mr. McGuinty after the Claimant left the Pennsylvania State Government in April 2003. A full year elapsed between the time the Claimant left the Government and the introduction of the AMLA, yet there still does not exist a single document to prove that he communicated in any way with the Managing Director of the company he alleges he solely owned.

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

62 Witness Statement of Barry Drew (October 18, 2010), ¶ 16. Supplementary Witness Statement of Philip Noto (October 23, 2010), ¶ 12; Witness Statement of Michael Wolf (Undated), ¶ 8;

63 Bureau of Human Resources, Department of Revenue, Employment History (May 24, 2010) (TAB-32 / CAN-366). Witness Statement of Barry Drew (October 18, 2010), ¶¶ 15, 17. Mr. Drew’s witness statement conflicts slightly with the Claimant’s employment record in that he suggests that the Claimant left the Government of Pennsylvania in February 2003. The Claimant would have also been aware that his tenure as a political staffer was effectively over when Edward G. Rendell, a Democrat, was elected Governor in November 2002. See Witness Statement of Vito G. Gallo (October 25, 2010), ¶ 7.
reviewed or approved any expenses, or was otherwise informed of the financial status of the Enterprise. There is not a single letter, e-mail, facsimile, or other record of correspondence between the Claimant and the Enterprise’s comptroller, Mr. Nalli, or its accountant, Mr. Peri. Further, there is no evidence of a single item of correspondence between the Claimant and the Limited Partners, who were the Enterprise’s sole source of funds.

52. In fact, the Claimant did not even have signing authority for the Enterprise’s bank account. The Claimant asserts that he instructed Mr. Swanick to do so, but provides no documentary evidence of any such instruction. Moreover, Canada requests documents with respect to what the Claimant paid on behalf of the Enterprise (or the LP) for June 26, 2002-June 17, 2004, but the Claimant did not produce any documents. See Request for Documents From the Government of Canada, October 15, 2008, Request # 20.

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

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

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

There is no indication that the Claimant would have received any proceeds.

56. In April 2003, Mr. Cortellucci, on behalf of both Enterprise and the Limited Partnership, entered into an agreement with REDACTED pursuant to which REDACTED would seek purchasers for Adams Mine.\(^6\) This agreement indicates that all of the sale proceeds would have become "gross revenues" of the Limited Partnership. Mr. Cortellucci’s decision to retain REDACTED to sell Adams Mine is in direct conflict with REDACTED

Moreover, this agreement does not contemplate any of the proceeds from the sale of Adams Mine being paid to the Claimant.

57. Finally, REDACTED

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

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

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

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

59. The Claimant alleges that his role in the Enterprise's operations, and indeed, the sole justification for his involvement with the Enterprise, Yet, the Claimant has introduced no documentary evidence to show that he even attempted to fulfill this role. There are no e-mails, letters, facsimiles, presentations, pitch materials, or memoranda that were sent out or given to potential investors, and no records of any meetings or phone calls to substantiate any fundraising activities by the Claimant.56

60. The only document that the Claimant has introduced to purportedly support his fundraising efforts is a personal calendar kept by his long-time friend, Mr. Noto.57 This calendar records a number of meetings between Mr. Noto, who was not a potential investor, and the Claimant that took place throughout 2003.58 Yet, not one of these entries mentions Adams Mine, the Enterprise, or even waste disposal in general terms. They also do not mention any potential investors or fundraising activities of any kind. Indeed, none of these entries indicate that these meetings were anything other than meetings between friends.

61. In his original sworn witness statement, the Claimant stated 59Canada requested such documents from the Claimant but he produced none. See Request for Documents From the Government of Canada, October 15, 2008, Requests # 102, 108.

57 Philip Noto Witness Statement (October 25, 2013), Exhibit B.

58 Ibid., Exhibit B.
62. The Claimant also stated that [REDACTED] [REDACTED] [REDACTED] Finally, the Claimant swore that [REDACTED] [REDACTED]

63. However, both his[153] and Mr. Noto's[154] most recent witness statements, and the witness statement of Mr. Belardi,[155] confirm that the Claimant's earlier testimony was not true. The Claimant, Mr. Noto and Mr. Belardi now all admit that none of them ever spoke to a U.S. investor about the possibility of raising the funds for the development of Adams Mine, much less secured their interest.[156]

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

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

155 Witness Statement of Jeffrey Belardi (October 25, 2010), ¶ 5.

156 Supplementary Witness Statement of Philip F. Noto (October 25, 2010), ¶ 16 ("I spoke with Greg Chrin at first in a general nature to gauge his interest in a landfill project in Canada. After Mr. Chrin expressed interest, I had subsequent discussions with him focused on his consultation and participation as a "subject matter expert" in all aspects of the landfill business, including financing."); Witness Statement of Jeffrey Belardi (October 25, 2010), ¶ 15. ("Mr. Gallo’s strategy, which I agreed to, was to wait until the Northern Ontario site was ready for construction before approaching Keystone/Commonwealth.")
64. Without explaining this contradiction with his earlier witness statement, the Claimant has now attempted to explain away his inactivity on the grounds that it was not necessary for him to begin raising funds until it was time for construction to begin.167 Given the financial situation of the Enterprise during the Claimant's purported ownership, however, this explanation for the lack of fundraising activity by the Claimant is unconvincing.

65. [REDACTED]

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

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

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

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

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

69. In the first litigation, brought against the Enterprise by Canadian Waste Services Inc. ("CWS") in February 2003, CWS sought to invalidate the Enterprise’s title to Adams Mine.\textsuperscript{102} CWS had objected to the sale of Adams Mine to the Enterprise by Notre prior to the transaction closing, on the basis that it had a right of first refusal on the site. REDACTED

Further, the Cortellucci Group
also
There is no documentary evidence that the Claimant
was consulted or even informed of

70. The CWS litigation persisted for three years, until March 2006. The Enterprise’s counsel in the CWS litigation was Reuter Scargall Bennett LLP ("Reuter Scargall"). There is no documentary evidence in the record that the Claimant was involved in this retainer or even informed of it. It also appears that Further, there is no evidence, documentary or otherwise, that Reuter Scargall ever communicated a single time with the Claimant, or that any information at all concerning the lawsuit was ever forwarded on to him by anyone.

[Redacted]

[Redacted]

[Redacted]


[Redacted]

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

8. There is No Documentary Evidence That the Claimant Was
Involved in the Enterprise’s Negotiation for Compensation
under the AMLA

72. On April 5, 2004, the AMLA was introduced into the provincial Legislative
Assembly in Ontario. As introduced, the AMLA offered the Enterprise compensation
for all of the expenses that the Enterprise and Notre had paid in relation to Adams Mine
since 1989. This effectively amounted to an offer by the Government of Ontario to pay
directly to the Enterprise millions of dollars more than the Enterprise had spent acquiring

117 1532352 Ontario Inc. v. Minister of Natural Resources, Court File No. 2236/A3 (Ont. Sup.
pp. 1246-1247 (TAB-40 / CAN-320); Bill 49, An Act to prevent the disposal of waste at the Adams Mine
site and to amend the Environmental Protection Act in respect of the disposal of waste in Lakes, 1st Sec.
38th Leg., Ontario, 2004 (1st Reading) (TAB-50 / CAN-431).
119 Ibid. (TAB-50 / CAN-431) Legislative Assembly of Ontario, First Session 38th Parliament,
owner to obtain compensation…. What this means is that our government is being fair and dealing openly
with everyone, including the owner of the land. This is an open and transparent process. We are doing the
right thing and taking the action desired by the majority, but we are also being fair to all parties and clear
from the outset on how to conclude this issue.”) (TAB-51 / CAN-402).
and managing Adams Mine, because it entitled the Enterprise not only to its own
expenses, but to those of Notre as well. 129

77. After the AMLA was abled, the Enterprise's litigation counsel in the Borderlands
Litigation, Mr. Acton, negotiated certain amendments on behalf of the Enterprise. 131 One
of the requests made by the Enterprise was

REDACTED

REDACTED

REDACTED

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

REDACTED

REDACTED

REDACTED

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

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

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

REDACTED

129 Confirmation of Settlement and Full and Final Release from Notre Development Corporation
to Her Majesty the Queen in Right of Ontario (November 7, 2005) (T12-52-CA-452-REDAC.

131 Counter-Memorial, ¶ 194-204.
is not a satisfactory explanation for why the Claimant, a law school graduate, never once sent written instructions or obtained anything in writing from Mr. Cortellucci, and was considering the purchase of an abandoned mine – allegedly worth some $105 million – that he had never visited and which was in a foreign country. In these circumstances, there should be a paper trail. As stated by the Iran-US Claims Tribunal in Carlson, the “trustworthiness” of individuals provides no credible excuse for the lack of a paper trail when a claimant is seeking to establish a tribunal's jurisdiction.

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

Supplementary Witness Statement of Vito G. Gallo (October 25, 2016), ¶ 21 ("I was very confident in Mr. Cortelluccia as a trusted agent and advisor...").

Carlson, ¶ 42 (TAB-18/BOA-147).
B. Neither the Claimant’s nor the Enterprise’s Tax Filings are Contemporaneous or Reliable Evidence that the Claimant Owned the Enterprise Prior to the AMLA

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

77. The Claimant, as a U.S. resident, is required by U.S. tax law to file his Individual Federal Tax Return Form 1040, and any accompanying Forms and Schedules, with the U.S. Internal Revenue Service (the “IRS”) by April 15 of each year. 136 Under U.S. tax law, a U.S. resident who is the sole shareholder of a foreign corporation must declare his ownership in two separate places on his personal income tax return: on a Form 5471, called a “Information Return of U.S. Persons with Respect to Certain Foreign Corporations” (“Form 5471”), and on a “Schedule B.”137 The failure to make such a declaration when required can result in both civil and criminal penalties, including a “$10,000 penalty for each annual accounting period.”138

78. The Claimant appears to have REDACTED: ____________________________ When the Claimant first produced REDACTED

137 The instruction for the basic return provides that “you may have to file Form 5471 if, in 2002, you owned 10% or more of the total (a) value of a foreign corporation’s stock…” Ibid., p. B-1. (TAB-56 / CAN-434). The specific instructions for Form 5471 specify that a sole shareholder of a foreign corporation is required to file a Form 5471 along with his basic tax return. IRS, Instructions for Form 5471 (Rev. January 2003), Information Return of U.S. Persons With Respect to Certain Foreign Corporations, pp. 1-3. (TAB-57 / CAN-435).
138 According to the instructions for Schedule B, Interest and Ordinary Dividends, a U.S. citizen is required to complete Part III of Schedule B, titled Foreign Accounts and Trusts, if he “own[es] more than 50% of the stock in any corporation that owns one or more foreign bank accounts.” IRS, Instructions for Schedules to Form 1040: 2002 Instructions for Schedule B, Interest and Ordinary Dividends, p. B-2. (TAB-56 / CAN-434).
139 Ibid., p. 3 (TAB-57 / CAN-435).
Moreover, as contemporaneous evidence of his ownership of the Enterprise prior to the AMLA...

79. However, the Claimant has now admitted that...

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

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

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

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

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

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

127 Correspondence Gallo 55 (July 14, 2010) p. 6 (TAB-64 / CAN-442).
This was more than after the AMLA, after the Claimant received Canada’s Request for Documents, and before he was required to produce his U.S. tax returns in this arbitration. As such, they are not contemporaneous evidence of his alleged ownership of the Enterprise prior to the AMLA. Moreover, the Claimant admitted on August 11, 2010, that as of that date, he still had not

80. The Claimant has not offered a credible explanation for his failure to file these required forms prior to the AMLA, especially in light of the substantial penalties that could be applied. In fact, he himself has offered no testimony at all on this issue. Moreover, the explanation offered by Mr. Swanick — is not convincing. The penalties for the failure to file these Forms have existed since before the Claimant allegedly acquired the Enterprise.441

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

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

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


443 Truster Zweig LLP, Re: V.G. Gallo v. Canada (December 17, 2010), p. 2. ("Trustee Report").
provincial CT23 tax return, by no later than June 30 of each year with the Canada Revenue Agency (the "CRA"), and the Ontario Ministry of Finance, respectively. RE

82. In this arbitration, the Claimant produced REDACTED

REDACTED

REDACTED

In his Memorial and in other submissions to the Tribunal, the Claimant REDACTED

REDACTED

83. On January 11, 2010, Canada requested that the Claimant consent to the release of original versions of the Enterprise’s federal tax returns from the CRA. In particular, Canada sought to confirm the date on which the returns were actually filed, and whether any amendments had been made.166

84. The Claimant initially refused to consent to the release of the original returns from the CKA directly to Canada. As such, on March 29, 2010, Canada moved the Tribunal to compel the Claimant to produce the returns directly to Canada.167 Ultimately,

165 REDACTED See also Correspondence Gallo-32 (June 5, 2009) p. 10 (TAB-61 / CAN-439). (T[A]ll of the tax returns filed by 1532282 Ontario Inc. and Vito Gallo, is both Canada and the USA, confirm that Vito Gallo was the 100 percent shareholder of the Enterprise.) REDACTED


167 The Claimant took the position that he was, in fact, cooperating and that Mr. Swaunik himself made a request of the Canada Revenue Agency in January 2010. See E-Mail Message from Charles Castle to Michael Owen (March 10, 2010) (TAB-69 / CAN-447); Reply on Jurisdiction, p. 98. There is absolutely no evidence that such a request was ever made by Mr. Swaunik in the files produced by the Canada Revenue Agency. Moreover, when Canada asked the Claimant to see a copy of the request, the Claimant refused to produce it as Canada was "not entitled to it." See E-Mail Message from Charles Castle to Michael Owen (March 15, 2010) (TAB-70 / CAN-448); Email from Charles Castle to Michael Owen (March 18, 2010) (TAB-71 / CAN-449).
the Tribunal directed the Claimant to do so, and Canada received the returns from the CRA on May 13, 2010. This was not only after the AMLA, but also the Claimant began his preparations to commence this arbitration.  

85. After Canada obtained original versions of the Enterprise’s federal returns from the CRA, therefore, the Enterprise’s returns are not contemporaneous evidence of the Claimant’s ownership of the Enterprise prior to the introduction of the AMLA.

b) The Enterprise’s Tax Returns Indicate

86. in both its federal and provincial tax returns, the Enterprise is legally required to provide certain information concerning the residency of its shareholders. First, in both returns, a Canadian corporation is required to indicate whether it is a “Canadian Controlled Private Corporation” (a “CCPC”). As Canada’s accounting expert, Mr. Perry Trustee, explains, a CCPC is “a private Canadian corporation in which residents of Canada have significant shareholdings.” Second, in both returns, the Enterprise is legally required to separately state whether it has any shareholders who are not residents.

106 Witness Statement of Frank Seri (July 14, 2010), ¶ 4: “The tax returns for 152382 Ontario Inc. for the 2002 and 2003 tax years were prepared on October 7th, 2004 and they were filed on October 6th, 2004.”

115 Trustee Report, p. 3.
of Canada. Further, the federal tax returns for the 2002 and 2003 taxation years, in other words, the Enterprise’s federal and provincial returns for the 2002 and 2003 taxation years, and Claimant’s allegation that he was the sole shareholder of the Enterprise prior to the introduction of the AMLA.

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

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

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131 Ibid. p. 4.
132 Ibid.
133 Witness Statement of Frank Peri (July 14, 2010), ¶ 2.
90. As Mr. Truster explains in his expert report, "Mr. Peri’s testimony that he designated REDACTED represents such a fundamental misunderstanding of one of the most basic Canadian tax rules, that is not credible."\(^{118}\) Whether a corporation with only a sole shareholder is a CGPC is determined by the residence of that sharehold – not its Directors.\(^{119}\)

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

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

\(^{117}\) Ibid., ¶ 3 and 7.
\(^{118}\) Truster Report, p. 4.
\(^{119}\) Ibid., p. 3.
\(^{87}\) Ibid.
93. Faced with this incontrovertible evidence, the Claimant and Mr. Swanick had no choice but to change their story. In a Supplemental Witness Statement, Mr. Swanick conceded that he had signed the federal returns, but that because the returns he signed were in a “General Index of Financial Information” (“GIFI”) format, he did not notice the CCPC designation. Mr. Swanick also alleged that he did not notice the CCPC designation because the certification on the GIFI returns relate solely to the “amount of taxable income reported,” and not to other items identified on the returns.

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

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

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184 Supplementary Witness Statement of Brent William Swanick (July 14, 2010), ¶ 5.
185 Truster Report, p. 5.
186 Ibid.
187 Ibid.
188 Ibid., p. 6.
96. Faced with this fact, Mr. Swanick changed his story again. In his most recent witness statement, he testified that he did not notice the designation of the Enterprise as a CCPC on the Enterprise’s provincial return because it appears on the second page and his signature does not appear until the seventeenth page.\footnote{Supplementary Witness Statement of Brent Swanick (October 19, 2010), ¶ 9.} The fact that fifteen pages separated these statements is as weak an excuse as it is irrelevant. Indeed, as Mr. Truster states, it is “highly incredible that Mr. Swanick would sign this certification on the provincial return without reviewing the statements made in the return, particularly with respect to CCPC status and shareholder residency.”\footnote{Truster Report, p. 6.}

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

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

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

100. First, the U.S. Department of Treasury requires that a U.S. person who is the sole shareholder of a corporation which owns foreign bank accounts that exceed $10,000 at any point during the year must file a “Report of Foreign Bank and Financial Accounts.”\footnote{U.S. Department of the Treasury, Form TD F 90-22.1 (Rev. 7/08) Report of Foreign Bank and Financial Accounts, OMB No. 1506-0089, Instructions (TAB-81 / CAN-457).}
The failure to file this report can result in civil penalties of up to $50,000, and criminal penalties of up to five years in prison and fines as high as $250,000. The Claimant has provided no evidence that he filed this report.

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

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

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

1. The Dates on the Corporate Documents are Unreliable

102. The Minute book contains eight documents that...

175 Ibid., s. 39-40 (TAB-83 / CAN-459).
176 Canada does not contest the date of Master Business Licence and the Articles of Incorporation, which were both filed with the Government of Ontario.
These documents include [REDACTED] are the only documents in the record dated prior to the introduction of the AMLA, which bear the Claimant’s signature." The Minute Book also contains [REDACTED] 176

103. However, after Canada brought a motion for the forensic examination of the Minute Book, 169 the Claimant admitted that the Shareholder Resolutions that were dated before the introduction of the AMLA were not in fact prepared until afterwards. 180 The Claimant, [REDACTED] initially produced [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] Even when Canada began to suspect that these documents were not

176 The Claimant initially provided Canada with a list of documents for forensic examination that did not include any of the Shareholder Resolutions. Counsel for the Claimant wrote to Canada a few days later and admitted that the Claimant and Mr. Swanick had backdated the Shareholder’s Resolutions for 2002 and 2003. In explaining his failure to list these documents as part of the Minute Book, the Claimant asserted that they were “kept separately” from the Minute Book. See Correspondence Gallo 56 (August 25, 2010), p. 4 (TAB-92 / CAN-468). However, [REDACTED] 180 Correspondence Can 52 (June 18, 2010) (TAB-62 / CAN-448). 181 See Letter from Charles Gallo to Michael Owen, Re Gallo v. Canada (August 20, 2010) (TAB-93 / CAN-469).
prepared until after the introduction of the AMLA, the Claimant was adamant that this was not the case.184 The Claimant even went so far as to introduce sworn testimony from Mr. Swanick which expressly "den[ied] that these documents were signed after the Adams Mine Lake Act was enacted."185

104. Just over a month after submitting that testimony to the Tribunal, as the forensic examination was ongoing, the Claimant finally admitted that all of the Shareholder Resolutions were not only prepared after the AMLA but that they were in fact not prepared until 2008, long after this arbitration began.186 In the same letter, the Claimant also admitted that the six Director Resolutions in the Minute Book that were dated as having been signed in the same years as the Shareholder Resolutions were also not actually signed until 2008, well after this arbitration was underway.187 Thus, the Shareholders Resolutions for 2002 and 2003 are neither contemporaneous, nor reliable evidence that the Claimant owned the Enterprise prior to the AMLA.

105. Initially, the Claimant took the position that the corporate documents in the Minute Book were prepared shortly after they were dated. Mr. Swanick testified that "[i]n accordance with my typical practice in respect of documents that do not leave my office, I signed the documents listed above within 60 days of the ‘as of’ date indicated on the face of the document, or in the case of the transfer of any share certificate, within 60 days of the date thereof."188 Subsequently, not only did the Claimant admit that the

183 Correspondence Gallo 55 (July 14 2010) p. 7 (TAB-64 / CAN-442) (“The Claimant has already produced the Minute Book for 1532382 Ontario Inc., including the original documents upon which his ownership of 1532382 Ontario Inc. is based. These include: … Resolution of the Shareholder of 1532382 Ontario Inc. (Tab 173), Resolution of the Shareholder (Tab 18) . . . “).”
184 Supplementary Witness Statement of Brent Swanick (July 14, 2010), ¶ 14-15.
185 See Letter from Charles Castle to Michael Owen (October 5, 2010) (TAB-94 / CAN-470). It is unclear when in 2008, these documents were prepared and unfortunately, it is likely to remain unclear. The Claimant alleges that Mr. Swanick forwarded him copies of these Shareholder Resolution via email and that he then sent signed electronic copies back to Mr. Swanick. The Claimant now asserts that all of these emails and the electronic copies of these resolutions from 2008 no longer exist.
186 Ibid. (TAB-94 / CAN-470)
187 Supplementary Witness Statement of Brent Swanick (July 14, 2010), ¶ 16.
Shareholder Resolutions and the Directors Resolutions were dated as much as five years after the date on the face of these documents, he also admitted that it was not clear when any of the documents in the Minute Book were prepared (while still maintaining that certain documents were prepared prior to the AMLA). These admissions cast considerable doubt on the reliability of Mr. Swanick’s testimony concerning the date of preparation of these documents. These admissions also cast doubt on whether the remaining documents in the Minute Book can be considered to be reliable contemporaneous evidence that the Claimant owned the Enterprise prior to the AMLA.

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

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

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

Correspondence Gallo 56 (August 25, 2010), p. 3 (TAB-92 / CAN-468).
2. **Several Documents are Missing from the Minute Book**

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

109. These appear to suggest a number of signed documents have been removed from the Minute Book. However, REDACTED

110. Further, the manufacturer of the Minute Book has confirmed that several documents and tabs included by the manufacturer with the Minute Book appear to have

REDACTED

*Email from Charles Gaste to Michael Owen (October 4, 2010) (TAB-95 / CAN-471).
been removed. These missing documents and tabs include a Securities Register, a Share Transfer Register, a tab for Shareholders Agreements and up to 10 Share Certificates. The Ontario Business Corporations Act requires every Ontario Corporation to maintain certain books and records concerning its share ownership. Including both a Securities Register and a Share Transfer Register. The Minute Book manufacturer has also confirmed that the Directors Register and List of Corporate Officers supplied with the Minute Book have been removed and replaced with near, though not exact, duplicates.

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

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

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

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

198 Ibid., ¶ 10.

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

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

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

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

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

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202 Soufziki, ¶ 78 (TAB-4 / BOA-136).
203 The witness statement submitted by Mr. Drew and the Report submitted by Prof. Welling are irrelevant to, and do not include testimony on, the factual issue of whether or not the Claimant owned the Enterprise prior to the introduction of the AMLA. As such, they will not be addressed further here.
204 Bin Cheng p. 309 (stating that "the mere ex parte statements of the facts by an interested party in a dispute are not considered as evidence and do not constitute sufficient proof of the facts alleged.") (TAB-6 / BOA-138); Reifnir & Hunter, pp. 307-308 (TAB-19 / BOA-149) (stating that "the untested evidence of a witness who has a clear interest in the result of the case may be given less evidentiary weight than the evidence of a witness who is truly independent.").

[REDACTED]

[REDACTED]

Compare Witness Statement of Jeffrey Belardi (October 25, 2010), ¶ 15. ("Mr. Gallo's strategy ... was to wait until the Northern Ontario site was ready for construction before approaching Keystone/Commonwealth"). See also Witness Statement of Mario Cortelucci, ¶ 38 ("Mr. McGuire spoke to me on one occasion about selling the Adams Mine site to turn a quick profit. ... Unknown to Mr. McGuire, an American citizen (Mr. Gallo) was already involved in the project and, accordingly, there was no need to pursue the sale to others."). Compare Agreement among 1532382 Limited Partnership and 1532382 Ontario Inc. (April 1, 2003) p. 2 (TAB-39 / CAN-426).
115. Mr. Swanick’s witness statements are also insufficient to prove that the Claimant owned the Enterprise prior to the introduction of the AMLA without corroborating documentary evidence. To begin, his testimony, like that of the Claimant and Mr. Cortellucci, is not “disinterested.” He is the sole Director and Officer of the Enterprise on which behalf this arbitration has been brought. Moreover, as stated above, Mr. Swanick’s testimony is unconvincing and unreliable as he has repeatedly made inaccurate statements to this Tribunal.208

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

208. Supra, ¶¶ 92-96 (with respect to the tax returns), and ¶¶ 103-105 (with respect to the corporate minute book).
209. Soufraki, ¶ 78 (TAB-4 BOA-136).
210. See e.g., Environmental Protection Act, Section 43 and 44, Order, Mammoet Disposal Systems Ltd. ¶¶ 1.18-1.19 (March 20, 1995) (TAB-30 / CAN-420). This Order which concerns illegal waste disposal that was occurring on lands adjacent to a transfer station that were owned by 682017 Ontario Ltd.
117. The witness statements of Mr. Belardi, Mr. Wolfe, and Mr. Noto should also be accorded little weight. All are long-time friends or colleagues of the Claimant,214 and are, thus, not "disinterested" parties.215 Moreover, none have direct, first-hand knowledge that the Claimant actually owned the Enterprise prior to the AMLA. Their testimony is based on hearsay from more than 8 years ago,216 and is of the type of general and vague testimony that tribunals have found should not be accorded much weight, especially where it is not corroborated by any documentary evidence.217

Mr. Peri and Mr. Certellucci were both Officers and Directors of #2017 Ontario Ltd. LEEC Compliance Audit Report for the City of Vaughan, Re: Mayor Linda Jackson (June 18, 2008), ¶ 4.40–4.41 (TAB-31 / CAN-421). This report indicates that, "Frank Peri, CA, on behalf of Four-Valleys Excavating & Graving Ltd., confirmed that the two companies are associated for income tax purposes. He also advised that the contributions were intended to be made on behalf of Mario and Nick Certellucci, the shareholders of the two companies, as opposed to by the corporations."218

Supra, ¶¶ 89-91.

212 Witness Statement of Jeffery Belardi (October 25, 2010), ¶ 9 ("One of my clients has been and is, Mr. Vito Gallo, whom I know on a professional and on a personal level. I have known Mr. Gallo for 25 years."); Witness Statement of Michael Wolff (Unsworn), ¶ 2 ("I’ve personally known Mr. Vito G. Gallo … since the early 1990’s as we’d met through mutual friends. We worked together in the Pennsylvania state government until 2002 …"); Witness Statement of Philip Noto (February 26, 2016), ¶ 2 ("I have known Mr. Vito Gallo … since 1998. We worked together in state government during the period of 1996 until 2002.").

See e.g. Bin Cheng, p. 317 (stating that when determining how much weight to give to witness testimony by third parties, "the personal, business or other relations between the individual claimant and the third persons whose testimony is offered may be legitimately considered by the tribunal."). (TAB-B / BOA-138).

213 Durward Sandifer, Evidence Before International Tribunals, Revised Ed., University Press of Virginia, 1975, p. 18 (explaining that "tribunals may refuse to have an award or evidence taken long after the event, if uncorroborated by other evidence."). (TAB-37 / BOA-155). See also, Studer v Great Britain (U.S. v. U.K.), 6 R.I.A.A, 149, p. 152 (American and British Claims Arbitration Tribunal #25) (stating that "statements prepared many years after the event … allowances must be made for infirmities of memory …"). (TAB-29 / BOA-156).

214 Menhence, Part III, Chapter B, ¶ 49 (TAB-21 / BOA-43). Jalal Mohi, ¶¶ 12, 19 ("The Tribunal considers this to be hearsay evidence, on which it cannot rely, unless the evidence is substantiated. Such substantiation is missing."). (TAB-22 / BOA-159). J/G/F, ¶ 57 (TAB-23 / BOA-151); Bin Cheng, p. 315 (TAB-6 / BOA-138). In his witness statement, Mr. Noto states that his day timer and written calendar indicate a number of meetings with the Claimant throughout 2003. However, those entries only indicate that Mr. Noto allegedly met with the Claimant. It does not state that those meetings were with respect to the Enterprise, Adams Mine, or any waste disposal facility in Canada. Consequently, these entries are of limited relevance to this arbitration. See Supplementary Witness Statement of Philip Noto (October 25, 2010), Exhibit B.
F. The Claimant’s Ownership of the Enterprise Prior to the AMLA is “Economic Nonsense”

118. Recent investment arbitration awards have considered the significant difference between the value of an investment and the amount allegedly paid for it by a claimant as a factor when deciding the claimant did not own the investment. For example, in Europe Cement, a Polish claimant sought to establish jurisdiction through its ownership of shares in two Turkish corporations. The claimant alleged that it purchased shares “valued at millions of dollars” for only “US$45,000, deferred for up to eight years.”246 The tribunal held that paying such an insignificant amount for such a valuable investment was “economic nonsense” and held that the claimant did not own the shares.

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

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

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

246 Europe Cement, ¶ 161 (TAB-3 / BOA-27).
247 Ibid. (TAB-J / BOA-27).
248 Fakes, ¶ 139 (TAB-11 / BOA-142).
121. Indeed, the evidence in the record suggests that the Claimant would never have had to contribute financially or managerially to the Enterprise. According to the Claimant, his only role was to participate in order to develop Adams Mine into a landfill. However, as explained above, the Enterprise was trying to sell Adams Mine, undeveloped. In such circumstances, the Claimant would not have been required to contribute any of his alleged fundraising expertise, and yet, according to the Claimant’s story, he still would have been entitled to receive the profits from such a sale.

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

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

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

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

214 NAFTA Article 110(1) (emphasis added).
215 Reply on Jurisdiction, ¶ 141.
124. Pursuant to NAFTA Article 1139, to be an “investment of an investor of a Party” it is necessary that the investment be “owned or controlled directly or indirectly by an investor of such Party.” However, while ownership or control is necessary, it is not sufficient. This is made clear by the definition of an “investor of a Party” which imposes the additional requirement that the individual “seeks to make, is making or has made” the investment in question.

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

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

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

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


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

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

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

226 Canada requested in Document Request 19 that the Claimant produce “Documents indicating the dates and amounts of capital the Claimant has invested in the Enterprise … by way of loans or contributions of capital.” The Claimant indicated in his list of responsive documents that the Shareholders
• contributed any technical, management or other expertise to the Enterprise; 277
• bore any risk should the Enterprise fail; 278 or
• stood to gain if the Enterprise succeeded in selling Adams Mine. 279

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

B. The Claimant has Abused Any Right to Claim

128. Even if the Claimant had a right to claim under the NAFTA, he abused that right by claiming damages of $105 million to an Enterprise to which he contributed nothing. A claimant abuses a right to claim when he harms others by using the right for a purpose other than the purpose for which it was created. 280 Where such an abuse of rights exists, even the Claimant agrees that there is no jurisdiction. 281

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

280 B. O. Jolowic平, “The Scope and Content of a Complaint of Abuse of Right in International Law”, 16 Harv. Int’l L.J. 47, p. 61 ("The concept of abuse of right implies that the exercise of a given right, or power, or discretion, should be for the end for which the right or discretion is conferred. Where the right or discretion has been used ostensibly for such an end but in reality for another purpose, and this has
129. In this case, the Claimant is using Article 1117 of the NAFTA to bring a claim on behalf of a Canadian investment to which neither he nor any other non-Canadians contributed. This is not the purpose of this Article. To the contrary, Article 1117 is intended to give a right to a foreign investor to claim on behalf of a foreign investment. Accordingly, in light of the lack of contribution by the Claimant or assumption of any risk, the "quid pro quo" between the foreign investor and the host state, which is the "cornerstone for the system of investment treaty arbitration," does not exist.\textsuperscript{222} There is no evidence that the Claimant "contributed to the flow of capital into the economy of [Canada]" and, thus, the Claimant should not be permitted to exercise "the right to bring international arbitration proceedings against [Canada]" pursuant to NAFTA.\textsuperscript{223}

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

131. Since the Claimant has harmed others by using a right for a purpose other than that for which it was created, the Claimant has abused that right.

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

\textsuperscript{221} Reply on Jurisdiction, ¶ 153.
\textsuperscript{222} Z. Douglas, p. 161, ¶ 335 (TAB 30 / BOA-158).
\textsuperscript{223} Ibid., 162, ¶ 336 (TAB 30 / BOA-158).
V. RELIEF REQUESTED

132. For the foregoing reasons, Canada respectfully requests that the Tribunal dismiss the Claimant’s claims in their entirety and with prejudice, order that the Claimant bear the costs of this arbitration including Canada’s costs for legal representation and assistance, 274 and grant any further relief it deems just and necessary.

Dated: December 20, 2010

Respectfully submitted on behalf of Canada,

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